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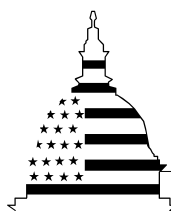
Report to the Chairman, Committee on  
Transportation and Infrastructure, House  
of Representatives

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October 2005

# AMTRAK MANAGEMENT

## Systemic Problems Require Actions to Improve Efficiency, Effectiveness, and Accountability



G A O

Accountability \* Integrity \* Reliability

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Highlights of [GAO-06-145](#), a report to the Chairman, Committee on Transportation and Infrastructure, House of Representatives

## Why GAO Did This Study

Amtrak has struggled since its inception to earn sufficient revenues and operate efficiently. In June 2002, Amtrak's new president began major efforts to improve efficiency. However, the financial condition of the company remains precarious, requiring a federal subsidy of more than \$1 billion annually. Capital backlogs are now about \$6 billion, with over 60 percent being attributable to its mainstay Northeast Corridor service. GAO reviewed Amtrak's (1) strategic planning, (2) financial reporting and financial management practices, (3) cost containment strategies, (4) acquisition management, and (5) accountability and oversight.

## What GAO Recommends

GAO makes recommendations in all five areas reviewed. These are designed to improve the strategic planning process; improve financial information; strengthen controls over costs and acquisition of goods and services; and strengthen transparency, accountability, and oversight. GAO also suggests that Congress ensure that future legislation for intercity passenger rail service contains clear goals and stakeholder roles, and incentives for results and accountability. Department of Transportation officials, in general, agreed with the report's findings. Amtrak's president was not convinced GAO's recommendations would achieve the results GAO expects but, in general, did not comment on specific recommendations.

[www.gao.gov/cgi-bin/getrpt?GAO-06-145](http://www.gao.gov/cgi-bin/getrpt?GAO-06-145).

To view the full product, including the scope and methodology, click on the link above. For more information, contact JayEtta Z. Hecker at (202) 512-2834 or [heckerj@gao.gov](mailto:heckerj@gao.gov).

## AMTRAK MANAGEMENT

# Systemic Problems Require Actions to Improve Efficiency, Effectiveness, and Accountability

## What GAO Found

Amtrak's basic business systems need to be strengthened to help achieve financial stability and meet future operating challenges. Recently, Amtrak's management has taken positive steps to instill some discipline and control over operations. However, fundamental improvements beyond these efforts are needed to better measure and monitor performance, develop and maintain financial controls, control costs, acquire goods and services, and be held accountable for results. Several key themes emerged across all five areas GAO reviewed.

- Amtrak lacks a meaningful strategic plan that provides a clear mission and measurable corporatewide goals, strategies, and outcomes to guide the organization. Also absent is a comprehensive strategic planning process, characteristic of leading organizations GAO has studied. Also, while Amtrak has recently taken steps to improve its acquisition function, GAO found that some major departments independently made large purchases and did not always adhere to Amtrak's procurement policies and procedures. Amtrak lacks adequate data on what it spends on goods and services, preventing it from identifying opportunities to leverage buying power and potentially reduce costs. Similarly, while Amtrak has recently reduced costs, revenues are declining faster than costs, leading to operating losses exceeding \$1 billion annually. These losses are projected to grow by 40 percent within 4 years; no effective corporatewide cost containment strategy exists to address them.
- Financial reporting and financial management practices are weak in several areas. Financial information and cost data for key operations, while improved, remain limited and often unreliable. For example, Amtrak's on-board food and beverage service lost over \$160 million for fiscal years 2002 and 2003. Amtrak's poor management and enforcement of its food and beverage contract (an outside contractor is responsible for procuring and distributing food and beverages for most of Amtrak's trains) may have contributed to this loss. Regarding financial reporting, GAO found that Amtrak had omitted or misallocated key expenses in several areas, substantially understating operating expenses in reports that managers use to assess performance. Similarly, Amtrak has not developed sufficient cost information to target potential areas to cut costs, accurately measure performance, and demonstrate efficiency.
- Developing transparency, accountability, and oversight is critical for achieving operational success. Since Amtrak is neither a publicly traded private corporation nor a public entity, it is not subject to many of the mechanisms that provide accountability for results. Mechanisms that do apply, such as oversight by the board of directors and the Federal Railroad Administration, are limited or have not been implemented effectively. Current congressional review of Amtrak offers an opportunity for addressing these transparency and accountability issues.

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**Abbreviations**

AAMPS	Amtrak Accounting, Material and Purchasing System
Amtrak OIG	Amtrak Office of Inspector General
DOT	Department of Transportation
FMFIA	Federal Managers Financial Integrity Act of 1982
FRA	Federal Railroad Administration
GAGAS	generally accepted government auditing standards
GPRA	Government Performance and Results Act of 1993
IPA	independent public accountant
MBTA	Massachusetts Bay Transportation Authority
RPI	route performance information
SBU	strategic business unit
SEC	Securities and Exchange Commission
SERP	Supplemental Executive Retirement Plan
STB	Surface Transportation Board

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United States Government Accountability Office  
Washington, D.C. 20548

October 4, 2005

The Honorable Don Young  
Chairman, Committee on Transportation  
and Infrastructure  
House of Representatives

Dear Mr. Chairman:

As requested, this report discusses the National Railroad Passenger Corporation's (Amtrak) management and performance. This includes information on Amtrak's strategic planning and a performance-based framework, financial reporting and financial management practices, cost containment strategies, acquisition management, and accountability and oversight. We make recommendations in each of these areas as well suggestions to Congress about intercity passenger rail policy.

As agreed with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. We will then send copies to other appropriate congressional committees, the President of Amtrak, and the Secretary of Transportation. We will also make copies available to others upon request. In addition, the report will be available at no charge on the GAO Web site at <http://www.gao.gov>.

If you or your staff have any questions concerning this report, please contact me at (202) 512-2834 or [heckerj@gao.gov](mailto:heckerj@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made major contributions to this report are listed in appendix III.

Sincerely yours,

JayEtta Z. Hecker  
Director, Physical Infrastructure Issues



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# Executive Summary

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## Purpose

In recent years, it has become clear that intercity passenger rail service has come to a critical juncture regarding its future in the United States. The National Railroad Passenger Corporation (Amtrak), the current provider of intercity passenger rail service, continues to rely heavily on federal subsidies, now totaling more than \$1 billion per year. Since it began operating in 1971, Amtrak has received federal subsidies totaling about \$29 billion. Given the precarious financial condition of the corporation, there is a wide diversity of proposals for what might be done to provide more self-sufficient and efficient intercity passenger rail service, ranging from limiting Amtrak's role and introducing competing rail service to keeping Amtrak intact and providing increased funding to improve its equipment and infrastructure.

To help inform congressional deliberations on these issues, the Chairman, House Committee on Transportation and Infrastructure, asked GAO to examine Amtrak's management and performance. GAO's review focused specifically on aspects of Amtrak's management and financial operations. The five areas that GAO addressed, which collectively provide insight into the performance of Amtrak, include (1) strategic planning and a performance-based framework, (2) financial reporting and financial management practices, (3) cost containment strategies, (4) acquisition management, and (5) accountability and oversight.

To address these issues, GAO reviewed documents on Amtrak's strategic planning process and preparation of goals and objectives, reviewed control activities related to Amtrak's financial reporting and the design of internal control policies over certain expenses, reviewed financial reports and obtained data on Amtrak's operating costs, and reviewed Amtrak's procurement policies and procedures. GAO also reviewed legislation relevant to the management and governance of Amtrak, including Amtrak's articles of incorporation and bylaws. GAO reviewed recent grant agreements between Amtrak and the Federal Railroad Administration, observed internal control practices over certain operating expenses, and evaluated selected contracts for the acquisition of various services for compliance with procurement policies and procedures. Finally, GAO interviewed Amtrak officials regarding the five areas addressed in this report, discussed management and accountability issues with members of Amtrak's board of directors, and interviewed officials at selected freight and commuter railroads. A more complete discussion of GAO's objectives, scope, and methodology is presented in chapter 1 of this report.

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## Background

Amtrak, although federally established and unable to operate without substantial federal subsidies to remain solvent, is not a government agency, but rather a private, for-profit corporation. It currently operates a 22,000-mile network providing service to 46 states and the District of Columbia, mainly using track owned by freight railroads. Amtrak also owns about 650 miles of track, primarily on the Northeast Corridor between Boston, Massachusetts, and Washington, D.C. Amtrak served about 25 million passengers in fiscal year 2004 and about two-thirds of Amtrak's ridership takes trains on the Northeast Corridor. Its financial condition remains precarious, and, according to Amtrak's management, the corporation will require billions of dollars to improve infrastructure for operation of the nationwide intercity passenger rail service.

Amtrak's financial struggles have led to numerous changes in corporate direction and organizational structure. Amtrak has also been influenced by requirements in the Amtrak Reform and Accountability Act of 1997 that it become operationally self-sufficient by 2002—a goal Amtrak did not meet. In 2002, under the direction of a new president, Amtrak established a more centralized, functional organization; adopted a new approach to management; and stated its intent to focus on financial stability and achieving a “state of good repair.”<sup>1</sup> As a centerpiece for these changes, Amtrak's president adopted a multipronged management approach that is based on the following five tools—all of which were designed to instill a sense of discipline to company operations:

- department goals that are to be a basis for Amtrak's budget;
- defined organization charts that identify a clear chain of command and are to be used to control labor costs;
- a capital program of specific projects and production targets needed to stabilize the railroad;
- a zero-based operating budget with a focus on maintaining or reducing the budget; and

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<sup>1</sup>A “state of good repair” is the outcome expected from the capital investment needed to restore Amtrak's right-of-way (track, signals, and auxiliary structures) to a condition that requires only routine maintenance.

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- monthly performance reports, which are to be Amtrak's primary tool for reporting on company performance results, internally and externally.

In April 2005, as GAO's report was being prepared, Amtrak's management and its board of directors released a proposed set of strategic reform initiatives—containing, among other things, a new vision statement—that would substantially change how the corporation operates. Among other things, this proposal would give states a larger role in deciding what services to offer and introduces greater potential for competition in providing intercity passenger rail service. The future of this proposal is largely unknown, and implementation will require both legislative changes (such as the federal government either assuming annual debt service payments or eliminating Amtrak's debt burden as well as removing Amtrak from the railroad retirement system) and extensive changes internally within Amtrak.

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## Results in Brief

At a time when Amtrak is at a critical crossroads, GAO found that the corporation faces major challenges in instituting and strengthening its most basic business systems. Fundamental improvements are needed in the way Amtrak measures and monitors performance, develops and maintains financial controls, controls cost, acquires goods and services, and is held accountable for results. Although Amtrak management has taken steps to instill discipline and control over its operations, the corporation still lacks effective operating practices characteristic of well-run organizations, whether public or private. Regardless of the future role that the administration and Congress may determine for Amtrak, major improvements are needed in the corporation's strategic management and cost controls. The following are highlights of the progress made and improvements needed in each of the five core areas GAO reviewed:

- *Strategic planning and management:* Amtrak has improved its management approach in recent years through the implementation of such things as organization charts and operating budgets and the monitoring of employment levels (called headcount). However, it lacks a comprehensive strategic planning process and performance-based framework characteristic of leading organizations (including government entities and private corporations) that GAO has studied in the past. For example, Amtrak lacks a meaningful strategic plan that articulates both a comprehensive mission statement and corporatewide goals to indicate how Amtrak plans to accomplish its mission. Amtrak has developed a capital plan (which it calls a strategic plan) that focuses

on the corporatewide goal of achieving a state of good repair, but it lacks a strategic plan that includes measurable corporatewide goals, strategies, and outcomes to guide the entire organization. In addition, without a mission or corporatewide goals, Amtrak cannot ensure that the annual department-specific goals developed by Amtrak's various departments support or improve overall corporate performance. Although Amtrak's management tools provide a framework for developing annual goals and budgets, these tools do not provide a long-term, integrated approach for managing the corporation and focus on outputs, not outcomes. Amtrak also needs a performance-based approach to its strategic planning process—that is, developing action plans for improving performance, generating key data to monitor performance, and using incentives to ensure responsibility and accountability—to achieve goals. As part of its newly proposed reform initiative, Amtrak plans to release a strategic plan in the fall of 2005, which will include a mission and goals for the company. This is a step in the right direction, but challenges, such as the need for congressional action and the ability to keep employees focused on long-term change, exist to fully implementing these initiatives.

- *Financial reporting and financial management practices:* In recent years, Amtrak's management has placed increased emphasis on providing reliable financial information, and progress has been made. For example, Amtrak's independent public accountant (IPA) previously reported multiple areas of significant internal control weaknesses as part of an annual audit of Amtrak's financial statements. For fiscal year 2004, the IPA reported that much progress had been made. In general, however, Amtrak has not implemented "preventive controls" necessary to better ensure the production of relevant and reliable financial information for management and stakeholders. GAO found that improvements are needed in the usefulness of information provided to management and stakeholders, in the design and implementation of internal control practices over certain areas of expense, and in Amtrak's efforts to strengthen financial management practices. For example, one key report used by Amtrak's management on a monthly basis omitted depreciation from each train route and business line, which totaled \$606 million in 2003 and \$479 million in 2002; this omission substantially understated reported expenses, which, in turn, hindered making a meaningful analysis of operating results and an assessment of performance. In another instance, as the result of omitting certain accrued benefit expenses in allocating such costs, employee benefits were understated by more than \$100 million, and Amtrak failed to

adequately document more than \$500,000 in supplemental retirement benefits awarded to Amtrak executives.

- *Cost containment:* Amtrak has instituted measures (such as controls over headcount levels) designed to contain costs, and its efforts have had some success. However, Amtrak's annual operating losses have grown and are now over \$1 billion annually. These losses are projected to rise about 40 percent over the next 4 years. Efforts to contain costs have been limited for two main reasons. First, the company has not yet developed a comprehensive, corporatewide cost containment plan that provides cost reduction goals, identifies how those goals are to be achieved, and provides for continuous improvement on those goals. Second, Amtrak has not fully developed unit cost and asset performance metrics that could help reduce costs and demonstrate efficient use of its resources. As part of its cost containment strategy, GAO found that Amtrak also needs to continue to use and seek to expand its use of cost reduction practices prevalent in the railroad industry—such as benchmarking and efficiency reviews. This would allow Amtrak to compare its practices with those of more efficient railroads and other transportation sector businesses to help decrease Amtrak's operating costs. Absent any changes, continued and increasing federal subsidization to keep the company solvent will be needed.
- *Acquisition management:* Amtrak's system for acquiring goods and services—when compared with the best practices of leading organizations—lacks critical elements needed to ensure efficiency, cost-effectiveness, and accountability. In recent years, Amtrak has taken steps to centralize its purchasing function to provide more authority and oversight and Amtrak has recently published a procurement manual, which provides detailed guidance on acquisition policies and procedures. However, some Amtrak units have made spending decisions and purchased services independent of the procurement department and sometimes in violation of the company's stated procurement policies and procedures. In addition, GAO's review of certain contracts, for the purchase of such things as advertising and professional services, showed a high frequency of noncompetitive contracts—that is, either sole or single source awards—and questionable review and approval practices. Further, review of expenditure data and selected transactions revealed the inappropriate use of a purchasing tool (designed for small purchases of \$5,000 or less) for which standards were clearly delineated. Finally, GAO found that Amtrak's knowledge and information systems related to procurement are fragmented and have

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limited ability to produce useful spending information. As a result of these problems, Amtrak cannot ensure that it is receiving the best value when acquiring goods and services.

- *Accountability and oversight:* Although Amtrak operates in the public spotlight, few formal accountability mechanisms apply, and those that do have not been effectively used. Amtrak's position as an organization that is neither a publicly traded private corporation nor a public entity means that it is not subject to many of the mechanisms that provide information to stakeholders or hold the company accountable for results. For example, Amtrak is not subject to either Securities and Exchange Commission rules, regulations, or public disclosure requirements, nor is it accountable to shareholders holding common or preferred stock since, by law, shareholders have little or no role in selecting members of the board of directors. Accountability and oversight mechanisms that do apply, such as oversight by the board of directors and the Federal Railroad Administration, are limited or have not been implemented effectively.

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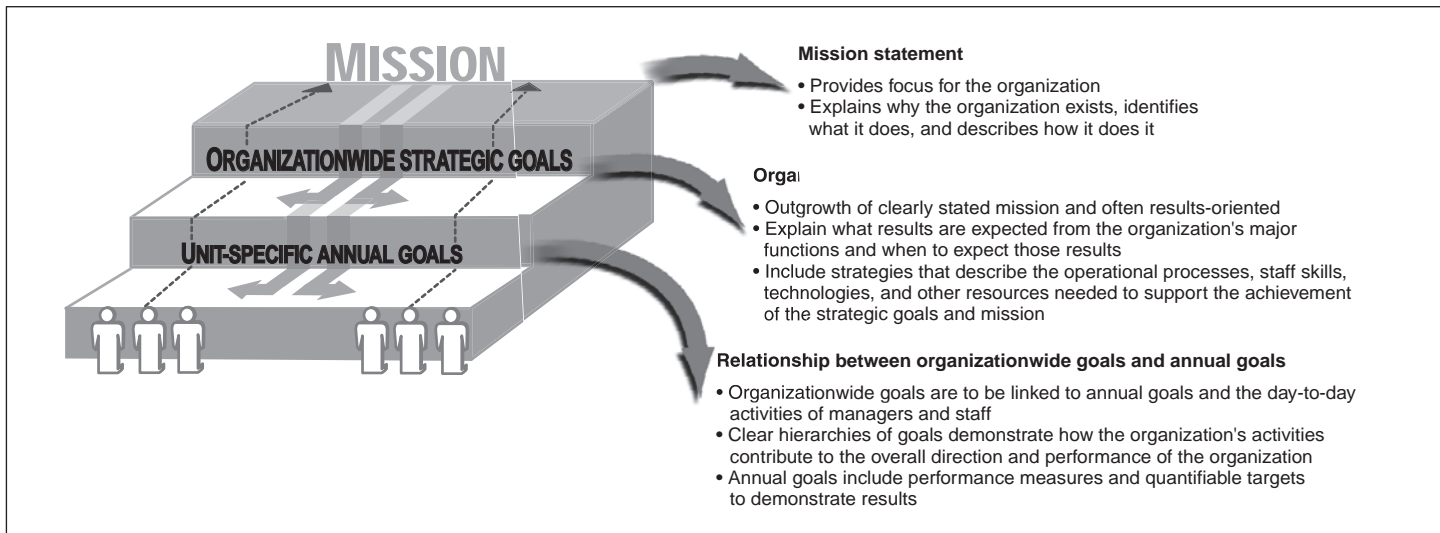
## Principal Findings

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### Amtrak Lacks a Comprehensive Strategic Plan and a Performance-Based Approach to Better Ensure Cost-effective Results

Leading organizations GAO has studied—both public and private—use strategic planning as a foundation for articulating a comprehensive mission and goals for all levels of the organization. This effort involves several important elements. (See fig. 1.) The first element is developing a comprehensive mission that employees, clients, and other stakeholders understand and find compelling. Leading organizations also seek to establish clear hierarchies for performance goals and measures for each organizational level linking them to overall corporate goals. Without clear, hierarchically linked performance measures, managers and staff throughout the organization will not have straightforward road maps showing how their daily activities can contribute to attaining corporatewide goals and mission.

Figure 1: Key Elements of a Strategic Plan



Source: GAO.

In contrast, Amtrak has not yet developed a meaningful strategic plan that includes critical elements characteristic of leading organizations we have studied. Specifically:

- *No comprehensive mission statement.* Amtrak has no comprehensive mission statement to provide and communicate a clear focus for the company. Amtrak's president believes that the administration and Congress are responsible for developing a mission, but federal law already articulates the company's purpose—to operate a national rail passenger transportation system. As any public or private organization, Amtrak is responsible for taking this purpose and establishing a clearly defined mission, a critical task that neither the management or the board of directors has yet accomplished.
- *Limited corporatewide goals.* Although Amtrak's management has established a goal for the corporation—returning the railroad to a state of good repair—this goal is too narrowly focused and does not encompass all corporate activities. For example, Amtrak's goal of a state of good repair and related capital plan address infrastructure aspects of the organization, such as repairing bridges and rails. Although this plan guides Amtrak's capital function, Amtrak lacks a strategic plan that articulates measurable corporatewide goals, strategies, and outcomes

for other important aspects of its operations, such as human capital, and other lines of business, such as commuter rail and reimbursable services.

- *Annual goals are not tied to comprehensive mission or corporatewide goals.* Absent an overall comprehensive mission and corporatewide goals, Amtrak's departments develop goals based on their activities and the priorities of Amtrak's president. Without a process for developing department-specific goals that relate to a comprehensive mission and corporatewide goals, departments cannot effectively assess or communicate whether their goals improve overall company performance. Moreover, the departments' abilities to establish and achieve goals are hampered by a lack of data analysis and Amtrak's organizational restructuring. Amtrak officials said that, in some cases, these goals are an expression of "aspiration," rather than a realistic target.
- *Management tools focused on the short term, not the long term.* Although Amtrak's management tools provide a framework for developing annual goals and budgets, these tools do not provide a long-term, integrated approach for managing the corporation, and they focus on outputs, not outcomes. Without a strategic plan to guide all business activities, Amtrak does not have a process for integrating the efforts across the organization or for assessing and addressing company risks. Moreover, without a strategic plan, Amtrak does not have overall corporate performance measures and cannot establish a clear understanding of what it is trying to accomplish with its resources and company activities.

Leading organizations GAO has studied also adopt a performance-based approach to ensure that all activities and individuals are working toward and achieving results. Although Amtrak's key departments are making some progress in this regard, GAO identified a number of ways in which they could improve. Specifically:

- *Develop specific strategies and action plans.* Amtrak's key departments do not consistently develop specific strategies or action plans for critical actions and milestones to achieve goals. For example, in addressing train delays, one department was still in the process of developing a plan that deals mainly with mitigating passenger-loading problems and did not develop documented strategies or actions for



other problems that affect on-time performance, such as freight or commuter train interference.

- *Provide performance-based incentives.* While Amtrak managers say they hold their managers accountable for achieving department goals, Amtrak does not have a pay-for-performance management system to provide incentive for achieving goals. Although Amtrak has proposed such a system to its board of directors, the board has concerns about the system, such as which management positions would be eligible and the operational and financial metrics to make merit pay and bonus decisions.
- *Improve performance-based data.* Amtrak's ability to monitor, evaluate, and report on performance is hindered by its data systems and reporting processes. This was a theme that was common across virtually every area GAO reviewed. For example, although the transportation, engineering, and mechanical departments report on their goals in a quarterly review, they do not report on all of their goals in this report. For example, the transportation department did not report on three of its eight goals at the end of fiscal year 2004.

In April 2005, the board, in conjunction with Amtrak management, issued a set of strategic reform initiatives for Amtrak, which is a first step toward developing a more strategic approach for the company. These initiatives include a proposed vision for Amtrak and for the future of intercity passenger rail and a proposed transition to planning and reporting by lines of business. Amtrak intends to release a new strategic plan for fiscal year 2006, which would ultimately result in the development of a comprehensive mission and goals for each line of Amtrak's business. Department goals would then be aligned to each line of business, according to an Amtrak official. The proposed changes in planning and reporting could provide Amtrak with a more all-encompassing approach, but fully implementing these initiatives requires overcoming major challenges. For example, as the chairman of Amtrak's board noted, legislative action is required to implement many aspects of the plan. These legislative actions include, among other things, the federal government either assuming Amtrak's annual debt service payments or eliminating Amtrak's debt burden (about \$3.8 billion in short- and long-term debt at the end of fiscal year 2004) as well as transitioning Amtrak out of the railroad retirement system. Amtrak officials also noted that major challenges internally within Amtrak, including the time and effort needed to implement these initiatives and the ability to keep its employees focused on long-term change, even with the

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uncertainty of Amtrak's future, may hinder implementation of the new planning process.

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## Financial Management Practices Could Better Support Amtrak's Decision Making

GAO examined the following three aspects of Amtrak's financial management and accountability framework: (1) the usefulness of financial information provided to management and external stakeholders, (2) the design of internal control over selected areas of expense, and (3) Amtrak's efforts to strengthen financial management practices. Opportunities for improvement are present in all three of these areas.

- Although Amtrak has made progress in establishing a more systematic process to provide financial information to management and stakeholders, much of the financial information it uses for day-to-day management purposes lacks certain relevant information or is of questionable reliability. Amtrak's monthly performance report, which Amtrak's president had deemed a "critical" document for managing the company, demonstrated this issue in several respects. For example, the monthly reports did not include relevant information on Amtrak's food and beverage revenue and expenses, even though food and beverage financial losses were over \$160 million for fiscal years 2002 and 2003. Also, information in another key report was often of questionable reliability. For example, data reported in monthly reports subsequently required significant adjustments—requiring up to 7 months to complete—to correct errors in amounts before financial statements could be issued. As a result, the reliability of the information provided to managers and stakeholders during the fiscal year was limited.
- GAO reviewed internal control practices in two areas—employee benefit expenses and food and beverage service—and found weaknesses in both. Employee benefits, for example, as reported in monthly performance reports, were understated by more than \$100 million because certain accrued employee benefit expenses were not considered. Further, documentation was inadequate to fully support more than \$500,000 of supplemental retirement benefits awarded to Amtrak executives. In the area of food and beverages, poor enforcement of contract provisions may have contributed to Amtrak's spending \$2 for every \$1 in revenue from on-board service. For example, Amtrak has never required the contractor supplying food and beverages for its trains to submit an independently audited annual report of budget variances for key items, even though the contract requires such a report. Also, Amtrak has never audited the contractor's purchase data—which is

allowed under the contract—to ensure that the contractor is passing along any discounts or rebates the contractor receives on items purchased.

- For fiscal years 2003 and 2002, Amtrak's IPA reported multiple areas of significant internal control weaknesses as part of an annual audit of Amtrak's financial statements. However, for fiscal year 2004, the IPA reported that much progress had been made and only one significant weakness remained—involving accounting for capital assets.<sup>2</sup> Amtrak's progress in addressing its control weaknesses is an important achievement. In general, however, its efforts have been achieved primarily through the implementation of manual detective controls instead of preventive controls. Thus, improvements made by the end of fiscal year 2004 enable the production of useful financial information after the fact—typically, 5 to 6 months after the end of the year. However, until effective controls are established that prevent errors in financial information and address their underlying causes, Amtrak's ability to produce relevant and reliable financial information for management and stakeholders to use for decision making will be hampered.

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**Despite Increasing Operating Losses and Federal Subsidies, Amtrak Has Not Developed a Comprehensive Cost Control Strategy**

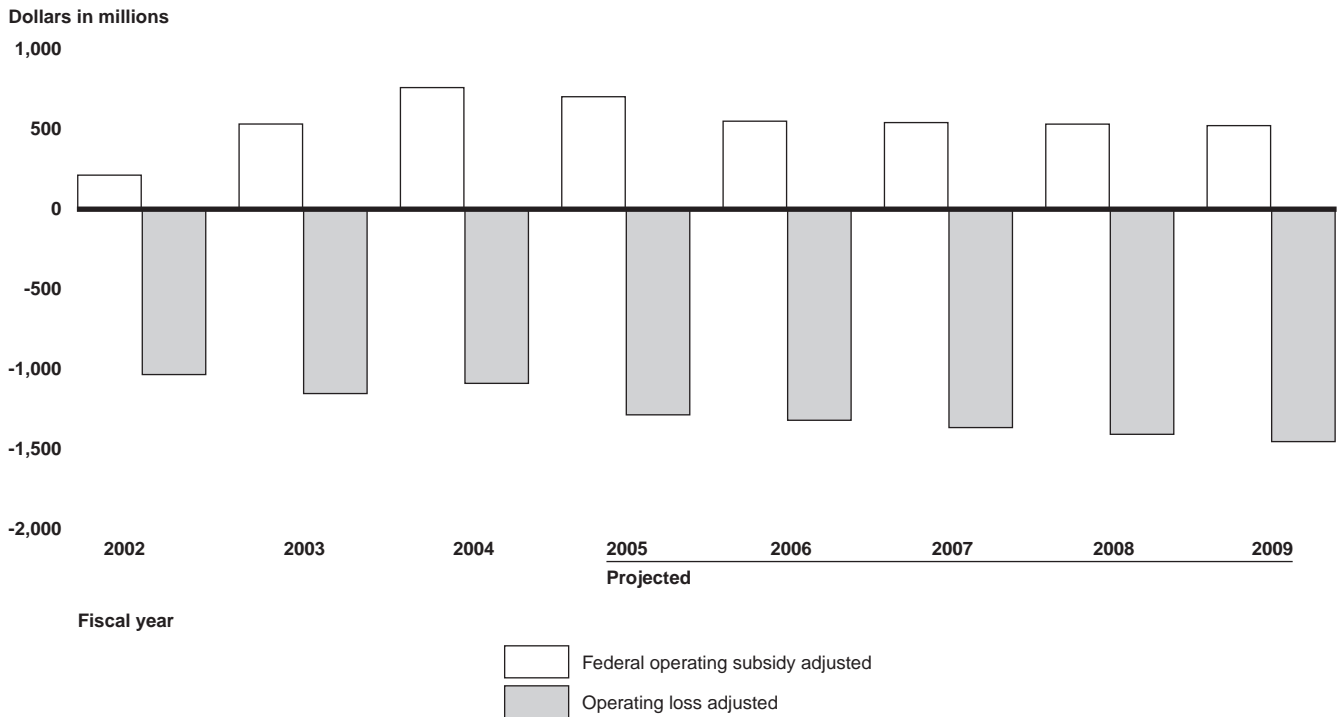
Amtrak's annual operating loss was over \$1 billion in fiscal year 2004 and is projected to increase about 40 percent to over \$1.4 billion by fiscal year 2009. (See fig. 2.) Amtrak has made efforts to cut costs, reducing its total expenses by 9 percent (in constant dollars) from fiscal years 2002 to 2004 by reducing headcount and introducing organizational efficiencies, among other things. Amtrak reduced its total employment by about 3,500 employees and reduced its labor costs by about \$200 million over the same period. Amtrak is working to reduce its costs through, among other things, labor negotiations with its unions; the introduction of health care contributions from its employees; the use of outsourcing for several of its mechanical, engineering, and other functions; and the creation of unit cost metrics in some of its operating departments to measure productivity. During the same period, Amtrak's revenues have decreased by 16 percent. In addition, Amtrak's projected losses may be understated, since they do

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<sup>2</sup>On June 27, 2005, Amtrak management provided GAO with a draft copy of the internal control report from its IPA, which is based on the IPA's audit of the fiscal year 2004 financial statements. GAO's comments on fiscal year 2004 are based solely on the contents of this draft internal control report. This report was subsequently issued on August 12, 2005.

not include interest expenses that are reported in its financial statements and rely on \$377 million in reduced costs that Amtrak estimates could be achieved as a result of operating efficiencies and benefits from capital investments it plans to undertake in fiscal years 2005 to 2009. Amtrak also faces serious challenges to reducing costs in the future. For example, Amtrak’s labor costs, which account for almost 50 percent of its total expenditures, are expected to increase over the next 5 years, putting more of a burden on Amtrak to reduce its other costs in order to significantly reduce its operational costs. These projections also do not take into account the removal in April 2005 of its Acela trainsets from service for an undetermined period due to brake-related problems. The absence of the Acela trainsets could have a significant impact on Amtrak’s fiscal year 2005 revenues.

**Figure 2: Amtrak’s Constant Dollar Operating Losses and Federal Operating Subsidy, Fiscal Years 2002 to 2009**



Source: GAO analysis of Amtrak and Federal Railroad Administration data.

Note: Amounts are in constant 2004 dollars. Fiscal years 2005 to 2009 figures for operating loss and federal subsidy are Amtrak projections. Operating losses from fiscal year 2002 to 2004 and projected losses from fiscal years 2005 to 2009 do not include interest expenses.

Amtrak's cost containment efforts have had limited success for two main reasons. First, Amtrak has not developed a comprehensive, corporatewide cost containment plan. Management's focus has been on creating and monitoring its yearly operating budget and managing headcount levels, leaving its various departments to decide on how much emphasis, if any, to place on other cost containment actions. Second, Amtrak has not fully developed unit cost and asset performance metrics that could help reduce costs and demonstrate efficient use of its resources. Amtrak officials said that such factors as recent increases in ridership and overhauls completed, when combined with recent decreases in employees (headcount), show that the company is "doing more with less." However, a significant portion of the reduction in headcount came as a result of termination of a commuter rail service and mail and express freight services—not necessarily from finding efficiencies while offering the same level of service. Without unit cost or asset performance statistics, Amtrak is less able to understand and measure its performance as well as demonstrate progress toward being more efficient. Some of Amtrak's departments are beginning to develop cost metrics, but they are encountering difficulty in obtaining detailed and reliable data as well as baseline statistics for trend analyses. Amtrak has some corporatewide efficiency metrics, such as ticket and passenger revenue per passenger mile, but these metrics do not demonstrate asset performance, such as output per unit of labor or per gallon of fuel consumed. The latter would give better insight into how efficiently Amtrak is using its assets.

Amtrak also needs to continue and expand its use of widely used industry cost containment practices—such as benchmarking, outsourcing, and efficiency reviews. Doing so would allow Amtrak to compare its practices with those of more efficient railroads and other transportation sector businesses to help decrease Amtrak's operating costs. Regarding benchmarks, freight railroads GAO contacted compare their cost containment strategies against those of their competitors as a means of incorporating best practices into their strategies. While some of Amtrak's departments have used benchmarking, other departments can use this technique to compare their performance against the other companies in the industry. With respect to outsourcing, Amtrak has outsourced several functions, including some maintenance of equipment and maintenance of way functions, and its commissary operations, and it has recently identified other noncore functions as possible candidates for outsourcing. However, Amtrak management has recognized that it must develop accurate cost statistics to effectively compare in-house costs with the costs of outsourcing. With respect to efficiency reviews, managers from freight

railroads told us that they hire operational and process engineers and use cross-functional teams to study key aspects of their operations, such as internal processes, route schedules, and yard operations, to find out how to improve these functions and track improvement efforts. In 2001, an outside consulting firm reviewed Amtrak's operations and recommended numerous actions. However, not all of these findings were implemented, nor were any resulting savings tracked, because changes in Amtrak's leadership and a subsequent reorganization changed Amtrak's focus, according to Amtrak officials.

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### Amtrak's Acquisition Function Is Limited in Promoting Efficiency, Cost-effectiveness, and Accountability in Acquiring Goods and Services

Amtrak's system for acquiring goods and services, when evaluated against a set of best practices that typify organizations with highly successful systems, is missing critical elements needed to ensure efficiency, cost-effectiveness, and accountability. In recent years, Amtrak has made improvements in this area, strengthening its purchasing function by (1) centralizing as well as elevating this function to the same level as other key departments, (2) issuing a procurement manual to communicate company procurement policies and procedures, and (3) performing outreach to major company departments to clarify and provide training on certain procurement policies and procedures. Nonetheless, as noted below, GAO identified several opportunities for improvement.

First, Amtrak has not yet succeeded in fully integrating the procurement function and adopting a more strategic approach to acquisitions throughout the company. When planning acquisitions of goods and services, departments that need these goods and services have sometimes functioned independently of the procurement department. This does not allow leveraged buying and may have resulted in Amtrak paying more than necessary for some purchases. For example, in fiscal year 2004, the Amtrak technologies department issued and signed a contract modification expanding an existing software contract without the procurement department's knowledge and in violation of Amtrak's procurement policy. This expansion increased the value of the contract by \$200,000.

Second, while the procurement department has made efforts to become more involved with other departments' procurement of goods and services, it has not adequately communicated and enforced policies and procedures intended to promote competition, obtain best prices, and protect the financial interests of the company. Amtrak only recently (June 2005) issued a comprehensive procurement manual that provides detailed guidance for procurement staff to follow when awarding contracts, and, basically, some

departments, acting independently in purchasing goods and services, have not conformed to Amtrak's own procurement policies and practices. The lack of clear direction and accountability until recently may have contributed to goods and services being acquired noncompetitively—that is, either sole or single source contracts—and independently of the procurement department. For example, GAO reviewed in detail a nonprobability sample of 61 contracts that had expenditures in 2002 and 2003, a substantial number (36) were awarded noncompetitively, and these contracts often did not include sufficient justification, which was required for a noncompetitive award. Further, review of selected transactions revealed the inappropriate use of a purchasing tool (designed for small purchases of \$5,000 or less) for which standards are clearly delineated. In some instances, this tool was used for purchases of over \$100,000. Additionally, some departments have authority to acquire services independent of the procurement department. GAO's review of one of these services—acquisition of outside legal services—showed weaknesses indicating that Amtrak may not be receiving the best value for the money and may be making improper payments. Problems with respect to outside legal services included lack of competition, lack of spend analysis, lack of specificity in documenting terms and conditions of the services to be provided, inadequate review of invoices, and inadequate supporting documentation for payments.

Finally, a poor knowledge and information system limits Amtrak's ability to identify opportunities for potential cost savings. Simply put, Amtrak cannot accurately determine how much it spends on goods and services, thereby missing opportunities to better leverage buying power and reduce overall spending. To make strategic, mission-focused acquisition decisions, leading private and public sector organizations establish spend analysis systems that provide knowledge about which goods and services are being acquired, the amount spent, and who is buying and supplying them. This knowledge allows organizations to identify opportunities to leverage buying, save money, and improve performance. In contrast, Amtrak's knowledge and information system does not produce the data needed to enable Amtrak to identify strategic sourcing opportunities. Such data could enable Amtrak to leverage its buying power and potentially reduce procurement costs.

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## Amtrak Does Not Have Adequate Oversight of or Accountability for Its Performance and Results

Fundamental changes are required to implement the needed improvements GAO identified with respect to measuring and monitoring performance, developing and maintaining financial records and internal controls, controlling costs, and procuring goods and services. However, as Amtrak focuses much of its attention on restoring its infrastructure to a state of good repair, there is a serious question regarding whether the company will sufficiently address these areas.

Oversight and accountability mechanisms to better ensure that needed improvements are addressed are limited or have not been exercised effectively. A major contributing factor is the unusual situation under which Amtrak operates—as neither a publicly traded private corporation nor a public entity. This means that Amtrak is not subject to accountability and oversight mechanisms by which other private or public entities would have to abide. For example, unlike publicly traded private corporations, Amtrak is not subject to accountability to stockholders or financial markets or to Securities and Exchange Commission rules, filings, and public disclosure requirements. Also, unlike public entities, Amtrak is not subject to the Government Performance and Results Act of 1993, the Federal Managers Financial Integrity Act of 1982, or various other reporting and accountability requirements established in law or regulation. Another factor is that existing oversight mechanisms are not working or are limited in scope. For example, although Amtrak has a board of directors with oversight authority, the board has been operating with less than a full complement of positions filled for considerable periods of time and conducts little formal oversight of performance. Also, federal regulators, such as the Federal Railroad Administration, have exercised limited oversight of Amtrak’s operations or overall performance.

Both the administration and Amtrak have proposed reforms that would change the basic operating structure, establish competition for intercity rail, and provide a different method for distributing federal subsidies. The effect of these changes, if implemented, on improving oversight and accountability mechanisms is unknown at this juncture. Reaching agreement on to whom Amtrak is accountable, however, is a critical first step. Without it, inadequate accountability will continue, and the issues raised in this report may not receive the visibility needed to resolve them. The board and other key stakeholders can take actions within the current operating framework, such as developing policies and procedures to increase oversight and accountability.



Congress has a central role in this issue. It created Amtrak and has continued to subsidize its operations over time. Amtrak's reauthorization expired in September 2002, and Congress is now considering what, if any, changes are needed in the structure and financing of intercity passenger rail. As part of this reauthorization, Congress will also play a role in determining the type of oversight to be provided and the accountability mechanisms to be used to ensure that the desired results and outcomes are achieved. As we reported in April 2003, the key components of a framework for evaluating federal infrastructure investments include (1) establishing clear, nonconflicting goals; (2) establishing the roles of government and private entities; (3) establishing funding approaches that focus on and provide incentives for results and accountability; and (4) ensuring that the strategies developed address the diverse stakeholder interests and limit unintended consequences. We continue to believe these components are important in evaluating and establishing federal policy toward intercity passenger rail.

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## Matters for Congressional Consideration

As part of the deliberation about the future of Amtrak and intercity passenger rail, Congress may wish to consider establishing a national policy for intercity passenger rail, and determining the appropriate role for Amtrak by ensuring that reauthorization or reform legislation (1) establishes clear, nonconflicting goals; (2) establishes the roles of both the federal and state governments as well as private entities; (3) establishes funding approaches that focus on and provide incentives for results and accountability; and (4) provides that the strategies developed address the diverse stakeholder interests and limit unintended consequences.

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## Recommendations for Executive Action

GAO is making detailed recommendations to Amtrak in all five areas examined. These recommendations are designed to improve (1) strategic planning to better guide the company, (2) financial information and financial management practices for better management of operations and for transparency internally and with key stakeholders, (3) corporatewide cost containment efforts to maximize efficiency and minimize operating losses, (4) acquisition of goods and services to ensure that the company gets the best value for the money, and (5) accountability and oversight mechanisms to better ensure that needed management improvements are sufficiently addressed and resolved and to provide needed transparency among key internal and external stakeholders. Specific recommendations in each area are found at the end of each report chapter.

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## Agency Comments and GAO Evaluation

GAO provided a draft of this report to the Department of Transportation (DOT) and Amtrak for review and comment. GAO received oral comments from DOT officials, including the department's general counsel. The DOT officials told GAO that, in general, they agreed with the draft report's findings, and they said the recommendations would be helpful as they work with Amtrak to achieve significant improvements in program and financial management (in accordance with Congress' statutory mandate that Amtrak become self-sufficient). The DOT officials agreed that if Amtrak receives federal funds, it needs to strengthen its accountability to the public and the federal government in a way that is effective, notwithstanding its peculiar corporate structure. Further, DOT officials told GAO that the department has worked with the Amtrak board of directors to enhance the board's oversight of Amtrak in a number of beneficial ways. DOT officials said that in 2005, the board has been especially active and has met with unusual frequency in an effort to require Amtrak management to address necessary changes. They also noted that the board's ability to work through board committees might benefit by having a full roster of congressionally confirmed directors in place, something that has not occurred since 2002. Finally, the DOT officials emphasized the potential utility of an expanded role for FRA, including additional legal authority to implement tools for enhanced oversight, such as the authority to impose more flexible and effective grant provisions for the funding it provides to Amtrak and the associated withholding of funds for nonperformance. FRA also provided clarifying and technical comments that GAO incorporated into this report as appropriate.

Amtrak provided its comments in a letter from its president and chief executive officer. (See app. II.) Overall, the president said that he was not convinced that GAO's recommendations would produce the results GAO expects, saying that there is no "silver bullet" for fixing Amtrak, nor is there a cookie-cutter approach that can be taken. Rather, he said that steady incremental improvements are best. In general, Amtrak did not comment on GAO's specific recommendations. The president also said that since coming to Amtrak, management has focused on maintaining liquidity, cleaning up the books, and rebuilding its plant and equipment, which has allowed the company to do more work with fewer people and keep operating needs flat. Basically, he said that "the results speak for themselves."

GAO believes that, although improvements have been made, the overall results have not been satisfactory. During the last 3 fiscal years, Amtrak's

operating losses have increased to over \$1 billion annually, and such losses are projected to increase about 40 percent by 2009. In addition, GAO found systemic problems in all five areas that it reviewed and found that Amtrak faces major challenges in instituting and strengthening its basic business systems. Certainly, the president's actions have helped quell what would likely have been even higher losses, but further fundamental changes are needed to help address a situation that is not yet under control. The recommendations contained in this report reflect sound and proven ways adopted by leading organizations to efficiently and effectively manage their operations. The importance of robust strategic planning, sound financial management, across-the-board cost control strategies, disciplined procurement practices, and strong oversight is undeniable. In GAO's opinion, not recognizing the value of these areas and not adapting them to Amtrak's environment will continue to lead to suboptimal results.

The views reflected in the comments of Amtrak's president that steady incremental improvements are the best approach for addressing Amtrak's problems do not appear consistent with the magnitude of changes discussed in Amtrak's April 2005 strategic reform initiatives. In April 2005, Amtrak's management and board of directors released their strategic reform initiatives—initiatives characterized by Amtrak as a dramatic departure from business as usual that would substantially change how Amtrak operates. As Amtrak's board chairman stated in April 2005, these initiatives include structural, operating, and legislative changes that, among other things, would outline a new focus on planning, budgeting, accounting, and reporting of financial activity and performance along Amtrak's business lines; increase state financial involvement in existing and emerging rail corridors; and open the market for virtually all functions and services of intercity passenger rail to competition. The chairman also stated that, although Amtrak had made substantial progress in establishing an organizational structure and management controls that had resulted in cost savings, "we have considerable room for further improvement." GAO believes the strategic reform initiatives clearly acknowledge the substantial systemic problems facing Amtrak, including those discussed in this report, as well as the need for reform in how intercity passenger rail service is delivered. GAO encourages Amtrak's president and management to work together with the board of directors to ensure that the issues and challenges raised in the strategic reform initiatives are addressed. This will be important if Amtrak is to make meaningful progress in addressing its problems and becoming more efficient.

Amtrak's president also commented about specific areas, as follows:

- *Strategic planning:* The president said that Amtrak's management team has identified the problems "as only we can" and has developed an approach that "works best for us." He said that the strategic planning mechanisms we recommend or that government agencies adopt may not be in line with those followed by Amtrak, but the goals are the same. He reiterated that to him, while process is important, results are what matter. GAO agrees that results matter, but, overall, results are not improving. As both public and private organizations have long recognized, sound strategic planning mechanisms or "processes" are vital to chart a clear direction and mission, develop road maps for cost-effective operations based on this mission, and measure and be held accountable for results. The management tools Amtrak has adopted since May 2002, while helpful, are focused too narrowly and are clearly insufficient to stem the operating losses the company is experiencing. By focusing on "outputs," such as overhauls and track laid, rather than "outcomes," such as achieving on-time performance and a certain level of customer service, company management has no assurance that limited funds are being used for those areas that result in the highest return with respect to the impact on operating losses and the efficient and effective management of the company. GAO believes adopting a systematic and organized strategic approach—in line with GAO's recommendations—is necessary to achieve the results that both management and the public expect.
- *Procurement management:* Amtrak's president said that many of the issues GAO raised in the draft report are ones that Amtrak has focused on for a number of years, and the company is in the process of implementing changes in this area. GAO commends Amtrak for recognizing the need to improve its procurement function. However, GAO's work shows that there continues to be substantial systemic problems with Amtrak's procurement function and that additional actions are needed to ensure Amtrak is getting the best value for its money in the acquisition of goods and services and in recognizing cost saving opportunities.
- *Financial management:* Amtrak's president commented that, during his tenure, Amtrak's financial performance has improved dramatically and that the company closes its books on time and reports monthly results more quickly than most companies of its size. In addition, the president noted that Amtrak's material internal control weaknesses and

reportable conditions (as reported by Amtrak's IPA), and the dollar value of net audit adjustments, had all decreased. Amtrak's president agreed that Amtrak's financial processes were labor intensive, but he said that lack of modern technology had not stymied Amtrak's efforts to produce results. GAO agrees that Amtrak has made improvements in its financial management and reporting and that the number of material internal control weaknesses and reportable conditions has decreased. This report acknowledges these improvements. However, GAO's work shows that there continue to be substantive problems related to financial management at Amtrak—problems that act to undermine the usefulness of financial information produced and adversely impact Amtrak's ability to make sound business decisions. These problems include monthly performance reports that are not as useful as they could be and that contain financial data that are not reliable, inadequate internal controls related to certain expenses (such as employee benefits expenses and Amtrak's food and beverage service), and weak efforts to strengthen management practices and make financial information transparent. GAO believes Amtrak will find it difficult to make sound business decisions related to its operations and its different lines of business, control its costs and operating losses, increase its efficiency and cost-effectiveness, and demonstrate progress in achieving outcome-based goals and objectives without addressing these financial management problems.

- *Food and beverage service:* The president said that Amtrak has recently taken a number of actions to better manage this service, including reforming the delivery of food service (such as eliminating food and beverage service on selected short-distance trains) and renegotiating its contract with Gate Gourmet (formerly called Dobbs International). Amtrak's president also noted that GAO's draft report failed to mention the cost of labor as it relates to food and beverage service—a cost that both GAO and Amtrak agree is the largest single cost of the operation. GAO agrees that Amtrak's actions regarding its food and beverage service are steps in the right direction, and GAO encourages Amtrak to continue to seek ways to improve management and controls over this service. Both GAO's June 2005 testimony before the Subcommittee on Railroads, House Committee on Transportation and Infrastructure, and its August 2005 report on Amtrak's food and beverage service discussed management and control problems related to this service and made

recommendations for improving this control.<sup>3</sup> Both the testimony and the report also acknowledged the labor costs associated with Amtrak's food and beverage operation. GAO agrees that labor costs associated with Amtrak's food and beverage service are substantial and should be an integral component in any strategies and plans Amtrak develops to improve the efficiency and cost-effectiveness of this service. GAO's June 2005 testimony indicated that a recent Amtrak Inspector General report suggested a way that Amtrak could address its food and beverage labor costs. Since labor costs associated with the food and beverage service are part of Amtrak's overall labor cost structure, it was beyond the scope of GAO's work for this report to analyze these specific costs. This present report discusses internal controls related to Amtrak's food and beverage service and identifies ways Amtrak can strengthen these controls to ensure this service is operated more efficiently and cost-effectively.

Amtrak also made various clarifying and technical comments that GAO has addressed in the text of this report. Among the technical comments was a proposal by Amtrak's procurement department to liberalize Amtrak's policy related to delegation authority for contract changes. This proposal was in response to GAO's recommendation that Amtrak ensure that contract changes be approved in accordance with the company's current delegation of authority policy. At the time of GAO's review, this policy limited change order approvals on the basis of the cumulative value of contracts—that is, the level of authority needed to approve contract change orders is determined by the cumulative value of the contract, not the amount of the change order. Amtrak's proposal would change this policy to allow approval of change orders by a contracting agent until the total value of all contract changes meets or exceeds the agent's delegated authority to approve changes. Additional changes beyond this dollar value would then require approval by an individual with a higher level of delegation authority. GAO agrees that some flexibility in the approval authority may be desirable, especially for relatively low-dollar value changes. However, in liberalizing its approval authority for change orders, Amtrak should proceed cautiously by setting monetary thresholds for contracting agents that represent a relatively low-dollar value when compared with the

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<sup>3</sup>GAO, *Amtrak: Management and Accountability Issues Contribute to Unprofitability of Food and Beverage Service*, [GAO-05-761T](#) (Washington, D.C.: June 9, 2005); and *Amtrak: Improved Management and Controls over Food and Beverage Service Needed*, [GAO-05-867](#) (Washington, D.C.: Aug. 24, 2005).

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original value of the contract. Doing so would allow more efficient use of procurement department resources while maintaining oversight of contract changes. Also, as GAO recommends in this report, Amtrak's procurement department, regardless of whether or not this proposal is adopted, should exercise proper oversight of its contracting agents to ensure adherence to its current delegation of authority policy.

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# Introduction

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Intercity passenger rail is at a critical crossroads regarding its future in the United States. The current provider of intercity passenger rail service, the National Railroad Passenger Corporation (Amtrak), has struggled since its inception in 1970 to earn sufficient revenues and continues to rely heavily on federal subsidies to remain solvent; currently, these subsidies total more than \$1 billion annually. Despite federal subsidies, the corporation has continued to experience financial difficulties. For example, in June 2001, Amtrak was forced to mortgage a portion of Pennsylvania Station in New York City to raise \$300 million; in July 2002, it had to obtain a \$100 million loan from the federal government in order to meet expenses and continue operating. In June 2002, under a new president and chief executive officer, Amtrak underwent reorganization. However, the financial condition of the corporation is still precarious, and, according to management, the railroad will require billions of dollars to improve its infrastructure and achieve a “state of good repair” as it continues to operate a nationwide intercity passenger rail service.<sup>1</sup>

In recent years, various congressional and administration proposals have called for restructuring intercity passenger rail in the United States. These proposals have included breaking Amtrak up and introducing competing rail service. For example, one recent proposal would create a separate infrastructure corporation as a means to maintain and rehabilitate the Northeast Corridor—which runs from Washington, D.C., to Boston, Massachusetts, and is a critical component in Amtrak’s passenger rail system—and other infrastructure. A separate operating corporation would be created to provide rail service. Under this proposal, much of the responsibility for intercity passenger rail service would be delegated to states or groups of states operating through interstate compacts, and the operating corporation that succeeds Amtrak would have to compete to provide service.<sup>2</sup> In contrast, other proposals call for little restructuring at all and instead would keep Amtrak intact and provide it with increased funding to improve equipment and infrastructure.

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<sup>1</sup>A “state of good repair” is the outcome expected from the capital investment needed to restore Amtrak’s right-of-way (track, signals, and auxiliary structures) to a condition that requires only routine maintenance.

<sup>2</sup>On April 13, 2005, the Secretary of Transportation offered proposed legislation for restructuring intercity passenger rail, called the Passenger Rail Investment Reform Act. In general, this proposal would transition the ownership and management of the Northeast Corridor to an interstate compact of Northeast Corridor states and the District of Columbia, reduce (and after 4 years eliminate) operating subsidies for long-distance train service, and require that train operations be opened to competition.



To aid Congress as it deliberates on the future of Amtrak and intercity passenger rail in the United States, the Chairman, House Committee on Transportation and Infrastructure, asked us to examine various aspects of Amtrak's management and performance. This report discusses Amtrak's (1) strategic planning and a performance-based framework for achieving goals; (2) financial reporting and internal control practices and how well they support management and accountability of the corporation; (3) costs and cost containment strategies, including the existence and use of metrics to identify and understand the nature of the corporation's costs; (4) acquisition management, including the procurement department's placement within Amtrak and integration into other departments' acquisition activities, compliance with procurement policies and procedures, and the quality of Amtrak's knowledge and information systems; and (5) overall accountability and oversight of the corporation.

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## Amtrak's Financial Struggles Have Led to Changes in Corporate Direction and Organization

The Rail Passenger Service Act of 1970 created Amtrak to provide intercity passenger rail service because existing railroads found such service to be unprofitable. Currently, Amtrak operates a 22,000-mile network that provides service to 46 states and the District of Columbia. In operating this network, Amtrak mainly uses track owned by freight railroads. Amtrak owns about 650 miles of track, primarily on the Northeast Corridor between Boston, Massachusetts, and Washington, D.C. In fiscal year 2004, Amtrak served about 25 million passengers, or about 68,640 passengers per day. According to Amtrak, about two-thirds of its ridership is wholly or partially on the Northeast Corridor.

Amtrak has undergone numerous changes in its corporate direction and organizational structure in an attempt to improve its financial condition. These changes were influenced, in part, by the Amtrak Reform and Accountability Act of 1997, which required Amtrak to become operationally self-sufficient by December 2002.<sup>3</sup> Examples of changes over the last decade include the following:

- *Establishment of strategic business units (SBU)*. In September 1994, Amtrak's then president stated that a vision for the corporation needed to be articulated and that decisions needed to be more market-driven. Between October 1994 and January 1995, with the assistance of a

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<sup>3</sup>This act prohibited Amtrak from using federal funds for operating expenses, except an amount equal to excess Railroad Retirement Tax Act payments, after 2002.

management consulting firm, Amtrak reorganized into the SBUs in an attempt to address these issues. According to Amtrak, the SBUs were established to provide a method for better managing performances and differences in businesses or markets within the company and were designed to anticipate and facilitate rapid response to change, place decision making close to the customer, and establish authority and accountability. Amtrak established three SBUs—Northeast Corridor, Intercity, and West. The SBUs were largely self-contained units that had their own chief executive officers, handled their own rail service, procured their own materials and supplies, and handled their own financial management and planning. Amtrak also established corporate and service centers to support the SBUs and provide services that either had economies of scales or required special technical skills.<sup>4</sup> In undergoing this reorganization and establishing the SBUs, the expectation was that this new structure would, among other things, result in fewer management positions, lower costs, and establish accountability for results.

- *Improvement of financial health by reducing service.* In 1995, Amtrak attempted to improve its financial condition by changing its approach to route and service actions. In particular, Amtrak eliminated 9 routes, truncated 3 routes, and changed the frequency of service on 17 routes. The expectation was that Amtrak could save about \$200 million from these actions while retaining a high percentage of revenues and passengers.
- *Improvement of financial health by expanding service.* In December 1999, Amtrak again changed corporate direction by adopting a strategy that consisted of 15 planned route and service actions, the majority of which involved an expansion of service. The expectation was that by increasing service significant new revenue would be generated, especially from hauling mail and express cargo.

None of the above changes met expectations. Instead of the SBUs leading to decreased costs, Amtrak's operating costs generally increased. For example, as we reported in May 2000, Amtrak incurred about \$150 million

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<sup>4</sup>For example, Amtrak retained a chief financial officer, a general counsel, and a chief mechanical officer. The corporation also retained a board of directors to provide overall governance, a president to manage the company and establish strategic direction, and a management committee to set corporate policy.

more in expenses than planned over the 1995 to 1999 period.<sup>5</sup> Employment levels were a significant factor. Although Amtrak's total employment generally decreased from 1994 to 1996, by 1999 Amtrak had about the same number of management employees and more agreement employees (union-represented) than in 1994.<sup>6</sup> In addition, Amtrak's operating loss (total revenue minus total expense) fluctuated between fiscal years 1994 and 2002 but generally increased from about \$770 million in fiscal year 1995 to about \$1 billion in fiscal year 2002.<sup>7</sup> At the same time, Amtrak continued to receive substantial federal operating and capital support.<sup>8</sup> (See fig. 3.) Subsequent financial results from the service actions in 1995 and 1999 also did not meet expectations. As we reported in April 2002, the 1999 service expansion failed, in part, because Amtrak overestimated the mail and express revenue it was able to generate and because Amtrak failed to obtain a full understanding of freight railroad concerns before implementing the expansion strategy.<sup>9</sup> At the time of our report, most of the route actions of the service expansion had been canceled.

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<sup>5</sup>GAO, *Intercity Passenger Rail: Amtrak Will Continue to Have Difficulty Controlling Its Costs and Meeting Capital Needs*, [GAO/RCED-00-138](#) (Washington, D.C.: May 31, 2000). As we reported, Amtrak missed its expense targets from 1995 through 1997 by about \$355 million. However, in 1998 and 1999, Amtrak spent less than planned by \$205 million. The net was \$150 million more than planned.

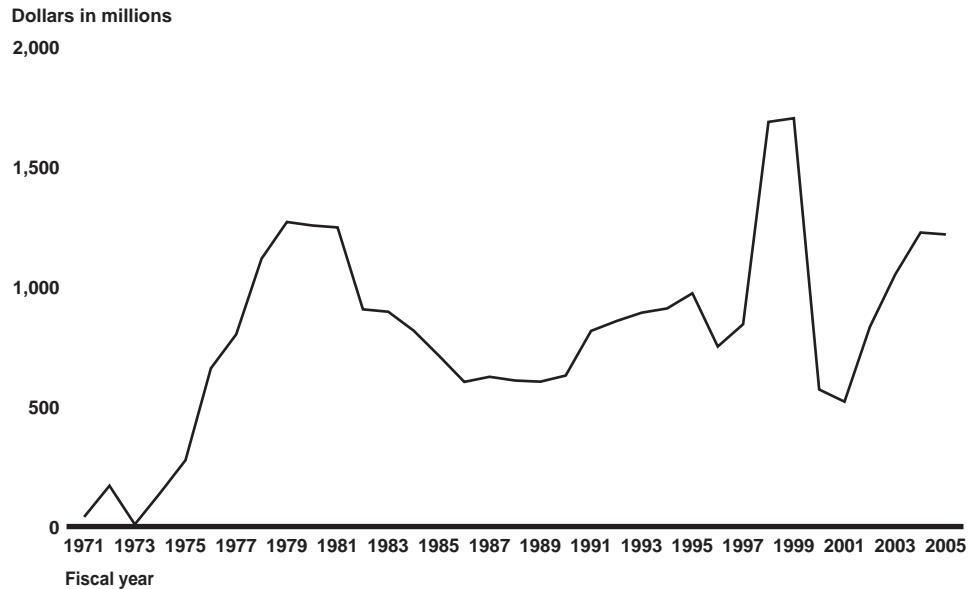
<sup>6</sup>In 1999, Amtrak employed about 22,500 agreement employees and about 2,700 management employees—about the same total number as in 1994. Between September 2000 and September 2002, total Amtrak employment decreased from 24,886 to 21,442.

<sup>7</sup>In nominal dollars; values exclude federal and state capital payments recognized as revenue.

<sup>8</sup>In fiscal years 2004 and 2005, Amtrak received over \$1 billion in federal subsidies.

<sup>9</sup>GAO, *Intercity Passenger Rail: Amtrak Needs to Improve Its Decisionmaking Process for Its Route and Service Proposals*, [GAO-02-398](#) (Washington, D.C.: Apr. 12, 2002).

**Figure 3: Federal Subsidies to Amtrak, Fiscal Years 1971 to 2005**



Source: GAO analysis of Federal Railroad Administration data.

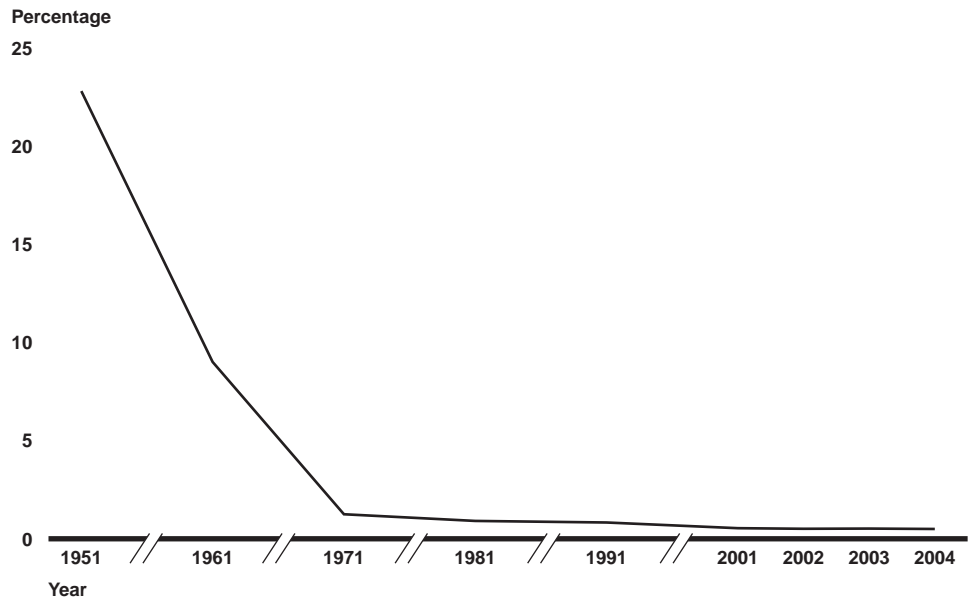
Note: Amounts are in nominal dollars. Excludes \$880 million in loan guarantees but includes about \$2.2 billion in Taxpayer Relief Act funds received in fiscal years 1998 and 1999. Amounts for fiscal year 1998 exclude \$199 million in capital funds since Amtrak received Taxpayer Relief Act funds in that year. The receipt of Taxpayer Relief Act funds precluded Amtrak from receiving the \$199 million in capital funds.

Amtrak's financial condition, instead of improving, deteriorated. In June 2001, Amtrak mortgaged a portion of Pennsylvania Station in New York City for \$300 million to meet expenses. In November 2001, the Amtrak Reform Council—an independent oversight body created by the Amtrak Reform and Accountability Act of 1997—formally determined that Amtrak would not reach operational self-sufficiency by December 2002, as required by the act. Finally, in July 2002, Amtrak obtained a \$100 million federal loan to meet expenses and continue operating. As we reported in April 2003, Amtrak also had developed a substantial deferred capital backlog of infrastructure improvements—about \$6 billion worth (\$3.8 billion, or about 63 percent, of which was attributable to the Northeast Corridor).<sup>10</sup>

<sup>10</sup>GAO, *Intercity Passenger Rail: Issues for Consideration in Developing an Intercity Passenger Rail Policy*, [GAO-03-712T](#) (Washington, D.C.: Apr. 30, 2003). In April 2005, the Department of Transportation Inspector General estimated this backlog at about \$5 billion.

Aside from the financial struggles, reorganizations, and route and service actions, Amtrak has also struggled with a small share of the intercity travel market (see fig. 4). On the basis of data obtained from the Federal Railroad Administration (FRA), intercity passenger rail accounted for a relatively substantial portion (15 percent or more) of the travel market through the mid-1950s. However, by the early 1970s—about the same time Amtrak was created—the rail portion of intercity travel had declined to just over 1 percent of the intercity travel market. Since 1981, the passenger rail portion of the intercity travel market has been less than 1 percent, and, in 2004, intercity passenger rail was estimated at 0.5 percent of the market. FRA officials said decisions to invest in a national highway program and improvements in air travel, in part, led to the dramatic decreases in rail ridership.

**Figure 4: Intercity Passenger Rail Market Share, 1951 to 2004**



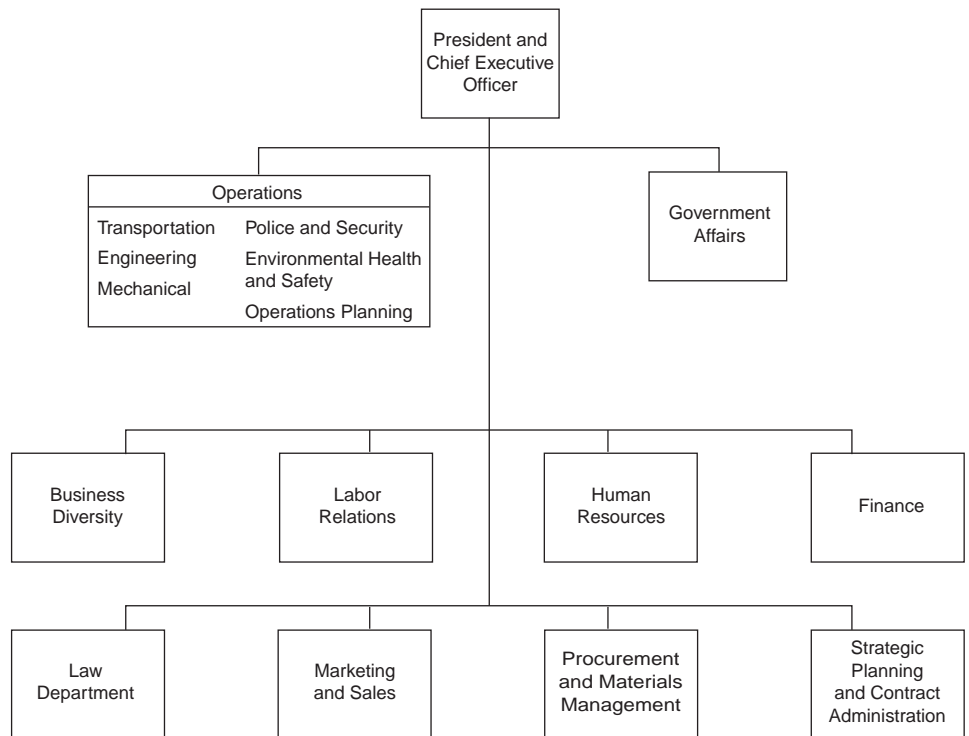
Source: Federal Railroad Administration.

Note: Data used to prepare this table are based on various estimates made by FRA. Unit of measure is millions of intercity passenger miles. A passenger mile is one person transported one mile. The market share is based on intercity passenger rail's share of the total intercity passenger miles of automobiles, buses, air carriers, and railroads.

Most Recent Changes  
Have Focused on  
Improved  
Management, Financial  
Stability, and  
Infrastructure Renewal

In June 2002, under Amtrak’s new president and chief executive officer, the corporation abolished the SBUs and reorganized again. In making this organizational change, Amtrak recognized that the previous structure was too complex, had overlapping management duties, and had inefficient management decision making. The reorganization was to establish a more centralized, functional structure; establish accountability; and form a more orderly, lean hierarchy. (See fig. 5 for Amtrak’s current organization chart.)

Figure 5: Amtrak Organization Chart, as of October 2004



Source: GAO analysis of Amtrak data.

According to Amtrak’s new president, the company faced a multitude of problems at the time of his arrival. These problems included (1) no approved and distributed budget (even though the fiscal year was half over); (2) a finance department that was unable to close its books for fiscal year 2001 (and did not do so until 1 year after the close of fiscal year 2001); (3) no organization charts; (4) little control over employment (called “headcount”); and (5) an organization with fragmented responsibility for

large functional areas, such as transportation, engineering, and mechanical (equipment). Amtrak's president told us that, when he arrived, he needed a structure to help him gain control of the company and that many functions were in poor shape. For example, he said that the procurement function was a part of the finance department and had no clear purchasing authority or review. Amtrak adopted a number of strategies to address these problems. These strategies included restoring company accounting practices to strict compliance with generally accepted accounting principles; preparing a multiyear project-specific capital plan to achieve a state of good repair; and using the budget process to establish operating goals and objectives and to hold managers accountable. Amtrak's president said these strategies were used to reduce headcount; increase production (e.g., ties installed, cars overhauled); and shift maintenance activities into planned production lines as opposed to spot repairs.

In conjunction with the 2002 organizational change, Amtrak's president also adopted a new approach to management that focused on five management tools: (1) defined organization charts, (2) zero-based operating budget, (3) capital budget (communicated through a 5-year strategic plan), (4) department-by-department goals and objectives, and (5) monthly performance reports. (See table 1.) The performance reports were to contain financial as well as production and budget variance information. Amtrak uses the five management tools not only to manage the company but also to help contain costs. The changes were designed to increase control over Amtrak, instill a sense of discipline in how the company was operated, and simplify the management structure to assign more responsibility to fewer people and hold them accountable for results. Since the reorganization, Amtrak has centralized many of its departments (such as the mechanical and marketing and sales departments) and established a budget process focused on the five management tools and control of headcount.

**Table 1: Amtrak's Five Management Tools**

<b>Tool</b>	<b>Description</b>
1. Organization chart	<ul style="list-style-type: none"> <li>• Identifies a clear chain of command</li> <li>• Basis for developing Amtrak's budgets</li> <li>• Used to control Amtrak's labor costs</li> </ul>
2. Operating budget	<ul style="list-style-type: none"> <li>• Based on the headcounts and resources needed to accomplish department activities (zero-based budgeting process)</li> <li>• Focuses on maintaining or reducing the budget</li> </ul>
3. Capital budget	<ul style="list-style-type: none"> <li>• Based on capital investment needed to stabilize the railroad</li> <li>• Includes specific projects with production targets</li> <li>• Communicated through Amtrak's strategic plan</li> </ul>
4. Goals and objectives	<ul style="list-style-type: none"> <li>• Developed by each department</li> <li>• Basis for Amtrak's budgets</li> </ul>
5. Monthly performance report	<ul style="list-style-type: none"> <li>• Summarizes Amtrak's financial results, operating statistics, and capital activity</li> <li>• Primary tool for reporting Amtrak's performance, both internally and externally</li> </ul>

Source: GAO analysis of Amtrak data.

As part of the reorganization, Amtrak also refocused its efforts on stabilizing the corporation financially and restoring the infrastructure to a state of good repair. For example, Amtrak's April 2003 strategic plan (covering the period of fiscal years 2004 to 2008) stated that intercity passenger rail was in crisis, in part, due to physical deterioration and financial instability. To address these issues, the plan identified over \$5 billion in total capital funding needs—with annual funding needs (both operating and capital) ranging from about \$1.8 billion in fiscal year 2004 to about \$1.4 billion in fiscal year 2008. These funds were to be used to, among other things, return plant and equipment to a state of good repair, control operating deficits, and restore liquidity to the corporation. The plan was designed to address Amtrak's immediate problems and to buy time for policy makers to decide the future structure of intercity passenger rail. Amtrak's June 2004 strategic plan (covering the period of fiscal years 2005 to 2009) similarly reiterated the need to stabilize the railroad and make capital investments in infrastructure. It identified about \$4 billion in capital funding needs over the 5-year period—with about \$1.7 billion in average annual funding needs (operating, capital, and debt service).<sup>11</sup> Under this

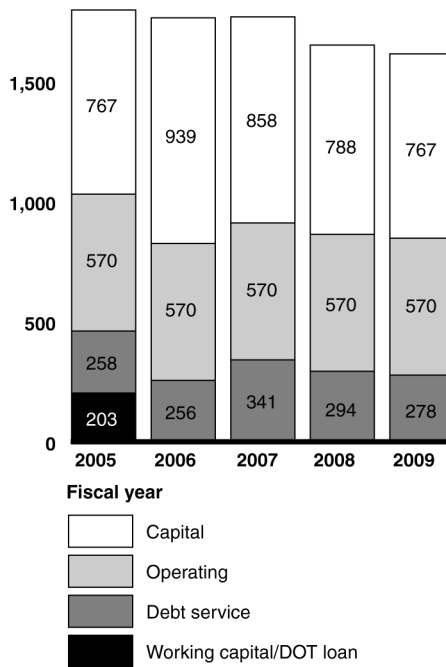
<sup>11</sup>The calculation of annual funding needs excludes \$203 million in funds that were needed in fiscal year 2005 for working capital and were also needed to repay a Department of Transportation loan.



plan, operating support was projected to remain constant at \$570 million per year, while capital funding needs were expected to increase from fiscal years 2005 to 2006 and then gradually to decrease. (See fig. 6.) Again, the June 2004 plan was designed to address Amtrak's immediate problems of stabilizing the railroad while bringing the infrastructure to a state of good repair.

**Figure 6: Projected Funding Needs in Amtrak's June 2004 Strategic Plan**

Dollars in millions  
2,000



Source: Amtrak Strategic Plan, FY2005-2009 (dated June 29, 2004).

Note: The \$203 million shown for fiscal year 2005 was a one-time need for working capital and was also needed to repay a Department of Transportation loan.

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## Amtrak's Operations, Governance, and Oversight Are Covered by a Variety of Requirements

Amtrak's operations, governance, and oversight are covered by a hybrid of public and private sector requirements. Amtrak was created as a corporation under federal law. Until 1997, Amtrak was classified as a mixed-ownership government corporation under the Government Corporation Control Act. Although federally created and the recipient of substantial federal financial assistance—about \$29 billion since it began operating in 1971—Amtrak is to be operated as a for-profit corporation.

We reported in December 1995 that the Government Corporation Control Act was intended to make government corporations accountable to Congress for their operations while allowing them the flexibility and autonomy needed for their commercial activities.<sup>12</sup> A mixed-ownership corporation can be defined as a corporation with both government and private equity. In the case of Amtrak, the federal government held preferred stock of the corporation, and there were private entities that held common stock.<sup>13</sup> At the time of our 1995 report, Amtrak had nine board of director (board) members, five were appointed by the President and the remaining four were the Secretary of Transportation, the president of Amtrak, and two individuals selected by Amtrak's preferred stockholder (the federal government). Also at that time, Amtrak reported that it was not subject to and did not administratively adopt such statutes as the Government Performance and Results Act of 1993 (GPRA) and the Federal Managers Financial Integrity Act of 1982 (FMFIA). GPRA was designed to impose a new and more businesslike framework for management and accountability, including a requirement that federal agency missions be clearly defined and that both long-term strategic and annual goals be established and linked to mission statements. FMFIA imposed requirements for heads of federal agencies to evaluate and report on internal controls.<sup>14</sup>

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<sup>12</sup>GAO, *Government Corporations: Profiles of Existing Government Corporations*, GAO/GGD-96-14 (Washington, D.C.: Dec. 13, 1995).

<sup>13</sup>At the end of fiscal year 2004, the federal government continued to hold preferred stock of Amtrak (approximately 109 million shares, with a book value of about \$10.9 billion), and there were 9.4 million shares of common stock outstanding (with a book value of about \$94 million) held by three railroads and a holding company.

<sup>14</sup>Internal controls are plans of organization, methods, and procedures adopted by management to ensure that (1) resource use is consistent with laws, regulations, and policies; (2) resources are safeguarded against waste, loss, and misuse; and (3) reliable data are obtained, maintained, and fairly disclosed in reports.

The Amtrak Reform and Accountability Act of 1997 changed Amtrak's status as a mixed government corporation by removing Amtrak from the list of mixed-ownership government corporations. Today, Amtrak is at most similar in nature to a "government-established private corporation." Reflecting its private stature, Amtrak is not subject to most statutes that make federal establishments accountable. Statutes such as GPRA and FMFIA do not apply to Amtrak. Amtrak is a closely held corporation whose stock is not publicly traded; it is not subject to Securities and Exchange Commission oversight or to provisions of the Sarbanes-Oxley Act of 2002. However, as conditions to Amtrak's continued receipt of federal subsidies, Amtrak is subject to such federal statutes as the Freedom of Information Act and the Inspector General Act of 1978. Recent grant agreements between FRA and Amtrak have also made Amtrak subject to federal regulations applicable to for-profit organizations as well as certain federal procurement regulations.<sup>15</sup> Amtrak is also subject to limited jurisdiction by the Surface Transportation Board over matters such as compensation disputes with other railroads, as well as federal railroad safety laws administered by FRA.<sup>16</sup>

As a private, for-profit corporation, most statutes and regulations that govern the activities of federal entities do not apply to Amtrak. This includes federal acquisition regulations. Instead, Amtrak develops its own policies and procedures for handling the acquisition of goods and services. Under the terms of grant agreements between Amtrak and FRA, Amtrak is expected to comply with procurement, ethical, and other standards, including standards governing the conduct of employees engaged in the award and administration of contracts. Generally, contracts are to be awarded competitively using written procurement procedures, thereby ensuring that materials and services purchased with federal grant funds are obtained in a cost-effective and appropriate manner. The standards also require that procurement records and files shall include the basis for contractor selections, justifications for the lack of competition, and the basis for contract cost or price. Amtrak has incorporated both the federal

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<sup>15</sup>Under the fiscal year 2005 operating grant agreement between Amtrak and FRA, Amtrak is subject to 49 C.F.R. Part 19, Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations, and 48 C.F.R., Subpart 31.2, Contracts with Commercial Organizations.

<sup>16</sup>Amtrak also told us it was subject to federal environmental laws (including the Clean Water Act, the Clean Air Act, and the Resource Conservation and Recovery Act); the Occupational Health and Safety Act; and regulations of the Food and Drug Administration.

standards and their requirements in its procurement manual issued in June 2005. FRA is responsible for ensuring compliance with procurement standards.

Amtrak's corporate governance is defined in its articles of incorporation and bylaws. Amtrak is domiciled in the District of Columbia. The board is responsible for managing the affairs and business of the corporation and for oversight of Amtrak's president and management team. The Amtrak Reform and Accountability Act of 1997 reduced Amtrak's board from nine to seven members, who are appointed by the President with the advice and consent of the Senate. The Secretary of Transportation represents the federal government as a member of Amtrak's board. The board has operated with less than a full complement of voting members (seven members) since July 2003. Between October 2003 and June 2004, the board had only two voting members (excluding the Secretary of Transportation or his designee).<sup>17</sup> As of May 2005, the board had three members, (excluding the Secretary of Transportation or his designee and the president of Amtrak). Amtrak's bylaws also authorize the establishment of committees to assist the board in carrying out its management responsibilities. In March 2002, the board eliminated ad hoc committees, along with the corporate strategy committee and the safety, service, and quality committee. At that time, the audit, corporate affairs, finance, compensation and personnel, and legal affairs committees were created. As of May 2005, the board continued to have these five committees. Finally, Amtrak's bylaws permit the corporation to conduct periodic shareholder meetings as necessary. Following enactment of the Amtrak Improvement Act of 1981, which abolished election of members of the board of directors by the common shareholders, Amtrak has not held a shareholders' meeting.

Oversight of Amtrak's activities, other than through the board, is provided by a number of means. Congress plays a role through the authorization and appropriations process. The Amtrak Reform and Accountability Act of 1997 authorized federal appropriations for Amtrak through September 30, 2002.<sup>18</sup> Although a new authorization had not been enacted as of July 2005, the authorization process permits Congress to review Amtrak's previous and planned use of federal resources. The appropriations process provides

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<sup>17</sup>The president of Amtrak is a member of the board but is not a voting member.

<sup>18</sup>Amtrak continued to receive funds in fiscal years 2003 to 2005 through annual appropriations.

Congress with the opportunity to oversee Amtrak's stewardship of federal funds on an annual basis. Starting with Amtrak's fiscal year 2003 appropriations legislation, Congress adopted measures to increase the Secretary of Transportation's responsibility for providing oversight and accountability for the federal funds used for intercity passenger rail service. Among other things, these measures require that Amtrak transmit a business plan to the Secretary of Transportation and Congress, supplemented by monthly reports describing work completed, changes to the business plan, and reasons for the changes. The business plan is to describe the work to be funded with federal funds. Consistent with requirements begun in the fiscal year 2003 appropriations act, Amtrak and FRA have entered into grant agreements for the use of fiscal years 2003, 2004, and 2005 federal funds. FRA determines Amtrak's compliance with these grant agreements.

Amtrak's activities are also subject to review by the Inspector General's offices within Amtrak and the Department of Transportation (DOT), as well as review by GAO. The Amtrak Office of the Inspector General (Amtrak OIG) was established by the Inspector General Act Amendments of 1988 to provide independent audits and investigations; promote economy, efficiency, and effectiveness; and prevent and detect fraud and abuse in Amtrak programs and operations.<sup>19</sup> The Department of Transportation Inspector General also plays a role in assessing Amtrak's financial performance and is charged with assessing Amtrak's financial performance and needs for every year after 1998 in which Amtrak requests federal financial assistance. GAO has the authority to review Amtrak activities and transactions. Over the years, we have issued numerous reports and testimonies on Amtrak's financial performance and the need for federal financial assistance.

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## Objectives, Scope, and Methodology

The overall objective for our work was to determine whether Amtrak is using its federal resources in the most efficient and cost-effective manner. Our specific objectives were to determine (1) Amtrak's strategic planning process and the extent to which Amtrak has implemented a performance-based approach; (2) Amtrak's financial reporting and internal control practices and how well they support management and accountability of the corporation; (3) Amtrak's costs and cost containment strategies, including

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<sup>19</sup>GAO, *Activities of the Amtrak Inspector General*, [GAO-05-306R](#) (Washington, D.C.: Mar. 4, 2005).

the existence and use of metrics to identify and understand the nature of the corporation's costs; (4) Amtrak's acquisition of goods and services, including organizational alignment and strategic focus, compliance with procurement policies and procedures, and information management; and (5) the overall accountability and oversight of the corporation. We focused on these five objectives since these are key elements to addressing the efficiency and cost-effectiveness with which federal resources are used by Amtrak. We did not explicitly review information technology and human capital issues—which are two additional elements of a management and accountability framework used in leading organizations to successfully manage resources. We also did not review revenue issues, such as Amtrak's strategies and controls for setting fares or projecting revenue estimates. Our scope was primarily limited to Amtrak's policies and procedures from fiscal years 2002 to 2004. However, we collected data prior to this time period to provide context and to ascertain what trends, if any, exist.

To address strategic planning and performance-based issues, we reviewed documents describing Amtrak's management tools; strategic planning process; and the process for preparing budgets, goals, and objectives. We reviewed minutes of Amtrak board meetings and interviewed Amtrak and FRA officials and members of Amtrak's board to understand the corporation's strategic planning process and interviewed Amtrak officials on the extent to which a performance-based management framework had been implemented. We used this information to analyze the nature of Amtrak's strategic planning process, identify whether Amtrak had established a clear statement of its mission, and determine whether this mission was linked to measurable goals and objectives. We also reviewed and analyzed Amtrak's monthly performance reports and the department quarterly reports for the transportation, mechanical, and engineering departments to assess performance information generated by Amtrak. We interviewed commuter and freight railroad officials and VIA Rail Canada (VIA Rail)<sup>20</sup> officials to determine industry strategic planning practices. We used relevant GAO reports and widely used standards and best practices, as applicable, to determine criteria for assessing Amtrak's management structure as well as to suggest best practices to Amtrak.

To assess Amtrak's financial reporting and management practices, we gained an understanding of control activities related to financial reporting, the design of internal control practices over the expenses related to food

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<sup>20</sup>VIA Rail Canada is Canada's intercity passenger rail provider.

and beverage operations and employee benefits, and efforts to strengthen management practices. We also reviewed selected workpapers for fiscal years 2002 and 2003 that were relied on by an independent public accountant (IPA) firm to issue an opinion on the Amtrak consolidated financial statements, IPA letters that considered internal control practices over financial reporting, and reports by the Amtrak OIG. We observed control practices over certain key areas of expense and analyzed interim financial information for areas such as train route performance, food and beverage operations, and employee benefit expense. To test the reliability of the financial data provided by Amtrak officials, when practical, we compared such information with amounts reported in Amtrak's audited financial statements for fiscal years 2002 and 2003. We interviewed officials from various Amtrak departments and the Amtrak OIG as well as officials from FRA, Amtrak's IPA, and the food and beverage contractor. In addition, we interviewed and collected information from officials from several freight and commuter railroads. This information was used in conjunction with GAO's *Standards for Internal Control in the Federal Government*, to assess how well Amtrak's financial reporting and management practices support the management and external stakeholders' efforts.

To address cost and cost containment issues, we reviewed Amtrak financial reports and obtained data on Amtrak's operating costs. We also interviewed Amtrak, FRA, freight and commuter railroads, and VIA Rail officials about cost control practices. The freight railroads were selected on the basis of their size in terms of operating revenue and track mileage and carloads originated, and, in the case of commuter railroads, both the volume of ridership in 2002 and the size of capital and operating budgets, among other factors. VIA Rail was selected because it is a large (in terms of route miles operated) intercity passenger railroad and has characteristics similar to Amtrak in that VIA Rail operates both long- and short-distance intercity passenger service and relies on government support to maintain operations. We used Amtrak documents and interviews with Amtrak officials to assess Amtrak's cost containment strategy and the company's knowledge of its costs. In performing our analysis, we used information from Amtrak's audited financial statements for fiscal years 2002 and 2003. We also used information from Amtrak's preliminary financial statements for fiscal year 2004. These statements were in the process of being audited during our review. Amtrak released its audited financial statements in August 2005 after our audit work was completed. However, to test the reliability of the preliminary information we used, where practical, we compared data from the preliminary statements with the audited statements. We found no major differences.

To address acquisition issues, we reviewed Amtrak's procurement policies and procedures; drafts of Amtrak's procurement manual; and other documentation, such as organization charts and department goals. We also reviewed reports prepared by the Amtrak OIG on procurement issues. We observed how procurement requests are handled and processed and discussed Amtrak's acquisition practices with officials from the procurement department. We reviewed data on expenditures made for advertising, sales promotion, professional services, and consulting and reviewed a nonprobability sample of 61 contract files associated with these services to assess compliance with Amtrak's procurement policies and procedures.<sup>21</sup> (See app. I for our contract selection methodology.) We also (1) reviewed expenditure data related to Amtrak's use of outside legal services and the law department's guidelines applicable to outside legal services and (2) discussed the law department's practices for acquiring outside legal services with law department officials—including specific examples of how they acquire those services. In addition, we discussed procurement practices with officials in other departments, such as the finance, marketing and sales, engineering, and mechanical departments. To obtain an understanding of acquisition practices in other railroads, we discussed procurement practices with officials at four freight railroads and five commuter railroads as well as with procurement officials at VIA Rail.

To assess the reliability of the procurement data Amtrak provided, we compared them with Amtrak audited financial statement data for fiscal years 2002 and 2003 for the accounts we reviewed. (The expenditure data came from a different database.) We then asked Amtrak to reconcile differences that we identified between the two sets of accounts. Because Amtrak officials said this reconciliation had to be done manually and would take substantial time, data were reconciled for only one account—sales promotion. Consequently, we used the procurement expenditure data only to select a nonprobability sample of procurement contracts to review. Similarly, we could not reconcile expenditure data for Amtrak's outside legal services—taken from the law department's case management system—with audited financial data. As a result, these data were only used to identify selected matters to discuss with law department officials about how outside legal services are acquired. Finally, we used information on payments of invoices for outside legal services from Amtrak's accounts

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<sup>21</sup>Results from nonprobability samples cannot be used to make inferences about a population, because in a nonprobability sample some elements of the population being studied have no chance or an unknown chance of being selected as part of the sample.



payable system. Again, because we could not reconcile the accounts payable information with the audited financial data, these data were used solely to select a nonprobability sample of 10 invoices to assist us in understanding the controls over payments for outside legal services.

To address overall accountability and oversight issues, we reviewed legislation relevant to the management and governance of Amtrak, Amtrak's articles of incorporation and bylaws, and recent grant agreements between Amtrak and FRA. We also reviewed various proposals to reform both intercity passenger rail and Amtrak operations put forth by the administration and Amtrak's board and management. Finally, we discussed oversight and accountability issues with Amtrak, board, and FRA officials and reviewed previous GAO reports on Amtrak's financial condition and operations. We used this information to identify the type and degree of oversight and accountability that has been exercised by various Amtrak stakeholders and the potential role that reform efforts might play in future oversight and accountability of Amtrak or other intercity passenger rail operators.

In performing our work, we reviewed and considered best practices described in documents from leading organizations in each of our five areas. These documents included various GAO reports and guides issued over the years on strategic plans and planning processes, financial management and internal controls, the implementation of GPRA requirements, acquisition practices, and the components of a framework for analyzing federal investments. These documents helped us to compare Amtrak's management practices with those of leading organizations.

We conducted our work from April 2004 to July 2005 in accordance with generally accepted government auditing standards.

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# Amtrak Lacks a Comprehensive Strategic Plan and a Performance-Based Approach to Better Ensure Cost-effective Results

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Although Amtrak has improved its management approach in recent years, it still lacks a comprehensive strategic planning process and performance-based framework characteristic of leading organizations. Leading organizations we have studied use strategic planning to articulate a mission and goals for all levels of the organization, measure progress toward those goals, and ensure accountability for results. Amtrak, however, has not developed a comprehensive strategic plan that includes a mission statement and corporatewide goals to articulate what it is trying to accomplish. In the absence of a clear statement of its overall mission, Amtrak developed a capital plan (titled by Amtrak a “strategic plan”), which focuses mainly on one goal—restoring the company’s infrastructure to a state of good repair. Although this plan provides guidance for its capital funding, Amtrak lacks a meaningful strategic plan that articulates measurable corporatewide goals, strategies, and outcomes. Similarly, while the five management tools instituted by Amtrak’s president provide a framework for determining annual goals and budgets, they do not provide an approach that sufficiently focuses on outcomes (such as service and on-time performance) rather than outputs (such as units of production). The departments within Amtrak have developed their own department-specific goals, but without a mission or corporatewide goals, Amtrak cannot ensure that its department-specific goals support or improve overall corporate performance. Further, many department goals were set without a sufficient understanding of current baselines or what was achievable.

Evidence of a robust, corporatewide performance management framework is also absent. Key departments within the company—the engineering, mechanical, transportation, and marketing and sales departments—could benefit from a performance-based approach to achieving goals—that is, developing and documenting strategies or action plans to achieve goals; using an incentive-based system to help ensure clear responsibility and accountability for supporting corporate performance; and generating key data for monitoring, evaluating, and reporting on performance.

In April 2005, Amtrak’s board and management released a set of strategic reform initiatives that includes a vision for Amtrak and suggests that Amtrak, among other things, plan and report by lines of business—but challenges exist to fully implementing these initiatives. Specifically, Amtrak officials noted such challenges as the need for legislative action and the ability to keep its employees focused on long-term change. These challenges, along with the uncertainty of Amtrak’s future, may all affect whether Amtrak’s initiatives are adopted and implemented.

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## Leading Organizations Manage by Focusing on Missions and Goals Spelled Out in a Strategic Plan

Leading organizations we have studied—both public and private—use strategic planning as the foundation for their activities.<sup>1</sup> For these organizations, the strategic plan articulates a mission and goals for all levels of the organization that are tied to the strategies that will be used to achieve those goals. The strategic plan provides a foundation for strategic management initiatives, such as organizational realignment; performance planning, measurement, and reporting; accountability for results; and improvements to the capacity of the organization to achieve its goals. The strategic planning process facilitates communication within the organization as well as with external clients and allows oversight bodies to assess overall performance. For example, in the federal arena, GPRA established a strategic planning process as a way to demonstrate and communicate performance and focus federal agencies on the results of their activities (outcomes) as opposed to the activities themselves. Publicly traded, private companies—such as the freight railroads whose officials we interviewed—said they rely on strategic planning to establish, assess, and communicate company goals, resources, and strategies for the next 3 to 5 years.

Strategic plans developed by the leading organizations we studied include the basic elements outlined in figure 7. One of these elements is a clear linkage between the overall organizational mission, organizationwide strategic goals, and the activities of all organizational units. The first step in the process involves developing a comprehensive mission statement that employees, clients, customers, partners, and other stakeholders understand and find compelling.<sup>2</sup> The leading organizations we studied then seek to establish clear hierarchies for performance goals and measures by linking the performance goals and measures for each organizational level to successive levels and ultimately to the corporatewide goals and mission. Annual goals provide a connection between the corporatewide strategic goals and the day-to-day activities of managers and staff and provide measures of progress toward achieving the

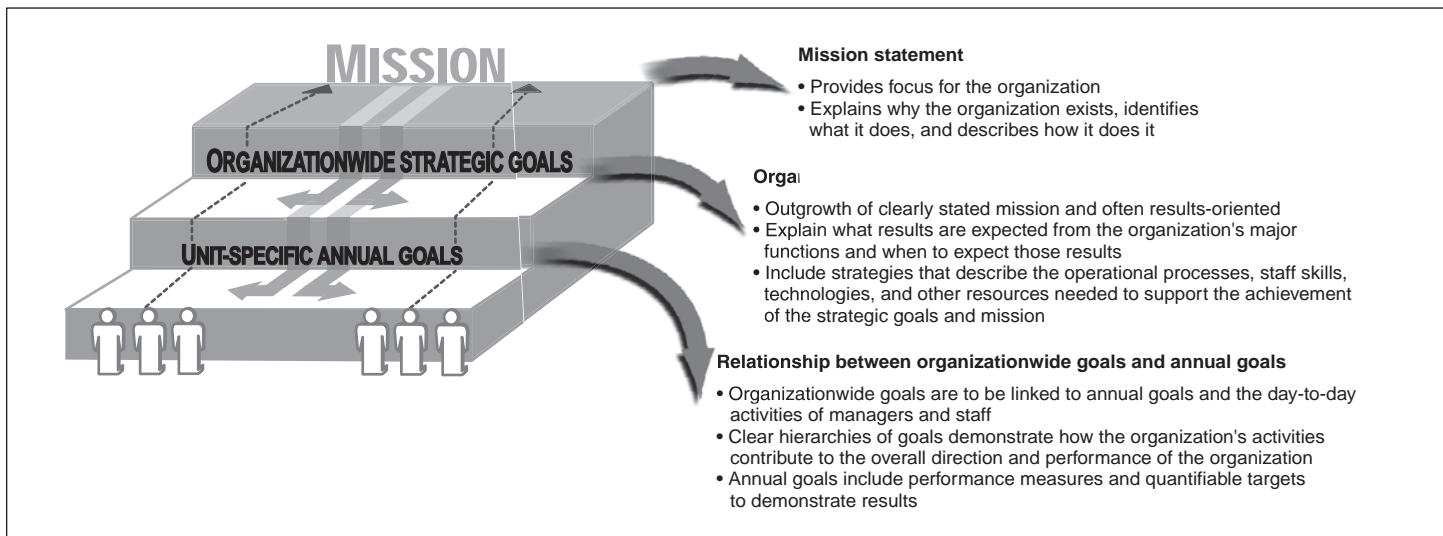
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<sup>1</sup>GAO, *Executive Guide: Leading Practices in Capital Decision-Making*, GAO/AIMD-99-32 (Washington, D.C.: December 1998). In this executive guide, criteria were developed to select a mixture of private and public organizations, including, but not limited to, the Mobil Corporation, General Electric, Washington State, and Minnesota.

<sup>2</sup>GAO, *Comptroller General's Forum: Highlights of a GAO Forum on High-Performing Organizations: Metrics, Means, and Mechanisms for Achieving High Performance in the 21<sup>st</sup> Century Public Management Environment*, GAO-04-343SP (Washington, D.C.: Feb. 13, 2004).

corporatewide mission. Without clear, hierarchically linked performance measures, managers and staff throughout the organization lack straightforward road maps showing how their daily activities can contribute to attaining corporatewide goals and mission.

**Figure 7: Key Elements of a Strategic Plan**



Source: GAO.

In addition, a performance-based framework is essential for ensuring that all activities and individuals within the organization are working toward goals and achieving results. Within this framework, organizations identify strategies and resources to achieve their goals; hold individuals accountable for contributing to those goals; and use performance data to monitor, evaluate, and report on progress toward goals. Once these organizations develop fact-based understandings of how their activities contribute to accomplishing their mission and broader results, they evaluate and adjust their efforts, if necessary, to optimize their contributions to corporate results.

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## Amtrak Lacks a Strategic Plan That Includes Key Elements Necessary to Comprehensively Manage the Corporation

Amtrak has not developed a comprehensive strategic plan that articulates a mission, corporatewide goals that are tied to the mission, strategies that will be employed to achieve those goals, and outcomes for efforts needed to run all the components of its operations—both capital and operating. Amtrak developed a capital plan—which it calls a strategic plan—that covers capital projects, ties to the capital budget, and supports the state of good repair goal, but Amtrak does not have a documented plan that includes measurable or comprehensive corporatewide goals or strategies for other aspects of the company’s operations. Units within Amtrak have developed department-specific goals, but without a strategic plan, Amtrak cannot ensure that these goals support corporatewide performance.

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## Amtrak Lacks a Comprehensive Statement of Its Overall Mission

Amtrak does not have a comprehensive statement of its overall mission to provide and communicate a clear focus for the company. One Amtrak official noted that the issue of Amtrak’s mission is at the heart of the Amtrak debate. Amtrak’s president has not established a comprehensive mission for Amtrak. Instead, he has focused on repairing and improving the railroad and believes that policy makers—such as the administration and Congress—are responsible for determining Amtrak’s role. However, federal statute already articulates a purpose for the company—to operate a national rail passenger transportation system.<sup>3</sup> To bring focus, Amtrak, like any public or private organization, is responsible for taking that broad purpose and establishing a clearly defined mission that describes specifically what the organization plans to do and how it plans to do it.

Amtrak’s board of directors has a role in defining this mission, but until recently, the board has not been active in doing so. The chairman of Amtrak’s board agreed that the board is responsible for establishing a mission for Amtrak, but the Amtrak board meeting minutes between February 2002 and August 2004 did not contain any written documentation of the board discussing a vision or mission for Amtrak. The board chairman said the absence of a full complement of board members has limited the board’s ability to develop a mission for the company.<sup>4</sup>

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<sup>3</sup>49 U.S.C. § 24701.

<sup>4</sup>Over the period of October 2003 to June 2004, the board only had two voting members, exclusive of the Secretary of Transportation or his designee.

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Amtrak's Corporatewide  
Goal and Strategies  
Encompass Only Part of Its  
Operations

Since April 2003, Amtrak's president focused the company's efforts on returning the railroad to a state of good repair—that is, to improve the condition of its equipment and infrastructure. In testimony before the Senate Committee on Commerce, Science, and Transportation in 2003, Amtrak's president noted that repairing and improving the railroad is in “everyone's interest” because regardless of Amtrak's future structure, Amtrak's infrastructure will have to be in a state of good repair to provide intercity passenger rail service. As we reported in April 2003, Amtrak had developed a substantial deferred capital backlog (about \$6 billion—\$3.8 billion of which was attributable to the Northeast Corridor),<sup>5</sup> and in reports dating back to 1995, we noted that this issue needed to be addressed soon.<sup>6</sup> Amtrak officials have noted that, in the past, the absence of a focus on a state of good repair had resulted in such things as deteriorating bridges, increased trip times, and decline in overall ride quality.

Amtrak's goal of a state of good repair addresses infrastructure deficiencies. However, the company's focus on this one issue leads to an unbalanced approach to the management of its business. For example, Amtrak's goal of a state of good repair addresses the company's capital program, including the repair or replacement of rails, bridges, and locomotives, but does not encompass important elements of Amtrak's operations—such as human capital and customer service—and lines of business—such as commuter rail and reimbursable services.<sup>7</sup> Focusing on one priority at the expense of others may skew the company's overall performance and keep managers and oversight bodies from seeing the whole picture. In the subsequent chapters, we explain how Amtrak has significant challenges in a number of areas, such as an increasing operating loss and the procurement of goods and services. Not broadening its focus to include the myriad of other challenges and critical areas at Amtrak could continue to jeopardize the future viability of the company and undermine efforts to control the required level of federal subsidies and ensure federal dollars are efficiently and effectively spent.

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<sup>5</sup>[GAO-03-712T](#).

<sup>6</sup>GAO, *Intercity Passenger Rail: Financial and Operating Conditions Threaten Amtrak's Long-Term Viability*, [GAO/RCED-95-71](#) (Washington, D.C.: Feb. 6, 1995); *Northeast Rail Corridor: Information on Users, Funding Sources, and Expenditures*, [GAO/RCED-96-144](#) (Washington, D.C.: June 27, 1996); and [GAO/RCED-00-138](#).

<sup>7</sup>Amtrak operates six commuter rail services under contract and provides mechanical and engineering services for third parties.

Amtrak does not have a meaningful strategic plan but rather has developed a detailed 5-year capital plan to support its corporatewide goal of a state of good repair. Amtrak titled this document a “strategic plan,” but Amtrak’s president and board chairman both acknowledge that this plan is essentially a capital plan that covers capital projects and ties to the capital budget. The capital goals in Amtrak’s plan translate to capital production goals for certain departments, such as the mechanical and engineering departments, and link to achieving the goal of a state of good repair. For example, the engineering department had a performance goal to install 155,760 concrete ties in fiscal year 2004. By completing this goal, the engineering department is supporting Amtrak’s goal of achieving a state of good repair, although without a strategic plan, it is unclear how important this performance goal is toward achieving a state of good repair or to what extent achieving this goal will remedy the infrastructure deficiency.

Although Amtrak has a detailed capital plan, Amtrak lacks a strategic plan that articulates a comprehensive mission, measurable corporatewide goals, strategies, and outcomes for the efforts needed to run all the components of its operations—both capital and operating. For example, Amtrak does not have a documented plan that states measurable corporatewide goals or strategies for controlling or reducing costs, managing on-time performance, increasing the productivity of the workforce, or reducing dependence on federal funding in its strategic plan. Amtrak’s capital plan for fiscal years 2005 through 2009 includes information on Amtrak’s operating loss—noting that its operating loss will increase over the next several years. To offset this increase, the plan proposes implementing “additional service, crew, and equipment efficiencies.” This plan, however, does not include measurable targets or strategies to achieving these efficiencies. Amtrak’s president maintains that the operating budget provides guidance for these initiatives. Although the operating budget provides financial targets for the departments, it does not, however, articulate measurable goals, strategies, or outcomes for the corporation.

Amtrak’s president acknowledged that there was very little documentation of plans, strategies, and goals. He said that Amtrak was looking to produce results, not develop documents and written strategies during this time. He also said that staff knew what they needed to get done during the 2002 to 2005 time frame—reduce headcount and increase production. In our view, however, this is a risky approach since there is no assurance that goals and strategies are clearly communicated and understood by those responsible for carrying them out. Moreover, it is also important to establish clear, consistent goals at the organization and agency levels in order to identify

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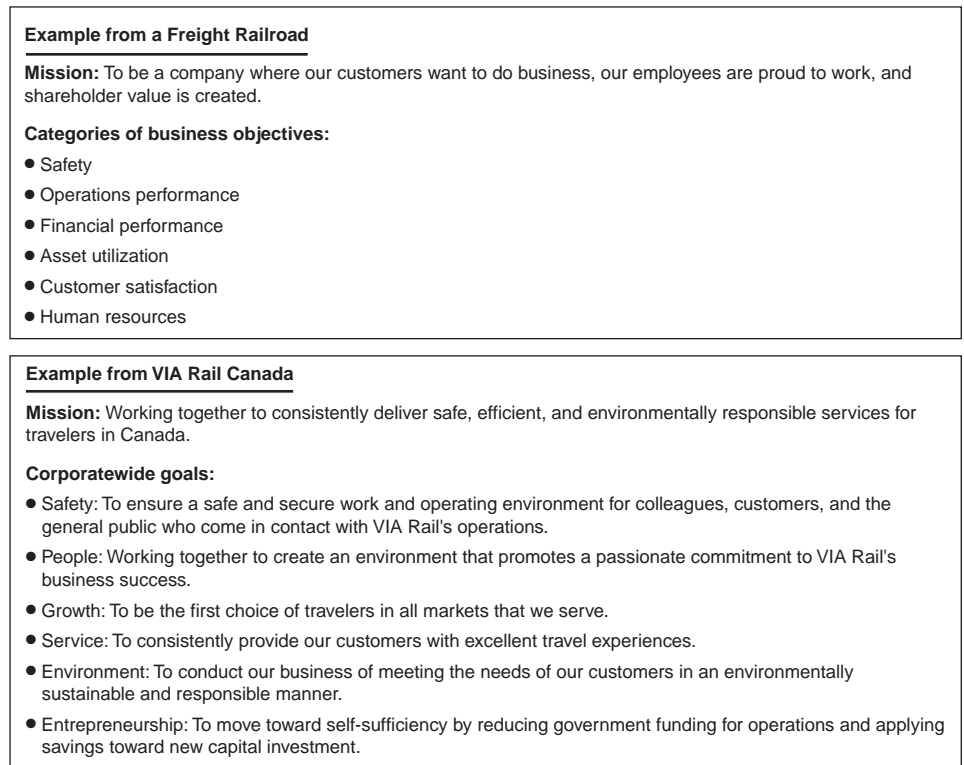
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the risks that could impede the efficient and effective achievement of these goals.

Unlike Amtrak, some of the railroads we contacted develop comprehensive corporatewide goals to support their missions. Figure 8 illustrates examples from these railroads. For example, one freight railroad company developed a mission statement that focuses on its three constituencies—customers, employees, and shareholders—and established six categories of business objectives to implement that mission and drive its strategic planning process. In another example, VIA Rail established a mission statement that is supported by its six corporatewide goals.

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**Figure 8: Examples of Missions and Goals from Other Railroads**



Sources: Freight railroad officials and VIA Rail Canada's strategic plan.



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Without a Link to a Mission  
or Corporatewide Goals,  
Amtrak's Department-  
Specific Goals Do Not  
Demonstrate Support of  
Corporate Outcomes

Absent a strategic plan containing a comprehensive mission and corporatewide goals and strategies, Amtrak lacks a process for developing annual department-specific performance goals that ensures these goals support or improve corporate outcomes. Leading organizations we studied developed fact-based understandings of how their activities contribute to accomplishing their overall mission and broader results.<sup>8</sup> In contrast, Amtrak's capital-related goals link to its capital plan, while Amtrak's department heads generate operations-related goals that are based on the priorities and activities of their own departments and seek to align those goals with the priorities of Amtrak's president. Except for providing a standard template for stating the departments' goals, Amtrak has little companywide written guidance on how to develop department goals and objectives.

The process Amtrak uses provides no assurance that goals developed by a department contribute to improved overall company performance. Amtrak managers said some department goals, such as those related to on-time performance, safety, and ticket revenue, are self-evident. We agree that these goals are important for Amtrak's performance. However, without a strategic plan that addresses all company activities, the departments cannot (1) assess or communicate the extent to which their department-specific goals are related to the priorities of the organization or (2) contribute to Amtrak's overall performance.

In addition to the lack of a process for developing department-specific goals that relate to a mission and corporatewide goals, Amtrak's department-level targets<sup>9</sup> in fiscal years 2003 and 2004 were not always set with a clear understanding of current baselines or what a department could hope to achieve. This lack of clarity, according to Amtrak officials, resulted from such things as the following:

- *Limited experience or data on which to set goals and targets.* According to Amtrak officials, in previous years, goals existed in areas such as safety and on-time performance, and some departments developed their own set of goals. However, prior to fiscal year 2003,

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<sup>8</sup>GAO-04-343SP.

<sup>9</sup>According to the Office of Management and Budget, a "target" is defined as a quantifiable or otherwise measurable characteristic that tells how well a program must accomplish a performance measure.

departments were not required to develop goals as a basis for Amtrak's budgets. As a result, some department-level targets in fiscal years 2003 and 2004 were based on assumptions, not an analysis of data, because data did not exist. An Amtrak official acknowledged that in fiscal years 2003 and 2004, there was no hard link between goal setting and data analysis. For example, the target for the transportation department's injury goal<sup>10</sup> in fiscal years 2003 and 2004 was based on the previous year's target since, according to an official in the transportation department, the department did not achieve its goal of a 3.8 injury ratio in the previous fiscal years. The engineering department established a delay minute target for fiscal year 2003 but missed the target by over 60,000 minutes because, according to the chief engineer, the department set the goal without an understanding of the impact of the company's increased capital activities.<sup>11</sup> Without data, goals have also been set by making incremental improvements to historical trends. For example, the engineering department established an absenteeism target to reduce absenteeism by 10 percent over the fiscal year 2003 results. Amtrak officials said that, in some cases, Amtrak's goals are an expression of "aspiration" rather than a realistic target. For example, Amtrak's on-time performance has averaged about 75 percent from fiscal years 1990 to 2003, yet the transportation department set its fiscal year 2004 on-time performance at 85 percent.

- *Organizational restructuring.* According to officials, Amtrak's organizational restructuring effort also affected the departments' ability to establish and achieve goals. For example, officials in the mechanical department noted that although the department established goals in fiscal years 2003 and 2004, officials were more focused on the restructuring effort than on achieving department goals and maintain that organizing the department's structure, policy, and standards are critical components required to meet the departments' goals.

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<sup>10</sup>The injury ratio is determined by the number of injuries per 200,000 work-hours, which is an industry standard in reporting employee injury rates.

<sup>11</sup>In fiscal year 2003, the engineering department's target for reducing the number of delay minutes caused by capital work was 111,212 delay minutes. Amtrak's chief engineer noted that fiscal year 2003 was the first time an effort had been made to set a goal for delay minutes due to capital investment activities. He stated that the fiscal year 2003 capital program was a major increase in capital activities over the prior years and foreseeing the combined impact of these activities was beyond the department's capabilities in fiscal year 2003. However, he stated, in fiscal year 2005, these delays are being forecasted and measured and thoughtful goals are being established.

Amtrak officials recognize that goal development at Amtrak is a work in progress and believe that the departments are more focused in setting more strategic and measurable goals. For example, in a review of the marketing and sales department's ticket revenue goals for fiscal years 2003, 2004, and 2005, we found that the department had established more specific targets for its 2005 goal than for its 2003 goal. However, without a mission statement or corporatewide goals, Amtrak cannot demonstrate or ensure that its departments' activities contribute to accomplishing corporate results.

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### Amtrak's Five Tools Support Short-term Results but Not the Long-term Management of the Corporation

Amtrak's five management tools provide a process for identifying Amtrak's need and use for resources on an annual basis and produced some results. As noted in chapter 1, Amtrak's president instituted five management tools—the organization chart, operating budget, capital program (communicated through a document that Amtrak calls a strategic plan), goals and objectives, and monthly performance reports. These tools are used to manage the corporation, control costs, and address the challenges that existed when Amtrak's president arrived at Amtrak. Annually, each department is required to develop budgets that are based on activity levels and clear, specific, measurable goals. Amtrak's president stated that because of these tools, Amtrak has seen results, including decreased headcount and increased production activities, from what Amtrak characterized as “a program that had been all but eliminated by fiscal year 2002” to a production line approach with tangible results.

Although Amtrak's tools provide a framework for developing annual goals and budgets, these tools do not provide a long-term, integrated approach for managing the corporation and focus on outputs (units of production), not outcomes (results, such as better service or on-time performance). One important internal control standard is risk assessment, and a precondition to risk assessment is the establishment of clear, consistent goals and objectives both at the entity level and the activity (program or mission) level.<sup>12</sup>

Without a strategic plan to guide all business activities, Amtrak does not have a process for integrating the efforts across the organization or for assessing and addressing company risks. Moreover, without a strategic

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<sup>12</sup>GAO, *Internal Control Management and Evaluation Tool*, [GAO-01-1008G](#) (Washington, D.C.: August 2001).

plan, Amtrak does not have overall corporate performance measures and cannot establish a clear understanding of what it is trying to accomplish with its resources and company activities.

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## Amtrak's Planning Process Could Benefit from Increased Use of a Performance-Based Framework to Achieve Its Goals

While Amtrak's key departments—the mechanical, engineering, transportation, and marketing and sales departments—have made some progress in setting goals, they will likely continue to struggle in achieving those goals without incorporating elements of a performance-based framework. These elements include

- developing strategies or action plans that describe the processes, methods, and resources necessary to achieve the goals;
- linking unit goals to individual responsibilities to hold individuals accountable for contributing to the achievement of the goals; and
- using reliable performance data to monitor, evaluate, and report performance results and determine how well activities and programs contribute to achieving goals and improving performance.

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## Amtrak's Key Departments Do Not Consistently Develop Comprehensive Strategies to Achieve Department Goals

Amtrak's key departments do not consistently develop comprehensive strategies or action plans for achieving their key goals. For example, the marketing and sales department articulated specific objectives or actions for achieving its ticket revenue goal in fiscal years 2003 and 2004. In contrast, the transportation department is still in the process of implementing a plan to address train delays caused by passengers boarding the train, but the department did not develop documented strategies or action plans for other elements that affect on-time performance, such as freight or commuter train interference. An official in Amtrak's transportation department noted that some goals lack action plans because some goals and objectives lend themselves to action plans better than others and that "aspirational goals" often come down to "just work harder."

Without action plans, Amtrak lacks clearly stated strategies for how it intends to achieve its goals. For example, the mechanical department established a goal in fiscal year 2004 to create a "national" mechanical department but did not develop a specific action plan to achieve that goal. Although Amtrak's president acknowledged that Amtrak did not have a written action plan for establishing the national mechanical department, he

maintains that he and his staff knew what needed to be done to establish the national department. Officials in the mechanical department stated that organizational charts were used to detail the position requirements and equipment assignments by location, and that standard work scopes were also developed. However, without a documented action plan, Amtrak cannot ensure that critical actions and milestones are established and accurately communicated to those involved in the transition or monitor progress toward the transition.<sup>13</sup>

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### An Incentive-Based Performance Management System Could Strengthen Accountability for Achieving Goals

To hold the department heads accountable for goals and budgets, Amtrak's president holds quarterly and periodic reviews with department heads, who are required to sign off on financial and headcount information in the company's monthly performance reports. For example, the department heads within the operations department—including the engineering, mechanical, and transportation departments—review the status of their budgets and goals every quarter in a meeting with Amtrak's president and senior vice president of operations. Departments outside of the operations department, such as the marketing and sales department, meet with Amtrak's president on a periodic basis to review the department's budget and discuss the status of some department goals.

Although Amtrak managers told us that they hold their managers accountable for achieving department goals and the results of the goals are factored into annual personnel evaluations, Amtrak does not have a pay-for-performance management system to provide incentive for achieving goals. That is, individual performance is not directly tied to compensation. Leading organizations we have studied seek to create pay, incentive, and reward systems that clearly link employee knowledge, skills, and contributions to organizational results. Amtrak officials noted that management has considered implementing a performance-based compensation system and has discussed a plan with Amtrak's board of directors. However, because of other concerns being addressed by the board, Amtrak management's pay-for-performance plan has not been on the

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<sup>13</sup>In our December 2004 report, we found that Amtrak did not develop an implementation plan for addressing the key challenges related to the settlement between Amtrak and the Consortium of Bombardier and Alstom. We also reported in February 2004 that Amtrak's lack of comprehensive project management for the Northeast High-Speed Rail Improvement Project contributed to its inability to achieve project goals.

board's agenda as of March 2005, and, according to an official, Amtrak does not plan to implement such a plan this fiscal year.

According to an Amtrak official, the board has been working with management to resolve their concerns about the pay-for-performance system, such as which management positions would be eligible and the operational and financial metrics to make merit pay and bonus decisions. Another Amtrak official noted that the current performance evaluations do not have much impact on performance because there is no satisfactory or unsatisfactory rating and no tie to compensation. An Amtrak official from the strategic planning department noted that a pay-for-performance system is critical to successfully implementing Amtrak's strategic reform initiatives. This type of system, he stated, is essential for Amtrak to act more like a private entity. However, it would be difficult for Amtrak to implement a pay-for-performance system without first establishing organizationwide goals that provide the basis for aligning daily activities with broader results.

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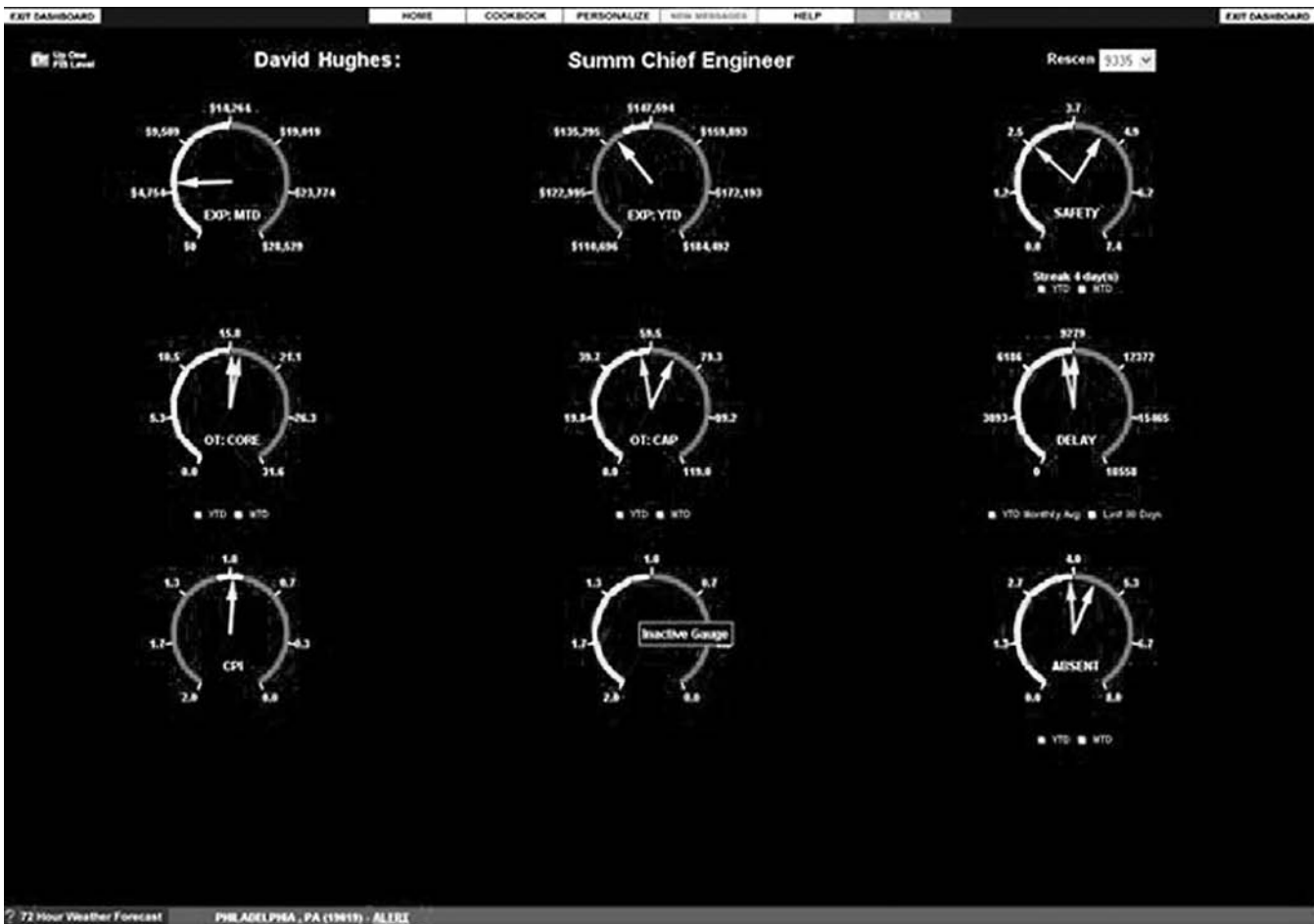
### **Amtrak's Data Systems and Processes Limit Its Ability to Monitor, Evaluate, and Report on Performance**

A common theme we found in numerous areas we reviewed involved Amtrak's limited ability to effectively monitor, evaluate, and report on performance due to the shortcomings of some of its data systems and reporting processes. These shortcomings were manifested in several ways. First, we found numerous instances where key reports were missing relevant information or where information was of questionable reliability. As discussed in more detail in chapter 3, we found that Amtrak's monthly performance reports, a key document used by managers and stakeholders alike, did not contain information that would enhance their relevance to users. For example, information on Amtrak's food and beverage service did not include gross profit analysis, revenues, cost of meals, and other basic metrics. Second, as discussed in detail in chapter 4, Amtrak lacks certain key cost metrics, such as cost-per-revenue passenger mile and cost-per-locomotive overhaul that would allow managers to better measure performance, assess whether resources are being used efficiently, and identify potential cost-saving areas. Finally, as discussed in detail in chapter 5, Amtrak's procurement and financial databases are limited such that management does not have detailed, reliable, and comprehensive data on total spending for the estimated \$500 million it spends annually on goods and services. The absence of such information, which is due, in part, to limitations in Amtrak's computer systems and lax controls over data reliability, makes it difficult to identify strategic sourcing opportunities, leverage Amtrak's buying power, and reduce procurement costs.

One department we reviewed had made progress. That is, Amtrak's engineering department has developed a data system that allows the department's managers to monitor performance in a real-time basis. The department developed a computer "dashboard" system that is updated every day and requires the department's 45 managers to review the status of their goals on a daily basis after they log into their computers. See figure 9 for a snapshot of the dashboard. For example, one "dial" on the dashboard shows the real-time status of the department's safety goal compared with the year-to-date and month-to-date targets. The chief engineer said that if these data show a variance in a goal, he can "drill" into the data to determine the unit within the department that is experiencing problems and the person responsible for that unit. He then contacts the head of the specific division to discuss the cause and the actions taken to address the problem. Although this system does not monitor all of the department's goals, it allows managers to monitor, analyze, and quickly respond to changes in performance goals on the basis of real-time information.

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Figure 9: Snapshot of the Engineering Department's Dashboard System



Source: Amtrak.

Despite positive developments in some areas, Amtrak's overall reporting processes lack management controls, which can lead to an incomplete and inaccurate picture of performance. Leading organizations we have studied prepare annual performance reports that document the results the organization achieved compared with the goals they established. To be useful for oversight and accountability results, these reports, among other things, clearly communicate performance results. In contrast, although an Amtrak official noted that all departments are encouraged to report on their goals through the monthly performance reports, Amtrak's key departments do not consistently report on all their goals through an



established process, such as quarterly reviews or the monthly performance reports. For example:

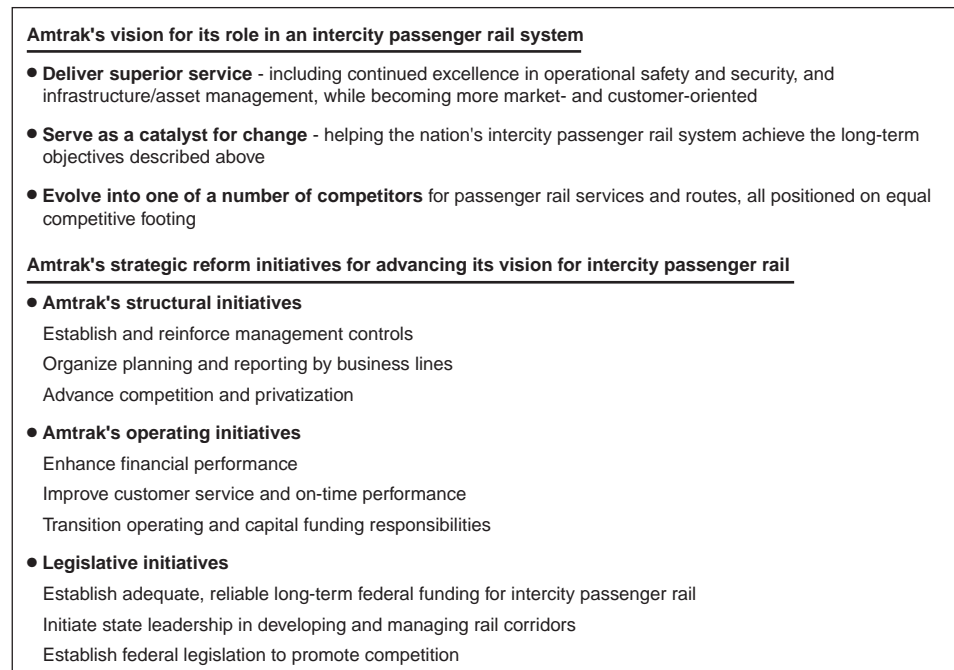
- Although the transportation, engineering, and mechanical departments report on budgets and goals in a quarterly review process with Amtrak's president and senior vice president of operations, they do not report on all of their goals in these reports. For example, the transportation department did not report on three of its eight goals at the end of fiscal year 2004—including goals on reducing road vehicle equipment expenses and meeting public health and Food and Drug Administration standards relating to food handling, water point inspection, and facility comprehensive plans. According to one official, these goals are not included in these reports because they have less emphasis for the department than safety and on-time performance goals and involve only \$1.5 million of the department's \$1 billion budget. He noted that the managers within the transportation department report on these goals to the vice president of transportation. Without a formal process for reporting on these goals, it is unclear whether these goals were achieved.
- Similarly, officials in the marketing and sales department stated that they work with the finance department to determine which goals to report in the monthly performance reports. Through the monthly performance report, the marketing and sales department reported on its ticket revenue, ridership, and safety targets but did not report on the status of its targets relating to developing and implementing service and product improvements. Officials in the marketing and sales department noted that the department monitors the progress of its goals and updates the progress on a quarterly basis.

Amtrak officials told us that the departments report on “key” department goals through the monthly performance reports and monitor other goals within their departments. This selective reporting does not provide the complete transparency needed to provide management and key stakeholders with a complete and accurate picture of each department's performance and the performance of Amtrak as a whole. Also, presumably all established goals, while perhaps not all equal in terms of importance to the department, are relevant and important or they would not have been established. Reporting on only certain goals is counter to a systematic performance-based approach and may ultimately impede stakeholders from knowing the complete information from which to judge overall performance.

## Amtrak's Proposed Strategic Reform Initiatives Face Significant Implementation Challenges

In April 2005, the board, in conjunction with Amtrak management, released its proposed strategic reform initiatives, which included a proposed vision for the future of intercity passenger rail service<sup>14</sup> and Amtrak's role in this vision.<sup>15</sup> (See fig. 10.)

**Figure 10: Amtrak's Vision and Strategic Reform Initiatives**



Sources: Amtrak Strategic Reform Initiatives and FY06 Grant Request, April 2005.

<sup>14</sup>This vision for an intercity passenger rail system is outlined through four objectives: (1) development of passenger rail corridors based on a federal-state capital matching program, with states serving as the developers and "purchasers" of competitively bid corridor services; (2) return of the Northeast Corridor infrastructure to a state of good repair and operational reliability, with all users gradually assuming financial responsibility for their proportionate share of operating and capital needs; (3) continuation and possible addition/elimination of certain national long-distance routes based on established performance thresholds; and (4) emergence of markets for competition and private commercial participation in all passenger rail functions and services.

<sup>15</sup>Amtrak Strategic Reform Initiatives and FY06 Grant Request, April 2005.

Unlike in prior years, the proposal notes that the strategic plan for fiscal years 2006 through 2010 will contain business plans for each line of business, along with operating and capital investment plans to meet the objectives—driven by milestones, goals, and timetables. According to an official in Amtrak’s strategic planning group, Amtrak intends to develop a strategic plan for fiscal year 2006 that would include a company mission statement and goals that would tie to the mission and goals of each line of business, and Amtrak’s department goals would be based on the mission and goals for Amtrak’s lines of business. In addition, the proposal states that Amtrak will (1) provide regular reports on its progress toward this plan, as well as continued monthly performance and financial reports, along with future annual assessments of lessons learned at each phase, and (2) will propose any adjustments to the plan details or overall objectives as necessary. Amtrak proposes to complete the implementation planning process during the summer of 2005 and release the plan in the fall of 2005.

If fully implemented, these proposed changes in planning and reporting could potentially provide Amtrak with a more comprehensive management approach and guidance for the various components of its business, including its capital program, and provide better information both internally and externally on Amtrak’s overall performance. However, challenges exist to fully implementing these initiatives. First, as Amtrak’s board chairman noted, legislative action is required to implement many aspects of the plan. These legislative actions include, among other things, the federal government either assuming Amtrak’s annual debt service payments or eliminating Amtrak’s debt burden (about \$3.8 billion in short- and long-term debt at the end of fiscal year 2004) and transitioning Amtrak out of the railroad retirement system. Second, Amtrak officials noted that major challenges within Amtrak exist in implementing this new planning process, including the time and effort needed to implement these initiatives and the ability to keep people focused on long-term change, even with the uncertainty of Amtrak’s future.

As of May 2005, the missions and goals for the lines of business were in the process of being developed and should be completed within the next couple of months, according to an Amtrak official. In addition, the departments were developing their goals for fiscal year 2006, using the same process from the past 3 fiscal years. With the goal development process already under way, this official noted that Amtrak decided that the departments would continue to develop their goals while the mission and goals for the lines of business were also being developed. Once the mission and goals for the lines of business are determined, Amtrak officials will

assess whether the departments' goals conflict with the goals established for each line of business and, if so, adjust the goals accordingly. Amtrak officials also told us that the departments met in June 2005 to discuss goals and ensure coordination and support between departments.

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## Conclusions

Amtrak's management tools have allowed the company to operate with a more structured process. Among other things, these tools provide Amtrak with a clearer organizational structure, a mindset of managing to goals and objectives, and a means of reporting progress. These tools represent a good first step. In a number of respects, however, these tools present a limited framework when compared with other organizations that have progressed further in their strategic planning efforts. It is clear that Amtrak will need to continue moving aggressively in this area, because current efforts have not been sufficient to provide all elements of the organization with a clear mission, an understanding of how to set and accomplish goals that contribute to this mission, or sufficient information on the progress being made toward a mission. This action will be needed in spite of what may happen with regard to Amtrak's proposed changes to its structure and its role in intercity passenger rail. To address the multitude of challenges facing Amtrak and provide useful performance information to Congress, Amtrak needs to build the capability to define goals, set priorities, ensure follow-through, and monitor progress.

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## Recommendations for Executive Action

To build on the strategic planning efforts already under way at Amtrak, we recommend that Amtrak's president take the following four steps to create a strategic planning and performance-based management approach:

- prepare a *comprehensive strategic plan* with a clearly defined mission, organizational goals and objectives that encompass all of Amtrak's activities, and strategies or action plans to achieve those goals;
- establish *annual performance goals* that tie to the mission and corporate goals;
- develop an incentive-based *performance management system* that ensures responsibility for goals is clearly articulated at all levels of the organization; and

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- assess and develop the *data systems and processes* necessary to monitor, evaluate, and report—both internally and externally—on progress toward Amtrak’s mission and strategic and annual performance goals.

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# Financial Management Practices Could Better Support Amtrak's Decision Making

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Improvements are needed to ensure that Amtrak's management and stakeholders are provided with useful financial information, and that financial management practices are sufficient. We examined three aspects of Amtrak's financial management: (1) the usefulness of financial information provided to management and external stakeholders, (2) the design of internal control over selected areas of expense, and (3) Amtrak's efforts to strengthen management practices. While progress has been made, all three areas are in need of further improvement.

First, although Amtrak has made progress in establishing a more systematic process to provide financial information to management and external stakeholders, much of the financial information it uses for day-to-day management purposes lacks certain relevant information or is of questionable reliability. Second, our review of the design of internal control practices in two areas—employee benefit expenses and food and beverage service—identified a number of weaknesses. For example, not considering certain accrued employee benefit expenses resulted in an understatement of more than \$100 million in employee benefit expenses and a potential lost revenue of \$12 million under reimbursable agreements, and poor enforcement of contract provisions may have contributed to Amtrak's spending \$2 for every \$1 in revenue from on-board food and beverage service. Third, although progress has been made in responding to other internal control weaknesses identified by Amtrak's IPA in recent reports, the progress has come mainly through the implementation of manual after-the-fact detective controls that do not prevent errors from entering the system. In addition, Amtrak missed opportunities to increase the usefulness and transparency of financial information by restricting public reporting of work performed by its IPA.

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## Financial Reports Lacked Certain Relevant Information and Contained Significant Errors

In recent years, Amtrak has placed increased emphasis on improving the financial information used to manage the company. However, although Amtrak has made progress in improving its financial information, we found that this information could be more useful. After reviewing 29 monthly performance reports and three year-end addenda<sup>1</sup> issued from May 2002 through September 2004, we found that the reports' shortcomings limited their usefulness to management and external stakeholders. They lacked certain relevant information and contained significant errors. Since these

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<sup>1</sup>Two of these addenda were for fiscal year 2002, and the third was for fiscal year 2003. The year-end addendum for fiscal year 2004 was not available at the time of our analysis.

reports were issued, Amtrak has made further progress, but more remains to be done.

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### Certain Relevant Information Was Not Included in Monthly Performance Reports

Our past work has shown that one common component of strategies adopted by leading organizations in the area of financial management is providing meaningful information to managers and external stakeholders. Amtrak has taken steps in this area by creating monthly performance reports containing a variety of financial information, including financial information for specific train routes, called route performance information (RPI). According to Amtrak officials, these reports are now one of Amtrak's key management tools. We view the reports as a positive step: they represent a significant contribution toward establishing a systematic process to provide financial information to internal and external stakeholders.

Although the monthly performance reports are an improvement, we found that practices were not in place to ensure the monthly reports contained information that would enhance the relevance to management and external stakeholders. The information available in the reports included preliminary financial statements and budget reports. Amtrak officials view the monthly reports as summary documents and believe a sufficient amount of information is being provided. We agree the monthly reports are summary documents. Missing, however, was information that could enhance management decision making and stakeholder input, such as information about food and beverage service activities, employee benefits, and core business operations (see fig. 11). For example, enhanced food and beverage-related information would include gross profit analysis, revenue information (including separate amounts for food and beverage sales), information on the cost of meals, and other metrics basic to a food service operation. The absence of this information hinders the assignment of accountability for performance internally or externally by key stakeholders.

**Figure 11: Examples of Relevant Information Not Included in Amtrak's Monthly Performance Reports**

**Food and beverage service**

Revenue and expense information specific to Amtrak's food and beverage service, an area with significant financial challenges. Despite food and beverage-related financial losses totaling about \$160 million for fiscal years 2002 and 2003, the monthly performance reports we reviewed did not separately report any information on food and beverage revenue or expense, but instead combined these amounts with other reporting line item amounts.

**Employee benefits**

Employee benefit cost trends, changes in the components of benefit costs, and initiatives to manage these costs were not included in the monthly reports. While the monthly reports include a comparison of actual employee benefit expenses to budgeted amounts, additional information related to these significant costs, which totaled over \$1.5 billion in the 3 fiscal years ended September 30, 2004, or about 16 percent of Amtrak's total operating expenses, was not provided.

**Lines of business**

For core business operations (rail passenger service) and each noncore line of business (commuter rail operations, reimbursable agreements, and commercial activities): (1) components of key expenses (i.e., salaries and benefits) and (2) trends in key expense categories and differences in actual versus budgeted results.

Source: GAO analysis of Amtrak monthly performance reports.

The RPI included in the monthly performance reports also lacked certain relevant information, as follows:

- First, the financial information was at a summary level that did not allow detailed analysis of individual train routes. Only aggregate amounts were provided for total revenue, expense, and net profit or loss for each of the approximately 45 train routes that are Amtrak's core business line (rail passenger transportation) as well as for its noncore business lines (principally, commuter rail operations and reimbursements for equipment and right-of-way maintenance services). Not available, for example, were specific amounts for such expense components as salaries, employee benefits, and overhead for each train route and noncore business line. Also absent was comparative expense information, such as month-to-month and year-to-year changes in expenses. Such information could be useful in addressing issues raised in congressional testimony by Amtrak's board chairman on April 19, 2005. In this testimony, the chairman outlined a need to focus on providing reporting of financial activity and performance along Amtrak's business lines.<sup>2</sup>

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<sup>2</sup>Testimony of David M. Laney, Esq., chairman of Amtrak's board of directors, before the Subcommittee on Surface Transportation and Merchant Marine, Senate Committee on Commerce, Science, and Transportation, on Tuesday, April 19, 2005.



- Second, even the summary information for each train route and business line did not include depreciation expense. This expense, which totaled \$606 million in 2003 and \$479 million in 2002, was not allocated by train route or by business line. Amtrak did not include the allocation of depreciation expense, because management believes allocating such a large noncash item is not helpful in determining the operational result of a route. For example, Amtrak told us that total depreciation expense includes depreciation of the capitalized costs of certain sale and leaseback transactions, the required accounting for which Amtrak believes inflates the “true” capitalized costs of these assets and, thus, the related depreciation expense. However, not allocating these significant expenses had the effect of understating reported expenses for core and noncore business lines by 19 percent and 15 percent, respectively. For a capital-intensive business, this information is critical to assessing performance and making business choices about individual train routes and noncore business line activities, such as commuter rail operations.

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### Information in Monthly Performance Reports Was of Questionable Reliability

A third limitation of the information in the monthly performance reports was that it was of questionable reliability. We identified several problems related to reliability, as follows:

- *Financial information was incorrect and had to undergo subsequent adjustments.* Information in the monthly reports was generated from data that subsequently required significant adjustments to correct errors in amounts before audited financial statements could be issued. As a result, the reliability of the information provided to managers and stakeholders during the fiscal year was questionable. For example, according to Amtrak, after the close of the fiscal year, corrections made to the Amtrak financial information included management entries and audit adjustments, with the latter being made only after receiving sign-off from the external auditor (the fiscal year 2002 opinion was dated March 31, 2003 and the fiscal year 2003 opinion was dated February 25, 2004).<sup>3</sup> These adjustments, which totaled hundreds of millions of dollars

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<sup>3</sup>In its technical comments on a draft of this report, Amtrak told us that releasing unaudited data on a monthly basis and then releasing final audited data after sign-off by independent auditors is the norm for all corporations. We agree; however, because of the magnitude of the misstatements in Amtrak's unaudited monthly data and the time required after the end of the year before the information is corrected, the information used for decision making during the year is not reliable and, therefore, is not useful.

for fiscal years 2002 and 2003 and required 197 separate entries to correct the books and records, were not reflected in the monthly reports and the RPI data until 7 months after the end of the fiscal year. The magnitude of these misstatements might have been detected had Amtrak performed a comprehensive risk assessment to identify the core causes of these vulnerabilities in accounting and financial reporting controls that adversely impacted the usefulness of the monthly performance reports and RPI data. Amtrak has noted that financial audit adjustments, one of the types of corrections made at year-end, have decreased significantly from fiscal years 2002 through 2004, which would have a positive effect on the reliability of interim financial information provided to stakeholders. However, a risk assessment would be particularly important to identifying the need for and designing practices to improve the reliability of information in monthly performance reports by reducing all types of adjustments at year-end. In our discussions with Amtrak officials, we were told that no such risk assessment had been performed.

- *Changes to methods for allocating costs to individual train routes were insufficiently documented.* Amtrak officials could not provide us with documentation to support any of the changes made to how expenses were allocated for any of the reports we reviewed. For example, Amtrak did not document who authorized the changes, the reason for or effect of the changes, or even the number of changes that were made. Further, without documentation to support changes made to how expenses were allocated, it was not practical for us to independently replicate the amount of expenses charged to individual train routes. As a result, we were unable to determine the effect of the changes we identified on the quality of information provided to stakeholders. In addition, officials advised us that since the beginning of RPI publication in 1993, no comprehensive review had been performed of the allocation methods to assess the reasonableness, consistency, and reliability of results.<sup>4</sup> In providing technical comments on a draft of this report, Amtrak officials told us on September 2, 2005, that many areas, such as fuel and insurance expenses, have been reviewed through special studies over the years and that allocation methodologies are

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<sup>4</sup>Amtrak officials told us that at the start of fiscal year 2004, Amtrak began documenting some of the changes to allocation rules. This effort could be a positive change in controls. However, our limited review of certain supporting documentation generated from this practice identified inconsistencies in the amount and nature of the support. In addition, we could not ensure that all changes to the allocation rules were documented.

reviewed continuously, eliminating the necessity for a comprehensive review. We were not provided with evidence of such reviews and, as previously noted, we found that changes to how expenses were allocated were not documented.

- *Overreliance on allocation of cost.* It is generally preferable to directly identify as many costs as practical to cost centers or activities such as train routes and to indirectly allocate the remainder on some reasonable and consistent basis.<sup>5</sup> However, Amtrak relied heavily on indirect cost allocation methods in assigning costs to individual routes. In all, for fiscal years 2002 and 2003, Amtrak allocated about \$4.3 billion of costs using cost allocation methods and directly assigned only about \$357 million, or about 8 percent. This practice impacts the reliability of the RPI being presented to key stakeholders. Amtrak officials told us that a significantly higher percentage of costs is, in effect, direct. That is, certain costs pertain only to a single route and are accordingly allocated fully to that route, producing the same result as direct assignment. However, we were not provided with evidence to support the assertion that a percentage significantly higher than 8 percent of costs is directly assigned.
- *Sufficient support for reported amounts was not available.* Amtrak did not generate sufficient support for amounts reported as reconciling items of the RPI to the grand total of expenses reported in Amtrak's statement of operations. For example, we requested support for \$2 billion of expenses reported as RPI reconciling amounts in fiscal years 2003 and 2002. We sought this supporting information to assess the reliability of the total expense amounts allocated to the individual train routes. However, an Amtrak official said that the information was not readily available and would need to be developed for our purpose, and that such a reconciliation was considered redundant and unnecessary. When we received some of the information that we requested for 2003, we found errors affecting the reliability and credibility of the RPI. For example, approximately \$11 million of employee benefit expense had been improperly included with the expenses for noncore lines of business and was not, as should have occurred, allocated in an equitable manner to all business lines. As a result, we estimated that the information in the RPI for the expenses of core business lines (intercity rail passenger transportation) was understated by an estimated \$9.5

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<sup>5</sup>Statement of Federal Financial Accounting Standards, Number 4.

million; the expenses for commuter rail operations and other noncore business lines were overstated by the same amount.

In addition, we found that depreciation expense in the amount of \$479.3 million was reported in the RPI for fiscal year 2002 at \$44.3 million, an understatement of \$435 million. A corresponding overstatement of \$435 million was reported in the RPI for the expense of noncore business lines. Amtrak officials have suggested this instance was an insignificant “typographical error”; however, we view it as the product of inadequate control procedures over the generation of the RPI. We also found that an amount of \$19.8 million, which was identified as prior period adjustments, was not consistent with the audited financial statements for 2003, which reflected no prior period adjustments. In total, expenses per the RPI agreed with total expenses per the audited financial statements. However, given the specific errors identified, this situation could only occur with offsetting differences of like amounts in other RPI-reported amounts. Thus, the RPI also included misstatements in one or more other areas to adjust the report for these errors.

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## Internal Control Weaknesses Existed in the Two Areas GAO Reviewed

A sound, entitywide system of internal control is an integral part of effective management. Internal control helps to ensure effectiveness and efficiency of operations, reliability of financial reporting, and compliance with applicable laws and regulations. Managers need to continually assess and evaluate their internal control practices to ensure that they are well-designed and well-operated, are appropriately updated to meet changing conditions, and provide reasonable assurance that organizational objectives are being met.

We reviewed the internal control practices in two key areas of Amtrak's business and found weaknesses in both areas.<sup>6</sup> The two areas we reviewed, selected because of their size and importance, were the following:

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<sup>6</sup>We conducted our review using the principles underlying GAO's *Standards for Internal Control in the Federal Government*. We applied these principles as our standard because of the significance of the federal role in Amtrak's operations and the importance of Amtrak's responsibility to account for its stewardship of the billions of dollars of government resources provided to it. These principles are consistent with the internal control principles established by the American Institute of Certified Public Accountants and are used in audits of nongovernmental entities.

- *Employee benefit expenses.* These expenses totaled more than \$1.5 billion over the 3-year period ending September 30, 2004, and represent approximately 16 percent of the total operating expenses over that period.
- *Food and beverage service.* Food and beverage service expenses totaled more than \$324 million over the 2-year period ending September 30, 2003, and represent approximately 5 percent of the total operations expenses over that period. In addition, food and beverage service is critical from a financial standpoint because, as our analyses show, Amtrak loses substantial sums of money on food and beverage service.

The weaknesses we found adversely affected the quality of financial information provided to management and external stakeholders. In the employee benefit area, for example, control weaknesses resulted in a misstatement of expenses among lines of business of nearly \$105 million and in potential lost revenue from third-party reimbursements totaling \$12 million for the 3-year period we reviewed. In the food and beverage area, although Amtrak incurred \$2 in expense for every \$1 in revenue, it did not ensure compliance with key contractual provisions that would have enhanced the quality of the information available for management purposes.

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**Internal Control over  
Employee Benefit Expenses  
Needs Further  
Improvements**

During our review of the 3-year period ending September 30, 2004, we noted improvements in Amtrak's monitoring of actual and allocated employee benefit costs; however, control weaknesses exist in the benefits programs for both Amtrak's employees and its senior executives. The weaknesses in the larger program relate primarily to how benefit costs are allocated and adjusted, while the weaknesses in the senior executive program relate primarily to establishing the basis for performance award amounts.

**Costs of Providing Benefits Were  
Understated and Not Fully  
Recovered**

Amtrak did not allocate accrued postretirement health benefit expenses among its lines of business; instead, it allocated only the company's

estimated cash contributions to fund health benefit expenses for current retirees.<sup>7</sup> As a result, the cost information provided to stakeholders on the different lines of business was incomplete and understated. Amtrak's practice of allocating only the estimated cash contributions is also different from the practice used by Class I freight railroads in developing shipping rates.<sup>8</sup> In setting their rates, these railroads identify and include as a basis for setting rates the full costs of these benefits, whereas Amtrak identifies and recovers only the cash basis costs for services performed for third parties.

In addition, for fiscal years 2002 through 2004, Amtrak used standard rates that did not result in the allocation of the actual amount of benefit expenses to all of its different lines of businesses, including reimbursable work performed for other entities in return for a fee, which resulted in potentially lost revenue totaling \$12 million. Amtrak established standard benefit expense rates at the beginning of each year and applied the rates to actual labor expenses as they were incurred throughout the year. However, it was not until fiscal year 2003 that Amtrak began to periodically adjust its benefit expense rates to reflect actual experience. We noted that the amount of the misstatements decreased in 2004 when compared with the earlier years we reviewed. Also, because the following year's benefit expense rates are established before Amtrak issues its audited financial statements, the company would need to adjust the rates used for the effect of prior year-end adjustments—a practice it first employed in 2004.

The net effect of these weaknesses was an understatement of benefit expenses among Amtrak's lines of business totaling nearly \$105 million and potentially lost revenue totaling \$12 million. (See table 2.) The largest understated amount—\$76.9 million—resulted from the difference between the amount Amtrak allocated using estimated cash contributions (\$25.8

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<sup>7</sup>The cash basis method of accounting reflects revenues when received and expenses when paid rather than at the time the revenue is earned or the expense is incurred, which applies to accrual accounting.

<sup>8</sup>These methods are governed by applicable law and related regulations issued by the Surface Transportation Board (STB). The STB developed a standardized costing model for the freight railroads that is used for, among other things, developing variable expenses the STB needs to evaluate the reasonableness of maximum shipping rates during dispute proceedings. We recognize that Amtrak is not required to comply with requirements imposed on the freight railroads, but the practices of the freight railroads offer an interesting illustrative comparison to those of Amtrak. Class I railroads are the nation's largest railroads.

million) and the total accrued postretirement expenses (\$102.7 million). Also, by not adjusting standard benefit rates to reflect higher actual amounts, Amtrak understated expenses among its lines of business by another \$28 million.

**Table 2: Summary of Effects of Understatements and Potentially Lost Revenue for the 3-year Period Ending September 30, 2004**

Dollars in millions

<b>Issue</b>	<b>Understatement</b>	<b>Potentially lost revenue</b>
Not allocating full accrued costs of employee benefits	\$76.9	\$7.5
Not adjusting standard benefit rates to actual amounts	28.0	4.5
<b>Total</b>	<b>\$104.9</b>	<b>\$12.0</b>

Source: GAO analysis of Amtrak data.

By not including accrued postretirement expenses in billings to outside parties, Amtrak may potentially lose revenue; it also risks not collecting all accrued benefit expenses should commuter or reimbursable contracts be terminated. When we brought this issue to the attention of Amtrak officials, they said that outside parties might be resistant to reimbursing Amtrak for an allocable share of these expenses. However, we reviewed examples of commuter and reimbursable contracts and found that a reasonable interpretation of the contractual provisions supports the use of full accrual expenses as the basis for amounts charged under these agreements consistent with how such amounts are determined under Amtrak’s overall method of accounting.

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Control Practices over  
Supplemental Executive  
Retirement Plan Awards Were  
Weak

Control practices over Amtrak's Supplemental Executive Retirement Plan (SERP) were weak.<sup>9</sup> In February 2000 and January 2004, \$551,765 was granted in 34 separate SERP awards. Five awards totaling \$147,580 were given to the two individuals who served as Amtrak's president and chief executive officer during this period; the remaining awards went to 25 other persons. We identified three main weaknesses with the way in which these awards were made:

- *Criteria to evaluate performance were absent.* The employment contract for Amtrak's current president provides that the board will authorize payment of a SERP award after a review of performance, based on criteria or goals set forth in a separate document as a guide. After we inquired about these criteria, an Amtrak official told us that no separate document existed setting forth the criteria that the board should use in evaluating performance. Board minutes approving the awards did not identify any specific performance goals that were achieved. For example, the board approved an award to a former president on the basis of Amtrak's performance in fiscal year 1999 and the positive outlook for fiscal year 2000. However, Amtrak reported losses of \$846 million, \$840 million, and \$877 million for fiscal years 1998, 1999, and 2000 (ending September 30, 1998, 1999, and 2000, respectively).
- *Key terms needed to implement the process effectively were not defined.* The SERP document contains important terms that are not adequately defined and, in some cases, are inconsistent with language found in board minutes and resolutions that implemented the plan. (See table 3 for examples.) The most important term that is not defined in the SERP is the "target" that must be met before the board will approve an award. Two terms included in the SERP—"financial targets" and "corporate plan targets"—can mean different things. For example, the latter term may include nonfinancial performance measures. Amtrak's management informed us that these terms had not been expressly

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<sup>9</sup>Amtrak's board passed a resolution in September 1999 approving the implementation of a SERP. The board also accepted management's proposal that, "contingent on Amtrak meeting its annual Corporate Plan targets and subject to board approvals, the SERP would provide an additional contribution of up to 10 percent of management committee members' pay into individual non-qualified deferred compensation accounts that will be 100 percent vested at the time contribution is made.



defined.<sup>10</sup> Such ambiguity leaves open the possibility that the board could apply inconsistent definitions, adversely affecting the credibility of award decisions.

- *Awards were granted before financial results were finalized.* The board granted awards in February 2000 and January 2004; the awards granted in 2004 were given before the company had issued its audited financial statements. This practice may not be prudent, given Amtrak's history of significant changes to reported operating results upon audit.

**Table 3: Examples of Key SERP Terms That Were Not Defined**

<b>Term used in SERP document</b>	<b>Term used in board resolution</b>	<b>Potential effects</b>
Financial targets	Corporate plan targets	No consistency in basis for award
Management committee member; senior staff employee	Management committee member	Lack of clarity as to who is eligible; when asked, management could not provide a definitive list
Compensation	Pay	Inconsistency in how amount of award is determined

Source: GAO analysis of Amtrak data.

Adequate control practices over activities involving the SERP are necessary for Amtrak to fulfill its responsibilities to be accountable for stewardship of its resources, including federal subsidies.

**On-board Food and Beverage Service Control Practices Need Strengthening**

During fiscal years 2002 and 2003, Amtrak incurred \$2 in expense for every \$1 in revenue from its on-board food and beverage service. The total loss for these 2 years was over \$160 million. This loss must be funded by other revenue sources, including federal subsidies; reduction in expenses; or some combination of the two. Amtrak's control practices over its on-board food and beverage service need strengthening. We found that, although this

<sup>10</sup>For the January 2004 awards, the board's resolution stated the reasons for the awards were that "Amtrak achieved significant reductions in spending and managed to complete the year under budget, meeting its financial goals for FY03." However, it is not clear what aspects of the budget the board was referring to in its resolution. Amtrak's management could not tell us whether the board's reference to the budget meant revenue, expenses, net income, or some or all of these. The board did not expressly approve in advance the financial targets that would serve as performance measures for any subsequent SERP awards.

activity has significant inherent risk, Amtrak did not ensure compliance with key provisions of its contract<sup>11</sup> or adequately monitor contractor activity.

### Contract Provisions Were Not Enforced

Amtrak has not enforced key contract provisions, which has negated its ability to prevent and detect improper payments for food and beverage service. We identified three key provisions that were not enforced.

- *Providing an annual report.* The contract requires the contractor to provide an independently audited annual report within 120 days following the end of each contract year. This report was to be certified by contractor officials. Within the annual report, the contractor was to provide (1) actual and budgeted amounts for key line items and (2) a narrative explanation for any actual to budget variance greater than 1 percent in the aggregate for all commissaries.<sup>12</sup> However, Amtrak has not required the contractor to provide this annual report for any of the 5 years the contract has been in place. Amtrak was unable to provide documentation regarding why this key contract provision was not enforced. Amtrak officials told us that they relied on contractor-provided monthly operating statements and on reports from the Amtrak OIG instead of the annual report.

These mechanisms, while useful, would not meet fundamental control purposes. We found that the monthly operating statements lacked critical information that was to be included in the annual report and, importantly, lacked independence because they were prepared by the party seeking reimbursement and were not audited. In contrast, the contractually required annual report was to have been certified by contractor officials and audited by a certified IPA. The Amtrak OIG reports, while providing management with information on some aspects of Amtrak's food and beverage service activities, should not be viewed as a substitute for a comprehensive internal control program. Internal control should be a continuous built-in component of

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<sup>11</sup>In January 1999, Amtrak entered into a contract with Dobbs International (now called Gate Gourmet International (Gate Gourmet)). This contract expires on September 30, 2006. Under the terms of the contract, Gate Gourmet supplies substantially all food and beverage service items for on-board sales by Amtrak employees. The contract includes one 5-year extension option.

<sup>12</sup>Amtrak owns 11 commissaries nationwide. Gate Gourmet operates these commissaries for Amtrak.

operations that, among other things, considers the results of audits and ensures prompt resolution. This component is especially critical in an operational area where Amtrak is losing considerable money. In addition, upon reviewing the Amtrak OIG's work, we found that certain scope limitations existed. For example, the Amtrak OIG noted in a report on the food and beverage contract to Amtrak management that its work in this area had been limited due to the contractor's failure to provide certain requested information and documentation.

- *Determining whether discounts and rebates were adequately passed along.* Under the contract with Gate Gourmet, Amtrak is permitted to receive discounts and rebates on food and beverage purchases by the supplier. However, Amtrak has not implemented processes to ensure that rebates and discounts received directly from suppliers or indirectly through its contractor are accurate and complete. The contract allowed Amtrak to audit the contractor's allocations of trade and quantity discounts received from purchases of food and beverages. However, Amtrak has neither requested an audit of the discounts credited to it over the 5 years the contract has existed, nor requested that the contractor certify that all discounts due to Amtrak had been credited to its account. Again, Amtrak was unable to provide us with written documentation supporting its decision or its consideration of this issue. Contractor representatives told us that many discounts are immediately reflected in the prices billed and, therefore, directly provided to Amtrak. They said that other supplier-offered discounts are paid or credited to the contractor retroactively, which are then allocated to individual accounts of the contractor (like Amtrak) on the basis of the percentage of aggregate purchases of the discounted items. Amtrak officials advised us that discounts and rebates totaling \$278,385 and \$278,073 for fiscal years 2003 and 2002, respectively, had been received on gross purchases subject to discounts and rebates of \$3.6 million and \$2.9 million, respectively.<sup>13</sup> Amtrak officials also explained that the majority of rebates are received directly from suppliers and reviewed. However, no formal procedures have been established to review and verify the accuracy of the amount of rebates and discounts actually received from the suppliers. Because Amtrak did not require an independent audit or

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<sup>13</sup>Total purchases by the contractor for Amtrak exceeded \$90 million for the 2-year period, roughly 13 times the amount of purchases the contractor reported as being subject to discounts and rebates.

otherwise analyze the trade and quantity discounts received, it has limited assurance that such amounts were reasonable and complete.

- *Measuring contractor performance.* The contract called for performance standards and measures to assist Amtrak in monitoring and evaluating contractor performance. These standards and measures have not been established in accordance with the provisions of the contract. Amtrak officials explained that these standards are addressed elsewhere in the contract. However, we believe that preparation of formal standards and measures, as called for in the contract, would have facilitated increased oversight. Under the contract, these standards include timeliness and completeness of deliveries, adherence to product specifications, food safety and sanitization practices, proper accounting for stock, and compliance with laws and regulations. Performance measurements could be used to evaluate performance against established performance standards, with the appropriate incentives and penalties applied on the basis of performance. In addition, appropriately used performance standards would be a mitigating control to partially address the risk associated with relying on contractor-produced monthly reports as the basis for payment to the same contractor.

### Contractor Purchases Need More Monitoring

While Amtrak performs several activities to monitor food and beverage purchases by the contractor, these activities could be bolstered. We found that items were purchased at amounts that varied significantly without sufficient explanation or documentation of the variances. Amtrak officials said that they monitored contractor purchases using daily reports that listed quantity, unit size, cost, and the last prior purchase of the previous day's purchases. Also, Amtrak staff at its various commissaries sign off on a daily summary of invoices paid by its contractor and randomly verify the consistence of supplier invoices and receiving documentation. Further, Amtrak makes available to all employees via its intranet, various revenue reports that capture information by train, car type, location, dates, and usage reports that allow the review of stock issued to trains. However, Amtrak has not formally established internal control procedures, which would include ensuring that (1) all reviews are conducted in a timely and consistent manner, (2) identified errors or other issues are documented and tracked, and (3) corrective actions taken are documented to ensure completion. During fiscal years 2002 and 2003, Amtrak's data showed that it incurred \$2 in expense for every \$1 in food and beverage revenue, which resulted in a 2-year loss of over \$160 million.

We used forensic auditing techniques, including data mining,<sup>14</sup> to selectively review over \$80 million of *purchase order information* for fiscal years 2002 and 2003. Our review found that the contractor was generating purchase orders with significant variances in unit order prices during both fiscal years 2002 and 2003. For example, the order prices of a 12-ounce Heineken beer ranged from \$0.43 to \$1.04 per bottle in 2003, the order prices of a 4-ounce beef tenderloin ranged from \$3.37 to \$7.19, and the order prices of a 10-ounce strip steak ranged from \$3.02 to \$7.58. In 2002, the Heineken beer order prices ranged from \$0.63 to \$3.93 per bottle, the beef tenderloin ranged from \$0.30 to \$6.60, and the strip steak ranged from \$3.52 to \$16.35 per portion.

Amtrak officials told us that purchase order information did not always reflect actual amounts paid—either in total or per unit. For example, Amtrak officials said a price change may have occurred between the time an item was ordered and when it was delivered. They also said record-keeping errors may have occurred, and unit prices in the inventory system may, for example, be based on a different pack size than that received or from that used for the last purchase. However, given the importance of purchase orders in a food and beverage operation, it is important that internal control practices include processes to systematically analyze and monitor purchase order information. No such procedures were established by Amtrak.

To determine whether order prices reflected actual amounts paid, we nonstatistically selected 37 payment transactions and reviewed the *underlying supporting documentation* provided by Amtrak, including purchase orders, receiving records, vendor invoices, and evidence of payments. The supporting documentation provided for these transactions identified significant variances in certain unit prices paid during fiscal years 2002 and 2003. For instance, our review of the supporting documentation provided for the 37 payment transactions found payments for the Heineken beer ranged from \$0.43 to \$1.04 per bottle, payments for the beef tenderloin ranged from \$3.05 to \$6.59 per portion, and payments

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<sup>14</sup>Data mining applies a search process to a data set, analyzing for trends, relationships, and interesting associations. For instance, data mining can be used to efficiently query transaction data for characteristics that may indicate potentially improper activity.

for the strip steak ranged from \$4.70 to \$5.28 per portion.<sup>15</sup> Amtrak officials stated that the strip steak examples were “emergency purchases.” However, following our request for documentation to support this claim, the Amtrak senior director of food and beverage service told us on June 29, 2005, that documentation to support the assertion that these were emergency purchases did not exist. The establishment of internal control procedures that require the documentation of the (1) identification and correction of errors and (2) approval for emergency purchases would ensure that adequate documentation is readily available for review by internal and external parties.

We also found that, Amtrak, on the basis of amounts reported by the contractor, paid the contractor each month for the cost of food and beverages purchased for Amtrak, as well as for commissary and associated labor expenses and other expenses incurred—the contract is a reimbursable contract. The contractor was also paid a fee based on the cost of on-board stock. However, Amtrak did not establish adequate internal control to address the potential risk of paying the contractor on the basis of contractor-reported amounts that did not include adequate supporting documentation. During fiscal years 2002 and 2003, contractor-prepared monthly operating statements were the basis for amounts paid by Amtrak totaling over \$138 million to the contractor for goods and services provided. However, because proof of actual contractor payments made to suppliers was not required, and because of the other significant internal control weaknesses we previously listed, Amtrak had limited assurance that the amounts paid to the contractor were valid.

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<sup>15</sup>In our June 2005 testimony on Amtrak's food and beverage service ([GAO-05-761T](#)), we stated that in 2002 Amtrak purchased Heineken beer, in 12-ounce bottles, at a price as high as \$3.93 per bottle. This information was based on the documents provided to us by Amtrak. However, based on additional documents that Amtrak provided us on June 29, 2005, it appears that this purchase was for 10 half-kegs of beer, not 10 cases as indicated on the documents Amtrak previously provided.

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## Amtrak Has Made Progress in Improving Financial Management Practices, but More Work Remains

For fiscal years 2002 and 2003, Amtrak's IPA reported multiple areas of significant internal control weaknesses as part of an annual audit of Amtrak's financial statement.<sup>16</sup> However, for fiscal year 2004, the IPA reported that much progress had been made and only one significant weakness involving accounting for capital assets remained.<sup>17</sup> Amtrak's progress in addressing its control weaknesses is an important achievement. In general, however, its efforts have been achieved primarily through the implementation of manual detective controls instead of preventive controls. Thus, improvements made by the end of fiscal year 2004 enable the production of useful financial information after the fact—typically, 5 to 6 months after the end of the year. However, until effective controls are established that prevent errors in financial information and address their underlying causes, Amtrak's ability to produce relevant and reliable financial information for management and stakeholders to use for decision making will be hampered.

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## Progress Was Made in Addressing Internal Control Weaknesses

In audits for fiscal years 2002 and 2003, Amtrak's IPA noted that the company had made progress in addressing internal control weaknesses that previously had been reported to Amtrak's board of directors. Further, based on its audit of Amtrak's fiscal year 2004 financial statements, the IPA reported that much progress had been made and that only one significant weakness—involving accounting for capital assets—remained. However, the IPA noted that improvement had been achieved primarily from the implementation of manual detective controls compared with preventative

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<sup>16</sup>As of June 27, 2005, Amtrak's IPA had not issued its report on the audit of Amtrak's financial statements for the fiscal year ending September 30, 2004—approximately 9 months earlier; however, on this same day, Amtrak management provided us with a copy of the internal control report from the IPA based on its work on the audit of the fiscal year 2004 financial statements. Our comments on fiscal year 2004 are based solely on the contents of this internal control report.

<sup>17</sup>Amtrak's IPA reported one material weakness in this internal control report. A material weakness, under standards established by the American Institute of Certified Public Accountants, is a reportable condition in which the design or operation of one or more internal control components does not reduce to a relatively low level the risk that errors or fraud in amounts that would be material in relation to the financial statements may occur and be detected within a timely period by employees in the normal course of performing their assigned functions. Reportable conditions are matters coming to the IPA's attention that, in its judgment, relate to significant deficiencies in the design or operation of internal control and could adversely affect the organization's ability to record, process, summarize, and report financial data consistent with the assertions of management in the financial statements.

controls. Such detective, or “back-end,” controls take place after transactions have been recorded and then corrected for misstatements after the fact. These controls are subject to human error, and a loss of key individuals could result in control breakdowns. In addition, it is relatively labor-intensive to ensure that such controls are operating effectively.

We reviewed Amtrak's response to the IPAs findings in fiscal years 2002 to 2003 with respect to internal control weaknesses regarding capital assets and found that Amtrak's response could be improved. We selected this area because of its size and significance—depreciation and amortization represented approximately 20 percent of Amtrak's total operating expenses for fiscal year 2003, and Amtrak's capital assets represent more than 83 percent of its total assets. Amtrak's IPA had identified ongoing problems in this area in fiscal year 2001 audits. Similar to what the IPA observed, we found that Amtrak's response was limited mainly to back-end control procedures—that is, Amtrak looks at transactions after they had been recorded and corrects for misstatements after the fact. Such back-end procedures do not identify core causes of accounting mistakes and prevent the errors from entering the system.<sup>18</sup> In contrast, front-end prevention control practices should, if fully and properly implemented, among other things, improve the usefulness of Amtrak's internal financial information. Importantly, without the appropriate front-end procedures to prevent errors from entering the system, information used by management and external stakeholders for decision making may not be reliable. Potential front-end procedures could include such things as monthly or more frequent reviews for accuracy and appropriateness by management of (1) capital expenditures incurred to date, (2) expected costs to complete against initial and revised project budgets, and (3) all proposed manual journal entries.

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<sup>18</sup>We discussed with Amtrak's IPA the approach Amtrak had taken. Representatives of the IPA told us their work did not extend to considering the appropriateness of the strategy Amtrak employed or whether the approach would be sufficient for interim financial reporting, such as the preparation of monthly reports that are to be provided to management and external stakeholders.



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Other Opportunities to  
Increase the Usefulness and  
Transparency of Financial  
Information Have Been  
Missed

Amtrak management missed several other opportunities to use its IPA's work to increase the usefulness and transparency of its financial information. These opportunities relate to making all audit reports available to the public and expanding the work that the IPA conducts.

Report on Internal Control and  
Compliance Was Not Made  
Public

Amtrak's IPA is engaged to report on the results of the audit of the consolidated financial statements of Amtrak. The IPA reports on the results of the audit of the consolidated financial statements, conducting this work in accordance with *Generally Accepted Auditing Standards* issued by the American Institute of Certified Public Accountants. This set of standards is typically used for audits of publicly and privately owned organizations. Amtrak's IPA is also separately charged with reporting in accordance with generally accepted government auditing standards issued by the Comptroller General of the United States. These standards, which are designed to meet the needs of users of government audits, prescribe two additional reporting requirements—reporting on internal control and reporting on compliance with laws, regulations, and provisions of contracts or grant agreements.

The public sees the results of only one of these efforts. Amtrak tasked its IPA with issuing two reports, but the only report that is publicly available is the report that provides an opinion on the results of the audit of Amtrak's financial statements. The second report, which covers internal control and compliance with laws, regulations, contracts, and grants, is restricted to the use of Amtrak's management and the board of directors. DOT officials told us that they also receive the second report. Many other entities with significant federal ties (through direct subsidies, loan guarantees, or other direct and indirect relationships) receive and make publicly available reports by their IPAs that are in accordance with generally accepted government auditing standards. These entities include the United States Postal Service, Pension Benefit Guaranty Corporation, and Railroad Retirement Board. Amtrak officials were not able to provide us with a distribution list for this second report, and, according to these officials, they had no recollection of these reports being requested by or sent to any external parties.

The concept of accountability for public resources is important in our nation's governing processes. Legislators, government officials, and the public want to know, among other things, whether (1) government

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resources, such as the over \$29 billion in subsidies provided to Amtrak, are managed properly and used in compliance with laws and regulations and (2) services are being provided efficiently, economically, and effectively. The desirability of transparency with respect to audit information on Amtrak's internal control and compliance with laws and regulations is, in our view, high given Amtrak's public mission and the large federal subsidies involved.

### Increasing IPA Role Could Help Improve Information

Amtrak's financial information could also be improved by using additional expertise available from the IPA—some of this expertise is already called for by contract but not utilized. The contract between Amtrak and its IPA called for work addressing compliance with certain federal regulations concerning overhead rates developed and applied to recover indirect costs associated with work performed for outside parties.<sup>19</sup> While the contract contemplated this type of work, Amtrak did not engage the IPA to perform the work. Amtrak could also use the IPA's experience and knowledge by engaging the auditor for additional work related to making its financial information more useful to management. For example, engaging the IPA to review financial statements on an interim basis may have identified opportunities for improvement in the reliability and timeliness of data provided to stakeholders. Further, Amtrak could benefit from engaging an IPA to perform work specific to enhancing the timeliness and reliability of financial information used in monthly reports and for day-to-day decision making by management and external stakeholders. While this increased role by the IPA would not be without cost, the IPA is in a good position to efficiently identify the core causes of errors in financial information and other issues and develop controls and processes to prevent these errors.

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## Conclusions

Although Amtrak has made progress in providing financial information for management purposes, the current information lacks the relevance and reliability needed to support managers and external stakeholders in exercising stewardship over the agency's operations, including federal subsidies. The current information is incomplete, in terms of both what is included and how specifically Amtrak's various train routes and lines of businesses can be evaluated. This information also contains significant errors. These deficiencies point not only to a need to improve financial reporting practices, but also to a deep-seated set of concerns: that is, the

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<sup>19</sup>48 C.F.R. Parts 140 and 646 and 48 C.F.R. Part 31.

types of internal control practices that are needed to help ensure the reliability of financial reporting are not in place. Amtrak's management may be able to correct a number of these issues on its own, but the company is likely to need outside help in developing a comprehensive approach to address internal control weaknesses and improve the financial information for management and external stakeholders.

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## Recommendations for Executive Action

To ensure that Amtrak's financial reporting and financial management practices support sound business decisions and the efficient and effective use of federal funds provided to Amtrak, we recommend that the Secretary of Transportation direct the Federal Railroad Administrator to take the following three actions:

- require Amtrak to submit a plan, which includes specific actions to be taken, anticipated outcomes (consistent with the recommendations outlined below), and completion dates, to improve its financial reporting and financial management practices;
- review and provide Amtrak with feedback and direction, as necessary, on this plan to ensure that the most effective approach(s) to improving financial reporting and financial management practices are implemented; and
- monitor Amtrak's performance under the plan and report, at least annually, to Congress on progress being made by Amtrak regarding improvements of its financial reporting and financial management practices—this report should identify any specific actions either Amtrak or Congress should take to facilitate such improvements.

To improve Amtrak's efforts in addressing financial management challenges and better support management decision making, we recommend that the president of Amtrak take the following eight actions discussed in table 4:

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**Financial Management Practices Could**  
**Better Support Amtrak’s Decision Making**

**Table 4: Specific Recommendations—Financial Reporting and Financial Management Practices**

Issue	Recommendation
<b>Improve usefulness of financial reporting</b>	
Include relevant information in monthly performance reports	<p>Add the following information to monthly performance reports:</p> <ul style="list-style-type: none"> <li>• Food and beverage services: separate revenue and expense information, gross profit analysis, information on the cost of meals, and other metrics basic to a food service operation.</li> <li>• Employee benefits: cost trends, changes in the components of benefit costs, and initiatives to manage these costs.</li> <li>• Each line of business: components of key expense line items and functional activities (such as salaries and benefits), trends in key expense components, differences in actual versus budgeted results, and appropriate performance metrics (such as revenue per passenger mile and expense per passenger mile).</li> <li>• Each train route in the route performance information (RPI): comparative expense and net profitability or loss, amounts for depreciation expense, and amounts for other components of expenses (such as salaries and benefits).</li> </ul>
Increase reliability of information in monthly performance reports	Perform a comprehensive risk assessment of financial reporting processes that support preparation of monthly performance reports and the RPI, to include determining areas of vulnerability, implementing appropriate compensating and mitigating internal controls, and ongoing monitoring to ensure compliance.
Make allocation policies and procedures more transparent	Document policies and procedures related to controlling the information in the monthly performance reports, including the RPI. The policies and procedures should cover how expenses are allocated to Amtrak’s routes, as well as specific guidance on documenting the justification and authorization of changes made to allocation methods.
<b>Improve financial management practices</b>	
Ensure benefit costs are complete and can be recovered in billings to outside parties	Allocate accrued postretirement health benefit expenses among Amtrak’s lines of business and reflect accrued costs in billings for employee benefits under reimbursable agreements with outside entities. Adjust standard benefit expenses rate on a timely basis.
Make compensation decisions more transparent	<p>Modify existing controls:</p> <ul style="list-style-type: none"> <li>• Clearly define all significant terms used in Supplemental Executive Retirement Plan (SERP) determinations (such terms include management committee member, senior staff employee, compensation, financial targets, and performance goals) so that they can be consistently applied throughout the process.</li> <li>• Reconsider the timing of management proposals for SERP awards to ensure that decisions are based on information from audited financial statements.</li> </ul>
Develop internal control enhancements	Develop a comprehensive action plan for immediately implementing preventive controls to enhance the reliability of financial data and address the reportable condition over accounting for capital assets in the most recent reports and letters of comment from the independent public accountant.
Seek assistance in strengthening procedures	<p>Engage an independent public accountant to provide</p> <ul style="list-style-type: none"> <li>• special services as necessary to provide assurance over compliance with federal regulations concerning overhead rates developed and applied to recover indirect costs associated with work performed for outside parties and</li> <li>• review-level attestation work on Amtrak’s quarterly financial statements.</li> </ul>

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**Better Support Amtrak's Decision Making**

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(Continued From Previous Page)

<b>Issue</b>	<b>Recommendation</b>
Enhance accountability and transparency	Continue to have annual audits of its financial statements performed under <i>U.S. generally accepted government auditing standards (GAGAS)</i> and, effective beginning with its fiscal year 2004 financial statement audit, make publicly available the auditor reports prepared under GAGAS reporting standards for financial audits, including those on internal control and compliance with laws, regulations, and provisions of contracts and grants.

Source: GAO.

Recommendations on the findings pertaining to Amtrak's food and beverage service are contained in a separate report issued in August 2005.<sup>20</sup>

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<sup>20</sup>GAO, *Amtrak: Improved Management and Controls over Food and Beverage Service Needed*, [GAO-05-867](#) (Washington, D.C.: Aug. 24, 2005).

# Despite Increasing Operating Losses and Federal Subsidies, Amtrak Has Not Developed a Comprehensive Cost Control Strategy

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Although its operating losses and federal subsidy have been increasing, Amtrak has not developed a comprehensive cost control strategy. While Amtrak's operating expenses have decreased over the past 3 fiscal years, its operating losses have grown each year and are now over \$1 billion<sup>1</sup> annually. These losses are projected to increase by about 40 percent over the next 4 years. Amtrak's cost-cutting focus has been on creating and monitoring its yearly operating budget and managing headcount levels, with its various departments deciding how much emphasis, if any, to place on any other cost control actions. However, such cost control actions have not been integrated into a comprehensive cost control strategy. Without a comprehensive strategy for containing costs, Amtrak will likely miss opportunities to reduce its operating losses. Furthermore, Amtrak does not have complete and reliable cost data that would support a comprehensive strategy. Without these data, Amtrak has limited ability to understand its corporate and unit costs and to identify where potential cuts might be most effective. Finally, Amtrak needs to continue to employ widely used industry cost reduction practices—such as benchmarking, outsourcing, and efficiency reviews—to help decrease its operating costs.

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<sup>1</sup>All dollar figures in this chapter are adjusted to constant 2004 dollars, unless otherwise noted.

**Amtrak's Annual  
Operating Loss Has  
Grown to over \$1  
Billion and Is Projected  
to Increase to over \$1.4  
Billion, While Federal  
Subsidies Have  
Increased**

Although Amtrak's operating expenses have decreased, Amtrak's annual operating loss (total revenues minus operating expenses) has grown to over \$1 billion each year over the last 3 fiscal years. During this same period, Amtrak's federal operating subsidy<sup>2</sup> increased over 200 percent, from about \$200 million in fiscal year 2002<sup>3</sup> to over \$700 million in fiscal year 2005.<sup>4</sup> Amtrak is projecting that its federal operating subsidy will remain stable from fiscal years 2006 to 2009, but that its operating losses will increase about 40 percent to over \$1.4 billion by fiscal year 2009.<sup>5</sup> (See fig. 12.)

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<sup>2</sup>Amtrak's federal subsidy—separated as operating and capital subsidies—is distributed as a grant from FRA. Operating subsidies generally support Amtrak's day-to-day operations, including operating and maintaining rolling stock (locomotives and passenger or other cars), tracks, and stations. Amtrak's capital subsidy is designed for the acquisition or improvement of the railroad's rolling stock and infrastructure.

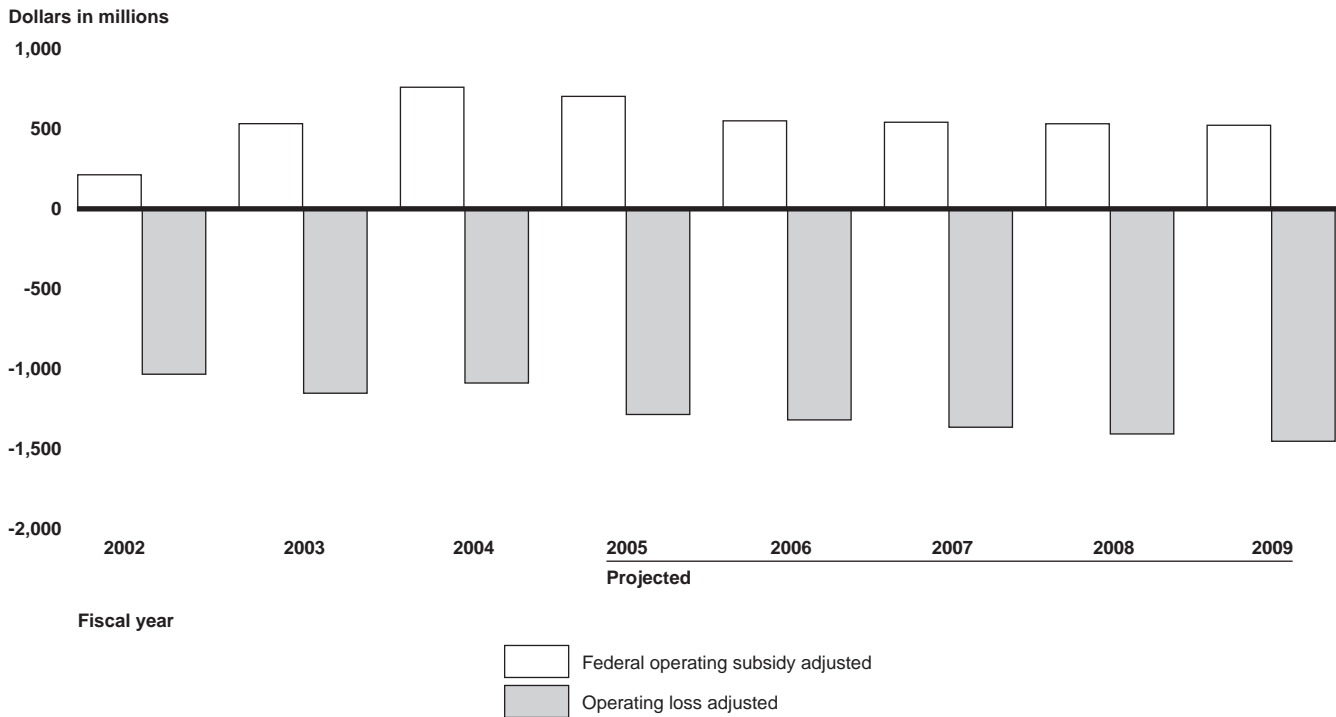
<sup>3</sup>The amount for Amtrak's operating support in fiscal year 2002 does not include the following: \$230 million in capital for maintenance, which, according to Amtrak officials, Amtrak considers an operating expense; \$105 million appropriated for various security and life safety improvements; or FRA's fiscal year 2002 \$100 million emergency loan to Amtrak.

<sup>4</sup>As shown in chapter 1, Amtrak's total federal subsidy since 1971 has been variable—ranging from about \$9 million in fiscal year 1973 to over \$1.7 billion in fiscal year 1999.

<sup>5</sup>For this report, we focused on Amtrak's expenditures, rather than revenues.

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**Figure 12: Amtrak's Constant Dollar Operating Losses and Federal Operating Subsidy, Fiscal Years 2002 to 2009**



Source: GAO analysis of Amtrak and Federal Railroad Administration data.

Note: Amounts are in constant 2004 dollars. Fiscal years 2005 to 2009 figures for operating loss and federal subsidy are Amtrak projections. Operating losses from fiscal year 2002 to 2004 and projected losses from fiscal years 2005 to 2009 do not include interest expenses.

Amtrak's operating loss projections may be understated, however, since they do not include interest expenses<sup>6</sup> and rely on \$377 million in operating efficiencies that Amtrak estimates it could achieve as a result of operating efficiencies and benefits from capital investments in its Fiscal Year 2005 to 2009 Strategic Plan. In its April 2005 Strategic Reform Initiatives proposal, Amtrak estimates that it can achieve operating savings of nearly \$550 million by fiscal year 2011. To achieve these savings, however, all of the elements in the reform proposal must be implemented, including the following: receiving an 80 percent federal capital match for state intercity passenger rail funds, realizing increased revenues from passengers,

<sup>6</sup>Amtrak's interest expenses (net of interest income) averaged over \$140 million between fiscal years 2002 and 2004 (in constant 2004 dollars).



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obtaining additional state operating contributions for corridor trains, and eliminating all of its legacy debt by the federal government. (See table 5.)

**Table 5: Assumptions in Amtrak's Strategic Reform Initiative for Fiscal Year 2011 Operating Savings**

Dollars in millions	
<b>Assumptions</b>	<b>Proposed savings</b>
<b>Revenue enhancements</b>	
Cumulative benefit from gas price increases	\$80
Customer service enhancement benefit	100
Proportionate share access payment increase from Northeast Corridor commuter agencies	30
Additional state operating contributions from fully allocated costing on all corridor trains	115
Additional state operating contributions from fully allocated costing on all long-distance trains	15
<b>Subtotal</b>	<b>\$340</b>
<b>Cost reductions</b>	
Outsourcing	\$90
Productivity	60
Phase-out of Railroad Retirement Tax	55
<b>Subtotal</b>	<b>\$205</b>
<b>Total</b>	<b>\$545</b>

Source: GAO analysis of Amtrak data.

Note: This table does not include the financial impact of a working capital infusion or other assumptions, such as no restructuring charges, from fiscal years 2006 to 2011.

These projections also do not take into account the removal in April 2005 of Amtrak's Acela trainsets from service for an undetermined period due to brake-related problems. The absence of Acela trains could have a significant impact on Amtrak's fiscal year 2005 revenues.<sup>7</sup>

Both Amtrak's revenues and total expenses decreased between fiscal years 2002 and 2004. Amtrak's revenues decreased by over 16 percent, and its

<sup>7</sup>Amtrak's senior vice president of operations recently stated that Amtrak is losing over \$1 million each week the Acela trainsets are out of service. According to Amtrak's May 2005 monthly performance report, between April 15 and May 31, 2005, Amtrak lost \$17.5 million in revenue as a result of the Acela trainsets being out of service.

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total expenses decreased by over 9 percent.<sup>8</sup> Amtrak's revenues decreased more than its expenses by over \$50 million. (See table 6.) The relationship between these decreases in both revenues and expenses can be reflected by the change in Amtrak's operating ratio, which shows that for every \$1.00 in revenue, Amtrak spent \$1.51 in fiscal year 2002. In fiscal year 2004, this increased to \$1.63. As of July 2005, this number for the fiscal year to date decreased slightly to \$1.61.

**Table 6: Amtrak's Real Total Revenues, Operating Expenses, Total Expenses, and Operating Ratios, Fiscal Years 2002 to 2004**

Dollars in thousands

Description	Fiscal year <sup>a</sup>			Change from fiscal years 2002 to 2004 <sup>b</sup>
	2002	2003	2004	
Total revenues <sup>c</sup>	\$2,313,642	\$2,117,908	\$1,931,512	\$(382,130)
Operating expenses <sup>d</sup>	2,849,451	2,652,004	2,450,472	(398,979)
<b>Operating ratio<sup>e</sup></b>	<b>1.23</b>	<b>1.25</b>	<b>1.27</b>	<b>0.04</b>
Total expenses <sup>f</sup>	\$3,488,917	\$3,417,610	\$3,158,016	\$(330,901)
<b>Total revenue to total expense ratio</b>	<b>1.51</b>	<b>1.61</b>	<b>1.63</b>	<b>0.13</b>

Source: GAO analysis of Amtrak data.

<sup>a</sup>Amounts for fiscal years 2002, 2003, and 2004 include mail and express revenues and expenses. For fiscal year 2004, operating expenses and total expenses do not include \$82.4 million in noncash special charges for discontinuance of mail and express service.

<sup>b</sup>Amounts may not equal due to rounding.

<sup>c</sup>Total revenues exclude federal operating subsidies.

<sup>d</sup>The operating ratio is calculated as operating expenses divided by total revenues. Operating ratios more than 1 indicate total operating expenses are higher than total revenues.

<sup>e</sup>Total operating expenses do not include interest or depreciation expenses.

<sup>f</sup>Total expenses include interest and depreciation expenses.

The reasons for decreasing revenues and expenses include the following:

- *Revenues:* The termination of the Massachusetts Bay Transportation Authority (MBTA) commuter rail contract resulted in a \$150 million revenue loss in fiscal year 2004, or about 40 percent of the total

<sup>8</sup>Fiscal year 2004 total expenses include depreciation and net interest expenses but do not include a one-time special charge of \$82.4 million in noncash expenses Amtrak took as a result of termination of its mail and express business.

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reduction in Amtrak's revenue. Revenues also decreased in part because Amtrak phased out its mail and express freight line of business in fiscal year 2004.<sup>9</sup>

- *Operating expenses:* Decreases occurred in most of Amtrak's major expense categories. Labor costs, Amtrak's largest single expenditure category, accounted for about \$200 million, or over 60 percent, of the overall decrease in expenses. Amtrak reduced its overall labor costs alone by almost 12 percent from fiscal years 2002 to 2004. This reduction was mainly achieved by reducing employees by about 3,500 over the same time period; about 1,500 of this reduction was due to the termination of the MBTA contract.<sup>10</sup>

Amtrak will likely face challenges to reduce its operating costs through reductions in labor costs in the future. Amtrak's labor costs account for almost 50 percent of its total expenditures in fiscal year 2004. The labor force is about 85 percent unionized; therefore, attempts to reduce labor costs for much of Amtrak's labor force must be negotiated with the unions. According to Amtrak officials, by April 2005, Amtrak had signed contracts with 3 of its 15 unions, representing about 37 percent of Amtrak's union workforce. If the pattern from these three agreements extends to the agreements with the other unions, Amtrak officials estimate that wage costs could increase by almost 10 percent over the 5-year life of the agreements. Amtrak officials expect that each labor union settlement will include this same level of wage increase, since Amtrak has extended this level of wage increase to every union as part of its initial offer in the current bargaining round. Amtrak's labor relations officials are negotiating changes to work rules to increase productivity and lower headcount, which could lower labor costs. However, since Amtrak does not keep formal track of labor productivity savings or have labor productivity measures for its workforce, it is unclear how Amtrak will know if these savings are actually being achieved. As union labor wages increase and other labor cost reductions are uncertain, Amtrak may be pressured to reduce other costs in order to achieve significant reduction in its operating costs.

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<sup>9</sup>Part of the revenue decrease between fiscal years 2003 and 2004 can also be attributed to a one-time \$30 million sale of assets in fiscal year 2003.

<sup>10</sup>Amtrak operated MBTA's trains and maintained their equipment and infrastructure under a contract that ended on June 30, 2003.

According to Amtrak officials, Amtrak may be able to offset other cost increases, such as health care costs, by introducing employee contributions toward health insurance premiums. Prior to the current round of labor negotiations, union employees did not contribute toward their health insurance costs, which constituted about 18 percent of Amtrak's total labor costs in fiscal year 2004. Amtrak officials stated that Amtrak has successfully implemented employee contributions in the three agreements it has already signed, and that these contributions are a part of Amtrak's initial negotiation offer to each of its unions.<sup>11</sup> However, since both work rule changes and employee health care contributions are subject to negotiation with each labor union, it is uncertain if Amtrak will be able to implement them across its workforce.

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## **Amtrak Has Not Developed a Comprehensive Cost Control Strategy**

Amtrak has not developed a comprehensive cost control strategy that uses performance or cost information to most effectively direct its cost control efforts. In our work on GPRA, we noted that leading organizations in the public and private sector—in their efforts to improve performance while reducing costs—use performance information as a basis for allocating scarce resources and for assessing which of their processes are in the greatest need of improvement in terms of cost, quality, and timeliness. In particular, we found that no picture of how taxpayers' money is being spent is complete without adequate cost and performance information. By analyzing the gap between where they are and where they need to be in order to achieve desired outcomes, management in leading organizations can target those processes that are in the most need of improvement, set realistic improvement goals, and select appropriate improvement techniques.<sup>12</sup>

We found examples of comprehensive cost strategies at several of the railroads we studied. One freight railroad, for example, adopted a corporatewide review of its entire cost structure to identify less incremental and more strategic cost saving opportunities. Railroad officials said this effort, under its chief financial officer, resulted in \$90 million to \$100 million in cost savings per year. VIA Rail, Canada's intercity passenger

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<sup>11</sup>In the three agreements signed, employees are ultimately expected to contribute \$75 per month toward their health insurance premiums.

<sup>12</sup>GAO, *Executive Guide: Effectively Implementing the Government Performance and Results Act*, GAO/GGD-96-118 (Washington, D.C.: June 1996).

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rail company, also has had a focused corporatewide effort to reduce costs since its government funding decreased in the early 1990s. Since that time, according to VIA Rail officials, VIA Rail has maintained its corporatewide cost reduction efforts in large part due to its fixed subsidy level from the Canadian government. Because VIA Rail's management knows that it will receive a set amount every year in government subsidy and no more, it has a clear incentive to contain its costs below its revenues and subsidy amount. VIA Rail is further incentivized to reduce costs because any amount of the federal subsidy not spent can be set-aside by the railroad for future use.

Amtrak's efforts to develop a cost control strategy or to obtain the information necessary to do so have been unsuccessful. For example, Amtrak's chief financial officer announced a department goal for fiscal year 2003 "to develop system-wide costs and standards for major activities," which would "provide a better understanding of its cost structure, leading to better [cost] control." However, Amtrak's former chief financial officer stated that this goal "did not take off," leaving no effective corporatewide impetus or action plan to ensure it was implemented. Amtrak's controller cited two reasons why Amtrak has not created a corporatewide cost containment strategy. First, Amtrak does not have any detailed benchmarks (i.e., information or standards) available that could be used in its efforts to create corporatewide cost information. Amtrak has not developed reliable and accurate unit cost information or standards to construct benchmarks because it has no reliable cost information on which to base them. Second, Amtrak does not have an integrated, reliable, or timely way to track and collect cost information across all departments. Amtrak's controller told us that Amtrak's current financial software was not designed to capture cost information from different departments across the country. The software currently in use has been implemented piecemeal over time, making it difficult for different versions to interact and share data.

Amtrak's acquisition function is a good example of the company's difficulties in identifying costs and cost saving opportunities. Although Amtrak officials told us that they analyzed procurement spending, we subsequently found that they were unable to conduct an enterprisewide

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spend analysis<sup>13</sup> to develop a picture of what the company is spending on goods and services and to identify those cost areas for strategic sourcing<sup>14</sup> and potentially substantial savings opportunities. When we asked Amtrak for examples of a spend analysis, it took company officials several months to provide such examples, and what was provided was primarily a compilation of savings that had been achieved through various procurement department initiatives. On the basis of data provided, we could not determine how much, if any, of these savings had been achieved through an analysis of spending. Procurement officials subsequently explained that no specific individual or group within the department is responsible for conducting a spend analysis, and there is no systematic process for conducting such analyses. Rather, Amtrak officials told us that all procurement department staff are responsible for identifying cost savings opportunities. Moreover, while not disagreeing with the value of a spend analysis, procurement department officials indicated that such analyses would be extremely difficult without a system that accurately produced the necessary data—a system that does not currently exist at Amtrak.

Setting up a spend analysis program can be challenging, according to our prior research on leading companies that have used this tool to reengineer their approach to procurement and produce billions of dollars in savings.<sup>15</sup> Like Amtrak, companies have had problems accumulating sufficient data from internal systems that (1) do not capture all of what a company buys or (2) are being used by different parts of the company but are not connected. What private companies and federal agencies are doing to overcome the data challenges could serve as a guide to improving Amtrak's ability to conduct a spend analysis to strategically reduce procurement costs. Private

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<sup>13</sup>A "spend analysis" is a tool that provides companies with knowledge about how goods and services are being acquired, about the amount spent, and about who is doing the buying and supplying. Conducting a spend analysis also provides opportunities to leverage buying power and reduce costs for commonly purchased goods and services.

<sup>14</sup>"Strategic sourcing" is a process used by leading commercial companies and a small number of federal agencies to establish an organizationwide approach to leveraging the organization's buying power and fostering new ways of doing business.

<sup>15</sup>GAO, *Best Practices: Using Spend Analysis to Help Agencies Take a More Strategic Approach to Procurement*, [GAO-04-870](#) (Washington, D.C.: Sept. 16, 2004); *Best Practices: Improved Knowledge of DOD Service Contracts Could Reveal Significant Savings*, [GAO-03-661](#) (Washington, D.C.: June 9, 2003); and *Best Practices: Taking a Strategic Approach Could Improve DOD's Acquisition of Services*, [GAO-02-230](#) (Washington, D.C.: Jan. 18, 2002).

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companies have developed formal, centralized spend analysis programs through the use of five spend analysis key processes—automating, extracting, supplementing, organizing, and analyzing data.<sup>16</sup> Companies that use a spend analysis find that they are buying similar products and services from numerous providers, often at greatly varying prices. For example, one company conducted a spend analysis of the telecommunications services it used and reduced the number of vendors from three to one, thereby saving \$3.2 million in the first 8 months of the new contract.<sup>17</sup>

Similarly, other railroads confirmed the value of spend analyses as well as the need to have consolidated, organized, and reliable procurement data to conduct such an analysis. For example, officials at VIA Rail indicated that they have not yet conducted a central, comprehensive analysis of their spending because they have not had the necessary information systems. However, they have worked to improve their systems to a level that will permit this type of formal, centralized spend analysis. An official at another freight railroad indicated that the railroad has a department specifically dedicated to conducting spend analyses and identifying ways to maximize the cost-effectiveness of certain procurements. While this department does not analyze the railroad's procurement spending across the board, it can identify companywide areas for coordinated purchasing and potential cost savings. Like the commercial best practices identified in our prior work, members of this cross-functional group are drawn from other departments, such as the finance department and a user department (a department that needs acquisition services), to work on special projects and analyze spending in given areas and to work closely with the procurement department.<sup>18</sup> This department found that they could save \$4.9 million in 1 year by paying for prep work services (maintenance or repair services) for freight cars on a per car basis, rather than by the hour. This new approach provides an incentive for the service provider to work more efficiently.

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<sup>16</sup>GAO-04-870, pp. 5-9.

<sup>17</sup>GAO-02-230, p. 10.

<sup>18</sup>GAO-02-230, GAO-03-661, and GAO-04-870.

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## Amtrak's Management Tools Do Not Constitute a Comprehensive Cost Control Strategy

Amtrak currently seeks to control costs through the use of five management tools,<sup>19</sup> which Amtrak's president has used to manage and try to stabilize Amtrak's financial situation. For example, according to Amtrak officials, Amtrak's management uses its annual budget to focus on the structure and size of Amtrak's labor force, which has facilitated Amtrak's making labor force reductions—resulting in lower labor costs. However, even though they are implemented across the company, these tools alone do not constitute a corporatewide cost control strategy. These tools are not a part of a corporatewide plan that identifies cost goals, identifies how these goals are to be achieved, and provides for the continuous improvement on those goals. For example, Amtrak's monthly performance reports, while providing information about past performance, does not provide any explicit cost reduction goals or identify ways to reduce costs.

In the absence of a corporatewide cost containment strategy, Amtrak's cost control efforts, outside of using its five management tools, have been largely unfocused and inconsistently applied throughout the company. According to Amtrak finance officials, Amtrak's focus has been on producing and monitoring its annual operating budget, among other things, which has taken emphasis away from a more strategic view of its cost structure. Amtrak's executive management provides verbal guidance on department goals each year, but each department then individually chooses what costs to focus on when creating their goals. Consequently, each department's management decides how much focus (if any) to place on cost containment. This practice may lead to a narrow focus on specific costs or lead to conflicting cost containment efforts among departments. For example, Amtrak's chief engineer said that, without strategic coordination and planning, a goal to reduce overtime in the engineering department could lead to an increase in repair times for signals on the Northeast Corridor, which in turn could lead to significantly increased train delays. This situation could adversely affect the transportation and other departments.

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<sup>19</sup>As discussed in chapter 1, Amtrak's five management tools include the following: clear goals and objectives, defined organization charts, zero-based operating budget, capital program, and monthly performance reports.



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## Lack of Cost Data Limits Amtrak's Ability to Identify Areas to Efficiently Reduce Costs or to Measure the Results of Cost Control Actions

In our work on effectively implementing GPRA, we found that in establishing unit cost information, an organization can

- demonstrate the cost-effectiveness and productivity to stakeholders,
- link levels of performance with budget expenditures,
- provide baseline and trend data for stakeholders to compare performance, and
- provide a basis for focusing an organization's efforts and resources to improve its performance.<sup>20</sup>

The railroad industry is an asset-intensive business, and the efficient performance of those assets is critical to the financial performance of any railroad. For example, unit cost metrics, such as cost-per-passenger revenue mile, cost-per-locomotive overhaul, or cost-per-mile of rail replaced, could show the cost performance of each of Amtrak's core functions (e.g., transportation, maintenance of equipment, and maintenance of track and infrastructure). However, Amtrak has not fully developed unit cost and asset performance metrics like these that could demonstrate the efficient use of its resources and help to identify and reduce costs.

Most of the freight railroads we contacted, as well as VIA Rail, used unit cost and performance metrics to inform their business decisions in key areas, such as transportation, maintenance of equipment, and maintenance of infrastructure. As one railroad executive stated, unit cost and performance metrics are "predictive tools to understand how improvement translates into increased revenue, lower expenses, and/or higher profits." In addition, the Association of American Railroads has developed a set of asset performance metrics for the freight railroad industry, such as ton-miles per employee, ton-miles per locomotive, and ton-miles per dollar of operating expense, to show how efficiently that industry uses its assets and spends its money relative to output.

In 2000, we reported on the importance of these measures for Amtrak because these measures indicate the efficiency with which Amtrak's

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<sup>20</sup>GAO/GGD-96-118.

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resources, such as labor, are being utilized.<sup>21</sup> We said that without productivity metrics, Amtrak can neither demonstrate nor manage the efficiency of its individual resources. For example, Amtrak uses production statistics like overall ridership, number of overhauls completed, or miles of rail replaced to demonstrate production in its core activities. Amtrak believes that recent increased production in these core activities, when combined with its recent decrease in employees, show that it is “doing more with less.” However, as we previously noted, a significant portion of the reduction in Amtrak’s headcount came from the termination of MBTA and mail and express freight services—not necessarily from finding efficiencies while offering the same level of service. Without unit cost or asset performance metrics, it is unclear how well Amtrak is performing per unit of production, how well it is utilizing any specific asset, or where it could most effectively target its cost reduction efforts.

Some of Amtrak’s departments are now beginning to develop some unit cost metrics for selected maintenance of equipment and infrastructure functions, such as cost per car or locomotive overhauled. These efforts, which involve creating new metrics and data systems, have not yet been coordinated across the company and have proven to be challenging. One obstacle encountered so far is the lack of detailed data. For example, Amtrak’s chief mechanical officer stated that the mechanical department had to first redesign the way information was gathered in their maintenance facilities to create meaningful unit cost statistics per car or locomotive overhauled, inspected, or repaired. Current cost benchmarks for labor and material costs were developed when the mechanical department’s system was first implemented but have not been updated with new labor rates or material prices—making estimation and benchmarking for these costs unreliable until new information is gathered.

Labor cost figures are also unreliable, since there is no link between Amtrak’s payroll system and the mechanical department’s system. Department officials stated that they plan to add links to Amtrak’s payroll and add material cost and ordering capabilities to their current system once it is stabilized. A department official stated that testing of the link to Amtrak’s payroll system has started, and the department is planning to fully implement the link by the end of fiscal year 2006. In addition, a mechanical department official stated that there are no production statistics available prior to fiscal year 2003, thereby forcing the department to construct new

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<sup>21</sup>[GAO/RCED-00-138](#).

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baseline production statistics for each maintenance facility. Department officials attributed this lack of data to several recent reorganizations, the storage of data in several unconnected computers, and the departure of several key department staff. Department officials also stated that because Amtrak's approach to equipment maintenance has changed since fiscal year 2002, any production statistics that were available would not be directly comparable.

According to Amtrak's chief engineer, the engineering department is also currently designing an Internet-based system using Global Positioning System devices in maintenance vehicles to help gather data about how much time maintenance crews spend on maintenance tasks. The department plans to use these data in developing unit cost information. Prior to implementing this project, the department did not have a mechanism for gathering accurate cost data. Further, the department has just started to set productivity benchmarks and will soon begin an infrastructure inventory. According to the chief engineer, this system will take about a year to implement and to begin gathering data. This information will be used to begin establishing cost and productivity benchmarks. Using the information gathered by this new system, the engineering department hopes to achieve 3 to 4 percent productivity gains each year for the next 5 years.

A lack of detailed data also prevents Amtrak from creating more comprehensive corporatewide efficiency metrics. Amtrak does have some corporatewide efficiency metrics that demonstrate overall corporate revenue and expense performance. These metrics include ticket and passenger revenue per passenger mile and total and core revenues and operating expenses per seat mile.<sup>22</sup> However, these metrics do not demonstrate asset performance, such as output per unit of labor or per gallon of fuel consumed. The latter data would give insight into how efficiently Amtrak is utilizing its assets. When we tried to emulate some of Association of American Railroad's corporate performance metrics for Amtrak, we found that Amtrak could not provide comparable output or asset data to allow for the creation of some of the measures. For example, we could not create a clear revenue-per-passenger-mile-per-employee measure. Although Amtrak could provide the number of revenue passenger miles for its core intercity passenger business, it could not provide the

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<sup>22</sup>"Core revenues and operating expenses" refer to those revenues and expenses for Amtrak intercity passenger rail train operations. They do not include commuter rail service.

number of employees broken out between its different lines of business. An Amtrak official stated that because some employees work across its different lines of business, this breakout could not be completed.

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## Amtrak Should Continue to Use Common Rail Industry Practices in Focusing on Its Cost Control Efforts

Amtrak has implemented some commonly used rail industry practices—such as benchmarking, outsourcing, and efficiency reviews of operations—to contribute to its cost control efforts. Amtrak could also identify more opportunities to use these practices. Doing so would allow Amtrak to compare its practices with those of more efficient railroads and other transportation sector businesses to help decrease Amtrak’s operating costs. Examples of actions Amtrak could take in this area include the following:

- *Benchmarking*: Officials at most of the freight railroads we spoke with stated that they compared their cost containment strategies against their competitors in the industry. Such comparisons may be beneficial to share best practices within the industry. While some Amtrak departments have used benchmarking to improve their safety and other practices, other departments could use the same techniques to learn best practices and benchmark themselves against the best railroads and other organizations to improve performance. DOT officials also believed that Amtrak needs to do a better job at developing benchmarks for assessing performance, and that such benchmarks should be based on other passenger transportation providers, such as airlines.
- *Outsourcing*: Officials at some of the railroads we interviewed told us that they have outsourced some of their noncore functions to reduce their operating costs. For example, all of the freight railroads we contacted have contracted out some of their functions, such as car and locomotive maintenance services or legal representation, to outside contractors. Amtrak officials stated that they have been very aggressive in their use of outsourcing. They said Amtrak has outsourced half of its engineering functions; most of its information technology work; and some of its mechanical function, including locomotive painting and some wreck repairs. Amtrak officials stated that they are looking to outsource more locomotive repair activities in the future, including overhauls of its Acela trainsets. Recently, Amtrak has tentatively identified other noncore functions that it could outsource to outside contractors, such as janitorial/cleaning and food service functions. In addition, Amtrak’s April 2005 Strategic Reform Initiatives noted that accurate cost statistics for those functions would have to be created in

order to compare Amtrak's cost performance against any prospective contractor's cost performance.

- *Efficiency reviews:* One railroad official with whom we spoke said that his railroad had hired operational and process engineers to study the railroad's internal processes, route schedules, and yard operations to find out how to improve these functions and reduce their operating costs. Another railroad had internal cross-functional teams—comprising departments such as train operations, engineering, finance, and others—that continually analyzed up to seven different areas of operating costs, implemented ways to reduce costs, and tracked the resulting savings. An outside consulting firm studied Amtrak's operations and organization in fiscal year 2001. This review recommended several changes to reduce or control costs, including, among other things, increasing employee productivity, reducing crew sizes and overtime expenditures, and reducing food and beverage costs. However, not all of these findings were implemented nor were any resulting savings tracked because changes in Amtrak's leadership, and its subsequent reorganization, changed Amtrak's focus, according to Amtrak officials.

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## Conclusions

With operating losses having reached \$1 billion and projected to increase even more, Amtrak's cost reduction efforts need to have as much impact as possible. Cost containment efforts are of particular interest for the federal government because without significant progress in reducing operating losses, substantial and continued federal subsidies will likely be needed to keep the company solvent. Our review of Amtrak's cost containment efforts indicates that Amtrak has opportunities for a more corporatewide approach for containing costs—for example, it can ensure that all relevant departments are taking meaningful steps to examine such issues as ways to reduce injuries or overtime. While Amtrak has looked to outsource functions to reduce costs, there are also indications that it can learn from other railroads' efforts in this regard as well as from these railroads' efforts to benchmark performance and conduct efficiency reviews. However, developing a successful strategy will be challenging, if not impossible, unless Amtrak can develop comprehensive and reliable cost data. A lack of cost standards and benchmarks, coupled with the lack of corporatewide integrated data collection software, will continue to prevent Amtrak from obtaining the detailed information it needs to understand its cost structure and to develop a sound strategy for attacking costs.

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## **Recommendations for Executive Action**

To ensure that Amtrak can better meet the challenge of increasing its efficiency and reducing its operating costs, we recommend that the president of Amtrak take the following four actions:

- comprehensively assess Amtrak's cost structure and the performance of its assets;
- establish efficiency and unit cost measures with clear inputs to benchmark individual asset and corporate productivity, which will demonstrate efficient use of Amtrak's resources;
- develop a cost containment strategy that uses these new cost measures and guides the cost reduction actions across all departments; and
- continue the use of and seek more opportunities to use cost containment practices that are widely used in the railroad industry, including a spend analysis of goods and services procured, benchmarking, outsourcing, and efficiency reviews.

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# Amtrak's Acquisition Function Is Limited in Promoting Efficiency, Cost-effectiveness, and Accountability

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Amtrak's system for acquiring goods and services, which accounts for an estimated \$500 million to \$600 million in annual expenditures for the company, is missing critical elements necessary for efficient, cost-effective purchasing. Our past work in assessing the effectiveness of the acquisition function in leading organizations shows that several elements are key to ensuring that sound purchasing processes are being followed and to promoting efficiency, cost-effectiveness, and accountability. These elements include placing the function appropriately in the organization and backing it with organization leadership, creating and enforcing clear and consistent policies and procedures throughout the organization, and ensuring that its knowledge and information system<sup>1</sup> can provide meaningful and reliable data.

Amtrak's acquisition function, while improving, continues to face challenges in all three areas. First, although Amtrak has centralized and elevated its procurement function, there is still ample evidence to show that other departments have made sizable acquisitions without involving the procurement department. This practice can limit Amtrak's ability to obtain goods and services at the most economical prices or to otherwise protect the company. Second, in the past, Amtrak did not adequately communicate or enforce its procurement policies and procedures, limiting its ability to ensure that sound contracting practices are followed. Amtrak has recently taken actions that may help in this regard, including developing a procurement manual, conducting more training, and monitoring purchases more thoroughly. Finally, an inadequate knowledge and information system limits Amtrak's ability to analyze spending and identify opportunities for potential cost savings. As a result, Amtrak cannot ensure that its resources have been utilized appropriately when acquiring goods and services.

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## Effective Acquisition Requires Key Organizational Elements

Our body of work on acquisition best practices has identified several factors that can help organizations better ensure that their procurements

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<sup>1</sup>An effective knowledge and information system is an enterprisewide system that integrates financial and operating data to support both management decision making and external reporting requirements.

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are undertaken in an efficient and effective manner.<sup>2</sup> As figure 13 indicates, these factors include a company's or agency's organizational leadership and alignment, acquisition policies and procedures, and knowledge and information management system.<sup>3</sup>

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**Figure 13: Organizational Elements Critical to Effective Acquisition**

**Organizational leadership and alignment**

The appropriate placement of the procurement function within an organization can facilitate effective management of acquisition activities, including planning and overseeing acquisitions throughout the organization. In addition, organization leaders need to create a climate that fosters good acquisition practices.

**Policies and procedures**

To facilitate effective planning, award, administration, and oversight of contracts, and to help ensure the best value for goods and services, the organization must have clear, consistent, and enforceable policies and procedures. Internal controls and performance and accountability measures help to ensure that policies and procedures are implemented and have the desired outcomes.

**Knowledge and information management**

To make informed strategic decisions aimed at reducing costs, improving service levels, measuring compliance, and managing providers, the organization must have a knowledge and information system that can produce meaningful and reliable data.

Source: GAO-04-544, p. 2.

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## Elevating Procurement Function in Organization Structure Has Not Yet Resulted in a More Strategic Approach to Acquisition

An effective acquisition function requires the appropriate placement within the organization, leadership's fostering of good acquisition practices, and a strategic focus toward acquisition planning and management throughout the company.<sup>4</sup> To its credit, Amtrak has made improvements to its procurement function, particularly related to its organizational leadership and alignment. For example, after Amtrak's current president eliminated the SBUs in 2002, the procurement units from each of the SBUs were centralized into a single procurement department, and the department head was elevated to the level of vice president, reporting directly to the

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<sup>2</sup>GAO, *Transportation Security Administration: High-Level Attention Needed to Strengthen Acquisition Function*, GAO-04-544 (Washington, D.C.: May 28, 2004).

<sup>3</sup>A fourth factor identified in GAO-04-544 concerns human capital issues, which we do not address in this report.

<sup>4</sup>GAO, *Homeland Security: Successes and Challenges in DHS's Efforts to Create an Effective Acquisition Organization*, GAO-05-179 (Washington, D.C.: Mar. 29, 2005).



president.<sup>5</sup> In previous years, the procurement department had been part of Amtrak's finance department, which, according to the vice president of the procurement department, made it difficult to ensure the use of sound acquisition practices. He also said that elevating his position to the level of other key departments within the organization, such as operations, marketing, and finance, provided him with more authority to oversee and enforce acquisition policies throughout the company. Additionally, Amtrak adopted a new electronic system—known as eTrax—that tracks the acquisition process and allows for greater oversight. For example, this system includes controls over purchase requisitions prepared by user departments—those departments that need acquisition services—as well as controls over payment requests, a tool used for small dollar purchases.

Further, adherence to acquisition policies has taken on greater significance as a result of the grant agreement between FRA and Amtrak. As we discussed in chapter 1, the grant agreement requires Amtrak to follow procurement standards that ensure that goods and services are acquired in a cost-effective manner and in compliance with applicable federal statutes and executive orders. Although FRA is responsible for ensuring compliance with procurement standards, its oversight has been limited because of a lack of resources. FRA officials have told us that they have had to rely on Amtrak for assurance that they are in compliance with the requirements of the grant agreement. An FRA official told us that, although the grant agreement for fiscal years 2003 and 2004 included language that Amtrak comply with federal procurement standards, it was not until the fiscal year 2005 grant agreements that Amtrak, for the first time, was expected to fully comply with the procurement standards in the grant agreements. This compliance includes seeking, to the maximum extent practicable, competition in the acquisition of goods and services. The FRA official said that, in fiscal years 2003 and 2004, FRA was concerned about whether Amtrak could comply with such standards, and, therefore, the standards were not strictly enforced.

Despite these attempts to oversee and increase controls over the acquisition process, the procurement department has yet to become fully integrated into Amtrak's planning and management process, limiting the

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<sup>5</sup>Currently, the procurement department is responsible for the acquisition of goods and services throughout Amtrak, with the exception of acquiring outside legal services, labor arbitration agreements, executive recruitment search services, electric propulsion agreements, and audit and investigative services.

extent to which good acquisition practices have spread throughout the organization. When planning spending for service acquisitions, user departments have often functioned independently of the procurement department and made spending decisions without coordinating or partnering with the procurement department. Procurement department officials told us that the extent of their involvement in user departments' planning process depends on whether user departments inform them of their plans before submitting requisitions.

Our work disclosed numerous examples of acquisitions made by user departments independent of the procurement department. For example:

- The engineering, mechanical, and marketing and sales departments frequently used payment requests to purchase services well in excess of \$5,000, the maximum threshold specified by Amtrak.<sup>6</sup>
- In 2003, the operations planning department agreed to terms and fees with a software vendor for a pilot program, although Amtrak policies require that only the procurement department agree to terms and conditions. Documentation in the contract file indicated that the operations planning department had already authorized \$8,500 in travel expenses by the time the procurement department was brought into the process. Subsequently, the vendor refused to provide the procurement department with a cost breakdown and comply with certain travel requirements because of the agreements already reached. The contract was initially valued at \$60,000, and 1½ years later, its value increased by another \$500,000 when Amtrak fully implemented the pilot program. When the contract manager processing the acquisition learned what the operations planning department had done, she required that it document why the travel requirements were not included in the contract.
- More recently, in fiscal year 2004, Amtrak technologies (a unit of Amtrak's finance department) issued and signed a contract modification expanding an existing software services contract without the procurement department's knowledge. This expansion increased the value of the contract by \$200,000. The Amtrak OIG detected what Amtrak technologies had done during the course of an audit that the procurement requested on the contract. The Amtrak OIG recommended

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<sup>6</sup>Amtrak increased the maximum threshold for payment requests from \$2,000 to \$5,000 in November 2004.

that Amtrak technologies follow established procurement policies when acquiring services.

These activities were detected after the fact; no controls existed at the time to prevent their occurrence. In the case of payment requests, the vice president of procurement has since taken on the role of approving payment requests for departments that have used them inappropriately. In the case of user departments awarding contracts and agreeing to terms and conditions independently, procurement department officials indicated that, before fiscal year 2002, very few controls were in place and departments frequently operated independent of the procurement department. Since fiscal year 2002, the vice president of procurement has been working to reign in departments that were considered to be "out of control." While procurement department officials believe that they have brought more acquisitions under control, they explained that changing the culture within Amtrak has been a gradual process, and they believe that they still have a long way to go.

The independent acquisition of services has prevented the procurement department from managing these procurements and controlling spending. Moreover, Amtrak has likely paid more for services than it would have otherwise. When user departments negotiate terms and fees on their own, they lose the opportunity to use the procurement department's expertise in negotiating terms that are in Amtrak's best interest. Further, when user departments award contracts independently, they put Amtrak at both a business and a financial risk. The procurement department's standard service contracts are written to ensure that Amtrak's interests are protected. Contracts issued outside of the department may obligate Amtrak to the prices and terms of the agreement, but may not include the language that protects Amtrak's interests.

Both in previous studies and in discussions with freight railroads, we have found that a more centralized approach can save money and provide other benefits. As we reported in 2002, leading companies have taken a more strategic approach when acquiring services by identifying opportunities to leverage their buying power, reduce costs, and better manage their suppliers.<sup>7</sup> For example, these companies helped business managers acquire key services and made extensive use of cross-functional teams to help better identify service needs, select providers, and manage contractor

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<sup>7</sup>GAO-02-230.

performance. Similarly, officials from a freight railroad we contacted for this study told us that they used strategic sourcing<sup>8</sup> to completely restructure their acquisition function. They explained that, as a result of significant staff reductions and a need to outsource to suppliers, they changed from a department that primarily processed purchase orders to one that used cross-functional teams focused on procurement planning, sourcing, and managing suppliers. The officials indicated that this restructuring saved the railroad more than \$240 million over 3 years. We also recently reported that the Department of Homeland Security had demonstrated some successes in implementing a strategic sourcing program to leverage the department's buying power. These successes involved greater collaboration among the department's various organizations and a savings of over \$14 million since the program's creation.<sup>9</sup>

Amtrak's procurement department has recently taken additional steps to more fully integrate the procurement department into user departments' acquisition planning and management. For example, the procurement department is currently working with the human resources and labor relations departments to identify all health benefits contracts. Once these contracts have been identified, procurement department officials told us that they will develop a strategy, consolidate the contracts, and open them for competition as they come up for renewal in an effort to achieve cost savings. Additionally, the procurement department official responsible for services contracts is becoming more involved in user departments' planning activities by attending their staff meetings and developing a tracking system to alert departments when contracts are expiring or running low on funds.

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<sup>8</sup>Strategic sourcing is a process used by leading commercial companies and a small number of federal agencies to establish an organizationwide approach to leveraging the organizations' buying power and fostering new ways of doing business.

<sup>9</sup>GAO-05-179.

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## Communication and Enforcement of Policies and Procedures Have Been Limited

Amtrak has not always adequately communicated and enforced acquisition policies and procedures for services, which limited its ability to ensure that sound contracting practices were followed. Recent steps have been more positive: that is, the procurement department has issued a manual of acquisition policies and procedures, and the department also is taking steps to ensure that existing policies, along with review and approval processes, are followed. The types of problems we identified with past procurements illustrate the importance of these steps.

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## Acquisition Policies and Procedures Were Not Clearly Communicated in the Past

Amtrak's acquisition policies and procedures have not always been clearly communicated to the entire organization. Leading organizations we have studied adopt clear, transparent, and consistent policies and procedures that govern the planning, award, administration, and oversight of acquisitions. These policies and procedures must also be clearly communicated to all involved in the acquisition function.<sup>10</sup> Although the procurement department periodically issued directives specifying policies and procedures for the acquisition of goods and services, these directives did not provide detailed guidance for procurement staff to follow when awarding contracts. Additionally, according to procurement department officials, user departments either circumvented or were unaware of existing acquisition policies and procedures set forth in these directives.

Recently, Amtrak has taken steps to address the lack of clear and comprehensive guidance. In June 2005, the procurement department issued a comprehensive procurement manual for acquisition staff. The procurement department's staff said their initial goal was to complete the manual by October 2003. However, according to a procurement department official, completion of the manual was delayed because of needed reviews by the law department and the need to incorporate FRA grant agreement language during the course of developing the manual.

Amtrak's procurement department officials also have conducted outreach efforts to inform user departments of current acquisition policies and procedures. For example, since February 2005, the vice president of the procurement department has made presentations about acquisition policies and procedures to user departments. (See table 7.) According to a procurement official, the intent was to deliver these presentations only to

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<sup>10</sup>[GAO-04-544](#).

major departments. However, other departments, such as the human resources and transportation departments, which are responsible for providing medical benefits and food and beverage service, were not scheduled to receive this presentation. Procurement and finance department officials have also made presentations to field offices about the various acquisition tools available. These presentations covered specific acquisition tools, such as payment requests for small purchases and the use of purchase cards for low-cost items, as well as the process for paying invoices.

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**Table 7: Procurement Presentations to Major Amtrak Departments in 2005**

<b>Department or unit</b>	<b>Date of presentation</b>
Engineering	February 1, 2005
Finance	February 15, 2005
Law	March 3, 2005
Police and security	March 7, 2005
Amtrak technologies (unit of the finance department)	March 21, 2005
Mechanical	April 12, 2005
Environmental, health, and safety	May 2, 2005
Marketing and sales	June 20, 2005

Source: Amtrak.

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## **Established Acquisition Policies and Procedures Have Not Been Enforced**

Amtrak has not consistently enforced established policies and procedures for the acquisition of goods and services. As we recently reported, leading organizations recognize the need to ensure that their prescribed policies and procedures are being enforced so that acquisitions are made appropriately.<sup>11</sup> We found, however, that Amtrak was not following such policies and procedures in many instances. Our review of a nonprobability sample of 61 service contract files covering \$85.3 million (75 percent) of the expenditures for professional services, consulting, marketing, and sales promotion services in fiscal years 2002 and 2003, as well as our review of expenditure data and our discussions with officials from both the

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<sup>11</sup>GAO-04-544.

procurement department and user departments, demonstrated the following four problems:<sup>12</sup>

- a high frequency of noncompetitive awards,
- insufficient or no justification for many noncompetitive contract awards,
- a lack of appropriate approval for sizable increases in contract costs, and
- bypassing of the procurement department through inappropriate use of payment requests.

#### Frequency of Noncompetitive Contract Awards

Of the 61 contracts we examined in detail,<sup>13</sup> a substantial number, 36 (59 percent), of the awards were made noncompetitively.<sup>14</sup> As table 8 indicates, the majority of them were made before fiscal year 2003. The vice president of the procurement department generally acknowledged that the extent of Amtrak's noncompetitive procurement of services was too high and needed to be reduced. Leading organizations we have studied<sup>15</sup> recognize the importance of competition to better ensure that the best value is obtained in awarding contracts. In fact, Amtrak's acquisition policies and procedures

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<sup>12</sup>Results from nonprobability samples cannot be used to make inferences about a population, because in a nonprobability sample some elements of the population being studied have no chance or an unknown chance of being selected as part of the sample. See appendix I for the file selection methodology that we used in conducting this review. We focused on fiscal years 2002 and 2003 because they were the most recent years for which audited financial statements were available for the purpose of assessing the reliability of expenditure data.

<sup>13</sup>Of the 61 contracts we reviewed, Amtrak could locate no documentation for 4. They provided printouts of information from their acquisition system for these 4 contracts. These printouts contained minimal information, which allowed minimal analysis. For another contract, Amtrak was missing one of the three folders of documents prepared during the course of the contract. We analyzed this contract to the extent allowed by the available documentation.

<sup>14</sup>We define noncompetitive awards as those that Amtrak considered as either sole or single source. We obtained information regarding whether a contract was a sole or single source award by reviewing documentation in the contract file and, if necessary, discussing them with procurement department officials.

<sup>15</sup>[GAO-03-661](#) and [GAO-02-230](#).

require that goods and services be acquired competitively to the maximum extent practicable.

**Table 8: Number of Contracts GAO Reviewed, with Expenditures in Fiscal Years 2002 and 2003, That Were Competitively and Noncompetitively Awarded**

Time frame awarded	Contracts reviewed			Total
	Competitively awarded	Noncompetitively awarded	Undetermined	
Before fiscal year 2002	12	14	3	29
Fiscal year 2002	6	13	0	19
Fiscal year 2003	3	9	1	13
<b>Total</b>	<b>21</b>	<b>36</b>	<b>4</b>	<b>61</b>

Source: GAO analysis of Amtrak data.

**Insufficient or No Justification for Noncompetitive Contracts**

A significant number of the noncompetitive contracts we reviewed had either no justification or insufficient justification. Amtrak acquisition policies in force at the time these contracts were awarded required justifications spelling out the specific circumstances warranting a noncompetitive procurement for procurements valued at \$100,000 or more.<sup>16</sup> Guidance in effect at the time identified specific circumstances that were not acceptable justifications for noncompetitive awards, such as a preference for a particular vendor by the user department. Of the 36 noncompetitively awarded contracts we reviewed, 21 were valued at \$100,000 or more and thus required justifications. However, 10 of these 21 contracts did not include justifications or had justifications that did not conform to the guidance in effect at the time. As table 9 illustrates, the degree of compliance has increased since 2002, when SBUs were eliminated. Procurement department officials attributed the lack of compliance before 2002 to poor overall controls over service acquisitions.

<sup>16</sup>In February 2004, this threshold was reduced to \$25,000.



**Table 9: Extent to Which Noncompetitive Contract Awards GAO Reviewed Included Adequate Justifications**

Time frame awarded	Contracts reviewed			Total
	Justification conformed to Amtrak requirements	No justification provided or justification did not conform to Amtrak requirements	Insufficient documentation to determine	
Before fiscal year 2002	1	5	2	8
Fiscal years 2002 or 2003	8	5	0	13
<b>Total</b>	<b>9</b>	<b>10</b>	<b>2</b>	<b>21</b>

Source: GAO analysis of Amtrak data.

Beginning in 2002, after the procurement function was centralized and continuing through 2004, the procurement department began instituting new controls, which included adherence to the justification requirement for noncompetitive procurements. Current policies allow noncompetitive procurements in circumstances such as the following:

- Only one source is known to satisfy Amtrak's requirements.
- Contractor has unique capability, expertise, or equipment.
- Emergency situations.
- Follow-on work, when awarded to another contractor, would increase cost substantially or result in unacceptable delays or risk.
- Need is of such compelling urgency that Amtrak would be seriously harmed without the acquisition.

Several procurement department officials indicated that, more recently, user department requests for noncompetitive procurements have been rejected more often, and it has become much more difficult for user departments to get approval for such contracts. To illustrate, procurement department officials provided several examples of noncompetitive requests that the vice president of procurement had rejected. For example, an August 2004 request from the mechanical department and a March 2005 request from the engineering department were both rejected because they

**Contract Changes Were**  
**Inappropriately Approved**

would have likely resulted in additional noncompetitive acquisitions. The vice president of procurement also noted that the engineering department's request was based on a noncompetitive acquisition that had been obtained inappropriately through the use of a tool intended for small dollar purchases.<sup>17</sup>

Many of the contracts we reviewed—38 of the 61—included changes, some of which increased the contract's cost. In four instances, the final dollar amount was several times larger than the initial amount as a result of these changes. (See table 10.)

**Table 10: Contracts with Numerous Extensions Resulted in Significant Dollar Increases**

Type of contract	Number of extensions	Initial dollar amount	Final dollar amount
Frequent rider loyalty program	6	\$6,118,407	\$32,362,167
Software support	7	397,200	1,029,688
Software development	12	318,418	1,460,238
Signal survey services	4	45,000	764,418

Source: GAO analysis of Amtrak data.

Note: The above information was based on our review of 61 contracts for professional services and advertising, sales promotion, and consulting services. Dollar amounts in this table represent the amounts authorized in the contracts, not the expenditures actually made.

Although the cost of contracts can change over time, many of the changes to the 38 contracts were not approved in compliance with Amtrak's policies and procedures. Amtrak requires that, when a contract is changed, the person approving the extension should have approval authority equal to the new total dollar value of the contract. Of the 91 total changes in these contracts, however, at least 41 were approved by individuals who did not have the appropriate level of authority. The majority—28—occurred in fiscal year 2003 or later.<sup>18</sup> For example, in the software development

<sup>17</sup>Procurement department officials provided two other examples of denials from earlier in fiscal years 2003 and 2004. However, we found, during the course of our contract file reviews, that one of these denials was ultimately approved.

<sup>18</sup>Although the contracts we reviewed were awarded in fiscal years 2002 and 2003 or earlier, we reviewed all contract changes that had occurred through our review in fiscal year 2005.

contract identified in table 10, a director with an approval authority of \$100,000 for noncompetitive contracts approved a series of changes that were each individually less than \$100,000. However, as indicated in the table, the cumulative value of the contract exceeded his level of authority. Amtrak's vice president for procurement indicated there is debate within the procurement field about change order approval authority. In his opinion, the authority to approve changes should be based on the incremental amount of the change because having higher level officials approve small dollar changes is not an efficient use of their time. However, as evidenced by our contract file reviews, a series of small changes could result in a much larger contract.

#### Inappropriate Use of Payment Requests

We found many instances in which user departments were inappropriately using payment requests to purchase services. Payment requests are intended to be used for small dollar acquisitions having a maximum threshold of \$5,000.<sup>19</sup> These requests allow user departments to acquire goods and services directly from vendors without involving the procurement department. Goods and services acquired using payment requests are not obtained competitively, and user departments lose the opportunity to use the procurement department's expertise in negotiating contract terms. Additionally, payment requests are not considered contracts and, therefore, do not protect Amtrak's rights and interests as would a contract. Using payment requests makes it impossible for the procurement department to track and oversee acquisitions because they obviate the need for purchase orders, Amtrak's primary means of monitoring contract purchases.

Because reliable expenditure data were absent, we did not quantify the extent to which payment requests were used. Nevertheless, procurement department officials acknowledged that payment requests are often used inappropriately, and we found numerous instances of their inappropriate use. Some of these requests exceeded the threshold substantially. For example:

- In fiscal year 2002, the engineering department used a payment request for inspection services from a single supplier valued at more than \$72,000.

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<sup>19</sup>The \$5,000 threshold has been in effect since November 2004. Previously, the threshold was \$2,000.

- In fiscal year 2004, the engineering department used two payment requests for the same vendor to acquire services valued at more than \$79,000.
- In fiscal year 2004, the mechanical department used a payment request for software services from one vendor valued at almost \$13,000.
- In fiscal year 2004, the marketing and sales department used a payment request for photography services from one company valued at \$109,000.

We also found instances in which user departments utilized payment requests for goods and services when Amtrak also had contracts in effect. For example:

- The marketing and sales department used payment requests to pay invoices of \$68,596 and \$109,888 in fiscal years 2003 and 2004, even though a specific contract covering those services was already in effect.
- The mechanical department used payment requests to pay invoices of \$2,500 for professional services to a vendor for 3 consecutive fiscal years, despite having contracts for similar services in effect with the same vendor.

Amtrak officials gave several reasons for the inappropriate use of payment requests. First, not all officials were aware of the procurement policies and procedures. Marketing and sales department officials said they incorrectly interpreted the policy governing the use of payment requests. For example, one department official said he incorrectly thought that involving the procurement department was required only for significant and recurring expenditures, such as those exceeding \$1 million; he was not aware of the \$5,000 limit for the use of payment requests. Second, procurement officials noted that user departments likely find it more convenient to use payment requests because the vendor gets paid faster. Officials in the engineering and mechanical departments confirmed this. For example, Amtrak's chief engineer said that engineering department staff had likely used payment requests out of convenience, but he acknowledged that their use was not justified. Similarly, the chief mechanical officer also said that his department probably found payment requests to be more convenient and noted that they sped up the acquisition process. Procurement officials also explained that if funding or time is running out on a purchase order, user departments will use payment requests to ensure that the vendor gets paid.

Marketing and sales, engineering, and mechanical department officials all acknowledged that their departments had used payment requests inappropriately in the past but said this situation had been corrected. The vice president of marketing and sales also indicated that she had taken corrective actions to ensure adherence to procurement policies and procedures. These actions include scheduling training for staff and bringing acquisitions previously made using payment requests under the control of the procurement department.

Procurement department officials indicated they also have been working to reduce the misuse of payment requests through several means. For example, as previously mentioned, the vice president for procurement approves all payment requests—through eTrax—from user departments, such as engineering and mechanical, that have misused these payments in the past. Information from the procurement department indicates that the vice president denied 29 payment requests totaling more than \$255,000 between December 2004 and May 2005. Also, a new database has been established to better track the expiration date and remaining funds for contracts exceeding \$1 million. Although smaller contracts are not included in the database, a senior director in procurement indicated that individual contract managers in the procurement department are expected to monitor them on their own. He noted, however, that user departments are ultimately responsible for monitoring their contracts.

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### Review of Procurement of Outside Legal Services Showed Weaknesses in Areas Exempt from Procurement Department Review

In addition to the acquisition activities under Amtrak's procurement department, we also discussed acquisition activities with officials from other departments authorized to acquire selected services independently. Amtrak's delegation of authority specifically provides selected departments with the authority to procure goods and services in five areas without the involvement of the procurement department. We reviewed one of these areas,<sup>20</sup> outside legal services, because of the relatively large dollar value of the legal services procured—\$48 million during a 2-year period, ending

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<sup>20</sup>The other four services acquired independently of the procurement department are electrical power for the Northeast Corridor, labor arbitration agreements, audit and investigative services, and the use of executive recruitment firms.

September 30, 2003.<sup>21</sup> We found several weaknesses in the processes for the procurement and payment of outside legal services that increase the risk that Amtrak is not receiving best value for these services and is making improper payments for these services. These weaknesses included (1) a lack of competition in selecting firms, (2) a lack of spend analysis on outside legal services, (3) a lack of specificity in documenting terms and conditions of the services to be provided, (4) an inconsistent review of invoices for compliance with established billing guidelines, (5) inadequate documentation supporting purchases for certain matters, and (6) a lack of segregation of key approval and payment functions.

## Lack of Competition

Amtrak makes limited use of competition in acquiring outside legal services. Law department officials said they normally contract with firms they have used in the past as long as their performance has been good and their prices are reasonable. While Amtrak's procurement policy is to obtain goods and services as competitively as possible, law department officials said the only time the department would have firms compete for outside legal services is if a matter is highly sensitive or visible, or if the matter concerns a relatively new area. They explained that many matters are time-sensitive and do not allow time for competition. Other matters require specific legal expertise, including an understanding of Amtrak's history, business, and statutory and regulatory environment. Additionally, law department officials said they need to use attorneys admitted to the bar in the states in which lawsuits are filed and thus need to use attorneys throughout the country.

While selecting outside legal counsel may involve many important considerations besides price, officials of other railroads we contacted indicated that they have been successful when using competition to acquire either some or all of their outside legal services. For example, VIA Rail requires that all user departments, including their law department, obtain two or more bids before acquiring goods and services. Although VIA Rail's law department acquires its own outside legal services, it is still subject to the company's procurement policies and procedures. Officials from one freight railroad said they competitively selected a law firm to handle all of their outside legal work on intellectual property. Additionally, officials

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<sup>21</sup>In commenting on a draft of this report, Amtrak noted that its legal costs compare favorably with Class I railroads. Since our purpose was to evaluate how Amtrak acquires legal services and related internal controls over such acquisitions, we did not compare Amtrak's costs for legal services with other railroads'.

responsible for acquiring outside legal services at three commuter railroads indicated that they periodically compete legal services to develop a list of firms that they plan to use over a period of time, such as 3 to 5 years.

In commenting on a draft of this report, Amtrak indicated that it has retained law firms based on solicitation to multiple firms with varying degrees of success. We acknowledge that the acquisition of legal services can be unique, and it can be difficult in certain circumstances to obtain competition for such services. However, we believe Amtrak can more aggressively seek competition in its acquisition of outside legal services. The examples we describe represent a variety of ways in which other railroads have tried to use competition and leverage buying power that Amtrak should consider in its efforts to more efficiently manage spending on outside legal services.

#### Lack of a Spend Analysis on Outside Legal Services

Amtrak's law department has not used a spend analysis<sup>22</sup> on outside legal services in order to determine whether it receives the best value possible in terms of service and cost. Law department officials said they have undertaken some efforts to control spending—for example, within a given practice area or for support services such as copying. However, the department has not analyzed its spending as a whole to identify opportunities to reduce spending.

One such opportunity to reduce spending could be to reduce the number of law firms used. Although law department officials said they do not have enough work to direct to a specific firm to leverage buying and obtain volume discounts, Amtrak used 149 outside law firms in fiscal year 2002 and 157 the following year. In contrast, officials at one freight railroad (that operates in multiple states similar to Amtrak) indicated that they analyzed spending on outside legal services and found that they could effectively reduce the number of firms they used. At one time, the freight railroad used about 250 outside law firms but decided to pare down this number in order to develop stronger partnerships. They believed that frequently used firms would be more familiar with the railroad's business and be in a position to serve the railroad more efficiently. Ultimately, this railroad reduced the number of firms to 8 core counsels and about 50 additional firms to be used for specific areas of expertise or to obtain geographic coverage. According to railroad officials, this action reduced costs and enhanced collaborative cooperation between the railroad and the outside law firms.

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<sup>22</sup>Spend analysis is discussed more fully in chapter 4.

Amtrak officials advised us that in 2005 they purchased and installed legal case management software that will allow the tracking and analysis of legal fee expenses. However, an official confirmed that the new system still will not capture payment attributes, such as hourly rates, hours expended per matter, professional staff levels, and the time period the services covered.

Lack of Specificity in  
Documenting the Terms and  
Conditions of Services

Amtrak units do not specifically document the scope and terms of outside legal work to be performed. According to law department officials, the work to be done is frequently discussed with the firm by the attorney working on a matter, but there is not necessarily a record of these discussions. Outside law firms are provided with a copy of Amtrak's billing guidelines.<sup>23</sup> These guidelines include topics such as how bills are to be processed, allowable reimbursable costs, budgets, staffing, and conduct of litigation. However, the guidelines do not specifically outline the scope of work to be completed, outline the costs of services provided, or require acceptance of terms by authorized signature for each individual engagement. In contrast, Amtrak procurement policies generally require that contracts be signed and that they outline the scope of work to be performed and delivery dates for work products. The lack of documentation for outside legal services leaves Amtrak vulnerable to miscommunication concerning the work expected of outside law firms.

Inadequate Review of Invoices

The law department does not have a sufficient process to ensure that the outside legal firm invoices submitted for payment are compliant with Amtrak's billing guidelines, which are to be used to ensure payments are made properly. Formal protocols—such as specific review procedures to ensure compliance with the billing guidelines—do not exist, thereby limiting the effectiveness of the compliance reviews. When the law department receives an invoice for services, an attorney is expected to review it for compliance with the guidelines, in addition to verifying that the work was authorized and the time charged was reasonable based on their knowledge of the case.<sup>24</sup> Law department officials told us an attorney's review of invoices for compliance with billing guidelines is limited to assessing general compliance and identifying prohibited practices such as "block billing," which is the aggregation of time spent on

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<sup>23</sup>Amtrak, *Amtrak Guidelines for Outside Counsel* (March 1998).

<sup>24</sup>For invoices less than \$10,000, the deputy counsel of the practice group managing the matter is responsible for approving the invoices, while the Amtrak general counsel approves invoices for amounts of \$10,000 or more.



different activities into one amount and billing increments other than 6 minutes—the standard increment for billing purposes. We reviewed 10 invoices from fiscal years 2002 and 2003, totaling \$843,105, to gain an understanding of the attorney review process. We found that 4 of the 10 invoices, valued at \$118,947, did not comply with one or more of the requirements in the billing guidelines.<sup>25</sup> All 4 of these invoices had insufficient detail to assess compliance, and 1 of the 4 invoices reflected billed time increments greater than the 6-minute standard billing increment.

#### Inadequate Documentation Requirements for Payments

For settlement agreement payments, the law department does not provide sufficient documentation to the accounts payable section of Amtrak's finance department when seeking payment. Amtrak policy requires that accounts payable receive adequate documentation to avoid making duplicate payments. However, law department officials have determined that settlement payments are confidential; therefore, they only send "disclaimer" sheets showing the firm's name, the amount of fees and expenses, a stamp of authorization from the department, and a statement that the original document is on file. Amtrak officials told us that payment requests associated with settlements receive three levels of review within the law department prior to approval and, therefore, any concerns about inappropriate payment processing is misplaced. We disagree with this conclusion. The lack of documentation ensuring adequate review has taken place by the internal group with such responsibility—accounts payable—increases the possibility of duplicate payments and payments for other than approved amounts.

#### Insufficient Segregation of Key Duties

The law department does not adequately segregate key duties related to authorizing, reviewing, and receiving payments for outside legal services. These key duties need to be segregated among employees to reduce the risk of error, including improper payment. Law department officials said that it was common practice to have attorneys obtain the payment on behalf of the vendors (rather than having accounts payable send the payments directly to the vendor) and then forward these payments with

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<sup>25</sup>Due to significant weaknesses in the design of controls over the review, approval, payment, and monitoring of amounts for outside legal services and the results of our walk-through of the process, including inspection of a nonprobability sample of 10 invoices, we did not statistically sample payments for outside legal services to estimate what portion of the population of payments were appropriately reviewed and approved or to estimate if the payments represented a valid use of Amtrak's funds.

accompanying documents. Also, attorneys are allowed to create and edit the payee's name and address in addition to approving and receiving payment. This practice increases the risk that payments may be sent to unauthorized parties and to addresses other than that of the vendor. According to an Amtrak official, the practice of the accounts payable section sending payments to the law department ended sometime in fiscal year 2004, in all cases except settlement agreements. For payments related to settlement agreements, the law department still receives and determines when payment in a settlement agreement will be disbursed to vendors, because management has determined that the law department is in the best position to disburse the check. Again, the basis for not establishing sufficient procedures does not mitigate the fact that these payments are subject to a higher risk of being improper due to inadequately designed control practices.

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## Amtrak's Knowledge and Information System Does Not Support a More Strategic Approach to Acquisitions

Amtrak is missing the third key element of an effective acquisition process—meaningful and reliable data stemming from an organization's knowledge and information system. Amtrak's knowledge and information system currently does not produce the data needed that would enable Amtrak to identify strategic sourcing opportunities. Such data could enable Amtrak to leverage its buying power and reduce procurement costs.

In discussing the first key element of an effective acquisition function, we described how a number of leading companies have achieved significant savings by adopting a strategic approach to their procurement activities.<sup>26</sup> To do so, companies and a small number of federal agencies use a spend analysis, which involves automating, extracting, supplementing, organizing, and analyzing procurement data. However, Amtrak's procurement and financial databases were able to provide only limited information on specific accounts or the types of goods and services being purchased (such as professional services, advertising, and sales promotion), which precludes conducting a spend analysis. Although the vice president of procurement estimated that the company's annual expenditures for goods and services totaled \$500 million to \$600 million, the company was unable to provide detailed, reliable, and comprehensive data on total spending.

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<sup>26</sup>We also discuss these efforts in more detail in [GAO-04-870](#). See also [GAO-02-230](#) and [GAO-03-661](#).

Our review identified several reasons impeding Amtrak's ability to improve its knowledge of procurement spending to support a more strategic approach. These reasons include the following:

- *Amtrak's knowledge and information system is old and requires manual manipulation.* Leading companies have adopted systems that are programmed to routinely extract vendor payment and related procurement data from other financial and information systems, thereby allowing them to easily obtain needed information. In contrast, procurement department officials indicated that the Amtrak Accounting, Material and Purchasing System (AAMPS), which is used to process acquisition information and interfaces with Amtrak's financial systems, is a "batch system" that dates to the early 1980s.<sup>27</sup> As such, this system requires manual manipulation to retrieve data. To retrieve data, each data request must be individually programmed, by an employee who is very familiar with the complex coding inherent in the system, and then manually processed. Officials told us that it is difficult to obtain needed data because they must be requested in the precise manner necessary.
- *Amtrak cannot readily ensure that data are reliable.* We identified significant discrepancies between the procurement expenditure data we obtained and the data shown in the audited financial statements, bringing the reliability of these data into question. For example, fiscal year 2003 AAMPS expenditure data showed that Amtrak spent \$34.2 million on advertising; however, the audited financial statements for the same year listed advertising expenses of \$31.6 million, a difference of about 8 percent. Similarly, fiscal year 2003 AAMPS data showed expenditures of \$31 million for professional services; financial statement data showed \$24.4 million, a 27 percent difference. One control procedure that can ensure data reliability is to reconcile the discrepancies between AAMPS and the financial system. However, this type of reconciliation is difficult and, therefore, not part of Amtrak's normal procedures. For example, company officials recently undertook—at our request—a reconciliation between AAMPS data on sales promotion and the amounts reported in Amtrak's audited financial statements—discrepancies totaled almost \$3 million in fiscal year 2002

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<sup>27</sup>The eTrax system that we previously discussed is a user-friendly interface that feeds into AAMPS. The system is used, for example, to process purchase requisitions and payment requests.

and \$165,000 in fiscal year 2003. This process took about 1 month and considerable staff time because it had to be done manually.

- *Questionable reliability of AAMPS data prevents accurate tracking of spending.* Our review disclosed two problems that resulted in inaccurate acquisition data that hinders Amtrak management's ability to accurately track spending. First, a limited review of acquisition transactions revealed charges coded to incorrect accounts. For example, payments of about \$2 million to municipal and state governments between fiscal years 2002 and 2004 were incorrectly charged to the professional services and consulting accounts. Amtrak procurement officials agreed and said these payments were likely tax payments. We found several other instances of miscoding and brought these to the attention of procurement officials, who agreed that they too were incorrectly charged to wrong accounts. Other incidents of miscoding involved the cost of a dump truck (\$122,000) and ballast (\$150,000), both of which had been charged—in total or in part—to the professional services account. Procurement officials attributed data reliability problems to poor data entry and review procedures in user departments. Various employees in user departments often select the accounts to be charged when initiating transactions, and they may select accounts incorrectly. Although approving officials within the user departments are supposed to check to ensure that the accounts are charged correctly, they may not do so. Moreover, neither the procurement department nor the finance department reviews the coding of expenditure transactions, even on a spot-check basis. Even if errors are found, the extent to which they can be corrected is limited. Procurement and finance officials explained that AAMPS data cannot be corrected. They further explained that data in the financial systems can be corrected. However, this adjustment would correct only the dollar amounts in the account; it would not correct the information used by procurement officials to track spending on individual transactions.

A second source of unreliable data results from the heavy use of payment requests by user departments. As previously mentioned, Amtrak's ability to track spending is constrained when payment requests are used to acquire goods and services. Payment requests are used for a variety of expenditures, such as outside legal services, utility bills, and payments to other railroads. As previously discussed, user departments have inappropriately used payment requests to acquire goods and services. In these instances, Amtrak cannot track spending on acquisitions because payment requests do not require purchase

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orders, which are Amtrak's primary means of monitoring contracting spending.

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## Conclusions

Amtrak's improvements in its acquisition function, such as elevating it to the same level as other key departments and centralizing activities, are good first steps in establishing better control over acquisitions. There are, however, several opportunities for improvement on the part of Amtrak and FRA. One opportunity relates to more fully integrating this centralized function throughout the company, so that user departments are aware of and follow established company policies and procedures concerning acquisitions and coordinate more closely with the procurement department so that it has greater opportunity to add value to the acquisition process. Another opportunity relates to ensuring that established policies and procedures are followed more closely within the procurement department, and that adequate controls are in place for acquisitions handled outside of the procurement department (such as procurement of outside legal services). Our review showed that not following policies and procedures has likely increased what Amtrak has paid for services. Addressing these issues, as well as taking steps to develop a more meaningful knowledge and information system, would allow Amtrak to track and analyze spending and thus better manage its acquisitions. Further, increased oversight by FRA could help ensure that procurements are cost-effective and in compliance with federal requirements.

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## Recommendations for Executive Action

To ensure that Amtrak's acquisition management practices support sound business decisions and the efficient and effective use of federal funds provided to Amtrak, we recommend that the Secretary of Transportation direct the Federal Railroad Administrator to take the following three actions:

- Increase oversight by requiring Amtrak to submit a plan, possibly as part of the company's application for grant funds, identifying the specific actions that will be taken, consistent with the recommendations outlined below, to improve its acquisition management practices.
- Review and provide comments on this plan to Amtrak and work with Amtrak management and staff to develop the most cost-effective approach(es) to improving acquisition management practices. The approach(es) developed should ensure that Amtrak, FRA, and others, as

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appropriate, have adequate information on which to make business decisions regarding the acquisition of goods and services and the use of federal resources provided to do so.

- Report at least annually to Congress on progress being made by Amtrak regarding improvement of its acquisition management. This report should identify any specific actions either Amtrak or Congress should take to facilitate improvement in acquisition management, particularly improvement in its knowledge and information system and the use of acquisition data in identifying opportunities for cost savings.

To help improve Amtrak’s acquisition function and better promote efficiency, effectiveness, and accountability when acquiring goods and services, we recommend that Amtrak’s president work with the vice president of procurement to take actions that will address the various issues raised in this chapter. These issues, along with the five specific recommendations to address them, are shown in table 11:

**Table 11: Specific Recommendations—Acquisition Management**

Issue	Recommendation
Distributing and promoting current procurement policies and procedures	Ensure that all departments receive information on procurement policies and procedures, similar to the presentations that have already been given to a number of departments, and ensuring that all departments are held accountable for following those policies and procedures.
Enhancing the role of the centralized procurement function	Take additional action to become more integrated into the planning of all service acquisitions, similar to the actions Amtrak’s human resources and labor relations departments are taking with regard to awarding health benefits contracts.
Building greater adherence to established procurement procedures	Develop an action plan to better ensure that acquisition policies and procedures are communicated, followed, and enforced. This includes <ul style="list-style-type: none"> <li>• ensuring that user departments required to procure goods and services through the procurement department cannot acquire them independently;</li> <li>• ensuring that services are acquired competitively to the maximum extent possible, such as enforcing the requirement to obtain justifications for noncompetitive acquisitions;</li> <li>• ensuring that changes increasing the cost of contracts are approved in accordance with current delegation of authority, which requires that approvals are based on the cumulative value of contracts, not the incremental value of change orders; and</li> <li>• ensuring the appropriate use of payment requests by enforcing the requirement that payment requests not exceed \$5,000 and ensuring that they are not used when a contract and corresponding purchase order are in effect for a particular vendor.</li> </ul>

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*(Continued From Previous Page)*

<b>Issue</b>	<b>Recommendation</b>
<p>Providing better control over acquisition of outside legal services</p>	<p>Together with the law and finance departments, develop standardized acquisition policies and procedures for acquiring outside legal services to ensure that</p> <ul style="list-style-type: none"> <li>• acquisition of outside legal services is competitive to the maximum extent possible;</li> <li>• spending on outside legal services is analyzed to identify opportunities to control and reduce spending;</li> <li>• documentation specifying the terms and conditions of the work to be prepared;</li> <li>• attorneys completely and consistently review invoices for compliance with Amtrak's billing guidelines;</li> <li>• the law department follows Amtrak policy by providing approved invoices to the accounts payable section for payment; and</li> <li>• key duties, such as authorizing, reviewing, and receiving payments for outside legal services, are segregated, and that attorneys not be allowed to create and edit payees' names and addresses.</li> </ul>
<p>Addressing knowledge and information system problems</p>	<ul style="list-style-type: none"> <li>• Create an automated, centralized spend analysis system for capturing the type of reliable and complete spending data needed to identify opportunities to leverage Amtrak's buying power and provide better management and oversight of purchasing activities and suppliers. The system should include features that would</li> <li>• provide data on what categories of goods and services are being acquired; how many suppliers are being used for specific categories; and how much is being spent on specific categories, in total and for each user department and with each supplier; and</li> <li>• ensure that data are more readily and reliably retrievable on an automated and repeatable basis.</li> </ul>

Source: GAO.

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# Amtrak Does Not Have Adequate Oversight of or Accountability for Its Performance and Results

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Our work demonstrates that fundamental improvement is needed in the way Amtrak measures and monitors performance, develops and maintains financial records and internal controls, controls costs, and acquires goods and services. In the preceding chapters, we have outlined recommendations to improve the policies, procedures, and practices in these areas. However, as long as Amtrak continues to focus much of its attention on capital needs, there is a serious question concerning whether the company will sufficiently address these areas. Without sufficient accountability mechanisms and oversight to ensure that needed actions are implemented, Amtrak increases the risk of its having continued ineffective use of resources; increasing federal subsidies; and, in an extreme case, facing possible bankruptcy.

Currently, Amtrak's accountability mechanisms are weak and oversight is insufficient. Two factors contribute to this situation. First, although the federal government has an interest in Amtrak's mission, Amtrak operates in an unusual situation—that is, as neither a publicly traded private corporation nor as a public entity. This means Amtrak is not subject to the accountability and oversight mechanisms by which those types of entities would have to abide. For example, unlike publicly traded private corporations, Amtrak is not accountable to stockholders or financial markets and is not subject to Securities and Exchange Commission (SEC) rules, regulations, or public disclosure requirements. Also, unlike public entities, Amtrak is not subject to GPRA, FMFIA, or to various other reporting and accountability requirements established in law or regulation. The second factor is that accountability and oversight mechanisms that are applicable, such as oversight by Amtrak's board of directors and FRA, are limited or are not being implemented effectively.

Both the administration and Amtrak have proposed reforms that would change Amtrak's basic operating structure, establish competition for intercity rail, and provide a different method for distributing federal subsidies. The effect of these changes, if implemented, on strengthening oversight and accountability mechanisms is unknown. Reaching agreement on to whom Amtrak is accountable, however, is a critical first step. Without such a step, inadequate accountability will continue, and the issues raised in this report may not receive the sustained visibility needed to resolve them. Even within the current operating framework, Amtrak's board and other key stakeholders can take actions, such as developing policies and procedures and identifying needed information for conducting oversight, to increase oversight and accountability. Congress may also want to play a stronger role in (1) establishing an accountability mechanism for Amtrak or



(2) determining the extent and parties involved in holding Amtrak accountable for its performance and results and for the efficient and effective use of federal resources.

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## Public-Private Nature of Amtrak Significantly Influences Oversight and Accountability Efforts

Amtrak operates as neither a public entity nor a publicly traded private organization, a factor that influences both the degree of oversight it receives and the ability to hold it accountable for results—potentially reducing both. In general, Amtrak does not receive the same type of oversight that publicly traded, for-profit companies or a government corporation might receive. Some typical accountability and oversight mechanisms from which Amtrak is exempted are discussed below:

- *Stockholder accountability.* In general, Amtrak is not subject to the oversight and accountability of the financial markets. This situation is attributable to the fact that Amtrak's stock is closely held and not publicly traded. In publicly traded companies, poor financial or operational performance and nonachievement of goals can quickly be reflected by falling stock prices, declining ratings on bonds or other forms of corporate financial instruments, and a possible change in board membership. As a result, publicly traded companies have a strong incentive to perform as efficiently and effectively as possible and to take action if performance is not up to expectations. In addition, company management has an incentive to work on behalf of its owners—stockholders—to maximize the value of the business and achieve the highest return to stockholders possible. Currently, Amtrak does not have such an explicit incentive, since stockholders do not hold Amtrak accountable for its performance and results.<sup>1</sup> Amtrak has common stockholders,<sup>2</sup> but they have not played a significant role in corporate governance since the early 1980s when the Amtrak Improvement Act of 1981 removed the authority of common stockholders to elect board

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<sup>1</sup>This discussion is not meant to imply that Amtrak's stock should be publicly traded. Rather, it is to indicate that Amtrak is not subject to the same oversight and accountability mechanisms to which a publicly traded private business might be subject.

<sup>2</sup>The common stock is held by four entities: American Premier Underwriters, BNSF Railway Company, Canadian National Railway Company, and Canadian Pacific Railway Company. In general, these entities received stock at the time that Amtrak was created in exchange for equipment and services provided to allow Amtrak to begin operations. The Amtrak Reform and Accountability Act of 1997 required Amtrak to redeem the common stock by October 2002. However, as of May 2005, this stock had not been redeemed.

members. Since 1981, selection of board members has been controlled by the federal government—which holds all of Amtrak’s preferred stock. The President appoints board members with the advice and consent of the Senate. The Secretary of Transportation currently has a seat on Amtrak’s board. Although this is a voting membership, the degree of accountability is questionable since the Secretary represents only one of seven votes and does not appoint board members. Finally, according to FRA, it can withhold grant funding until Amtrak has complied with the specific requirements of that funding. Consequently, in this instance, Amtrak is accountable to FRA for grant compliance, not necessarily for corporate performance.

- *Financial market scrutiny.* Since Amtrak is not a publicly traded stock company, there is no stock market discipline to hold Amtrak accountable for its performance and results. The financial market does play some role in overseeing Amtrak’s financial performance, since Amtrak receives credit ratings that assess the company’s capacity to pay its financial obligations. For example, Amtrak receives credit ratings from Standard & Poor’s and Moody’s Investor Service.<sup>3</sup> Debt has become more of an issue for Amtrak since the corporation’s total short- and long-term debt has increased in recent years—from about \$1.7 billion to about \$4.8 billion from fiscal years 1997 to 2002. At the end of fiscal year 2004, Amtrak’s total short- and long-term debt was about \$3.8 billion.<sup>4</sup> However, the credit market assesses Amtrak’s ability to repay its debt obligations, not overall corporate performance or achievement of results. The limited market assessment of Amtrak’s debt reflects Amtrak’s continued and heavy reliance on federal subsidies to remain solvent.
- *Public disclosure requirements.* Although organized as a for-profit company with a substantial investment of public funds, Amtrak’s stock

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<sup>3</sup>As of March 31, 2005, Amtrak’s credit rating with Standard & Poor’s was BBB/Negative. This meant that Amtrak obligations had adequate protection but adverse economic conditions or changing circumstances could lead to weakened capacity to meet financial commitments. As of February 8, 2005, Amtrak’s credit rating with Moody’s Investor Service was A3. This meant that Amtrak’s bonds had favorable investment attributes and were considered upper-medium-grade. However, elements may be present that could suggest impairment at some point in the future.

<sup>4</sup>This amount includes both long-term debt and capital lease obligations (about \$3.7 billion) plus the current maturities of long-term debt and capital lease obligations (about \$129 million).

is closely held by a limited number of stockholders, and the stock is not publicly traded. As a result, in general, Amtrak is not subject to either SEC rules and regulations or SEC public financial disclosure requirements. This includes the filing of 10-K and 8-K reports—which are designed to provide information to the public and investors on a company’s financial condition and major events shareholders need to know about.<sup>5</sup> In publicly traded businesses, these reports serve as a form of oversight and accountability concerning financial condition and business practices. In lieu of SEC financial disclosure requirements, Amtrak does make certain information available about its business. Each year, Amtrak is required to submit to Congress by February 15<sup>th</sup> an annual operations report that identifies such things as ridership, revenues, and federal subsidies for each of its intercity routes. Amtrak also is required to annually submit to Congress a general and legislative report that discusses its operations and activities and includes a statement of revenues and expenditures for the prior fiscal year. In recent years, this report has been significantly late—repeatedly months after the close of the fiscal year and the due date of the report to Congress. Since fiscal year 2003, Amtrak also has been required to prepare and submit to the Secretary of Transportation and Congress a business plan to support its request for federal grant funds, which, according to FRA, Amtrak has done.

- *Application of certain federal laws and requirements.* Many laws and requirements that apply to federal entities do not apply to Amtrak. As discussed in chapter 1, Amtrak is not a government corporation even though it continues to rely heavily on federal support to remain financially solvent. Certain laws, such as GPRA (which is designed to ensure that programs are efficiently and effectively administered, and that agencies are held accountable for results) and FMFIA (which requires that financial systems and internal controls are in place and functioning as intended) are not applicable to Amtrak. As a result, the federal government must rely on other means, such as congressional oversight during authorization and appropriations hearings and FRA’s oversight of grant agreements, to ensure that Amtrak is using federal monies wisely, and that results and expectations from federal

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<sup>5</sup>The 10-K report is an annual report filed with SEC that provides a comprehensive overview of a company’s business and financial condition and includes audited financial statements. The 8-K is a report that companies file with SEC to announce major events that shareholders should know about. These events include completion of the acquisition or disposition of assets as well as changes in corporate governance and management, among other things.

investments are achieved. These means do not necessarily provide for a systematic mechanism to ensure adequate oversight of Amtrak or ensure that Amtrak is held accountable for achieving the results it sets out for itself.<sup>6</sup>

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## Amtrak's Board of Directors Has Not Exercised Sufficient Oversight or Held Management Accountable for Results

Amtrak's board of directors and its committees have also not played a strong oversight role and held the company accountable for results. Generally, an organization's board of directors plays a key role in corporate governance through its oversight of executive management, corporate strategies, risk management and audit and assurance processes, and communications with corporate stakeholders. As we recently reported, corporate governance can be viewed as the formation and execution of collective policies and oversight mechanisms to establish and maintain a sustainable and accountable organization, while achieving its mission and demonstrating stewardship over its resources.<sup>7</sup> Accountability requires that an organization effectively demonstrate, internally and externally, that its resources are managed properly and used in compliance with laws and regulations, and that its programs are achieving their intended goals and outcomes and are being provided efficiently and effectively.

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## Amtrak's Board Has Not Been Fully Engaged in Oversight and Accountability Efforts

Although responsible for managing the affairs of the corporation and ensuring good stewardship over resources, Amtrak's board has not exercised sufficient oversight of the corporation or held management accountable for results. Three main factors have contributed to the board's ineffectiveness in this area. First, the board has not had a full complement of members over the last several years. As previously discussed in this report, Amtrak has not had a full complement of seven voting members since July 2003. Over the period of October 2003 to June 2004, the board only had two voting members, exclusive of the Secretary of Transportation or his designee. According to Amtrak's board chairman, in the absence of a full membership, the board has tried to provide adequate oversight of the

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<sup>6</sup>This discussion is not intended to imply that Amtrak should be made a federal agency or necessarily brought under federal laws and requirements. This is also not a discussion of federal railroad safety laws that do apply to Amtrak. Rather, this discussion is to illustrate the unique environment surrounding oversight and accountability of Amtrak's performance.

<sup>7</sup>GAO, *Millennium Challenge Corporation: Progress Made on Key Challenges in First Year of Operations*, [GAO-05-625T](#) (Washington, D.C.: Apr. 27, 2005).

company, but he acknowledged that oversight has been difficult without a full complement of members. Further, he said that, the board has relied heavily on FRA for oversight of company operations. In his opinion, FRA has both the staff and expertise to evaluate operational-type issues, and it can “bridge the gap” on oversight until a full board is in place. DOT’s General Counsel, in commenting on a draft of this report, said that the department first looks to Amtrak’s board of directors to perform adequate oversight of the company and then, working through grants, performs a more limited and focused oversight of the company. The General Counsel acknowledged that lack of a full complement of members has hindered Amtrak’s board from providing sufficient oversight. However, he believes that given its limited resources, the board has done the best job it can and has been proactive in getting management to address problems.

Second, board oversight has been hindered by the lack of an established process or structure for conducting oversight or for ensuring management is held accountable for achieving financial and operational goals. Although Amtrak’s board is to meet monthly, there is no established process or protocol for reviewing corporate performance, and, according to the board chairman, the board has mainly focused on capital spending and capital projects. The board has deferred to Amtrak management to handle issues that arise if financial or other performance does not match established goals or budgets. The chairman noted that the board’s action in this regard is to ask questions of Amtrak’s president and senior vice president for operations about whether Amtrak is achieving results; however, in general, the board does not take specific actions when there are variances between expectations and performance results. Amtrak’s board chairman believes that Amtrak’s management is doing a good job in running the company, and that the president, in particular, has done a good job in bringing discipline to the corporation. However, he acknowledged that the board has not been as engaged in oversight of the company as it should have been.

Third, as discussed in previous chapters, good information necessary for effective oversight has been lacking. For example, Amtrak’s monthly performance report—a report, deemed by Amtrak’s president as “critical,” that is a primary means for reporting Amtrak’s financial and nonfinancial performance, both internally and externally—has significant limitations in the context of oversight and accountability. These limitations include the following:

- *Few measures of overall corporate performance exist.* For example, one of Amtrak’s stated goals is to bring the railroad to a state of good

repair. However, there is little in the monthly performance report indicating the corporation's overall progress toward achieving this goal or how much remains to be done to accomplish the goal. While individual pieces of information, such as the number of concrete ties laid, may indicate work accomplished, these data are not useful as an oversight mechanism if they are not set in the context of specific goals, objectives, and performance targets that must be accomplished to achieve a state of good repair. Amtrak's board chairman agreed, saying that, although the reports provided much financial information, more and better metrics on company performance are needed. He said that the availability of such information would better assist the board in its oversight role.

- *Information on the status of operating improvements is lacking.* The monthly performance report includes little information about initiatives to increase Amtrak's operational efficiency. Amtrak's June 2004 strategic plan identified nearly \$380 million in proposed incremental operating improvements<sup>8</sup> over fiscal years 2005 to 2009. These improvements included such things as additional service, crew, and equipment efficiencies and increased ridership and revenue. While there is information on some specific initiatives, such as ridership and revenue, there is little, if any, comprehensive, consolidated information about the status of these initiatives in the monthly performance report. This may be partially attributable to the fact the strategic plan did not link the dollar value of incremental improvements to specific initiatives. Since these initiatives were integral in determining the amount of Amtrak's operating grant needed, such information is important for the oversight of actual grants as well.
- *Usefulness of financial information is limited.* As discussed in chapter 3, much of the financial information provided to management and external stakeholders lacked certain relevant and reliable information. For example, the monthly performance reports contained significant errors that were not corrected until several months after the end of the fiscal year as part of the annual audit process. This delay affects the accuracy of the information for oversight purposes. Further, the monthly performance reports we reviewed did not separately report any relevant information on food and beverage revenue or expense, despite

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<sup>8</sup>The strategic plan identified these improvements as operating efficiencies and benefits from capital investments.

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food and beverage-related financial losses totaling about \$160 million in fiscal years 2002 and 2003. Finally, Amtrak's president told us that cost data for individual routes were unreliable.

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### **Amtrak Board Committees Also Have Not Been Fully Engaged in Oversight and Accountability Efforts**

Not only has the board exercised insufficient oversight, but the board's committees<sup>9</sup> also have not fulfilled their oversight requirements as set out in their charters. In March 2002, Amtrak revamped its board committee structure.<sup>10</sup> Several board committees, such as the audit, corporate affairs, and finance committees, have oversight responsibilities. However, many board committees have not met since September 2003. Under the board committee charters, the audit committee should meet at least four times annually, and the legal affairs committee should meet at least quarterly or as necessary. The corporate affairs and finance committees should meet monthly or as necessary.

Amtrak's audit committee is a good example of a board committee's not fully fulfilling its oversight responsibilities. This committee's primary functions include oversight of the corporation's accounting and financial reporting processes and the audits of Amtrak's financial statements and internal controls. Although we found that Amtrak's audit committee charter, as amended, contains audit committee duties and responsibilities that are consistent with good governance, the audit committee meets irregularly and did not fully carry out its oversight responsibilities. In fiscal year 2004, the audit committee did not meet at all. Amtrak officials told us that there were never enough members on the board in fiscal year 2004 to constitute a quorum. Further, while the committee met eight times in fiscal year 2003, it met only once in fiscal year 2002. Our review of committee minutes for fiscal years 2002 and 2003 and through August 2004 found there was no written record of the committee's reviewing and discussing auditor independence, or of management's code of ethical conduct and its compliance with such code. Further, the meeting minutes did not reflect

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<sup>9</sup>Amtrak's board has the following committees: Audit, Compensation and Personnel, Corporate Affairs, Finance, and Legal Affairs.

<sup>10</sup>Prior to March 2002, Amtrak's board had the following committees: Corporate Strategy; Ad Hoc Committee on Legislative Matters; Finance, Audit, and Administration; Budget and Management Ad Hoc Committee; Legal Affairs Ad Hoc Committee; Safety, Service, and Quality; and Ad Hoc Committee on Safety. One Amtrak official noted that prior to March 2002, most of Amtrak's board committees were inactive, and that the board put little emphasis on board committees.

that any independent meetings were held by the audit committee with the IPA.

In commenting on a draft of this report, both DOT and Amtrak officials told us that given the limited number of board members, Amtrak's board had assumed the functions of the audit committee. DOT officials said these functions included meeting with Amtrak's IPA to discuss audit and internal control issues, some of these meetings were held without the presence of Amtrak management. Analysis we performed showed that the board performed some audit committee functions or oversight. For example, our review of board minutes for fiscal year 2004 indicated that the board did hold one independent meeting with the IPA in January 2004, and received periodic status reports on the IPA's audit of Amtrak's fiscal year 2003 financial statements.<sup>11</sup> However, the board minutes contained no written documentation of the full board performing other audit committee functions, such as reviewing and discussing auditor independence or management's code of ethical conduct and Amtrak's compliance with such a code—important audit and internal control oversight functions.

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### Reform Strategies May Contribute to Better Alignment of Accountability and Performance

Although the board and its committees have not been fully engaged in oversight and accountability efforts, in April 2005, Amtrak's board and management jointly issued a set of reform strategies. These strategies embodied a new vision for Amtrak, and intercity passenger rail in general, that called for a number of changes, including reinforcing management controls, organizing planning and reporting by lines of business, and cultivating competition and private commercial activity in passenger rail functions and services. The new vision anticipates developing activity-based costing capabilities, increasing the outsourcing of activities, and pricing contracts for services on a unit cost basis. In addition, the reform strategies envision better aligning management accountability with performance, both by business line and by train route. Although it is yet to be seen how these initiatives will develop, we believe better aligning

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<sup>11</sup>We did not review the fiscal years 2002 and 2003 board minutes for specific audit committee functions because the audit committee held meetings during this time period. In its comments on a draft of this report, Amtrak noted that the board committees held regularly scheduled meetings until September 2003 when there was an insufficient number of board members to fulfill the committee functions. As previously discussed, from October 2003 to June 2004, the board only had two voting members, exclusive of the Secretary of Transportation or his designee. During this time period, the audit committee did not hold any meetings.



management accountability with performance will be an important step in both better facilitating the oversight of Amtrak and in ensuring better accountability for results.

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## Oversight of Amtrak's Performance by Some Key Stakeholders Has Been Limited

FRA and the Amtrak OIG, as key stakeholders in overseeing various aspects of the company's operations, have provided limited oversight of Amtrak's overall performance. Although responsible for providing billions of federal dollars to Amtrak each year in operating and capital subsidies, FRA has largely focused its efforts on Amtrak's compliance with grant agreements (about \$1.2 billion in each of fiscal years 2004 and 2005) and safety regulations. Since fiscal year 2003, Congress has imposed measures to increase the Secretary of Transportation's responsibility for providing oversight of and accountability for the federal funds used for intercity passenger rail service. Among other things, these measures require that Amtrak transmit a business plan to the Secretary of Transportation and Congress, supplemented by monthly reports describing work completed, changes to the business plan, and reasons for the changes. As we reported in February 2004, these measures impacted DOT's role with respect to the expenditure of federal funds provided to Amtrak.<sup>12</sup> However, these measures only apply to specific years for which they are included in appropriations acts. So far, these measures have applied to appropriations for fiscal years 2003, 2004, and 2005. In response to these measures, FRA has entered into grant agreements with Amtrak, and, according to FRA officials, Amtrak has provided the requisite business plans and monthly reports.

Although measures are in place to increase FRA's oversight of Amtrak's operations through grant agreements, FRA officials said they mainly dedicate their resources to the oversight of Amtrak's implementation of and funding needs for capital projects and to Amtrak's cash flow needs. In addition, FRA officials said they have been focused on the development and implementation of new intercity passenger rail policy. There has been less emphasis on oversight of operations and operating budgets. Such oversight has mainly come through the review of budgets and budget variances. FRA officials said there also has been less emphasis on oversight of overall corporate performance or on the extent to which Amtrak is

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<sup>12</sup>GAO, *Intercity Passenger Rail: Amtrak's Management of Northeast Corridor Improvements Demonstrates Need for Applying Best Practices*, [GAO-04-94](#) (Washington, D.C.: Feb. 27, 2004).

making progress toward meeting goals it establishes. FRA officials noted that Amtrak has no external baseline for performance statistics presented, and that better benchmarking of data to similar industries by line of business is needed. According to FRA officials, the quality of Amtrak's reporting has been improving. They said, however, that capital spending data continue to have problems because of financial system-related problems. FRA said Amtrak is aware that it needs to start from scratch with its financial system, but funding such an overhaul has been difficult.

FRA officials said DOT has a seat on Amtrak's board and by virtue of this position is knowledgeable about Amtrak's operations and goals. However, according to FRA, historically, the agency has not forced a particular approach toward running Amtrak or specifically held Amtrak management accountable for meeting or not meeting particular goals. An FRA official told us that the agency must be careful about its involvement with management decisions since, legally, Amtrak is a private, for-profit corporation. FRA officials said the agency can withhold funds from Amtrak for grant noncompliance but, to date, no funds have been withheld. In commenting on a draft of this report, DOT officials said there are both legal and practical issues associated with withholding money from Amtrak. According to DOT, legally, FRA can withhold grant monies if Amtrak violates specific provisions of the grant agreements. DOT believes its oversight role would be more effective if it had broader explicit statutory authority to withhold funds from Amtrak as a means to encourage achievement of Amtrak's annual business plan, its financial plan, and other performance measures. Such statutory authority would permit DOT to withhold discrete specific federal funds, if needed, instead of the current situation where withholding grant funds would involve large sums and could have a severe impact on Amtrak's continued operations.

FRA also attributed the lack of resources for its limited, focused approach to overseeing Amtrak. For example, FRA officials told us that they have had to rely on Amtrak's procurement department to tell them if Amtrak is complying with procurement requirements that are in the grant. According to FRA, there has been no direct verification of this compliance. As of March 2005, FRA had about six people assigned to intercity passenger rail policy development and implementation and Amtrak oversight. Three individuals were mostly full-time with the others being part-time. This number of staff was expected to increase through the creation of a new

division in March 2005 with a new division chief and two new hires designated to Amtrak oversight.<sup>13</sup>

Similar to FRA, the Amtrak OIG also has exercised limited oversight of Amtrak's corporate performance and accomplishment of goals. The Amtrak OIG was created by the Inspector General Act Amendments of 1988 to provide independent audits and investigations; promote economy, efficiency, and effectiveness; and prevent and detect fraud and abuse in Amtrak programs and operations. For fiscal year 2004, the Amtrak OIG had a staff of 88 and a \$12.5 million budget. The Amtrak OIG's Office of Audits is responsible for, among other things, conducting independent reviews of Amtrak's internal controls, overseeing and assisting in audits of Amtrak's financial statements, reviewing certain procurements and materials acquisitions, and monitoring compliance with laws and regulations. Evaluations include measuring Amtrak's compliance with corporate policies. However, as we recently reported, much of the work of this office (47 percent of all audits in fiscal year 2004) was focused on specific internal matters, such as environmental issues, inventory, and ticket sales.<sup>14</sup> An additional 29 percent of fiscal year 2004 audits focused on procurement-related matters. In general, oversight by this office is limited and does not include broader evaluations of programmatic matters or corporate performance based on corporate goals and metrics.

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## **Clarifying Amtrak's Role—and Its Key Overseers—Is Critical to Establishing Accountability**

Clarifying Amtrak's role—and its key overseers—will be critical for establishing accountability. While stronger oversight performance by Amtrak's board and refocused efforts by Amtrak's outside overseers can potentially bring about some oversight and accountability improvements, Amtrak will continue to have difficulty being more fully accountable if its role and the range of stakeholders to which it is accountable are not clarified.

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<sup>13</sup>According to FRA, as of June 2005, responsibility for intercity passenger rail policy analysis, board of director issues, and oversight had been consolidated into the existing program development division. According to FRA, the final staffing level of this division is being developed. The division currently has two full-time staff, with a third position being recruited. The division also has access, on a part-time basis, to staff of other divisions in FRA's Office of Railroad Development.

<sup>14</sup>GAO-05-306R.

As we reported over a decade ago, Amtrak and the federal government need to make important decisions about the future of intercity passenger rail service and the government's commitment to subsidize such operations.<sup>15</sup> We stated, at that time, our belief that continuing to operate the nationwide passenger rail system would require significantly increased resources if Amtrak were to offer quality service. Since our previous report, Amtrak has received more than \$10 billion in federal subsidies (capital and operating).<sup>16</sup> Although ridership has increased about 27 percent over the period, other measures of service, such as on-time performance, has fluctuated and generally decreased from 79 percent in fiscal year 1999 to about 71 percent in fiscal year 2004. Amtrak's market share has also largely stabilized at about 0.5 percent of the intercity travel market. However, Amtrak's need for federal support has not abated. Amtrak indicated in its April 2005 strategic reform initiative that the company is spending at a rate of \$1.4 billion per year, and that further increases in the level of capital investment will be required to minimize the risks of operational breakdown due to years of deferred maintenance.

Multiple proposals exist for what Amtrak's future should be, not only in defining what Amtrak should be doing, but in defining to whom Amtrak should be accountable. In particular, the administration's current proposal for Amtrak would move much of the focus of accountability to the regional, state, and local levels. The administration's proposal would significantly restructure the management and accountability of intercity passenger rail transportation in the United States. Modeled after the federal-state-local partnership in the federal transit program, the proposal would have regional, state, and local entities making the fundamental decisions about what intercity passenger rail services are justified and will receive public financial support. It would also make these entities responsible for planning, managing, and financing this service. The federal role would be to participate in making capital investments on a grant basis similar to the federal transit program, but not to subsidize operation of services that local entities would not subsidize themselves. The proposal would essentially split Amtrak's current responsibilities into two separate corporations. One corporation would transition train operations to a competitive basis, make Amtrak compete to operate intercity passenger service, and introduce the competitive forces of the marketplace to provide high-quality service at

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<sup>15</sup>[GAO/RCED-95-71](#).

<sup>16</sup>This amount excludes federal loan guarantees.

reasonable prices. The other corporation would continue, for a period of 6 years, to provide the dispatching, maintenance, and infrastructure services provided by Amtrak and carry out a multiyear infrastructure plan prepared by Amtrak. Title to Amtrak's assets, including the Northeast Corridor, would be transferred to the Secretary of Transportation. An interstate compact of eight states and the District of Columbia would manage all rail operations on the Northeast Corridor.

Amtrak has proposed a somewhat similar vision that would include a greater role for states in planning and developing passenger rail corridors. Its April 2005 strategic reform initiatives states that the current structure of intercity passenger rail service is unsustainable, and that a more aggressive approach that includes the introduction and development of competition is needed. Under both this initiative and the administration's reform proposal, it is clear that states would play an increased role in deciding what services are provided, who would provide them, who would cover operating losses, and who would oversee the results.

While there is growing agreement that the current model for providing intercity passenger rail service needs to be reexamined, there is much less agreement on what should be done. Deciding on a course of action, however, is critical. In our view, concerns about Amtrak's performance and accountability will remain unresolved as long as the current situation goes unchanged. Better resolve on Amtrak's board and management's part to hold the company accountable is not enough.

Congress has a central role in this issue. It created Amtrak and has continued to subsidize its operations over time. Amtrak's authorization expired in September 2002, and Congress is now considering what, if any, changes are needed in the structure and financing of intercity passenger rail. As part of this reauthorization, Congress will also play a role in determining the type of oversight to be provided and the accountability mechanisms to be used to ensure that desired results and outcomes are achieved. As we reported in April 2003, the key components of a framework for evaluating federal infrastructure investments include (1) establishing clear, nonconflicting goals; (2) establishing the roles of government and private entities; (3) establishing funding approaches that focus on and provide incentives for results and accountability; and (4) ensuring that the strategies developed address the diverse stakeholder interests and limit unintended consequences. (See fig. 14.) We continue to believe these components are important in evaluating and establishing federal policy toward intercity passenger rail.

**Figure 14: Components of a Framework for Evaluating Federal Investments**



Sources: GAO (data), Art Explosion (images).

## Conclusions

It is clear that Amtrak’s ability to operate efficiently and effectively is impacted by problems at several levels. At one level, Amtrak still has major challenges to overcome in strengthening its basic business systems, such as financial reporting, cost containment, and control over acquisitions. Creating effective systems in these areas is something that Amtrak, like any public or private organization, needs to address, and this is the case whether Amtrak’s role changes dramatically or whether it continues in its current form and its current role. On a different level, however, Amtrak faces a unique set of problems, which is not necessarily of its own making and which is, to an extent, beyond the company’s ability to resolve. These problems involve the issues that bookend this report—what is Amtrak’s role, and to whom is it accountable?

Since Amtrak’s reauthorization expired in September 2002, Congress now has the opportunity to decide what structure and mechanisms are best suited for the provision of intercity passenger rail service, what role intercity passenger rail is expected to play in the nation’s transportation system, and how this structure will make the most efficient and effective use of federal resources. It was not the focus of this report to evaluate the merits of various reform proposals or their particular costs and feasibility.

However, it is clear that Amtrak's ability to articulate its mission, align its various enterprises, and operate a results-oriented organization would be enhanced by a clarification of its role.

Part and parcel to the debate over the future of intercity passenger rail is the issue of adequate oversight and accountability for results and outcomes. In part, the current situation is the result of how Amtrak has evolved over time in its governance and accountability—an evolution that has largely left Amtrak unaccountable to anyone in particular. These problems have been exacerbated by the limited oversight exercised by Amtrak's board, and the relatively narrow scope of review activity by other oversight bodies, such as FRA. These groups have not filled the void. The reauthorization process offers an opportunity for Congress to take a new approach in whatever structure it elects to adopt for intercity passenger rail—an approach that ensures there is a clear and transparent mechanism for oversight and accountability, and that there are consequences if desired results and outcomes are not achieved. Without a clear mechanism and consequences, an intercity passenger rail provider (whether Amtrak or some other entity) will have less incentive to ensure achievement of results and outcomes and ensure that resources made available, whether federal or nonfederal, are used in the most efficient and effective manner possible.

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## **Matters for Congressional Consideration**

As part of the deliberation about the future of Amtrak and intercity passenger rail, we believe Congress may want to consider establishing a national policy for intercity passenger rail and determining the appropriate role for Amtrak by ensuring that reauthorization or reform legislation (1) establishes clear, nonconflicting goals; (2) establishes the roles of both the federal and state governments as well as private entities; (3) establishes funding approaches that focus on and provide incentives for results and accountability; and (4) provides that the strategies developed address the diverse stakeholder interests and limit unintended consequences.

---

## **Recommendations for Executive Action**

To strengthen the oversight of corporate performance and to increase the accountability of Amtrak's management for achieving the goals and objectives it establishes, and to provide the needed transparency among key internal and external stakeholders, we recommend that the chairman of Amtrak's board and the board members take the following three actions:

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**Chapter 6**  
**Amtrak Does Not Have Adequate Oversight**  
**of or Accountability for Its Performance and**  
**Results**

---

- develop policies related to the oversight of corporate performance and the specific procedures to be used to implement these policies;
- identify, in consultation with Amtrak’s president and senior management, the type and frequency of information required to implement the policies and procedures for oversight; and
- in conjunction with Amtrak’s management, assess the financial and other resources that will be required to develop the measures and information required to conduct cost-effective oversight, and prepare an action plan to implement needed changes in information and data systems to provide the reports and other documents required to meet the oversight policies and procedures adopted.

To strengthen DOT and FRA oversight of Amtrak’s performance, we recommend that the Secretary of Transportation direct the Federal Railroad Administrator to take the following four actions:

- work with Amtrak’s board and management to develop measures of overall corporate performance and related outcomes;
- require Amtrak to report on these measures of corporate performance and outcomes at least annually;
- identify and make known to Amtrak the range of potential consequences of not meeting, or making sufficient progress toward, a minimum level of performance on the corporate measures and outcomes; and
- report annually to Congress on the results of FRA’s oversight of Amtrak’s corporate performance and Amtrak’s progress toward meeting minimum levels of performance and outcomes (this report should identify any specific actions Congress should consider taking to better facilitate progress on achieving specific outcomes or to identify alternative ways the outcome might be achieved).



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# Methodology for Selecting Procurement Contract Files for Review

---

In order to assess the National Railroad Passenger Corporation's (Amtrak) compliance with its acquisition policies and procedures, we reviewed a nonprobability sample of 61 service contract files<sup>1</sup> that covered 75 percent of the total expenditures for fiscal years 2002 and 2003 in the following accounts:<sup>2</sup>

- Advertising (Account 553201).
- Sales promotion (Account 553209).
- Professional services (Account 505111).
- Consulting (Account 505115).

We selected the files we reviewed from data identifying expenditures made under purchase orders during fiscal years 2002 and 2003; the results of our analysis cannot be projected to the universe. Our objective was to obtain a mix of contracts with small, medium, and large dollar expenditures during fiscal years 2002 and 2003. Because our basis for selection was expenditures, as opposed to actual contract awards, the contracts selected include those awarded before fiscal year 2002 as well as contracts awarded during fiscal years 2002 and 2003.

Specifically, we selected contracts as follows:

Amtrak provided data on expenditures made under purchase orders during fiscal years 2002 and 2003. These data were segregated by financial account and identified specific transactions. These data included information such as vendors, purchase order numbers, and expenditure amounts for each transaction. Each purchase order number—also used as the contract

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<sup>1</sup>Results from nonprobability samples cannot be used to make inferences about a population, because in a nonprobability sample some elements of the population being studied have no chance or an unknown chance of being selected as part of the sample.

<sup>2</sup>We initially selected 2 additional contracts but subsequently excluded them from our analysis. One of these was a contract that had been originally awarded in 1994 and, according to a procurement department official, was to provide personnel in support of the engineering department. Work under this contract had started and stopped over the years and assessing it for compliance with Amtrak policies and procedures was not possible. The second contract we excluded from our analysis was a contract for maintenance on the Acela trainset. In this case, the consortium that had built the Acela had formed a corporation for the purposes of performing maintenance, and a purchase order had been created solely for the purposes of tracking payments to the consortium.

number—indicates whether it is a blanket purchase order (B), which allows purchases to be made over a period of time, or a standard purchase order (S), which is used for one-time purchases.<sup>3</sup>

To assess the reliability of the procurement data Amtrak provided, we compared it with Amtrak audited financial statement data for fiscal years 2002 and 2003 for the accounts we reviewed. (The expenditure data came from a different database.) We then asked Amtrak to reconcile differences that we identified between the two sets of accounts. Because Amtrak officials said this reconciliation had to be done manually and would take substantial time, data were reconciled for only 1 account—sales promotion. Consequently, we used the procurement expenditure data only to select a nonprobability sample of procurement contracts to review.

For each year and each account, we sorted the expenditure data by purchase order type and amount. For each account, we selected 2 to 10 purchase orders within each type of order—blanket or standard—in order to obtain a mix of large, medium, and small dollar expenditures so that we could assess compliance with acquisition policies and procedures for contracts with significant dollar values, as well as for contracts of lesser values.

We also noted that expenditures made under a given purchase order could be charged to more than one account. We only selected each contract once. However, for purposes of determining the extent of dollar coverage resulting from our selections, we included the expenditures under a given purchase order that were charged to another of the accounts within our scope (advertising, sales promotion, professional services, and consulting). According to Amtrak's expenditure data, total blanket and standard purchase order expenditures for the four accounts within our scope was \$114.3 million. The expenditures for the purchase orders we selected—according to the same data—totaled \$85.3 million in fiscal years 2002 and 2003, or 75 percent of the total expenditures for these accounts.

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<sup>3</sup>The expenditure data also included construction purchase orders, which we excluded because construction contracts were outside of the scope of our review.

When we reviewed the contracts, we determined whether they were awarded competitively or noncompetitively<sup>4</sup> and assessed them for compliance with policies and procedures in effect at the time of the contract award, or the guidance in effect when a change to the contract was processed. For example, if a contract was awarded in 2002, we used guidance applicable at the time of the award. If a change to the contract occurred, for example, in 2003 or 2004, we applied the guidance in effect at that time.

Finally, Amtrak could not locate any documentation for 4 of the contracts we selected. Instead, they provided printouts from the acquisition system. These printouts contained minimal information about the contract, such as the vendor name, amount of the award, and whether it was a competitive or noncompetitive award. Additionally, for another contract, one folder—out of three—was missing. We analyzed these contracts on the basis of the limited information available.

---

<sup>4</sup>We define noncompetitive awards as those that Amtrak considered as either sole or single source. We obtained information as to whether a contract was a sole or single source award by review of documentation in the contract file and, if necessary, discussion with procurement department officials.

# Comments from the National Railroad Passenger Corporation

Note: GAO comments supplementing those in the report text appear at the end of this appendix.

NATIONAL RAILROAD PASSENGER CORPORATION  
60 Massachusetts Avenue, NE, Washington, DC 20002  
tel 202 906.3960 fax 202 906.2850

David L. Gunn  
President and Chief Executive Officer



September 2, 2005

Ms. JayEtta Z. Hecker  
Director, Physical Infrastructure  
U.S. Government Accountability Office  
441 G Street, NW  
Washington, DC 20548

Dear Ms. Hecker:

In reference to the GAO's report to Congress titled, Amtrak Management – Systematic Problems require Action to improve Efficiency, Effectiveness and Accountability, I would like to provide a few comments and some observations to this report.

Over the last year and a half, the GAO has conducted this audit of Amtrak's management and performance procedure and has developed a set of recommendations for both the corporation and for the Congress. A considerable degree of effort was put into this report by your staff and mine, and I am sure you believe that your recommendations set forth will produce a certain set of results. I am not as convinced, and I have repeatedly made this point to you and your staff during the course of this project, including as recently as June 27, 2005. There is no silver bullet to fixing Amtrak, nor is there a certain "cookie cutter" approach that can be taken. I, and my team of managers, feel that steady incremental improvement is best. During the last thirty-six months, we have focused on maintaining liquidity, cleaning up the books, rebuilding plant equipment, and building an organization that can manage the budget and control costs. I think the results speak for themselves as you will note from the enclosed charts. We did all the work with less people and still kept our operating needs flat. We have given you this information, and I believe you have given us some credit for significant improvement.

Now let me respond directly to the other more specific problems you have raised in this report, in particular, the areas of Food Service, Procurement, Strategic Planning, and Financial Controls.

As it relates to food service:

- We are reforming the way that we deliver food service. I refer you to my comments attached to your report on Amtrak's food and beverage delivery services released in July 2005. Some initiatives were phased in quickly, such as the elimination of food and beverage service on selected short-distance trains, while others are being phased in gradually, so as not to disrupt the passenger experience which would surely impact revenue.

See comment 1.

See comment 2.

**Appendix II  
Comments from the National Railroad  
Passenger Corporation**



*Ms. JayEtta Z. Hecker  
September 2, 2005  
Page 2*

- We have provided our Board of Directors with a list of initiatives and pilot projects that are either already underway or will be implemented in the next few months. We have outlined these for the GAO as well over the course of this review.
- We are currently renegotiating the Gate Gourmet contract, which we expect will increase efficiencies and lower costs. In the near future, we will issue an RFI to identify providers who could offer either localized or regional service which are intended to drive down costs even further.
- Your report failed to mention, however, the cost of labor as it relates to the operation of our food and beverage service. It is by far the largest cost of the operation, as reported in the chart you presented to the House Government Reform and Oversight Committee during a recent hearing. All of the actions noted above cannot be done overnight and must be implemented with the passenger in mind.

See comment 3.

In the area of procurement management, many of the issues you have identified are ones that Amtrak has been focused on for a number of years. It is an area that has been changed greatly over the last few years to produce greater accountability and efficiency. We are in the process of completing the implementation of the changes for this area, many of which coincide with what is in your recommendations. You have been kept up to date on these changes.

See comment 4.

In the area of strategic planning, I believe that we have identified the problems, as only we can, and have developed an approach that works best for us and where tangible progress has been made. I refer you to the attachments that accompany this letter. While the path that we follow may not be the same as government agencies do, nor the one that you might recommend, our goals are the same. To me, while process is important, results are what matter.

See comment 5.

During my tenure, Amtrak's financial performance has improved dramatically. We close our books on time and report monthly results more quickly than most companies our size. Since FY02, we have reduced our material weaknesses from 5 to 0 and our reportable conditions from 12 to 1 over the same time period. Our net audit adjustments have also decreased from \$109 million in FY02 to just \$7 million in FY04. According to our independent auditors, KPMG, whom you have interviewed and shared with you the same results, there has been a strong emphasis on improving our controls and updating our policies and procedures. While your criticism of our labor intensive processes are valid, our lack of the latest technology in this area has not stymied our efforts to produce the results that many have sought.

**Appendix II**  
**Comments from the National Railroad**  
**Passenger Corporation**



*Ms. JayEtta Z. Hecker*  
*September 2, 2005*  
*Page 3*

See comment 6.

I have worked in the rail industry for 40 years and understand this business. I am not infallible, and Amtrak has a lot of problems to confront, but it is on a firmer footing today than when I arrived. As I said before, I believe our overall results largely speak for themselves. At times the focus of this report seemed to be more concerned with our process for achieving results rather than with the actual results.

Finally, in the 39 months that I have been at Amtrak, there have been at least 6 GAO audits or reviews of various practices at Amtrak. I understand that as you finish this one, another one starts on our relationship with commuter authorities on the NEC. In fact, our staffs have already met to discuss the scope of this project. We will keep you apprised of our progress as it relates to the report just completed and work on the project just getting started.

I have enclosed a summary of more specific edits and comments that I would encourage you to consider prior to releasing your final report. Many of the points raised in the preliminary report appear to be inaccurate or misleading. I am sure you would agree that it is important that this document be as accurate as possible.

Thank you for your time and assistance during this engagement.

Sincerely,

A handwritten signature in black ink, appearing to read "David L. Gunn".

David L. Gunn  
*President and Chief Executive Officer*

Enclosures

**Appendix II  
Comments from the National Railroad  
Passenger Corporation**

**Amtrak Capital Program  
Summary of FY06 Production Estimates**

**Ongoing Asset Replacement**

Replace mentassets on regular cycle, maintain infrastructure in state-of-good repair

Major Production Programs:	Production Estimates			
	FY04 Actual	FY05 Forecast	FY06 Grant Request	FY06 Budget
Interlockings renewed (each)	5	6	4	8
Interlocking turnouts (each)	27	25	33	33
Turnouts replaced (each)	115	105	80	51
Concrete ties (thousands)	152	153	150	117
Ballast renewed (track miles)	40	17	32	15
Rail installed (rail miles)	240	34	50	39
Wood ties/Timbers (thousands)	59	43	55	66
Equipment purchased (each)	12	7	55	--
Vehicles purchased (each)	55	--	60	28
Bridge ties replaced (each)	1,571	3,940	4,500	4,224
Undergrade bridges improved (each)	17	18	32	25
Fencing (thousands feet)	17	10	20	10
Stations improved (each)	4	14	35	12
Stations assessed (each)	75	60	200	125
Interlocking improved (each)	6	6	10	4
Automatic Block Signals (track miles)	63	44	136	72
Copper signal cable (miles)	11	4	2	1
Fiber communications cable (miles)	--	13	--	--
Catenary hardware (miles)	77	80	84	68
Substations improved (each)	22	13	26	14
Poles Renewed or Replaced (each)	13	10	140	10

\* Numbers may not add due to rounding

Page 1

Page 1 of 1

**Appendix II  
Comments from the National Railroad  
Passenger Corporation**

**Amtrak Capital Program  
Summary of FY06 Production Estimates**

**ROLLING STOCK**

Equipment overhauls, remanufacturing and purchase of new equipment as well as state-of-good-repair improvements to back shops and service and inspection facilities

Major Production Programs:

	Production Estimates (units)			
	FY04 Actual	FY05 Forecast	FY06 Grant Request	FY06 Budget

**Passenger Equipment**

Overhauls and remanufacture of existing car fleet

**Passenger cars - overhauls / remanufacturing**

Amfleet Cars Remanufactured / Heavy Overhauled	114	129	140	103
Superliner Cars Remanufactured / Heavy Overhauled	39	54	92	139
Horizon Cars Remanufactured / Heavy Overhauled	1	28	29	20
Surfliner Cars Remanufactured / Heavy Overhauled	--	11	--	--
Viewliner Cars Remanufactured / Heavy Overhauled	--	--	2	1
Heritage Cars Remanufactured / Heavy Overhauled	--	--	--	21

**Locomotives - heavy overhauls**

Electric	7	12	8	8
Diesel Locomotive heavy Overhauls	49	65	61	51

\* Numbers may not add due to rounding

Page 1

Page 1 of 1



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The following are GAO's comments on the National Railroad Passenger Corporation's (Amtrak) letter dated September 2, 2005.

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## GAO Comments

1. Amtrak believes that there is no “silver bullet” for fixing its problems and that making steady incremental improvements is the best approach. These views do not appear to be consistent with the magnitude of changes discussed in Amtrak's April 2005 strategic reform initiatives. This document—which was characterized by Amtrak as a dramatic departure from business as usual and would substantially change how Amtrak operates—outlines a number of structural, operating, and legislative changes that would, among other things, place a new focus on planning, budgeting, accounting, and reporting of financial activity and performance along Amtrak's business lines and open to competition the market for virtually all functions and services of intercity passenger rail. We believe the strategic reform initiatives clearly acknowledge the substantial systemic problems facing Amtrak, including those discussed in this report, as well as the need for reform in how intercity passenger rail service is delivered. As previously discussed in this report, we encourage Amtrak's president and management to work with the board of directors to ensure that the issues and challenges raised in the strategic reform initiatives are addressed.
2. Amtrak commented that it has recently taken a number of actions to better manage its food and beverage service, including reforming the delivery of food service and renegotiating its contract with Gate Gourmet (formerly called Dobbs International). Amtrak's comments also stated that our draft report failed to mention or recognize the cost of labor associated with the food and beverage service. We agree that Amtrak has taken actions regarding its food and beverage service, and we encourage Amtrak to continue to seek ways to improve the management and controls over this service. Both our June 2005 testimony before the Subcommittee on Railroads, House Committee on Transportation and Infrastructure, and our August 2005 report on Amtrak's food and beverage service made recommendations for

improving this control.<sup>1</sup> Both the testimony and report also acknowledge the labor costs associated with the food and beverage service. We agree with Amtrak that this is the single largest cost of this service. Because labor costs associated with the food and beverage service are a part of Amtrak's overall labor cost structure, it was beyond the scope of our work in this report to analyze these specific costs. However, our June 2005 testimony indicated that a recent Amtrak Inspector General report suggested a way Amtrak could address its food and beverage labor costs.

3. Amtrak commented that it was in the process of implementing changes in the procurement area, many of which coincide with our recommendations. We commend Amtrak for recognizing areas for improvement in its procurement area and for making changes. However, we found numerous systemic problems with the procurement function that still need to be addressed. The recommendations contained in this report are designed to help Amtrak address these problems.
4. Amtrak commented that it has identified the problems, "as only we can," and has developed an approach that "works best for us." Amtrak's president also commented that the strategic planning mechanisms we recommend or that government agencies adopt may not be in line with those followed by Amtrak, but the goals are the same. Further, he states that while the process is important, results are what matter. We agree results matter, but, overall, results are not improving. Our report notes that both public and private organizations have long recognized that sound strategic planning mechanisms or "processes" are vital to chart a clear direction and mission, develop road maps for cost-effective operations based on this mission, and be held accountable for results. We believe the management tools Amtrak has adopted in recent years, while helpful, are focused too narrowly and insufficient to stem the operating losses the company is experiencing. We also believe adopting a systematic and organized strategic approach is necessary to achieve the results management and the public expect.

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<sup>1</sup>GAO, *Amtrak: Management and Accountability Issues Contribute to Unprofitability of Food and Beverage Service*, [GAO-05-761T](#) (Washington, D.C.: June 9, 2005); and *Amtrak: Improved Management and Controls over Food and Beverage Service Needed*, [GAO-05-867](#) (Washington, D.C.: Aug. 24, 2005).

5. Amtrak commented that its financial performance has improved dramatically in recent years and that, among other things, it closes its books on time and reports monthly results faster than most other companies of its size. We agree that improvements have been made and that this is a step in the right direction. Our report recognizes these improvements. However, our work shows there continues to be substantive problems related to financial management at Amtrak. These problems include monthly performance reports that are not as useful as they could be and that contain financial data that are not reliable, and inadequate internal controls related to certain expenses. As we previously discussed, Amtrak will find it difficult to make sound business decisions and improve its efficiency and cost-effectiveness without addressing these problems.
  
6. Amtrak commented that, at times, our draft report seemed to be more concerned with the process for achieving results, rather than the actual results. We believe actual results are important and that the results are not satisfactory. Although improvements have been made, during the past 3 fiscal years, Amtrak's operating losses have increased to over \$1 billion annually, and such losses are projected to increase about 40 percent by 2009. In addition, we found systemic problems in all five areas we reviewed, and we found that Amtrak faces major challenges in instituting and improving its basic business systems. Amtrak's recent improvements have likely quelled what would have been even higher losses, but the situation is still not under control. The recommendations contained in this report reflect sound and proven ways adopted by leading organizations to more efficiently and effectively manage Amtrak's operations. We believe that not recognizing the value of these approaches and adapting them to Amtrak's environment will continue to lead to suboptimal results.

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# GAO Contact and Staff Acknowledgments

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**Appendix III**  
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Strategic Issues Team

Elizabeth Curda  
Sarah Veale

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# EXHIBIT 9

# Review of Amtrak's Management of Outside Legal Services

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Offices of Inspector General  
Joint Review Team



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\* This document contains certain Amtrak attorney-client or other privileged information. The Joint Review Team requests notification prior to disclosure of information in this document to anyone other than Members of Congress or their staff.

# Objectives

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The objectives of the Joint Review Team (JRT) were to:

- Determine whether the United States can be assured that the government received fair and reasonable value for the legal fees that Amtrak spent for outside counsel.
- Determine whether Amtrak's in-house counsel properly managed outside counsel and whether outside counsel complied with Amtrak's 'Guidelines for Outside Counsel' (Guidelines).

# Background

---

- The House Committee on Transportation and Infrastructure requested this review.
- The Office of Inspector General of the Department of Transportation and the Office of Inspector General at the National Railroad Passenger Corporation (Amtrak) jointly reviewed Amtrak in-house counsel's acquisition and management of outside counsel.

## Scope of Review

---

The JRT reviewed Amtrak outside counsel expenditures from June 2002 through June 2005:

□ Top 10 Law Firms	\$40,193,752
□ Total	\$102,621,205

See slides 44 and 45 for details on scope and methodology.

# Top Outside Counsel Firms June 2002 to June 2005

---

	<b>Total Billed</b>
1. Landman Corsi Ballaine & Ford	\$11,566,986.59
2. Manatt, Phelps & Phillips	\$7,381,430.82
3. DLA Piper Rudnick Gray Cary	\$4,089,506.09
4. Bonner Kiernan Trebach & Crociata	\$3,535,246.22
5. Anderson, Rasor & Partners	\$3,086,981.63
6. Morgan, Lewis & Bockius	\$2,847,354.21
7. Pillsbury Winthrop Shaw Pittman	\$2,710,145.07
8. Sims Law Firm	\$2,476,520.58
9. Jackson Lewis	\$1,353,357.76
10. Vedder, Price, Kaufman & Kammholz	\$1,146,223.37

# Significant Findings

---

- ❑ Amtrak did not properly manage outside counsel in a manner that limited costs and protected Amtrak's interests.
- ❑ Amtrak did not enforce the Guidelines, which would have been effective in protecting Amtrak's interests and preventing overcharges.
- ❑ Amtrak signed agreements with one law firm that significantly supplanted the Guidelines and voided its protections.

# GAO Reported Similar Findings in 2005 In Wide-Ranging Review of Management

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- The JRT's findings were very similar to the findings that the Government Accountability Office reported in October 2005 (No. GAO 06-145, "Amtrak Management – Systemic Problems Require Actions to Improve Efficiency, Effectiveness, and Accountability.")
- GAO began its review in May 2004 and met with Amtrak's General Counsel and staff beginning in June 2004.
- GAO's report covered a much wider subject area, the total management of Amtrak, and more narrowly examined the management of legal fees as one of several procurement issues.

# GAO Findings Listed 6 Problems Related to Amtrak's Procurement of Outside Counsel

---

1. Lack of competition in selecting firms.
2. Lack of spend analysis on outside legal services.
3. Lack of specificity in documenting terms and conditions of the services to be provided.
4. An inconsistent review of invoices for compliance with established billing guidelines.
5. Inadequate documentation supporting purchases for certain matters.
6. A lack of segregation of key approval and payment functions.



# Joint Review Team Findings: Amtrak Did Not Enforce the Guidelines

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In-house counsel did not enforce its Guidelines, dated March 1998, and did not:

- Adequately review outside counsel legal billing.
- Consistently request and manage budgets.
- Show familiarity with and understanding of the Guidelines.
- Properly manage outside counsel staffing and rates.
- Prevent prohibited billing practices.
- Ensure that outside counsel followed recordkeeping rules.
- Perform 'audits' anticipated by the Guidelines.

# Outside Counsel Firms Engaged In Prohibited Block Billing

---

- ❑ All top 10 firms submitted invoices with block billing, a practice prohibited by the Guidelines. Block billing lumps different tasks together under one entry on an invoice, obscuring the cost of each task.
- ❑ During the sample period, 31.4 percent of fees invoiced by the top 10 firms were block billed.
- ❑ Amtrak in-house Managing Attorneys are responsible for reviewing invoices and enforcing outside counsel's compliance with the Guidelines.
- ❑ Amtrak in-house Managing Attorneys failed to question or disallow block billing, even though it is easily recognized.
- ❑ One firm block billed almost exclusively until September 2005.

# Example of Prohibited 'Block Billing' On Outside Law Firm Invoice

<u>Date</u>	<u>Description</u>	<u>Init</u>	<u>Hours</u>
07/23/03	Telephone conferences with ██████, ██████ regarding foundation spreadsheet, OIG position, Engineering department position; letter to ██████ regarding foundation situation; attention to ██████ system update issues; review foundation crack spreadsheet; revisions and additional information regarding same; validate with ██████; motion to reconsider PE sealing; attention to ██████ additional Article 50 documentation; letter to ██████ regarding consideration of Amtrak letter to ██████ regarding rescheduling of PE seals review; attention to additions to ISO 9001 claim arising from structural stress hearing; documentation of same to ██████; telephone conference with ██████ regarding same; attention to issues regarding withdrawal of funds from retainage account for corrective work.	██████	6.80

# Firms Did Not Provide Required Invoice Details

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- Only 1 of the top 10 firms put cumulative billing per legal matter on each bill. Failure to do so hinders efforts to stay within budgets.
  
- One firm's invoices frequently did not show hourly rates or the time spent on each task, as required, until January 2005.
  - For example, the firm's January 2004 invoices did not show the amount of time spent for 405 of the 583 line items (or 69 percent).
  - The January 2004 invoices did not disclose any hourly rates.
  - It was therefore impossible to determine whether invoices totaling about \$143,000 were correct.

## Some Invoices Did Not List Hourly Rates, Which Obscured Omission of Discount

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- ❑ Another firm's invoices did not list hourly rates as required by the Guidelines.
- ❑ The absence of hourly rates obscured the firm's failure to consistently give Amtrak its negotiated discount.
- ❑ For the 3 years reviewed, that firm's billings would have been about \$30,000 less if the discounts had been consistent.

# Law Firms Should Write Down Unproductive or Excessive Time

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According to the U.S. Supreme Court:

“Counsel ... should make a good-faith effort to exclude ... hours that are excessive, redundant, or otherwise unnecessary; ... a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. ‘In the private sector, ‘billing judgment’ is an important component in fee setting.’ ”

Hensley v. Eckerhart, 461 U.S. 424 (1983)

## Amtrak's Invoices Showed Little Evidence of Write-Downs

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- ❑ Amtrak in-house counsel staff said invoices were lowered by outside counsel's write-downs of individual items, but there is evidence of this in only a very few invoices.
- ❑ Out of total billings of \$5.2 million in the sample, the review team found evidence of write-downs totaling only \$7,000, or .001 percent.
- ❑ Interviews with key Amtrak in-house counsel staff confirmed outside counsel made only a minimal number of write-downs.

## Very Few Invoices Showed Markings To Indicate a Thorough Review

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- Although one or more Managing Attorneys *should* review and approve each invoice for payment, we found very few invoices that exhibited any sign of review before approval -- just the perfunctory approvals on the face of the bill.
- Invoices lacked marking of comments, questions, and requests for clarification that are typical of a prudent and thorough review by in-house counsel.



## Firms Voluntarily Revealed Billing Errors, Indicating Insufficient Scrutiny by Amtrak

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- ❑ Two outside counsel firms voluntarily disclosed billing errors when they became aware of the JRT review.
- ❑ Voluntary disclosure of errors is an indication of insufficient scrutiny by in-house counsel.
- ❑ Each firm proposed to refund about \$30,000. One firm has withdrawn its offer.

# In-House Reviews Failed to Note These Problems Found by the JRT:

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- Use of highly paid attorneys and staff for work that could have been performed by lower-paid staff.
- No record of approval of changes in hourly rates.
- Lack of detailed description supporting the value of certain tasks and the time taken to complete tasks.
- Vague descriptions of activities performed. Example from one invoice: 'Review Amtrak documents.'
- Duplicate payments.
- No record of approval was provided for adding outside counsel attorneys and staff to a case.

# Outside Counsel Rarely Created Or Updated Budgets

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- ❑ Guidelines require outside counsel to create budgets for most matters, amend them when circumstances change significantly, and update budgets every six months.
- ❑ The JRT found very limited evidence of budgets or budget updates in either Amtrak's in-house counsel's or outside firms' responses to the review team's document requests.
- ❑ The JRT found no evidence of a systematic review of budgets, or that Amtrak's in-house Managing Attorneys provided outside counsel with feedback on budgets or required them to write off any amounts over budget.

# In-House Legal Staff Not Trained in Guideline Requirements

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- Amtrak did not provide any formal training or published tutorial about the Guidelines to its Managing Attorneys.
  
- Interviews of Amtrak's inside counsel showed that some misinterpreted or had insufficient knowledge of the Guidelines.
  - Some Managing Attorneys were unaware that block billing was prohibited.
  
  - One Managing Attorney interpreted the Guidelines as not being 'rigid commandments.'

# Amtrak's Selection of Outside Law Firms Raises Questions

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- ❑ Amtrak in-house counsel primarily selects large, metropolitan firms with high rates.
- ❑ Amtrak in-house counsel primarily selects firms it has previously engaged.

# In-House Counsel Does Not Have Standard Record-Handling Policies

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- ❑ Amtrak's General Counsel says each attorney uses his or her own method for maintaining legal files.
- ❑ Some Managing Attorneys rely on outside counsel to maintain files and have no recourse if the firms are unable or unwilling to provide the records.
- ❑ Amtrak in-house attorneys, including two high-ranking officials, were unable to readily and promptly produce their own files related to the top billing firm. In-house counsel said the files 'must have been thrown out.'
- ❑ Amtrak in-house counsel was frequently unable to respond promptly and thoroughly to requests from the JRT.

# Amtrak Has Not Conducted Any 'Audits' of Outside Counsel

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- ❑ Guidelines suggest in-house counsel should 'audit' outside counsel's invoices.
- ❑ Guidelines require outside counsel to fully cooperate with Amtrak in-house counsel's 'audits' of its invoices.
- ❑ We found no evidence that Amtrak in-house counsel has ever conducted an 'audit' of invoices.

# Some Outside Counsel Hourly Rates Were Higher Than Necessary

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- ❑ Some of the rates Amtrak is paying are generally high, from over \$450 per hour for an eighth-year associate (in 2002) to \$575 per hour for a partner (in 2004).
- ❑ The Guidelines state that Amtrak expects at least the same discount offered to a firm's other government clients or large corporate clients, whichever is lower. The JRT found no way to verify that the discounts Amtrak obtained were the best to which they were entitled. Nor did we find any indication that Amtrak attempted to verify that the discounts offered were in fact given.
- ❑ Some of Amtrak's in-house Managing Attorneys stated that the approval of negotiated rates and rate changes have not been documented.
- ❑ The Guidelines require that any increase in rates during the course of an engagement must be discussed with and approved in advance by an Amtrak in-house Managing Attorney. We found evidence of approval of rate increases for only 1 of the 10 firms.



## Some Outside Counsel Submitted Inappropriate Charges for Staff

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- The Guidelines require advance approval to add staff; prohibit charging for transition time; and suggest that no more than one partner, one associate, and perhaps a paralegal be assigned to any one legal matter.
  
- We found little evidence that Amtrak's in-house counsel was noting or managing the number of staff assigned to many of these matters.
  
- One frequently used firm submitted bills for:
  - Temporary attorneys at rates that staff attorneys would charge, rather than the actual cost that the law firm paid to temporarily hire the attorney.
  - Partner-heavy staffing.

# Outside Counsels' Claims for Reimbursable Expenses Could Not Be Verified

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- The Guidelines prohibit Amtrak from reimbursing an outside counsel more than it paid for expenses such as photocopies, expert witnesses, or use of databases, but do not require outside counsel to submit proof of its expenses.
- Only 1 of the 10 firms in the sample routinely submitted receipts or other evidence of reimbursable expenses.

## Outside Counsel May Have Overcharged for Travel Time

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- The Guidelines require that outside counsel's travel time be billed at only half of the normal hourly rate unless he or she works on the case while traveling.
- With few exceptions, invoices did not show whether this requirement was met, because the firms did not usually label or segregate travel time. When outside counsel did label travel time, they almost never indicated whether they worked on the case while traveling or were billing at the lower rate.

## Approval of Time Billed for Legal Research Could Not Be Verified

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- ❑ The Guidelines require prior approval from an Amtrak in-house Managing Attorney for legal research of more than 2 to 3 hours. The JRT found many instances of such research in the sample.
- ❑ The Guidelines do not require the approval to be made in writing.
- ❑ Amtrak in-house Managing Attorneys uniformly claimed they had given oral approval for such research.
- ❑ Without written approval, the JRT could not verify this.

## Case Management System and Financial Information System Were Not Reconciled

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The JRT compared reports from the Amtrak's case management system to its financial information systems and found the case management system understated expenditures by \$685,035.

Of this amount, \$252,274 (or 37 percent) was attributed to human error and the balance was attributed to the financial information systems being updated sooner than the case management system.

# In-House Counsel Signed Agreements That Supplanted the Guidelines and Their Protections

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- ❑ One of the firms most frequently used by Amtrak circumvented the budget requirement and other requirements in the Guidelines by negotiating several agreements from 2003 to 2005 that supplanted the Guidelines.
- ❑ The terms of the agreements were substantially less beneficial to Amtrak and more beneficial to the law firm than were the terms required by the Guidelines.
- ❑ The JRT found one similar agreement between Amtrak and one other of the top 10 law firms.

# Supplanting Agreements

## Increased Fees and Expenses

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- Agreements eliminated the guarantee of rates no higher than the best rates given 'comparable clients.'
  - Agreements substituted a 15 percent discount, then a 10 percent discount, without comparison to rates or discounts for other comparable clients.
  - Agreements eliminated the discount on non-lawyers paid up to \$160 per hour.
- Agreements made annual increases automatic, eliminating Amtrak approval process.
- Highest rate went up 50 percent (about \$200 per hour) in 2 years.
- Agreements eliminated prohibition of outside counsel earning profits on expenses such as photocopying.

# Supplanting Agreements Weakened Protection Against Ethical Violations

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- ❑ Agreements made an outside law firm's work product the property of the law firm, not Amtrak.
- ❑ Amtrak waived most conflicts of interest, in advance.
  - Amtrak agreed proper disclosure of the conflict has been made even before the conflict is known to Amtrak.
- ❑ Agreements initially allowed the law firm to terminate the engagement if Amtrak's payments were more than 30 days past due. A later agreement lowered that to 20 days.



## Agreements Will Handicap Amtrak In Any Fee Disputes With the Law Firm

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- ❑ Amtrak is required to register objections to invoices 'immediately.' Silence is equated with acceptance of the accuracy of the invoices.
- ❑ Agreement forces Amtrak into arbitration.
  - If Amtrak loses, it pays the current hourly rates, with no discounts, and must pay the firm for time the firm spends in the fee dispute.
- ❑ Firm can attach Amtrak assets.
- ❑ Firm is not required to prepare budgets, and any budgets prepared are not binding.

# Response From Amtrak

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Amtrak's General Counsel has not reviewed this document, but received a brief summary of the Joint Review Team's findings and observations.

Amtrak's General Counsel responded to this summary with comments that are attached to this document as an appendix.

# Amtrak Responded That It Has Made Certain Improvements

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Certain Amtrak in-house counsel policies or practices have been initiated or are being presently reviewed, including:

- Revising the Guidelines. The Government Accountability Office in May 2004 began a review of procurement issues concerning Amtrak's outside counsel and met with Amtrak General Counsel in June 2004. Amtrak began revising the Guidelines in July 2004. Amtrak stated it will conclude the revisions after it has received the JRT's recommendations.
- In Fiscal Year 2005, Amtrak began implementation of an electronic billing system. The implementation has not been fully completed.
- In Fiscal Year 2005, Amtrak began implementation of a case management system. The implementation has not been fully completed.

# Recommendations

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We recommend that Amtrak in-house counsel:

1. Adhere to the Guidelines.
2. Strengthen and update the Guidelines.
3. Implement processes to provide comprehensive oversight of outside counsel.
4. Train Amtrak in-house Managing Attorneys on proper review and management procedures.
5. Amtrak should seek ways to save money on its legal expenditures without sacrificing the quality of services.

# Recommendation 1.

## Adhere to the Guidelines

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- Conduct detailed, line-by-line bill analyses.
- Disallow payment of bills for unacceptable expenses and disbursements.
- Enforce requirements for budgets.
- Perform periodic 'audits.'

## Recommendation 2.

# Strengthen and Update the Guidelines

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- ❑ Prohibit any agreement that conflicts with the Guidelines unless a reasonable justification is documented and Amtrak's General Counsel approves.
- ❑ Add rules governing the appearance of conflict of interest.
- ❑ Require an engagement letter for each new matter.
- ❑ Require **written** approval for rate changes, staff changes, travel, or legal research beyond two to three hours.
- ❑ Require documentation of reimbursable expenses.
- ❑ Require that invoices demonstrate compliance with travel time requirements.

## Recommendation 3. A. Improve Management of Outside Counsel

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- ❑ Standardize procedures for procuring outside counsel.
- ❑ Periodically compare outside counsel fees to those charged to similar entities, such as freight railroads.
- ❑ Adopt a consistent and uniform recordkeeping system with policies and procedures for record management.

## Recommendation 3. B. Improve Management of Outside Counsel

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- ❑ Document all discussions about billing issues.
- ❑ Guard against inappropriate staffing, high hourly rates, and assigning multiple firms to a single legal matter.
- ❑ Create policies and procedures for periodic 'audits.'



## Recommendation 4. Provide Standardized Training

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- Present the Guidelines as the governing authority for the legal relationship with outside counsel.
- Communicate the importance of documenting compliance with the Guidelines.
- Emphasize the importance of obtaining, reviewing, and reconciling budgets with cumulative expenses.
- Implement periodic refresher training.

## Recommendation 5. Reduce Legal Expenses

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- ❑ Consider representation models in which inside counsel handle a greater percentage of Amtrak's litigation than they currently handle.
- ❑ Utilize newly installed case management system technology to identify factors that have the greatest impact on costs and identify matters with budgets that are being expended too quickly.

# Scope and Methodology

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## The Joint Review Team:

- ❑ Determined the top 10 outside law firms for the period June 2002 to June 2005 and requested all corresponding invoices and relevant documentation from the firms and from Amtrak.
- ❑ Reviewed a judgmental sample of invoices from each firm for compliance with Amtrak guidelines and reasonableness.
- ❑ Interviewed Amtrak in-house counsel and associated staff concerning the in-house counsel's management of outside counsel.

# Scope and Methodology: Selection of Samples

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Amtrak's in-house counsel uses two computer systems to track bills.

- The computer system for the four firms that primarily handle injury claims does not list invoices with dollar amounts. For those firms, we selected sample months within the 3-year period and reviewed all associated invoices.
- For the other six firms, we chose individual invoices from the in-house counsel billing lists. We covered all significant matters handled by each firm, chose invoices representing the entire 3-year period, and reviewed at least 20 percent of the total dollar value of each firm's invoices.

# Appendix: Text of Amtrak Law Department Responses

## **OIG Observations**

Outside counsel was not managed in a manner that limited costs and protected Amtrak's interests. For example, there was a lack of enforcement of 'Guidelines for Outside Counsel' (Guidelines), which would have been effective in protecting Amtrak's interests and preventing overcharges. Additionally, there was an absence of compliance with Guidelines, by not, among other things, adequately reviewing outside counsel legal billing, consistently requesting and managing budgets, managing outside counsel staffing and rates, and prevention of prohibited billing practices.

## **Law Department Comments**

You have asked for any additional information we may wish to provide or anything else that may shed further light on the OIG's observations set forth above. It is difficult to comment on such sweeping observations without also viewing the underlying findings; consequently, we will reserve our specific comments until the DOT/Amtrak OIG has concluded their report. We can, however, respond broadly.

First and foremost, the statement that "Outside counsel was not managed in a manner that limited costs and protected Amtrak's interests" is so overly broad that it lacks any credibility. Without the benefit of the specific examples relied on by OIG for this observation, we are unable to even discern whether the OIG's interpretation of the Guidelines is consistent with the Law department's interpretation. While we do not doubt that there are instances where outside counsel bills did not comply with Outside Counsel Guidelines, the OIG review apparently does not take into account the rigorous oversight of work done by outside counsel, the rigorous staffing requirements imposed by in-house counsel, the amount of work actually performed by in-house counsel in lieu of outside counsel, or the agreements reached with outside counsel to "write off," limit, or reduce fees.

There can be no doubt that these efforts by in-house counsel "limit costs and protect Amtrak interests." Unfortunately, the OIG's overly broad statement dismisses those efforts without examination and presents an unbalanced depiction of the work performed in the Law department.

## Appendix: Text of Amtrak Law Department Responses

We would also like to address the “examples” cited as support for this observation. The OIG states that “there was a lack of enforcement of Guidelines for Outside Counsel” and that there was a lack of compliance with the same Guidelines. Again, such a sweeping statement does not recognize the attorneys who are extremely diligent in applying the Guidelines and the work that all of the attorneys do to ensure Amtrak’s resources are appropriately managed. We have numerous examples which were described during the OIG interviews where in-house counsel has scrupulously held outside counsel to the terms of the Guidelines as well as their own individual standards. Given the hundreds of bills that are reviewed by each in-house attorney, it is not surprising that some contained instances that did not comply with the Guidelines. However, without any assessment of the magnitude and scale of any overcharges with those instances where bills were reduced, written off or other savings were achieved, the OIG’s conclusory statement leaves the false impression that the Law department does nothing to monitor and contain legal fees.

This observation also fails to recognize the Law department’s efforts to improve its ability to monitor compliance with the Guidelines through technological enhancements implemented in the last three years. Prior to 2004, the Law department had a rudimentary case management database and no ability to analyze legal charges over a period of time. Legal invoices were submitted on paper and did not allow for detailed supervisory review in Amtrak’s electronic payment processing system (eTrax).

In 2003, the Law department purchased case management software and a document retention system that allows attorneys and supervisors to monitor, manage and track all non-claims legal matters and invoices. At the same time, the Law department initiated an electronic invoicing pilot project with the Procurement department that allows legal invoices to be submitted, reviewed, approved, and paid electronically while capturing and transmitting that data into the case management system. The case management system has been in place since 2005 and the e-invoicing is currently being rolled out and now includes the majority of Amtrak’s large volume law firms. These two systems give the responsible attorneys, the Section Deputy General Counsels, and the General Counsel detailed information about the substance and legal fees associated with each and every matter. In addition, the case management system allows for tracking of fees against budgets, status reports, and the maintenance of documents associated with particular matters through the document retention system. The General Counsel and the Deputy General Counsels receive quarterly reports on all active matters indicating legal

## Appendix: Text of Amtrak Law Department Responses

fees expended and the status of each active matter. More detailed information on any matter is available at any time from any user's desktop. This has become a critical tool in managing outside counsel.

The e-invoicing program is quickly capturing the data necessary for the Law department to be able to conduct spend analyses of its firms in order to identify efficiencies that can then be leveraged. The fact that the details of every invoice can now be reviewed at every level of supervision also allows for better oversight of compliance with the Outside Counsel Guidelines.

Both of these programs are significant advances that allow the department to better manage its work. The Law department has also updated its Guidelines and is ready to distribute them to outside counsel as soon as the OIG audit is complete so we can incorporate any recommendations that are appropriate. We have also met with the attorneys and reinforced the requirements contained in the Guidelines and continue to remind the attorneys of their responsibilities.

It is our hope that the OIG report would address the big picture rather than simply focusing on the negative. For example, from 2003 to 2005 the Law department reduced the legal fees actually expended from \$31 million to under \$24 million; a 22% savings of over \$7 million dollars within a two year period. The Law department is currently on track to save an additional \$2 million in FY06 and has proposed an additional 5% reduction for FY07. These savings have been achieved through greater productivity with fewer in-house attorneys and through careful management of the substantive work performed by outside counsel including the resolution of some difficult and expensive cases. It would be a shame if the OIG report ignored the hard work done to achieve these substantial savings while focusing on errors that, while certainly important to track and diminish, can't possibly compare in magnitude to the savings that have been achieved.

We welcome the OIG audit of the Law department and look forward to recommendations that will help us achieve even greater efficiencies. We believe, however, that such broad, conclusory observations as you have provided do not present a balanced examination of the positive work done in the Law department and imparts a false impression of the oversight that does occur.

# Appendix: Text of Amtrak Law Department Responses

## **Request for Additional Information from OIG Regarding Manatt Engagement Letters**

### **Response prepared by Alicia Serfaty**

I understand that the OIG is “looking for any additional information or explanation regarding the letters and the decision to engage with the terms specified.” See e-mail from Jeff Black to William Herrmann dated April 20, 2006.

As I explained during my interview with the OIG on March 15, 2006, the language in the retainer letter provided to Manatt is somewhat broader than we typically use as it provides an advance waiver on matters that may be adverse to Amtrak. However, as I also indicated, we have from time to time agreed to such waivers so long as the firm is prohibited from taking an adverse position against Amtrak in litigation absent obtaining consent from Amtrak. The Manatt retainer letters contain such language. See e.g., Letter dated April 22, 2005 from Stephen Ryan to Marilyn Milner which states the following: “This consent and waiver does not permit us to use any confidential information obtained during the course of our representation of you in any matter, nor does it extend to our engaging in litigation, arbitration or other formal dispute resolution proceedings adverse to you without your consent.” Therefore, with this language included, I indicated that I would not otherwise object to the language, even though as a matter of course Amtrak prefers not to provide advance waivers on conflict matters.

Conflict waivers have become a larger issue with our larger firms as they merge with other firms and encounter clients with competing interests. The firms often press us for very broad waiver language and attempt to balance their business concerns against our need to protect the company’s best interest when we negotiate these. For example, we recently negotiated a new engagement letter with Morgan Lewis, one of our large law firm representatives. While they initially insisted on broad waiver language that would have included the possibility of them representing another client in litigation that was adverse to Amtrak, they eventually agreed to language that restricted the waiver to non-litigation matters. I have attached a copy of this engagement letter for your review and comparison.



# EXHIBIT 10

# Confidential Report

*Review of*

## Amtrak Law Department Performance *Especially as to Management of Litigation by Outside Counsel*

*Prepared for* National Railroad Passenger Corporation (“Amtrak”) Office  
of Inspector General

*Prepared by* John W. Toothman, Esq.

**Confidentiality Notice:** This document may contain certain Amtrak attorney-client or other privileged information, for which the DOT/Amtrak OIG Joint Review team requests notification from Congress prior to disclosure outside of Congressional members or their staff. Public availability is additionally to be determined under 5 U.S.C. § 552.

May 31, 2006

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## Summary of Observations & Conclusions

The Office of Inspector General (“OIG”) for National Railroad Passenger Corporation (“Amtrak”) retained my firm as consultants on legal fee management. We have been assisting OIG at Amtrak and the US Department of Transportation to conduct an investigation and review of Amtrak’s use of outside legal counsel and the operation of Amtrak’s in-house Law Department, particularly as it relates to selection, management, and compensation of outside counsel. Amtrak is responding to two Congressional inquiries about expenditures on outside legal fees and related issues.

The GAO conducted an overlapping examination, GAO 06-145, which touches upon some of the same issues: We have been working behind GAO and our analysis has been designed to consider all the legal department-related issues raised by GAO, but go deeper into those questions than GAO was able to go.

To respond to a Congressional inquiry, my firm assisted Amtrak and DOT OIG staff to review and analyze the performance of Amtrak’s Law Department. The primary focus of the inquiry was the time period from 2002 to 2005, for which the most relevant data was available. Our review included examination of Law Department activities in managing outside law firms as well as examination of bills and information from the outside law firms billing the largest amounts, by which we measured the practical impact of the Law Department’s management.

Amtrak’s Billing Guidelines for Outside Counsel, created in 1998, are excellent – not perfect – but providing a strong basis for Amtrak to manage its lawyers. Unfortunately, the management of Amtrak’s Law Department does not enforce its own guidelines, resulting in excessive and wasteful legal bills. Amtrak’s Guidelines require budgets from its lawyers, but almost no budgets were observed and none were reconciled with actual bills. Few of the bills exhibited signs of review by Amtrak – though they were duly signed off on by Amtrak staff attorneys. Amtrak concentrates its fee management efforts on securing what it thinks are discounts on hourly rates, but Amtrak does nothing to confirm that these are real discounts from real rates. Amtrak Guidelines give it the power to control staff assigned to its matters, but the firms are overstaffing. Compounding its problems, Amtrak assumes almost all its litigation (besides claims work) is complex and unique, leading it to select only the most expensive firms in the country to do its work.

I observed almost none of the give and take between in-house counsel and outside counsel that alert management should have produced. Amtrak’s Law Department is virtually invisible.

Amtrak's Law Department has short-circuited its Guidelines in favor of a few law firms, with whom it has what I refer to as "side agreements." These agreements consist of lopsided terms imposed by the firms for their own benefit. There is nothing in these agreements for Amtrak, begging the question why competent in-house lawyers would agree to them in the first place.

Amtrak needs to select firms with the right expertise that are anxious to do its work, not take it for granted. Amtrak needs to enforce its Guidelines (without carving out special agreements with a few firms), obtain budgets, and reconcile them with bills. The bills need to be reviewed carefully, along with hourly rates and staffing.

Amtrak's Law Department resisted this review, both by dragging its feet and by providing a litany of excuses not just for itself, but to protect the law firms it is supposed to be managing. Its records are a haphazard mess. It claims to have a new magic bullet coming on line with a software system to manage legal fees – there are no panaceas, just opportunities for good lawyers to work hard for their client.

This report does not address Amtrak's claims litigation or transactional legal work – we concentrated on litigation for now.

## Background

### Purpose & Course of Review

We have been working on aspects of this project since June 2005 (shortly after Amtrak received the two Congressional inquiries). My firm has been providing two basic types of assistance: (1) general consultation on standards and practices for law firms and legal departments, particularly as they relate to hourly fees and expenses billed by the firms, and (2) training and feedback to assist Amtrak OIG and DOT OIG personnel to undertake their own limited reviews of legal bills. Although there are still some items that may drift in from the Amtrak Law Department or perhaps one of the law firms, we have completed the work originally planned. This is still a preliminary report, however, in the sense that it is submitted for review by Amtrak's OIG for their comments and we may update the report if we obtain any new, pertinent materials.

We conducted a limited, mixed review of a sample of bills from the law firms billing the largest amounts to Amtrak. This is *not* a traditional accounting-style financial audit. Some of our analysis is also subjective and judgmental, based upon our professional training and experience. The objective has been to help Amtrak to answer the Congressional inquiries, assess the performance of the Amtrak Law Department, and make constructive suggestions for improvement. Assessing the performance of the Law Department involved, in turn, reviewing a small sample of bills from some of the law firms that were supposed to be managed by the Law Department. Amtrak and DOT OIG personnel reviewed larger samples of bills from the law firms' whose bills met the criteria of the Congressional inquiries (to the extent that such bills had been kept by the Law Department).

Reviewing outside counsel and the operation of a legal department involves a combination of reviewing the financial side of the relationship – fees and expenses – and the professional side of the relationship – performance and cost-effectiveness. We began by receiving background from Amtrak OIG staff about the Congressional inquiries and some general information about the breadth and cost of legal services used by Amtrak, particularly in the last five to ten years. Early on we obtained a copy of Amtrak's 1998 Guidelines for Outside Counsel and a sample of thirty or so legal bills provided by the Law Department. Determining whether these Guidelines were being followed and enforced became a primary focus of our examination.

Amtrak identified the law firms which are within the scope of the Congressional inquiry. To fully answer the pending Congressional inquiries, documents such as correspondence between outside and in-house counsel, retention agreements, budgets, samples of attorney work product, legal bills, and underlying documentation to support the bills were requested from the Law Department and some outside counsel. (According to the Law Department, much of the documentation called for by the

inquiries may no longer exist or was never received in the first place, which is itself an indication of poor management, especially for ongoing matters.)

After receiving some of this background information, our next step was to review a sample of the law firms' bills. Reviewing the bills helps us to analyze the performance both of the law firms and of the Law Department, which is responsible for managing the law firms. I provided training in techniques for analysis of legal bills and related issues to the members of the review team from Amtrak and DOT. Jane Morrison of my firm also reviewed a sample invoice from each of the top six billing firms, which were used as a point of comparison for the OIG team.

OIG personnel interviewed personnel from the Law Department, sometimes more than once. We consulted with OIG on interview topics that would be useful for our analysis. We have considered these interviews in our analysis as well.

OIG made follow-up requests to Amtrak Legal Department, which has been submitting additional information even as this report is being finalized.

OIG also inventoried bills and reconciled them with payments made by Amtrak, where possible. Unfortunately, the Law Department has not maintained files or billing data for more than the last several years, at most. Amtrak's Finance Department does keep some record of amounts paid, but without the bills we cannot determine whether the amounts expended were necessary or reasonable. This has made it impossible for Amtrak to definitively answer the Congressional inquiries for older data.

The Law Department has repeatedly emphasized that it has switched to a software-based system for legal fee management in 2005. Prior to that, whatever fee management there was appeared to be ad hoc through the line attorneys (called "Managing Attorneys" in the Guidelines) supervising each outside firm and, to some extent, requirements for higher level approvals for larger bills. The Law Department has also indicated that the billing guidelines first issued in 1998 are being revised at this time – they have explicitly stated that they are withholding publication of this edition until OIG issues its report. Given the time that has passed since these issues were first raised, my conclusion is that both issues have been designed to create moving targets to distract attention from the OIG findings and the Law Department's shortcomings.<sup>1</sup>

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<sup>1</sup> Based on the interviews, it appears that the automated bill review system is not performing as advertised and the Law Department is still suffering from the problems noted below, plus problems that arise from implementing a software panacea – software cannot excuse in-house counsel from their managerial duties.



### Tasks Undertaken by Amtrak & DOT Personnel

Some tasks that my firm normally handles alone were shared with or assigned to DOT and Amtrak OIG audit staff. This was done, in part, to expedite review of a larger universe of firms and bills and to be more financially efficient. This should also serve to train some DOT and Amtrak personnel to better examine legal fee issues in the future. OIG Staff inventoried bills and compared them with Amtrak Financial records, attempting to reconcile the two. OIG Staff also drew a sample of bills from the top 10 billing firms, 2002 - 2005, for closer examination, which they conducted and documented. This review included review of portions of relevant Law Department files, when available. (I reviewed their reports and notes, sometimes resulting in further work or followup.) OIG Staff also conducted the interviews of Law Department personnel, on which I consulted, with follow-ups on many interviews. Personnel from DOT and Amtrak drafted a joint slide presentation to summarize many of the results.<sup>2</sup>

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<sup>2</sup> Because the objective of this project was to examine performance of the Amtrak Law Department, not law firms per se, we did not focus on the substantive work product of the law firms or the results achieved. By consensus of the joint review team, non-random samples were used so that we could focus on larger bills, for example, and results should not, therefore, be blindly extrapolated.

## Observations, Analysis & Conclusions

My observations, analysis, and conclusions have been formed since we were engaged in June 2005, based on applying my experience to all the relevant information. In addition to relying upon my firm's direct observations, I am relying on information conveyed to me through Amtrak and DOT OIG, including information conveyed in numerous undocumented meetings and phone calls. Some of my observations, analysis, or conclusions are qualified.

Whenever reasonable, I give the benefit of any doubt to the Law Department and the law firms. But this is a management review, not an investigation undertaken for purposes of recovering funds or testifying in court.<sup>3</sup> For this reason, I also express my best opinion of the circumstances and solutions. For example, while I found no direct evidence of billing fraud, I found ample evidence that Amtrak is vulnerable to fraud, is not taking basic steps to avoid fraud, and exhibits a passive attitude toward its relationships with law firms that would not deter billing fraud.

There are two subsections to my observations, analysis, and conclusions. First, I address the performance of the Amtrak Law Department itself. Second, I address the investigation we conducted of a sample of the outside law firms billing the most to Amtrak between 2002 and 2005. By examining the firms, we gained further pragmatic insight into the performance of Amtrak's Law Department.

### Amtrak Law Department Performance

The primary objective of this review was to analyze the performance of the Amtrak Law Department. This analysis was based on reviewing documentation from the Law Department and staff responses to OIG interview questions. (Although the Law Department has not been provided a copy of this report or of the joint DOT/Amtrak OIG report, it was provided the opportunity to state its position on all significant subjects during the course of the interviews and follow-up interviews.) The final basis for my analysis of the Law Department's performance consists of our review of sample bills

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<sup>3</sup> My "standard of review" for a management review is to consider whether the interests of the client are being served cost-effectively. I look for evidence not only of acceptable results, but the presence of appropriate procedures and management activity that should detect problems and protect the client's interests when the going gets tough, not just in the routine situations. I am not particularly concerned about whether counsel's fees could be challenged successfully in court or whether ethical requirements are being violated.

and other materials from some of the outside law firms – the details of that part of the analysis are contained in a separate section, which follows this section.

## Law Firm Guidelines

The most important step in managing outside counsel is to establish, in writing, Amtrak's expectations. Many sophisticated clients fail to do this, but Amtrak actually has. Unfortunately, Amtrak's Law Department is not paying much attention to its own Guidelines and is not enforcing those Guidelines. In a few instances, Amtrak has cut unfavorable side deals with a few firms.

Amtrak Law Department Billing Guidelines: At least since 1998 Amtrak has published written NPRC Guidelines for Outside Counsel ("Guidelines"), which we understand from interviews are made known by the Law Department to all law firms performing services for Amtrak. An annotated copy of these Guidelines is attached. (The annotations highlight significant provisions.) The Guidelines were obviously prepared by someone who had collected samples from other sources and selected provisions that seemed to her to fit Amtrak best. The Guidelines predate the current top management of the Law Department, although some Law Department staff have been with Amtrak longer.

Creating and enforcing reasonable guidelines is an important function of in-house counsel. The Guidelines could use some refinement, but overall they should have given Amtrak a strong position from which to manage its outside counsel. My primary observation from this entire project has been that Amtrak's Law Department could have performed its duties quite well simply by enforcing the simple, common, and clear terms of these Guidelines. It failed utterly to do that, however.

The Guidelines are very good – almost state of the art. Unlike most clients, Amtrak has given itself ample discretion to manage its lawyers and their fees. They clearly inform outside counsel that Amtrak expects high quality legal services at lower-than-typical prices. The balance between managing and micro-managing outside counsel has been well-struck to avoid creating too much busy work for outside counsel and the in-house lawyers who are supposed to manage them. The Guidelines give Amtrak ample latitude to supervise the substance of outside counsel's work – to protect Amtrak's interests – and to manage their fees. They put Amtrak in the position of being a benevolent dictator to its lawyer/agents, which is where the client should be.

The Guidelines' approach to managing outside lawyers revolves around assigning a Managing Attorney from the Law Department with expertise in the type of matter to supervise each matter. There is a fairly comprehensive list of billing do's and don'ts, some minor, some crucial, some easy to enforce, others vague or requiring deep analysis of the bills to enforce. Two elements of the bill formatting rules in the Guidelines are crucial to fee management: The prohibition of "block billing," *i.e.*, lumping different tasks under one time entry, and the requirement that time entries be detailed, which the Guidelines

define as “complete and precise.” Unfortunately these requirements are not consistently or well enforced by the Law Department.

Another key element of the Guidelines is the requirement that the lawyers prepare and update a budget for most matters. (Among the improvements that could be included are a requirement that the lawyers reconcile their budgets with their bills, and that the budgets be broken down into the same task or categories of tasks as the bills, which would facilitate reconciliation.) As discussed below, budgets are critical to managing the work and fees of outside counsel, but we saw almost none of them, let alone evidence that they were actually used.

The Guidelines also have admonitions regarding staffing controls. Controlling staffing is key to controlling fees and quality of work. These admonitions are too vague, but they are a start. The Guidelines also address issues like travel expenses, research, non-litigation and litigation philosophies, consultation with in-house counsel, and special rules for handling claims litigation, which typically involves many smaller cases. There are standard forms for status and pre-trial reports to be made in claims cases.

Amtrak’s Law Department should be doing a more thorough job of documenting the outside firms’ agreement to abide by the Billing Guidelines. The guidelines could also be improved in some small ways, discussed below.<sup>4</sup>

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<sup>4</sup> The Law Department apparently expects this review to blame the Guidelines, or expects to be able to use the Guidelines as another excuse. For this reason, the Law Department has been saying for months that it is currently revising the Guidelines, but it is unclear what is being changed or why (other than to distract attention from the Law Department’s poor performance).

In 2006, Mr. Herrmann produced a draft dated July 2005 for amended Guidelines of Outside Counsel. The draft is an invitation to disaster. For example, it calls for outside counsel to dictate terms of the engagement in a separate “engagement agreement” that in turn references the Guidelines and says that the Guidelines will control in the event of a conflict – why Amtrak is inviting such conflicts is unclear. Uniformity of its agreements is critical to consistent management. Amtrak should insist on one agreement, *i.e.*, its Guidelines. Any necessary, reasonable requests of the firms can be included as addenda to the Guidelines.

This appears to be an attempt to present the OIG investigators with a moving target, not a good faith attempt to improve the operation of the Law Department. As noted before, the problem is not with the Guidelines, it is with the implementation by Law Department management and their actions and inaction.

The biggest problem with the Guidelines, as discussed below, isn't their content, but that they are not being enforced by Amtrak's Law Department. Law Department management is not ensuring that its staff and outside law firms are taking the Guidelines seriously. The Guidelines give Amtrak the right to "audit" its legal bills – this has apparently never been done. There was little concrete evidence that Law Department personnel were enforcing the Guidelines on their own. Interviews indicated that Law Department personnel interpret and enforce them unevenly, with no internal discussion or training to present the law firms with a uniform front. Another big problem, however, is that Amtrak has been making exceptions to the Guidelines for a few firms, for no apparent reason and contrary to the interests of Amtrak. These exceptions are discussed after discussing Amtrak's failures to enforce the standard Guideline terms.

Failure to Enforce Important Guideline Terms: There are a number of good, state of the art, terms in the 1998 Amtrak Guidelines for Outside Counsel. Unfortunately, my investigation found that some of the most important terms were not being enforced by Amtrak's Law Department. Based on the interviews conducted by OIG with Law Department staff, it appears that there are two explanations for this: (1) The Law Department does not seem to be aware of or choose to enforce some of the provisions or (2) The Law Department claims it is enforcing the provisions, but I found substantial evidence from the investigation that those efforts have been ineffective.

This chart summarizes the key provisions of the 1998 Guidelines and notes my observations about whether they are being enforced:

Amtrak Outside Counsel Guidelines (1998)				
Primary provisions (excluding claims litigation)				
Topic	Guideline Features	Location	Enforcement Observations	Notes
Relationship	Amtrak seeks a close working relationship, like co-counsel or joint representation. Amtrak is hiring particular lawyers, not entire firms. The engagement attorney is to work with a specific Amtrak "Managing Attorney." All "important documents" are to be copied to the Managing Attorney, who must also be consulted and approve all "significant decisions."	Intro. LDMA @ 1	For the larger firms, Amtrak may have a primary contact, but the relationship has spread to a larger group. For more complex cases, it appears the relationship is close, perhaps too close. Based on Amtrak's files, it appears its handling of case documents is haphazard.	This type of provision is good. Amtrak is slipping in the execution. I observed apparent communication between Amtrak and law firms, but not firm Amtrak control.
Hourly Rates	Amtrak "expects to receive a substantial discount" from "normal fee structure." Amtrak expects to "receive at least the same discount offered" to other gov't or corporate clients. Rate increases must be "discussed" and "approved" by Amtrak in advance. Amtrak is open to non-hourly arrangements.	FE&D @ 2	Amtrak does, in most instances, believe it is getting discounted hourly rates, but there has been no apparent attempt to confirm any of this. The paper record indicates that firms are routinely increasing hourly rates by large amounts without approval, but Amtrak staff claim to have been consulted orally. I saw no indication that Amtrak is using any alternative fee types.	Amtrak is fixated on hourly rates, not the whole fee equation. This is a vague version of a "most favored nations" clause, which may be appropriate, but is impossible to enforce without more research by Amtrak. Rather than talking about its hopes and expectations, Amtrak should be getting a specific written agreement. Amtrak chooses some of the most expensive firms in the country, so the discounts are only relative. Amtrak should be checking its rates with other clients of the same firm and with other firms.
Unacceptable Charges	Amtrak has a list of discouraged charges, like basic research, junior attorney training time, transition time. Amtrak also declines to pay for administrative activity, like conflicts checks and billing discussions. Amtrak declines to pay for overhead items, giving examples for clerical work, routine copying, file review, local calls, supplies, and part of fax charges. Amtrak has a basic rule that it will pay only actual cost, i.e., no profit on expenses.	FE&D @ 2. 3	We found many examples of forbidden charges in the sample bills. Amtrak does not seem to be taking advantage of these provisions to cut bills. Amtrak is not rejecting these charges when they appear on the bills, either because it's not catching them or not enforcing them.	These are standard provisions, including most of the do's and don'ts. They are fine as far as they go -- some are trivial. other things might be added.
Billing	Amtrak has a list of billing formalities, including a preference for monthly bills and tenth hour actual time increments (no minimum charges). Block billing is expressly prohibited, with examples of good and bad entries given. "Complete and precise" billing descriptions are required. Expenses must be itemized. Each invoice should have a running or cumulative total of fees billed on that matter to date. Firms are warned that Amtrak may audit their bills or be audited itself.	Billing @ 3. 4	Most of the firms comply with the basic formalities, but the block billing prohibition and detail requirement are ignored by many firms in a high percentage of the bills. Amtrak did little, if anything, to enforce this requirement, which could have resulted in denying large amounts. We found no evidence that Amtrak ever audited a legal bill, which was confirmed in the interviews.	The billing formalities are standard, while the block billing and detail requirements are exceptionally good.
Budgets	Amtrak requires an initial budget within 30 days of retention, then updates at least once every six months, more often if something significant comes up. Budgets for larger matters must be broken down. Budgets go through the entire matter. There is a small matter exception. The initial budget is supposed to identify all staff and give their rates, which dovetails with the staffing requirements.	Budgets @ 4	We found virtually no budget activity. Amtrak interviews claimed there were budgets in all or nearly all cases -- I cannot reconcile these facts.	The budget requirement could be spelled out better, with a provision for reconciling budgets with bills, but this is another exceptional aspect of these Guidelines. One thing to add would be a discussion of the consequences of missing the budget and controls on budget changes. Budgets need to be solicited earlier, as part of making the selection, when the competitive urge is present.
Staffing	Amtrak emphasizes that it selects particular attorneys for their expertise. Staffing changes must be discussed and approved by Amtrak in advance. Amtrak expresses a preference for no more than one partner, one associate, and one paralegal for support. Amtrak suggests that, if the firm wishes to have more than one attorney attend an event, that should not be billed to Amtrak.	Staffing @ 4. 5	The larger firms are routinely using larger staff and changing staff apparently at will. According to Law Department interviews, these changes were approved orally. In my opinion, many of the sampled matters are overstaffed, which increases fees substantially. There were few, if any, writeoffs in these bills, for whatever reason.	This section is strong, but suggesting that two attorneys plus a paralegal are necessary is sending the wrong message for more routine matters. The firm is required to identify staff and give rates in the budget section.

The “Side Agreements”: In the course of conducting the investigation, Amtrak OIG requested documents from the Law Department, including agreements with outside counsel. Amtrak and DOT OIG obtained several such agreements, particularly several with Manatt, Phelps and one with Morgan, Lewis. These have been labeled by me as “side agreements” because they appear to co-exist with the Amtrak Billing Guidelines, not supersede them. These agreements are compared with the Guidelines in a table attached to this report.

The side agreements appear to be stock law firm client billing agreements that they would attempt to have many clients execute – sophisticated clients with in-house counsel would never do so unless the agreements were entirely consistent with the client’s interest. This phenomenon arises because bar organizations recommend (and sometimes require) written disclosure of key billing and other issues to hourly clients, which has evolved in some quarters into these one-sided “agreements” by which the client waives, often unknowingly, many protections otherwise provided by fiduciary law and legal ethics rules. These are contracts of adhesion that law firms use to overcome various legal and ethical restrictions, particularly as to justifying and collecting fees and avoiding complications caused by potential conflicts of interest. The agreements Amtrak signed were not specially prepared for Amtrak and, unfortunately, there are no indications that Amtrak staff caused any of the stock terms to be modified in Amtrak’s favor. They generally address billing, conflicts of interest, and other issues of interest primarily to the law firms, so they do not necessarily negate many of the Guideline terms

Unfortunately, despite having in-house attorneys involved in each situation, the relationship between the Guideline terms and these side agreements is never made clear. It is unclear which terms would control in the event of a dispute, although the law firms would undoubtedly argue that their side agreements control, *e.g.*, because Amtrak Law Department did not require the firms to sign the Guidelines but the law firms had Amtrak sign their side agreements. Some, but not all, of the side agreements do mention the Guidelines, but without making it clear how the two would interact. Regardless of what one thinks of the terms of these agreements, the failure of the Law Department to clarify the interaction of the competing agreements is bad lawyering.

It is clear that Amtrak Law Department purposely entered into these side agreements, but it is unclear to me why – the additional terms undermine the more equitable attorney-client relationship created by the Guidelines, are contrary to the interests of Amtrak, and contain no quid pro quo for Amtrak. In addressing such agreements with law firms, I like to challenge them to state whether, if they had been representing Amtrak’s interests, they would have recommended that the client sign such one-sided agreements. Unfortunately, many lawyers view the inception of their fiduciary relationship as the perfect time to take advantage of the client’s trust. These agreements contain some terms that law firms commonly attempt to impose upon unsophisticated clients – still not a good reason for Amtrak to agree – but some of the terms are uniquely contrary to the interests of Amtrak, there is no apparent need for

them, and no sophisticated client (let alone one with a competent in-house legal staff) would agree to them. It is bad enough when an unsophisticated client signs these one-sided agreements, but one of the primary functions of in-house counsel is to provide more sophisticated protection of his or her client's interests – this was not done here.

Also noteworthy is that several of these side agreements were entered into in 2005 and 2006, after the GAO audit and this investigation were well under way. Either the Law Department is remarkably insensitive to its circumstances or entering into side agreements is an attempt to circumvent the Guidelines and the consequences of review, for the benefit of selected firms. All attorney-client relationships are terminable at-will, however, so Amtrak is not under any legal duty to continue any of these relationships.<sup>5</sup>

The matrix comparing these side agreements is attached as Exhibit C. The agreements are Exhibit D.

Recommendations -- Amtrak Billing Guidelines: As noted above, while the Guidelines are quite good, in my estimation, they could be improved.

There is not one single, ideal set of billing guidelines that will work for every client, in every situation. The terms of the guidelines must fit the client's objectives: Some clients have thousands of small, routine cases, others have a few major, complex cases that may make or break the company. (Amtrak is actually closer to the small, routine case model, but most of its in-house lawyers act as though Amtrak is in the "major case" category.) Some clients have no in-house lawyers to manage their outside lawyers, others, like Amtrak, have dozens. Amtrak also has some unique regulatory concerns and it must be accountable to taxpayers.

Amtrak's current Guidelines call for fairly tight management, with in-house counsel considering themselves to be intimately involved every step of the way. This assumes a fairly large in-house staff in proportion to the number of cases. At this management level, an in-house attorney is unlikely to be able to handle more than ten or so moderately complex, fast-paced cases at a time. This management burden could be reduced somewhat, particularly for more routine cases, by relying more heavily on establishing a preliminary case plan (with strategy and tactics made clear), requiring Amtrak input on certain key issues (like settlement), and using budgeting and bill review to monitor firm compliance.

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<sup>5</sup> There is a practical cost of changing law firms abruptly, including the lost value of time invested by one firm and the start-up time of the replacement firm, but these are frequently overstated.



Regarding the side agreements, Amtrak should notify the firms that the side agreements are no longer acceptable and that the Guidelines will control.<sup>6</sup> The firms may be invited to make individual requests to modify the Guidelines, but these requests must have some rational, necessary basis and not undermine the interests of Amtrak – making substantial changes to standardized Guidelines will increase the administrative burden on Amtrak. Amtrak’s in-house counsel should negotiate any changes with Amtrak’s best interests in mind. For example, all firms should be treated equally – no term should be provided to one firm that Amtrak is not prepared to grant to any other similarly-situated firm. Any law firms that are unwilling to work on Amtrak’s reasonable terms should be replaced, either by stopping the flow of new work to phase them out or terminating them now.

Creating and enforcing reasonable Guidelines does not solve all of Amtrak’s problems, but it will provide a much stronger management foundation and solve many problems.

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<sup>6</sup> Although it can be argued that having the firms sign the Guidelines is not necessary – they are instructions by the client to its fiduciary agents – it would be a good practice to have them signed.

## Legal Fee Budgets

Usually implemented as part of the Guidelines, obtaining budgets from outside law firms is critical to managing their fees and performance. Budgets encourage the law firms to plan ahead and then fulfill the client expectations their budgets create. Firms complain about budgeting, but a failure to issue a reasonable budget is a strong indication that the law firm does not have the right expertise to handle the matter cost-effectively.

Absence of Budgets: Requiring law firms to issue budgets is an important management tool. Many law firms are conditioned to subvert the process by ignoring budget requests, building in numerous unrealistic “assumptions” or caveats, and either making the initial budget unrealistically low (to win an RFP contest, revising the budget up as soon as the competition is excused) or grossly high (to cover all possibilities and relieve the firm of budget pressure). It is an important function of competent in-house counsel to conduct a meaningful budget process. Budgeting is not necessarily about saving money at the expense of the law firms so much as it is about making sure that the firm is pursuing the client’s objectives, not taking the client for granted, and expending fees cost-effectively.

The Amtrak Billing Guidelines require budgets in most matters. *See* Guidelines page 4. (The Guidelines could be improved somewhat in this regard, as noted above.) At least one firm (Manatt), has circumvented the budget process, with Law Department approval (Manatt side agreements dated 4/1/03 and 7/05, countersigned by in-house counsel). The exceptions are for small matters, under \$5,000 in likely fees and expenses. For larger matters, over \$50,000 in expected fees, the budget must be broken down into phases. (The budget also contains a requirement that the law firm specify the initial staffing – any changes to staffing after that should require advance approval under the staffing rules.)

An initial budget is due in 30 days from retention, or less if Amtrak asks – it should always as a part of the selection process. Budgets reveal the level of experience and intentions of counsel, making management much easier. Updated budgets are due as events occur or no less frequently than every six months. There should be reconciliation of budgets with bills – this is not explicit, nor was it ever done from what I have seen. Amtrak has avoided a common mistake made by many clients, who only ask for budgets extending out a year or quarter – Amtrak wants budgets to conclusion.

Despite verbal assurances in numerous interviews that budgeting is commonplace at Amtrak, Amtrak’s in-house lawyers have failed utterly in this regard. We found almost no evidence of budgeting – perhaps a half dozen attempts by law firms, with no interaction visible from the Law Department.

Regardless of the law firms' inclination to undermine the budget process, in-house lawyers should insist upon budgets, then manage a dynamic budget reconciliation and updating process. I advise clients that any firm professing an inability to budget is implicitly admitting that it lacks sufficient relevant experience, or else an intention to over-bill. Too often, clients do what Amtrak has done here: Mandate budgets, but not follow through.

Even if the firm exceeds all or part of the budget, which is common with a reasonably detailed budget, the budget process has value because (1) budgeting makes the firm think ahead and communicate what it plans to do, giving in-house counsel the ability to adjust those plans before they are executed,<sup>7</sup> (2) firms that budget are creating client expectations and should be more sensitive to the client's concerns about cost, (3) if the firm exceeds the budget, its explanations (or excuses) may reveal much about the firm's competence,<sup>8</sup> and (4) if the firm exceed the budget, it may spontaneously write-off fees or at least accept a write-off more readily. An important function of in-house counsel is to understand how to manage the law firms using budgets intelligently, even though it is not a perfect process.

What I refer to as the budget process is really a dynamic relationship between lawyer and client that starts with the initial budget. The budget actually consists of two important elements: (1) a plan of action for handling the matter and (2) an estimate of the fees and expenses that each step in the plan is expected by experienced counsel to cost. Experienced, competent lawyers can budget fairly accurately, including just a few reasonable assumptions or alternatives also based on experience. Experienced, competent lawyers can also give rational explanations when the budget is exceeded – including blaming themselves from time to time. Unfortunately, most lawyers are not as experienced as they would have one believe, which is made plain when they are asked to budget.<sup>9</sup> We therefore

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<sup>7</sup> Too often lawyers being paid by the hour simply follow their noses wherever they lead, without consideration for cost-effectiveness or a larger objective – knee-jerk reaction is the standard tactic.

<sup>8</sup> Firms typically blame their opponents and the courts and, behind their backs, the clients. Any firm that blames an opponent, for example, for taking discovery comparable to that taken by the firm is obviously naive, but that is a common excuse. These excuses may also make it plain, however, that the firm is not paying attention to the client's objectives, is hopelessly mismatched, or is simply wasting money.

<sup>9</sup> The lack of material experience in litigation and especially trial experience, a more common problem in large law firms, is because a single "complex" paper war can last for years and is typically settled short of trial. The opportunities for experience at large firms are also limited because the teams

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recommend including a budget requirement in the selection process, more to gauge the firms' reactions than to hold them to the numbers. Competent in-house counsel should be able to read the budgets, not just to make sure that the plan and estimated amounts seem reasonable, but especially for the footnotes, caveats, assumptions, and the like that may reveal whether the law firm knows what it is doing or just planning to learn at Amtrak's expense.

Obtaining the initial budget is just the start, but Amtrak ended it there in the few instances where it obtained a budget. Budgets must be reconciled with invoices,<sup>10</sup> which means that budgets and bills must be organized around the same task definitions to allow comparison.<sup>11</sup> (This is discussed in more detail in the section on bill formats, below.) The give and take stimulated by reconciling bills and budgets will have a direct impact on the amount of fees, but should also give in-house counsel deeper insight into what outside counsel are doing, whether all the staff assigned are necessary, their opinions of opposing counsel and the tribunal (in litigation), and the value of the case for settlement purposes.

*Recommendation: Budgets* Creating and monitoring budgets should be a primary task for the Law Department. The Law Department must enforce the Guidelines regarding budgets, review the budgets, reconcile budgets with bills, and address firms that go over-budget, change the budgets without a reasonable basis, or subvert the budget process. Budgets should be used to select counsel, monitor their performance, and evaluate whether counsel should be terminated.

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<sup>9</sup>(...continued)

are so large, thereby diluting the individual experience and increasing the need for a security blanket of expensive overstaffing as inexperienced litigators become partners. Clients should never assume that a "litigator" has significant trial experience unless he or she worked outside large firms – former government trial lawyers have far more experience.

<sup>10</sup> Some Law Department staff claimed in their interviews that more budgets are now being generated, and reconciled with invoices, using the new electronic billing system, which has supposedly been implemented in 2005-06. Despite numerous requests for this information, we saw no evidence it actually exists.

<sup>11</sup> A common problem with many law firm budgets is that they are presented as a single lump sum, without itemization of tasks or stages of the matter. This makes reconciliation impossible, so the client cannot tell whether the firm is "on budget" until the budget is exhausted or the matter completed. This leads, in turn, to situations where clients feel trapped into keeping the firm, even as budgets are shattered, because the matter is too far along to switch firms. Any client with in-house counsel to monitor matters must work with itemized budgets.

Amtrak may establish policies in the Guidelines on the consequences of exceeding budgets, but it is really up to in-house counsel to decide whether the firm is at fault for overruns and how to deal with them. Firms that do not cooperate in the budgeting process, as well as firms chronically over-budget, should be phased out or terminated. Amtrak might also consider rewarding firms who accomplish their work below budget (assuming the budget was not inflated), although the reward should be kept nominal.

## Bill Format & Review

In this section, I have grouped several issues relating to the handling of legal bills by the Law Department. The point is generally that the Law Department has not been alert and has not enforced Amtrak's rights as it should. Some of these issues are technical, but they ensure that the Law Department staff is able to look deeply enough into the bills to protect Amtrak's interests and, where appropriate, adjust the bills in Amtrak's favor.

Inadequate legal bill formats: Left to their own devices, many firms produce legal bills that are too obscure to be analyzed efficiently by in-house counsel. Either the time descriptions lack important details, multiple tasks are lumped together, or the bills are in unusual formats that impair review. Another problem arises if a firm is doing several matters – perhaps hundreds in the claims arena – at once, making it hard for in-house counsel to track time spent by the same timekeepers across many matters. Some firms even leave out important details, like the hourly rates of timekeepers. While sloppy or un-managed lawyers may bill this way out of habit, these practices are also used by lawyers trying to hide billing fraud. All these problems are exhibited somewhere in the Amtrak legal bills.

According to the Amtrak Billing Guidelines, law firms are expected to implement several requirements, including two bill format directives, that are crucial to fee management: (1) A prohibition against "block billing," *i.e.*, lumping or mixing different tasks under one time entry (Guideline page 3), and (2) a requirement that time entries be detailed, which the Guidelines define as "complete and precise," with examples of good and bad entries provided (Guideline page 4). Block billing and cryptic time entries were extremely common in the bills we reviewed. (Samples of these issues are presented below, in the analysis of the bill samples.) These are easy problems for in-house counsel to spot, they claimed in interviews to be enforcing them, but in practice they were not doing so.

Lumped or mixed entries tend to obscure the cost of each task. This also undermines reconciliation of time entries with the corresponding budget items. The preferable alternative is known as task-based billing, where each item for each time entry has its own time amount included, either in the body of a time entry or as a number of separate time entries for the same timekeeper in the same day.<sup>12</sup>

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<sup>12</sup> The prohibition of block billing in the Guidelines is an example of how Amtrak gave itself an advantage in potential fee disputes. Without the prohibition, block billing might be discouraged because  
(continued...)

Vague or cryptic time entries obscure the nature of the work being done. Common examples include leaving out the subject of a task, such as research or conferences, or failing to identify other participants in conferences or meetings. These may seem like trivial details, but they obscure things like duplicated or wasted effort, billing mistakes, and attempts to circumvent billing restrictions. That an entry is cryptic is universally a ground to deny payment for that entry under the common law, although the Guidelines reinforce that authority.

Some of the firms also had unusual bill formats, *e.g.*, with details like hourly rates missing or in an unusual location, which tends to impede review of the bills by in-house counsel. The formats of some bills also impede review, *e.g.*, with unusual page layouts. This impairs the Law Department's ability to conduct a meaningful review of incoming legal bills. To facilitate bill reviews, the Law Department should receive the bills in a usable, standardized electronic format.

The sample of bills we reviewed contained substantial quantities of both block-billed and cryptic entries, indicating that the Law Department was not enforcing these basic provisions. The near, but not complete, absence of objections by the Law Department is the problem here. Amtrak lawyers should have brought these deficiencies to the attention of outside counsel and used them to reduce unreasonable fees, especially for firms that continued to submit inadequate bills. Of course, the Law Department also needs to begin conducting meaningful reviews of all incoming bills to catch these problems, as discussed next.

Absence of Bill Reviews & Independent Bill Audits: Having in-house lawyers or trained staff promptly review incoming legal bills is an important aspect of the Law Department's responsibility at Amtrak (or any organization). Hourly legal fees are an unusual, variable expenditure that normal accounts payable systems cannot verify – one justification for having in-house counsel in the first place is to decipher the bills.

Not only are outside legal fees a substantial percentage of Amtrak's expenditures, but legal judgments and settlements are also considerable. Reviewing the bills is not primarily about saving money, but also about monitoring the staffing, tactics, and activities (and omissions) of counsel. Properly formatted bills provide an insight into what outside counsel are actually doing, not just what they claim they are doing.

The formatting rules, billing do's and don'ts, and other aspects of the Guidelines clearly contemplate prompt and thorough review of each legal bill by in-house counsel before approving them

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<sup>12</sup>(...continued)

it is not the better practice, but it is not normally a basis for denying payment of a fee unless some rule or agreement provides otherwise, as Amtrak did.

for payment. Every Amtrak bill I can recall bore some indication that it had been approved for payment by in-house counsel, but I saw virtually no indications that any of these bills had been reviewed, even cursorily. The few exceptions were little more than stray handwritten marks on an occasional time entry or expense item – almost none of these were pursued by in-house counsel. Yet these bills exhibited many obvious problems, from block billing and cryptic entries, described above, to violation of many other Amtrak Guideline provisions and other billing standards, as discussed in more detail in the section describing our review of sample bills, below.

Reviewing bills manually, in the fashion Amtrak did from 2002 to 2005, is not a very efficient task – electronic review is more systematic and precise – but experienced in-house counsel can read the bills like a medical chart of each matter to understand the matter’s prognosis.<sup>13</sup> Totaling up problems manually is difficult and time consuming, which is undoubtedly one reason Amtrak did not bother noting all the bad entries. At least, in-house counsel could have sent a letter or email reminding outside counsel of their obligations, citing a few examples, and thereby slow the bleeding – Amtrak did not do that, either.

Reviewing bills puts some in-house counsel in an awkward position because they are uncomfortable challenging fees and expenses of the firms they work with on a regular basis. A certain amount of this is human nature, and law firms are good at coopting their handlers. But Amtrak’s Law Department acts as though its job is to defend outside counsel, not manage them. The attitude exhibited by Amtrak’s Law Department when their handling of outside lawyers was questioned was to defend the lawyers and provide excuses for not reviewing them more aggressively. This is a bad sign, indicating that the Law Department has lost sight of its primary job: To protect the interests of Amtrak. In these situations it helps to have the firm prepare budgets, thereby taking some of the heat off in-house counsel and putting it onto counsel if they exceed their own budgets. Another solution many clients use is to retain an independent legal bill review or “auditing” firm, which also takes most of the heat off of in-house counsel.

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<sup>13</sup> We heard about the “new” electronic system during interviews and Jeff Black of Amtrak OIG confirmed that it exists. It has already taken roughly 1.5 years to implement this system, which is about half the normal life span of most software. The claim by the Law Department that this system has been used to budget, reconcile budgets, and review bills could not be confirmed. I offer no opinion on this new system, which seems to be a smokescreen to avoid the impact of the GAO and joint OIG reviews. I do offer the observation that many clients have attempted to use such systems, but have failed in the implementation because they either did not know how to use the system, they could not get in-house and outside counsel to use it consistently and properly, or they were unable or unwilling to police the outside law firms.



In-house counsel should have primary responsibility for routinely reviewing all incoming legal bills. But the Guidelines also provide that Amtrak may obtain independent legal bill audits (page 4) from firms like mine. As far as we could tell, Amtrak has never made any such effort in at least seven years.

During OIG interviews, the General Counsel apparently excused this lack of bill audits by suggesting that the Law Department was expecting OIG to enforce this provision, through examinations like this joint review, because the Guidelines (at pages 1 & 4) warn outside counsel to expect OIG and GAO audits as well. OIG investigations are not legal bill audits – the legal bill audits referenced are those which would routinely be instigated by in-house counsel and are a common tool employed by competent corporate and government counsel.<sup>14</sup> The Guideline provision makes it quite clear that there are two types of audits, with the OIG/GAO variety being just one:

Amtrak may, from time to time, in its sole discretion, audit outside counsel bills. Amtrak is itself audited from time to time by the General Accounting Office, the company's own Inspector General and other external auditors, usually at the request of Congress or a Congressional Committee. By undertaking to provide legal services to Amtrak, outside counsel agrees to cooperate fully with all such audits.

That the Law Department has never commissioned even one such audit (or requested OIG to do so) is another example of its failure to implement its own Guidelines. The message to the law firms is that, at least under the current management, Amtrak's Law Department is not being vigilant.

Periodic outside, independent bill reviews are useful for several reasons. First, of course, Amtrak benefits from the review of the particular bills in question to reduce bills and gauge the performance of the law firm(s). Second, Amtrak can compare its handling of the same bills to improve its regular bill review process. Third, Amtrak can discourage the law firms from taking Amtrak for granted. Properly conducted bill reviews from law firms heeding the Guidelines should not impair the attorney-client relationship.<sup>15</sup>

Minimal Review of Out of Pocket Expenses: Managing legal fees – hourly rates times hours – takes care of the largest piece of the outside legal expense. But costs, *i.e.*, expenses passed through to the client, are another issue, which is typically 10% or so of the total paid to law firms.

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<sup>14</sup> Without active review, in-house review plus occasional independent audits, Amtrak is exposed to bill padding or other forms of billing fraud.

<sup>15</sup> My firm has reviewed several of Amtrak's firms before and most of them tend to drag their feet.

There are Guidelines for various expenses, especially a requirement that they be charged at actual cost, which are apparently enforced only sporadically. The Guidelines should be improved in this regard, too. At least one firm has attempted to exempt itself from the prohibition against profit on internal expenses by causing Amtrak to agree to pay the firm's self-defined "standard rates," rather than actual cost, for internal expenses.

There are two classes of such expenses: Out of pocket expenses, which are passed through at actual cost (they cannot be marked up),<sup>16</sup> and internal expenses of the firm, which are also supposed to be charged at cost, but the firms can manipulate how they define that "cost" (examples include copying). Typically firms are required to obtain prior approval for large or unusual expenses and document significant expenses with receipts or the like. Aware of the ethical limits on expenses, many firms have constructed elaborate systems for passing off overhead items as costs.

Although we saw very limited evidence that the Law Department was monitoring outside legal bills, what little review we saw concentrated on the expenses – we saw one or two that were challenged successfully. (We found many more in our sample reviews.) Experienced in-house counsel should be able to spot more questionable expenses.

The Law Department should institute standard measures to manage and review expenses passed through by the law firms as part of the legal bill review process.

*Recommendations – Legal Bill Review & Formatting:* The Law Department must thoroughly and promptly review all incoming legal bills for compliance with Billing Guidelines, including format and content requirements, budgets, and overall reasonableness. This will also allow it to monitor the performance of counsel. As part of this process, the Law Department should also reconcile the bills with budgets and compile cumulative records of the amounts billed and paid, challenged, and the like. The Law Department should also establish a plan to conduct independent bill reviews or "audits" to verify its in-house process and make sure that the firms are not taking Amtrak for granted.

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<sup>16</sup> As noted above, however, Manatt has obtained Amtrak's permission, through a side agreement, to recover more than its actual costs on expenses.

## Other Outside Counsel Management Issues

Billing Guidelines, budgets, and bill reviews are the primary tools for managing outside counsel's fees and expenses. In this section, I include several additional issues that Amtrak's Law Department should be managing, but is not doing well, if at all, at this time. All of these have a direct impact on fees and expenses paid by Amtrak. At this time, Amtrak is wasting substantial amounts because it is not managing these issues properly.

Hourly Rates: One function of in-house counsel is to select law firms with reasonable hourly rates and monitor hourly rates as actually charged by outside counsel, including changes in rates. Hourly rates are only part of the fees equation, with reviews being necessary to monitor hours.<sup>17</sup> A client providing substantial business to law firms should expect, *inter alia*, substantial discounts from "standard" rates quoted by firms. Clients must be alert for high rates, rates charged for non-billable services (such as clerical services), rates charged for temporary or contract timekeepers (who should be passed through at actual cost), and attempts by the firms to increase hourly rates.

Amtrak does pay some attention to hourly rates – it is one of the easiest items to view – and the Guidelines call for some concessions. Amtrak's Law Department believes it is receiving discounts on hourly rates. According to more than one staff interview, negotiation of rates and changes to rates are oral and undocumented. Having selected some of the most expensive law firms in the country, the "discounts" given by the firm do not, however, make the resulting fees reasonable.

Unfortunately, many firms will claim they are giving discounts when they are not. Amtrak does not, however, do anything I could discern to verify these rates. The "standard" rates are retail rates that no serious client would pay. There are even instances in which firms, who are selected without competition, feel free to enhance their existing rates before quoting them to the new client. Amtrak should be communicating with other law firms to obtain competing hourly rates. Amtrak should also be communicating with other clients of each law firm to verify that they are paying similar or higher rates.

While it does pay attention to initial hourly rates, Amtrak has acquiesced to annual hourly rate increases, often without having them cleared in advance as the Guidelines require. Those increases have been unusually large and unilaterally imposed by the firms annually, thereby wiping out any

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<sup>17</sup> Monitoring fees is still critical because firms also erase nominal discounts with over-staffing, frequent and substantial rate increases, and the like.

apparent discount. (Many clients instead require rates to be frozen on each matter, at least for the first two years or so.)

If anything, Amtrak's Law Department should not assume that negotiating a "discount" on hourly rates will have any effect. Any combination of rate increases, inflated rates, hours worked, staffing, or wasteful tasks worked can erase the phantom hourly rate discount.

Absence of Indicia of Management Activity: There are telltale signs one would expect to see if a legal department is engaged in effective, aggressive management of outside counsel. These include write-offs or write-downs of fees and expenses, communications from lawyers seeking permission to change hourly rates or staff, consultation on tactics and strategy, communications from in-house counsel regarding problems Amtrak finds in legal bills, termination of firms for unsatisfactory performance, and the like.

Although Amtrak OIG requested the communications with outside law firms that would demonstrate this healthy activity, especially for the top ten firms being reviewed, there were virtually no such indicia of management activity. Unfortunately the interviews and responses from the Law Department suggest that they view themselves as champions for the outside lawyers, not managers of them. OIG interviews of Law Department staff include anecdotes about individual items occasionally written off or hourly rates "discounted" – these instances were sporadic and had minimal impact. That several law firms spontaneously disclosed substantial, longstanding issues when they became aware of the GAO and OIG investigations demonstrates the absence of similar impact by the Law Department.

Most of the outside firms' attitudes, as exhibited in their bills and communications, demonstrate that they take Amtrak's business for granted. Amtrak provides the top firms with millions of dollars in business, but even Amtrak's Law Department views itself as a second-class client. It is the job of in-house counsel to insure that Amtrak uses lawyers who will treat it as a first-class client, or replace them with others who will. The objective is to make sure that the firms are not taking Amtrak for granted by overbilling, overstaffing, or performing poorly.

Amtrak does not need to be dictatorial, but it does need to be reasonably vigilant and respected. Once Amtrak begins to manage its outside firms more thoroughly, there should be ample give and take with the law firms and a healthy client-attorney relationship should develop.<sup>18</sup>

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<sup>18</sup> Amtrak should document all significant communications with outside counsel. This provides documentation of their management activities, for future reviews. Counsel may express concern about protecting the information, but it should be privileged.

Staffing Issues: Controlling staffing by the outside firms is the easiest way to keep their bills down and insure that fees are not wasted on inexperienced or unnecessary staff. Firms make money by adding staff, so in-house counsel should question the necessity for every timekeeper after the first. One junior attorney, looking to impress his superiors with lots of billable hours for on the job training, can bill a client \$40,000 or more in a single month. By keeping staff off Amtrak's tab in the first place, Amtrak can save millions in fees that will never be billed and, thus, avoid having to fight with outside counsel over huge write-offs after the fact. The staff assigned by Amtrak's lawyers typically included too many lawyers as well as other staff that were unnecessary or non-billable.

To overcome the limited revenue potential of hourly billing, firms faced with sticker shock for high hourly rates have resorted to overstaffing matters and to designating non-billable work done by clerical staff, for example, as billable. Left to their own devices, firms will assign a pyramid of such timekeepers, some experienced and some not, all billing part-time to this and other matters, which increases the number of people who have to be educated on the matter and kept up to speed. Reducing the staff saves the cost of the unnecessary people, reduces the time spent on startup, and limits the time billed for status briefings.

Heavy staffing, assigning staff with irrelevant or minimal experience, and poorly organized staff are signs of trouble, all of which were present here. Firms billing by the hour make substantial additional profits by overstaffing. Large staffs are not only less cost-effective, but the time wasted on conferences increases geometrically while the potential for disorganization also increases. Firms have also created new job categories to convert overhead items, like clerical work, into what they contend should be billable time. Firms may even contract for temporary staff, but, rather than pass that expense through at actual cost, attempt to mark them up while concealing their true nature by inserting their time entries among those of their actual staff. Even the most complex matters can be handled efficiently by small, dedicated (not part-time, distracted) teams using modern support tools.

The Amtrak Guidelines require advance approval to add to staff, prohibit charging for transition time, and suggest a typical organization of no more than one partner, one associate, and perhaps a supporting paralegal – all reasonable requirements. The requirements are spread out in several locations, but what is there is good. Guidelines at page 2, 4, 5.

We saw almost no indication that Amtrak's Law Department was noting, let alone controlling, the large staff assigned to many of these matters. Moreover, there were several suspicious categories of staff, including "specialists" often billing at twice the rate of paralegals, heavy use of "of counsel", temporary attorneys billed at professional rates (rather than actual cost), and partner-heavy staffing.

Selection of Counsel: The days are supposed to be gone when sophisticated clients would hand their legal work to only those law firms with a friend in the legal department. In-house lawyers should

maintain their objectivity, not become advocates for the outside law firms at the expense of their clients. Legal departments should be aware of the best firms in their field in the normal course of performing their jobs and have the special expertise to investigate potential law firms, with the best interest of their client in mind.

Amtrak's in-house lawyers appear to have been coopted by their outside firms, they rarely select new outside firms, they are making no apparent effort to engage in a thorough law firm selection process, and the firms they use are among the largest and most expensive in the country.

The bias in many client companies is to pick the biggest firms in town because either the client assumes that these firms must be the best or, at least, whoever selects them cannot be faulted later.<sup>19</sup> This overlooks several important facts: (1) no matter how big a firm is, it may not have expertise with your particular issues, and (2) the biggest firms tend to get that way by charging large fees. We have found innumerable instances where clients hired a major firm because of perceived expertise, only to find dozens of junior attorneys fresh out of law school – or even temporary lawyers – on their bill doing the actual work. Larger firms also have a habit of taking their clients, even clients paying millions in fees, for granted, which is a major problem for Amtrak.

The Law Department is supposed to use its expertise to perform a more thorough, rational law firm selection process, not just pick the same firms any naive client would. Amtrak's Law Department has not investigated its firms properly and not considered alternative law firms that would be cheaper and provide equivalent, if not better, services. There are thousands of firms with expertise handling most of the work done for Amtrak – most of Amtrak's work is routine, both in subject matter and complexity. Finding smaller, appreciative firms, especially firms from outside expensive metropolitan areas, would save Amtrak millions a year in legal fees. For the few exceptions, more investigation may be necessary, but Amtrak's in-house lawyers are supposed to be doing that already.

The first step is to gather a list of qualified potential firms. Some legal departments run formal auditions or issue requests for proposals ("RFPs"), others go by word of mouth, but it is the responsibility of in-house counsel to canvass the profession and pierce general marketing talk and biases favoring the largest, most expensive firms to insure that the firms under consideration are really qualified and "fit" the type of matter. (Bad fits make mistakes and cost more.) Regardless how candidates are found, the search must be thorough, but that does not end the matter. In-house counsel must then dig deeply into the credentials of proposed staff, the firm's experience, its proposed plan and budget, references, hourly rates, and more to make sure the firm will "fit" this engagement.

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<sup>19</sup> This bias for large, expensive firms is a common problem, typically caused because (1) individual employees feel they will expose themselves to reproach if a smaller firm fails and (2) individual employees are not accountable for the fees wasted by picking large, inefficient firms.

Besides selecting a firm with relevant experience, Amtrak should be taking advantage of the selection process to induce competition among the firms. Once the selection is made, this competitive advantage is gone. Bargaining for a lower budget may only enhance the hypocrisy of unrealistic budgets, so the better option may be to induce the firms to put some teeth in the budget, drop hourly rates, eliminate marginal staff, or make other concessions.

Rewarding existing firms that perform well with more work is also acceptable, if they deserve it.<sup>20</sup> Amtrak needs to evaluate the performance of existing firms and, if they perform well, include them in the mix for major new assignments. For smaller, routine assignments, where the project is not going to involve, say, \$100,000 or more in budgeted fees, Amtrak might establish a policy of assigning them to existing firms with a good performance record.

Based on interviews by OIG staff of Law Department personnel, it appears that Amtrak almost never engages in any sort of in-depth selection process. The Law Department is going with the safe, expensive choice of “usual suspects” mega firms. Instead, it is tending to recycle the largest firms without analyzing whether to keep them and, when it does go out for fresh counsel, it selects large, general purpose, expensive law firms. Amtrak says it has tried auditions, but found them unhelpful – that may be true if the audition is not run well to overcome the firms’ resistance. Amtrak also has a large firm bias. Amtrak’s idea for considering smaller firms is to check with its minority and small business lists to see if there are any law firms on the list. Amtrak’s Law Department is far too lazy when it comes to selecting counsel.

While the firms Amtrak now deals with exclusively should not be disqualified (if they are performing well), they should not be the only firms considered and there must be independent evaluation by in-house counsel of the contenders. Amtrak’s existing firms are rarely terminated, although there has been at least one exception according to staff interviews. As an example of the haphazard selection process, Mr. Moore related that Amtrak considered two large, expensive, general DC firms to handle a NY case – yet one of the firms had earlier been replaced by the other because of unsatisfactory work. Mr. Herrmann has a personal rule that Amtrak will never hire an employment law firm that has ever represented employees, even in a mixed practice<sup>21</sup> – his search for an employment law firm produced just one candidate from a field with thousands of specialist law firms.

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<sup>20</sup> Without more thorough reviews of bills and performance, it is difficult for in-house counsel to assess the selection of counsel.

<sup>21</sup> That sort of loyalty requirement is more common in labor contract and union practice, not routine employment litigation, such as employment discrimination cases.

Amtrak needs to run competitive, thorough selections of counsel to find cost-effective, qualified law firms that fit the work, appreciate the business, and will do the work well, at a reasonable price.

Overlapping Law Firms: To avoid duplication of effort by different law firms, legal departments must make efficient, rational project assignments to law firms, keeping track of these assignments to make sure the firms do not stray from their assignments. While geography and specialization may dictate hiring additional firms, generally speaking the fewer firms a company uses, the less waste there should be so long as the firms are responsive, cost-effective, and "fit" the matters they are handling. Left to their own devices, ambitious firms will encroach upon one another's territory as a means to eliminate competition and acquire more business.

We found numerous examples in the samples of firms conferring with one another, rather than dealing with the Law Department. There seem to be overlapping counsel, which was reflected in numerous inter-firm communications on some matters. Ms. Serfaty's explanation for the use of at least four firms to handle the Bombardier and related litigation reveals a chaotic, ad hoc selection and management process.

We were unable to determine why this is, but it is the responsibility of the Law Department to manage such interactions to avoid waste. The Law Department should be the hub of all legal services, but it appears here that Mannatt had that role in many instances. A client with an extensive, experienced in-house legal department would not have outside general counsel, too.

After determining whether multiple firms are actually necessary, the Law Department must coordinate these efforts to avoid waste and confusion. Firms selected must "fit" their matters, *i.e.*, have relevant expertise, proper staffing, and handle matters cost-effectively.

Inadequate Record Keeping: Legal departments must maintain various key records for each legal matter, for a reasonable time, and in a readily retrievable form. This is necessary not only so that in-house counsel may monitor and review legal work, but to serve as a backup in the event firms lose materials (fire, flood, firm breakups, etc.), firms are terminated, work product is recycled to avoid duplication of effort, or the client wishes to conduct fee or performance reviews. Key records include what most firms call the pleading, correspondence, research, and discovery files, plus billing records (including invoices and expense documentation).<sup>22</sup>

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<sup>22</sup> Exceptions can be made for burdensome, low priority documents. If the firms are making proper use of technology, *e.g.*, electronic transcripts and scanned documents, these can be duplicated electronically very cheaply and quickly at virtually no cost to the client. These days the better part of a million document images will fit on a DVD.



Amtrak's interest is in making sure that its information can be retrieved, is kept confidential – it should also not have to pay multiple times to locate the same information. Amtrak's Law Department was unable to produce, readily and promptly, basic information it should have had on hand to manage outside firms. The Law Department frequently used disorganization of its own files as an excuse to delay or fail to respond to OIG inquiries. Apparently, for example, many Amtrak files for Landman, Corsi, Ballaine & Ford have gone missing.

According to Ms. Serfaty, the Law Department abides by Amtrak's records retention policy, whatever that means to them, but each in-house attorney operates as a virtual solo practitioner in maintaining these records for the matters they manage. Each attorney has his or her own practice for maintaining files, some apparently relying solely on the firms themselves to maintain files for them – meaning that they cannot possibly be managing the firms or monitoring their performance.

Amtrak gives no instruction to outside counsel on records retention either. Amtrak should declare that it owns all work product prepared on its behalf – you do not want the firms recycling your work product to other clients, especially given the loose conflicts rules contained in the side agreements with Manatt Phelps and Morgan Lewis. In the event of a dispute, or upon completion of the matter, it should be Amtrak's option to recover the files or have them destroyed. This is one item that should be addressed in revised Guidelines.

In short, the Law Department must keep all key files in readily retrievable form, which can be readily accomplished with commonly used electronic tools. The Law Department should also set a records retention policy for the law firms.

In-House Legal Work: With the modest amounts involved in many routine cases, which are by far the most common type of case handled by Amtrak, and the high headcount of the Law Department staff, I was surprised to learn that 99% of the Amtrak legal work is sent to outside counsel (other than claims and “corporate” work). Many in-house legal departments do more of their work in-house, taking over some of the work from outside counsel, thereby saving money by paying wholesale rather than retail. Outside counsel then act in the more limited roles of local counsel or providing specialized or discrete services it would not be cost-effective to hire in-house. Even with outside counsel handling a case, Amtrak should be doing more of the routine heavy lifting of discovery – the most expensive part of litigation – in-house or with its own vendor, converting materials to electronic form at wholesale prices rather than marked up retail rates charged by outside counsel. Having the capability to do more work in-house also gives a client more leverage in negotiating with and managing legal fees billed by outside firms, who are effectively competing with in-house counsel if they become too expensive.

Claims Litigation: Amtrak engages in a substantial amount of so-called "claims litigation," *i.e.*, claims against Amtrak for personal injuries by employees and passengers and perhaps other routine

claims. This work is comparable to what insurance defense counsel typically do as commodity, routine litigation. Presumably Amtrak self-insures for nearly all these claims.

This is not complex litigation – discovery and motions practice are minimal, most cases are settled, and the cases typically turn on routine liability issues or medical testimony. Although the same basic legal standards apply, bills, files, and work product for this type of work should look entirely different, with many firms getting paid flat or fixed fees.

In this phase of our work, we did not spend much time reviewing claims-related bills or issues. Reviewing claims litigation bills requires a different approach because the typical billing problems are different, typically spreading time across many matters at once.

Although reviewing the files and bills is helpful, Amtrak should also compare its overall claims statistics (fees plus judgments and settlements, successes versus losses) with those of comparable businesses. Risk managers or risk consultants generally maintain that sort of information.

Recommendations -- Outside Counsel Management: Amtrak's Law Department is not fulfilling its role. Instead of being the aggressive protector of Amtrak's interests, many in the Law Department, including upper management, seem to view themselves as the advocates for outside counsel. While in-house counsel should have a professional working relationship with outside counsel, they must manage them to curtail the expensive flaws built into an hourly billing system that rewards inefficiency, insecurity, and inexperience.

There should be a paper and e-mail trail of management activity, and the firms' responses thereto. Hourly rates quoted to Amtrak should be checked with the firms' other client references and Amtrak personnel should survey comparable firms' rates. Amtrak should more readily replace expensive or poorly performing firms. Smaller firms and firms outside expensive metropolitan areas should be included in the selection process – the objective is to find firms that will not take Amtrak for granted.

Once law firms are hired, Amtrak must keep the staffing stable – no musical chairs – and restrict any additions to staff. Consideration should be given to doing more work in-house, especially the expensive document handling involved in discovery. Amtrak should maintain organized files for its cases to aid management.

## Outside Law Firm Performance

My firm looked at a sample of bills and other information from six of the law firms billing the most to Amtrak between 2002 to 2005. I also looked at the work product of the DOT and Amtrak OIG personnel who reviewed many more bills from the ten top billing law firms in the same time period. Our focus was primarily upon what this would reveal about the Law Department's actual execution of its duties, not just what the Guidelines allowed or Law Department personnel said they were doing.

Examining the fees and performance of law firms requires an understanding of their unique structure, operation, and obligations. Law firms are not organized like most other businesses, they staff and approach work in a fashion that is different from the way most corporations work, and they are subject to special ethical and professional obligations. That law firms are different does not mean that they cannot be studied, understood, and managed. Indeed, lawyers are fiduciaries charged with higher obligations to serve their clients, but ironically their clients may be reluctant to give their lawyers direction or monitor their performance.

Unfortunately, this abdication of responsibility by clients tends to create a vacuum of direction for the lawyer. Moreover, a passive client often fails to exercise available rights, such as the right to determine whether the lawyer is subcontracting or delegating work to temporary or outside lawyers – unless the client knows about and exercises its rights, those rights may be lost at great cost to the client. Even the most diligent and well-meaning lawyers must have the client's input to appreciate the client's objectives and expectations. Left to their own devices, even diligent and well-meaning lawyers may waste time and money.

By rewarding time spent and not results, hourly fees encourage heavy staffing, procrastination, and multiplication of issues – lawyers who are experienced, efficient, and creative are not rewarded by hourly fees. Given that the incentives created by hourly billing may be contrary to the client's interests, the best way to counteract that tendency is to monitor the lawyer's performance and fees. Otherwise the client is faced with the very real prospect that, while the fees may be exorbitantly high, the quality of the law firm's performance may nevertheless be poor.

Legal Bill Content: Based on my review of a sample of bills from six law firms billing the largest amounts, I noted pervasive, obvious violations of the Billing Guidelines and general billing standards. There was almost no indication that anyone from the Law Department is reviewing the content of the bills, let alone enforcing the Guidelines. This was confirmed by a much larger review conducted by personnel from Amtrak and DOT OIG, with our assistance.

Here are some of the types of problems noted in the samples: (1) there are numerous incomplete and vague time entries; (2) there are hourly charges for clerical services that should be included in firm overhead and not billed separately; (3) there is a disproportionately large number of internal conferences among timekeepers in the same firm, which often indicates overstaffing and poor management; (4) there are examples of two or more timekeepers duplicating efforts, such as attendance of four or more timekeepers at meetings; (5) the formats of some firms' bills are unusual and tend to hamper examination; (6) the hourly rates of several firms are extremely high, even after being "discounted"; (7) there is very little documentation – usually none at all – to support out-of-pocket expenses passed through by the law firms; and, (8) there is little or no evidence of self-management by the law firms, such as write-downs or write-offs of fees.

As an example of why in-house counsel should be paying closer attention to the incoming bills, I noticed an odd pattern in the distribution of the Manatt time entries in our sample. For lawyers billing by the hour, there would usually be more entries in the range of 0.1 to 1.0 hours than larger amounts (say, 4.0 or more hours). This effect should be very pronounced for task-based bills because every phone call, every conferences, and so on would be a separate, small entry – the most common entry should be 0.1. Manatt was block billing – combining entries – but even so the most common entries should tend to be smaller, closer to 1.0 hours. Moreover, if the timekeepers are honestly recording time, the distribution of entries should be fairly smooth. In other words, 0.5, 0.6, and 0.7 should occur in roughly the same number of instances, and 3.5, 3.6, and 3.7 should also be in the same ballpark as one another (but fewer times than the smaller entries). Manatt, on the other hand, has far more large entries and very few small entries: The most common time entry is 9.0 hours. Plus, the distribution of Manatt entries is far from smooth: There are ten 9.0 entries, but none for 8.9 or 9.1. From this evidence, my concern is that Manatt's time entries are inaccurate and inflated.<sup>23</sup>

The following matrix summarizes the results of my firm's review of a sample of six hourly legal bills from six firms, which we used as a point of comparison with the reviews undertaken by Amtrak and DOT OIG personnel. Note that Amtrak is routinely using expensive, general purpose law firms with large, inexperienced staffing and high overhead. Amtrak should be making more effort to locate experienced, cost-effective firms up front.

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<sup>23</sup> Exhibit E is a graph of the Manatt Time Entry Distribution. The two lines are my representations of how the distribution would appear for a typical bill with block-billing (dark curve) or with task-based billing (lighter curve).

Firm	Block billing	Vague/Cryptic entries	All Problem Percent <sup>1</sup>	Staffing	Hourly Rates	Comments
DLA Piper	Slight amount	7% of sample	22% of sample	Moderate	High hourly rates	Better than most others in this sample, but substantial room for improvement.
Jackson Lewis	Moderate (6% in sample)	55% of sample	66% of sample	Heavy staff (8), partially explained by trial.	High hourly rates	Middle of the pack in the sample. This bill is high, but from trial time which may excuse some problems. Heavy expenses, heavy staff with heavy turnover.
Manatt Phelps	Yes (71% in sample)	30% of sample	89% of sample	Heavy, top heavy, with heavy training and clerical component	High hourly rates	Overall, the worst observed, with heavy staffing, attempts to pass off clerical/overhead as billable, failure to follow basic guidelines, and heavy expenses. We noted a very unusual time distribution, suggesting a disproportionate number of small entries (low) and large entries (high), which can be indicative of improper or padded billing.
Morgan Lewis	Not in sample	3% of sample	44% of sample	Heavy, inexperienced staff with heavy clerical component	High hourly rates	Overall, one of the worst observed, with a large expensive staff with expensive habits. Heavy clerical, research, expenses, conferences, digesting.
Shaw Pittman	Yes (67% of sample)	41% of sample	96% of sample	Heavy, inexperienced staff (2 part., 1 assoc., 3 junior assoc./trainees, 3 doc. para./clerical)	High hourly rates	Overall one of the worst observed, with a large staff with little relevant experience, high rates, poor timekeeping, lots of clerical work, duplication, conferences billed.

Firm	Block billing	Vague/Cryptic entries	All Problem Percent <sup>1</sup>	Staffing	Hourly Rates	Comments
Vedder Price	Not in sample	4% of sample	23%	Primary team 1 partner, 1 assoc., with some others.	Questions raised about discount, but rates otherwise reasonable.	Overall one of the best observed. Some personal and overhead expenses. Indications of improper minimum increment for calls/conferences.

**Problem Time Entries:** The table above references overall percentages of problem time entries from the sample of legal bills my firm reviewed. Here are descriptions of these problems, which are generally recognized as billing issues by judges and other legal authorities. These are all basic items that Amtrak’s Law Department should have been monitoring and, in most cases, doing something about.

**Block Billing:** Amtrak’s Guidelines prohibit block billing, which we call mixed entries. Without that requirement, we would normally not opine that a time entry may be disallowed on that ground alone – it is not a good practice, but it is not unethical or illegal. Prohibiting block billing helps Amtrak review the bills, if it ever actually does so, and to segregate activities by task so that these totals may be compared with budgets, for example.

Here is a breakdown of the percentage of this type of problem by firm in the samples my firm reviewed.

Law Firm	Mixed Time % Hours	Mixed Time % Fees
Piper	0%	0%
Shaw Pittman	61%	67%
Vedder Price	0%	0%
Morgan Lewis	0%	0%
Manatt	68%	71%
Jackson Lewis	8%	6%

The following table contains examples of mixed time entries:

Law Firm	Date	Timekeeper	Description	Hours	Rate	Amount
Shaw Pittman	7/6/2004	Allen, T	Review ExpressTrak operational documents for information regarding corporate structure related to ExpressTrak's settlement offer; coordinated document production visit to Delaware; participated in electronic discovery conference call with J. Mchay, M. Koehn and C. Lanzon.	7.30	\$ 220.00	\$1,606.00
Shaw Pittman	7/7/2004	Allen, T	Drafted responses to ExpressTrak's Second Request for Production of Documents; participated in e-discovery calls with CLS and Amtrak personnel; conducted pre-production document review.	7.10	\$ 220.00	\$1,562.00
Shaw Pittman	7/8/2004	Koehn, M	Review and revise ExpressTrak folder instructions, including testing and inserting screen prints to guide users; draft initial instructions for CLS's extraction, processing, and reporting regarding Amtrak active emails.	4.40	\$ 375.00	\$1,650.00
Shaw Pittman	7/9/2004	Gannon, J	Meet with ExpressTrak counsel on electronic discovery issues; review ExpressTrak's documents for hot documents; discuss inadvertent production issues with J. McKay and T. Allen.	6.3	\$ 270.00	\$1,701.00
Shaw Pittman	7/13/2004	Koehn, M	Confer with CLS regarding information missing for active email extraction reports; confer with Ms. Kim and Messrs. McKay and Allen regarding ExpressTrak's requests for expand custodian list; confer with Ms. Kim and Mr. Allen regarding active email collection and processing regarding non-NEC email; draft cover and transmit initial Active Email Extraction report to Mr. Lambert (ExpressTrak).	4.90	\$ 375.00	\$1,837.50
Shaw Pittman	7/16/2004	Koehn, M	Develop strategy for negotiating with ExpressTrak regarding edocument review efforts, including estimates regarding potential progress by email materials review team; confer with ExpressTrak contacts regarding next processing steps including deduplication and keyword searching and draft letter to Mr. Lambert (ExpressTrak) regarding same; review and consider ExpressTrak's initial search terms, confer with CLS regarding deduplication fees and costs of indexing and key word searches and options for discount regarding of individual queries to obtain key word "hit" counts.	5.40	\$ 375.00	\$2,025.00
Shaw Pittman	7/17/2004	Mazo, S	Speak with M. Glanz; set up summation; meet with T. Allen; meet with T. Gaskins-Saunders; review Amtrak documents.	7.80	\$ 205.00	\$1,599.00
Shaw Pittman	7/27/2004	Allen, T	Met with C. Lanzon and A Cannon regarding settlement and case status; corresponded with A McKay regarding amendments to pleadings; began drafting motion to amend pleadings.	9.50	\$ 220.00	\$2,090.00
Shaw Pittman	7/28/2004	Allen, T	Drafted responses to ExpressTrak interrogatories; placed calls to S. Lambert and M. Koehn regarding E discovery.	10.00	\$ 220.00	\$2,200.00

Mixed Time Examples

Internal Conferences & Memoranda: A significant amount of time was billed by these firms for internal conferences, *i.e.*, among their own staff. *See, e.g., In re Olson*, 884 F.2d 1415, 1428 (D.C. Cir. 1989) (attorneys with high hourly rates should not need so much conference time to discuss strategy). This does not include communications with client personnel, opponents, or the like. It is not uncommon for billing guidelines to restrict internal conferences, *e.g.*, by forbidding such charges or only allowing one attorney to bill for them.

Here is a breakdown of the percentage of this type of problem by firm in the samples my firm reviewed.

<b>Law Firm</b>	<b>Internal Conference % Hours</b>	<b>Internal Conference % Fees</b>
Piper	0%	0%
Shaw Pittman	14%	15%
Vedder Price	8%	8%
Morgan Lewis	0%	0%
Manatt	0%	0%
Jackson Lewis	0%	0%



Shaw Pittman	7/1/2004	Gannon, J	Meet with T. Allen on discovery tasks. Conference call with J. McKay, T. Allen and ExpressTrak counsel on outstanding discovery issues.	1.10	\$ 270.00	\$ 297.00
Shaw Pittman	7/2/2004	Allen, T	Call to C. Lanzon regarding discovery matters; reviewed CLS contract; met with L. Moshalagosha regarding document production issues.	0.70	\$ 220.00	\$ 154.00
Shaw Pittman	7/8/2004	Gannon, J	Review and edit Amtrak's objections and responses to ExpressTrak's second request for production of documents; review settlement correspondence; meet with T. Allen regarding discovery issues.	1.00	\$ 270.00	\$ 270.00
Shaw Pittman	7/12/2004	Gannon, J	Review documents produced by ExpressTrak; discuss trip to Tennessee with T. Allen.	1.20	\$ 270.00	\$ 324.00
Shaw Pittman	7/1/2004	Allen, T	Conducted preproduction document review; coordinated production of documents; calls to M. Koehn and J. Kim regarding discovery issues.	5.90	\$ 220.00	\$ 1,298.00
Shaw Pittman	7/14/2004	Allen, T	Preproduction review of documents; discussions with J. Kim and M. Koehn regarding e-discovery issues; review of metrics for active email files of LA and Chicago custodians; review desktop deposit instructions.	5.20	\$ 220.00	\$ 1,144.00
Shaw Pittman	7/16/2004	Allen, T	Calls to J. Kim and M. Koehn regarding e-discovery; call to R. Hyer regarding location of Mail and Express reports; reviewed Amtrak production for information on Amtrak personnel identified by ExpressTrak.	5.70	\$ 220.00	\$ 1,254.00
Shaw Pittman	7/20/2004	Allen, T	Review Amtrak documents for information on potential new document custodians; sent email reminder to custodians regarding discovery questionnaire; call to J. Kim regarding Mail and Express reports; call to M. Koehn regarding email search terms.	5.50	\$ 220.00	\$ 1,210.00
Shaw Pittman	7/21/2004	Allen, T	Review of Amtrak documents for information on potential new document custodians; call to M. Koehn regarding email search terms; emailed D. Arganbright regarding road radar issue.	5.00	\$ 220.00	\$ 1,100.00
Shaw Pittman	7/26/2004	Gannon, J	Review documents produced by Amtrak; discuss discovery issues and tasks with T. Allen, discuss bad order and settlement issues with T. Allen.	2.10	\$ 270.00	\$ 567.00
Shaw Pittman	7/27/2004	Gannon, J	Review and edit amended complaint and amended reply to counterclaim; discuss same with T. Allen; meet with C. Lanzon and T. Allen to discuss settlement and discovery issues.	2.30	\$ 270.00	\$ 621.00

Internal Conference Examples

**Cryptic Time Entries:** As discussed in the first portion of this report, the Guidelines and legal authority require descriptive, detailed time entries. A proper entry needs to describe the “who, what, where, when, why, and how” of the timekeeper’s activities. *See, e.g., Webb v. County Bd. of Education*, 471 U.S. 234, 240 (1985); *United Slate, Tile & Composition Workers, Local 307 v. G&M Roofing & Sheetmetal Co.*, 732 F.2d 495 (6th Cir. 1984); *see also, Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (attorney should "maintain billing time records in a manner that will enable a reviewing court to identify distinct claims").

Here is a breakdown of the percentage of this type of problem by firm in the samples my firm reviewed.

Law Firm	Cryptic % Hours	Cryptic % Fees
Piper	8%	7%
Shaw Pittman	51%	41%
Vedder Price	0%	0%
Morgan Lewis	0%	0%
Manatt	34%	30%
Jackson Lewis	57%	55%

Here are examples of cryptic time entries:

Shaw Pittman	7/1/2004	Gaskins -Saunde	Review documents from ExpressTrak.	5.0	\$ 205.00	\$ 1,025.00
Shaw Pittman	7/2/2004	Gaskins -Saunde	Review documents from ExpressTrak.	5.6	\$ 205.00	\$ 1,148.00
Shaw Pittman	7/8/2004	Gaskins -Saunde	Review documents from ExpressTrak.	5.8	\$ 205.00	\$ 1,189.00
Shaw Pittman	7/16/2004	Gaskins -Saunde	Review documents from ExpressTrak.	5.3	\$ 205.00	\$ 1,086.50
Shaw Pittman	7/20/2004	Gaskins -Saunde	Review documents from ExpressTrak.	6.8	\$ 205.00	\$ 1,394.00
Shaw Pittman	7/20/2004	Mazo, S	Review Amtrak documents.	5.0	\$ 205.00	\$ 1,025.00
Shaw Pittman	7/21/2004	Gaskins -Saunde	Review documents from ExpressTrak.	9.4	\$ 205.00	\$ 1,927.00
Shaw Pittman	7/22/2004	Gaskins -Saunde	Review documents from ExpressTrak.	6.2	\$ 205.00	\$ 1,271.00
Shaw Pittman	7/22/2004	Mazo, S	Review ExpressTrak documents.	4.9	\$ 205.00	\$ 1,004.50

**Cryptic Time Samples**

**Clerical Time Entries:** Legal fees already compensate law firms for the lawyer's or paralegal's salary, plus the firm's overhead and profit of the firm. Therefore a firm may not attempt to charge separately for overhead – it's included in the hourly rates. The work done by clerical staff is an example of non-billable overhead included in the hourly rates of professional timekeepers. *Missouri v. Jenkins*, 491 U.S. 274 (1989); *New Mexico Citizens for Clean Air and Water v. Espanola Mercantile Company, Inc.*, 72 F.3d 830, 834 (10th Cir. 1996) (citing *Halderman ex rel. Halderman v. Pennhurst State Sch. & Hosp.*, 49 F.3d 939, 942 (3rd Cir. 1995)) ("When a lawyer spends time on tasks that are easily delegable to non-professional assistance, legal service rates are not applicable.")

Here is a breakdown of the percentage of this type of problem by firm in the samples my firm reviewed.

Law Firm	Clerical % Hours	Clerical % Fees
Piper	0%	0%
Shaw Pittman	23%	12%
Vedder Price	0%	0%
Morgan Lewis	24%	15%
Manatt	0%	0%
Jackson Lewis	0%	0%

Law Firm	Date	Attorney	Description	Hours	Rate	Fees
Shaw Pittman	7/1/2004	Moshkelgosha, L	Preparation of documents for scanning and imaging for production; coordination with vendor regarding same; miscellaneous organizational tasks.	2.7	\$ 135.00	\$ 364.50
Shaw Pittman	7/1/2004	Wagner, C	Prepared and organized documents for production; reviewed privileged documents for entry into privilege log	4.5	\$ 110.00	\$ 495.00
Shaw Pittman	7/2/2004	Moshkelgosha, L	Continue with organizational tasks; coordination of seventh production and email regarding same.	2.5	\$ 135.00	\$ 337.50
Shaw Pittman	7/6/2004	Moshkelgosha, L	Continue with ExpressTrak indexing in preparation for printing and attorney review; miscellaneous organizational tasks; coordination with M. Glantz on ExpressTrak cd's (label errors).	4.3	\$ 135.00	\$ 580.50
Shaw Pittman	7/9/2004	Moshkelgosha, L	Assist C. Wagner with preparation of documents for scanning/imaging; coordination with M. Glantz and vendor on production issues; document organization.	1.0	\$ 135.00	\$ 135.00
Shaw Pittman	7/23/2004	Moshkelgosha, L	Attend to miscellaneous organizational tasks and ExpressTrak indexing for printing and review.	1.2	\$ 135.00	\$ 162.00
Shaw Pittman	7/26/2004	Moshkelgosha, L	Continue with ExpressTrak indexing in preparation for printing and attorney review; miscellaneous organizational tasks.	2.9	\$ 135.00	\$ 391.50

Clerical Time Examples

*Recommendations – Outside Law Firm Performance:* I examined samples of legal bills issued by the firms who billed the most in the 2002 - 2005 time period covered by our review. My focus was primarily upon the inferences that could be drawn from the bills about the performance of the Amtrak Law Department, which was supposed to be managing the firms and their fees. I found that the Law Department was not enforcing its own Guidelines, nor was it performing its role as manager of Amtrak's outside counsel.

To me, these bill samples reveal that these law firms are taking Amtrak for granted. They are billing for numerous timekeepers, including too many junior and senior timekeepers in many instances. Many, sometimes most, of their time entries do not comply with the Guidelines. The hourly rates, even after the Amtrak discounts, were high – this is largely a result of picking expensive metropolitan firms.

## Methodology & Notes

1. Information Reviewed: The factual basis for my opinions is information obtained through DOT and Amtrak OIG. I have relied upon my general knowledge and experience in the field regarding issues such as standard billing practices.
2. Methods: Under my supervision, an employee of my firm reviewed copies of the billing information provided. These materials were electronically scanned and converted into Microsoft Excel spreadsheets. The same employee initially reviewed and coded time entries according to various types of problems (or potential problems) as described above. I reviewed her work. This data is then sorted and filtered for my analysis using tools included in the spreadsheet program.
3. Review: Because they are issued by legal professionals, subject to requirements beyond those imposed on most commercial vendors, there are several layers of analysis to be conducted for any hourly legal bill. The burden of preparing billing records and proving the time spent, as well as that the time was reasonable and necessary, is on the law firm, which creates the records in the first place. First, and most fundamentally, the bill's content and format must provide the basic details, such as the subject of communications or research, to inform the client – or a judge – what was being done so that one can determine that the work itself, as well as the charge for it, was reasonable and necessary. Second, there are some types of time entry meeting this content requirement, but which appear inappropriate, unreasonable or unnecessary from reviewing that time entry. (An obvious example would be a 25 hour time entry.) Third, one must look beyond the face of the bill to determine whether the fees meet the legal standards contained in statutory and case law. This requires consideration of the bill in its legal context, *i.e.*, not just on its face alone, to determine whether it meets external standards for what is reasonable. (Examples include common concerns about excessive internal conferences, duplication of effort, and clerical work.) Fourth, there are various grounds upon which otherwise reasonable, necessary, and properly documented fees and expenses may be forfeited, such as ethical infractions by the lawyer or other legal rulings. This is beyond the scope of this report, however.
4. Authority: The various categories of problems with time entries for which we code are based on the rationale used by court decisions and other authorities to determine the reasonableness of legal fees in comparable cases. The general standard is whether the fees and expenses are necessary and reasonable, under the circumstances.

5. Scope: This memo presents my opinions based on the information available to me. We have not performed a financial or accounting audit of these fees and expenses. Our examination is more comparable to an accounting review or performance or operational audit, concerned more with our impressions of subjective questions rather than verifying every detail in the bills.
6. Absence of Direct Law Department or Law Firm Input: Our work is being done in confidence, which means we have had no direct input from the Law Department or the law firms. This means that we are not, for example, performing any tests that might reveal evidence of fraud, including fraud by insiders, fictitious vendors, or the like.
7. Interviews: All interviews were conducted by OIG staff, sometimes with our input. We reviewed – and relied upon – interview notes prepared by OIG staff. I was not present at the interviews.
8. GAO Review: I read relevant portions of a U.S. GAO Statement of Preliminary Facts and Key Information for a Review of Amtrak's Management and Accountability Policies and Practices (June 2005, Code 544087). Our review confirms the validity of the GAO concerns.

Exhibits

- A. Resume of John W. Toothman
- B. Amtrak Billing Guidelines (1998)
- C. Matrix Comparing Amtrak Guidelines & Side Agreements
- D. Side Agreements
  - 1. Manatt (2003)
  - 2. Manatt (2005, 3)
  - 3. Morgan Lewis (2006)
  - 4. McCarthy Leonard (2005)
  - 5. Howd Ludorf (2005)
  - 6. Adams Reese (2005)
- E. Graph for Distribution of Manatt Time Entries

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**RESUME OF JOHN W. TOOTHMAN**

(703) 684-6996  
(703) 759-2388 (fax)

Employment

*The Devil's Advocate* (1993-present): Founder of legal fee management and litigation consulting firm.

*LitWatch, Inc.* (1999-present): Publisher and Editor-in-Chief of litigation news service.

*The Toothman Law Firm, P.C.* (1993-present): Civil litigation and trial practice in federal and state courts, including appeals. (The firm was formerly known as John W. Toothman, PC, and Toothman & White, PC.)

*Shulman, Rogers, Gandal, Pordy & Ecker, P.A.* (1989-1993): Partner in charge of the firm's Alexandria, Virginia office. Commercial litigation practice in federal and state, trial and appellate courts, including litigation against the United States. Represented the U.S. Small Business Administration in receivership proceedings.

*Grad, Toothman, Logan & Chabot, P.C.* (1986-1989): Associate, then partner in firm eventually known as Grad, Toothman, Logan & Chabot, P.C. Commercial and tort litigation and trial practice in state and federal court (trial and appellate), as well as litigation against the United States.

*U.S. Department of Justice, Civil Division, Federal Programs Branch* (1984-1986): Trial attorney with wide array of client agencies and issues, including constitutional, statutory, and administrative law, ERISA, FOIA, employment discrimination, boycott, and other substantive issues. Top Secret, SI, and SCI security clearances.

*Akin, Gump, Strauss, Hauer & Feld* (1983-1984): Associate attorney in antitrust litigation section.

*Howrey & Simon* (1981-1983): Associate attorney, primarily in antitrust and intellectual property. Representation of an industrial trade association.

Education

*Harvard Law School, J.D., cum laude* (1981)

Ames Moot Court Competition Semi-Finalist

Research Assistant supplementing H. Hart, H. Wechsler, P. Bator, P. Mishkin

& D. Shapiro, *THE FEDERAL COURTS & THE FEDERAL SYSTEM* (2d ed. 1977)

Cambridge & Somerville Legal Services (clinical education)

"Complex Civil Litigation" (third-year paper)

*University of Virginia, M.S., Chem. Eng.* (1979); *B.S., Chem. Eng., with honors* (1977)

National Science Foundation Fellowship, Memminger Fellowship, Tau Beta Pi, Sigma Xi, Alpha Chi Sigma,

AICHE Scholarship Award, Dean's List, Intermediate Honors

Other Relevant Experience & Publications

Arbitrator, Fee Arbitration Service Panel, DC Bar Attorney/Client Arbitration Board (1994-1998)

Arbitrator, Virginia State Bar, Fee Dispute Resolution Program, 18th Cir. Comm. (June 1995 to present)

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Exhibit A

CONFIDENTIAL--INCLUDES PRIVILEGED AND CONFIDENTIAL MATERIALS  
SUBJECT TO AGREEMENT WITH CONGRESSIONAL STAFF



Co-author, with Douglas Danner, TRIAL PRACTICE CHECKLISTS 2d (West Group 2001;  
3 vols. supplemented annually)

Co-author, with William G. Ross, LEGAL FEES: LAW & MANAGEMENT (Carolina Academic Press 2003)

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Author, Chapters 11-13, *Fifth Annual Litigation Management Supercourse, Volume I* 575-594 (PLI March 1994)

Article, "For Trials, Get A Trial Attorney," 14(51) *National Law Journal* 17-18 (Aug. 24, 1992)

Article, "Ways To Counter The Down Side of Litigation," *Wash. Bus. Journal* 43 (Nov. 2, 1992),  
republished in *Newstrack* (Dec. 15, 1992)

Article, "10 Things Clients Can Do To Strengthen Later Suits," *Wash. Bus. Journal* 33 (Jan. 1, 1993)

Article, "Greasing the Wheels for Civil-Justice Reform," 15(34) *Legal Times* 43 (Jan. 18, 1993)

Article, "Justice May Justify Name Again," 15(30) *National Law Journal* 15-16 (March 29, 1993)

Article, "Attorney Fees: The Case for 'Value Billing,'" *Wash. Bus. Journal* 57 (June 18, 1993),  
republished in *Newstrack* (April 6, 1993)

Article, "Getting to the Heart of Excessive Attorney Fees," *Newstrack* (Aug. 3, 1993)

Article, "A No-Nonsense Approach to Monitoring Those Legal Bills," *Wash. Bus. Journal* 36 (Dec. 17, 1993)

Article, "Hire Trial Lawyers, Not Litigators, Say General Counsel," 4(27) *Corporate Legal Times* 39 (Feb.  
1994)

Article, "Second Opinions May Trim Legal Bills," 16(27) *National Law Journal* 17 (Feb. 14, 1994)

Article, "Alternative Billing: Living With the Uncorked Genie," 7(3) *Accounting for Law Firms* 3-4 (March  
1994)

Article, "Billing: Considering Alternatives That Work & Others That Don't," 7(4) *Accounting for Law  
Firms* 4-6 (April 1994)

Article, "In Litigation, It's Usually the Fall That Kills the Client," *Wash. Bus. Journal* 15 (May 13, 1994)

Article, "Ten Tips for Lawyers' Clients," *Nation's Business* 44 (Oct. 1994)

Article, "Legal Fees: You Can Keep Them In Check," 21(4) *Directorship* 8 (April 1995)

Article, "Creating a Retainer Agreement That's Fair to Both Sides," 8(7) *Accounting for Law Firms* 6-7  
(July 1995)

Article, "Standard Hourly Litigation Retainer Agreement," 8(8) *Accounting for Law Firms* 5-8 (August 1995)

Article, "Real Reform," 81 *ABA Journal* 80 (September 1995)

Article, "Audit Your Firm's Bills Before Your Client Does," 9(11) *Accounting for Law Firms* 1, 6-7 (Nov. 1996)

Article, "Integrated Legal Management: A Checklist," *WMACCA Counselor* 4 (July 1997)

Article, "Estimating Legal Fees: A Primer for Law Firms," 10(11) *Accounting for Law Firms* 1-6 (Nov. 1997)

Article, "Surviving a Legal Bill Audit," 15(1) *The Compleat Lawyer* 45-50, 62 (ABA Winter 1998)

Article, "Cost-Conscious Clients," 114(86) *Los Angeles Daily Journal* 8 (May 4, 2001)

Article, "Accurate Accounting," 114(103) *Los Angeles Daily Journal* 8 (May 29, 2001)

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Note, "Like It or Not, the Law is Now a Business," 16(3) *National Law Journal* 16 (Sept. 20, 1993)

Note, "We Three Kings of Corporate Law," 17(17) *National Law Journal* A21 (Dec. 26, 1994 - Jan. 2, 1995)

Note, "O Little Firm of Bethlehem (PA)," 18(17) *National Law Journal* A19 (Dec. 25, 1995 - Jan. 1, 1996)

Report, "Regarding Department of Energy Management of Contractor Litigation Expenses,"  
U.S. House Subcommittee on Oversight & Investigations of the Committee on Energy & Commerce (July  
13, 1994), and related reports for the U.S. General Accounting Office.

Report, "Managing Legal Services," 27(12) *MIS Report* (Dec. 1995) (International City/County  
Management Ass'n)

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Guest Lecturer, Trial Advocacy, National Law Center at George Washington University (Spring 1988)

Lecture, Georgetown University CLE, "Receiverships" (May 1991)

Lecture, Alexandria Bar Ass'n CLE, "Witness Preparation" (June 1992)

Lecture, Alexandria Bar Ass'n CLE, "Beyond Rambo: Effective Civil Litigation Tactics" (March 1993)

Panel Member, Alexandria Bar Ass'n CLE, "Ethics for the Trial Attorney" (March 1993)

Lecture, Alexandria Bar Ass'n CLE, "What's All This Nonsense About TQM, Value Billing, And  
Legal Bill Audits?" (Oct. 1993)

Panel Member, "Law Firm Governance 1994," (BDA program; Feb. 1994)

Moderator, Alexandria Bar Ass'n CLE, "Practice Before the Virginia Court of Appeals" (April 1994)

Panel Member, ABA Section of Litigation, "Roundtable for In-House & Outside Counsel" (Oct. 1994)

Lecture, Alexandria Bar Ass'n CLE, "An Ounce of Prevention: Billing Problems That Drive Clients  
Crazy" (Jan. 1995)

Lecture, North Carolina Ass'n of CPAs, "Legal Cost Containment Trends" (Sept. 1995)

Lecture, Alexandria Bar Ass'n CLE, "Attorney Fees: Law & Practice in Virginia" (Jan. 1996)

Lecture, Fairfax Bar Ass'n CLE, "Billing & Collection Practices" (May 1996)

Lecture, Int'l Munic. Lawyers Ass'n, "Managing Litigation Costs" (April 1997)

Moderator, RIMS, "Managing Legal Fees" (May 1997)

Panel Member, ABA Health Law Section & Am. Ass'n of Health Plans, "In-House Counsel Workshop"  
(April 1998)

Moderator, RIMS, "Warning Signs" (April 1998)

Moderator, RIMS, "Legal Fee Audit Guidelines" (April 1999)

Panel Member, American Ass'n of Law Libraries, "Getting the Client to Value Legal Research" (July 1999)

Moderator, RIMS, "Legal Fee Management" (May 2000)

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Recipient, Ross Essay Award, American Bar Association (1995)

Bar & Related Affiliations

Admitted to practice law in the District of Columbia (1981), Maryland (1990) (inactive), and Virginia (1987).

Also admitted to practice before the U.S. District Courts for the Eastern District of Virginia (and Bankruptcy Court), District of Columbia (inactive), Colorado, and Maryland (inactive); U.S. Court of Federal Claims (Claims Court); U.S. Courts of Appeals for the Federal, District of Columbia, and Fourth Circuits; and, U.S. Supreme Court.

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# **NATIONAL RAILROAD PASSENGER CORPORATION GUIDELINES FOR OUTSIDE COUNSEL**

## **INTRODUCTION**

The Law Department of the National Railroad Passenger Corporation ("Amtrak") has prepared these Guidelines for attorneys engaged to represent Amtrak. They are a part of and generally govern the engagement.

The Law Department supervises and maintains a close working relationship with outside counsel. We view in-house staff and outside counsel essentially as co-counsel. Together we are engaged in a joint effort to provide our client, Amtrak, with high quality, cost-effective legal services. The Law Department always reserves the right to participate to the extent it deems appropriate in any legal matter referred to outside counsel. This may include staffing a particular matter jointly with outside and in-house lawyers.

In most instances, Amtrak retains particular lawyers, not law firms, based on those lawyers' perceived skills, knowledge and experience. The specific attorney retained to lead the engagement (the "engagement attorney") is responsible for ensuring that these Guidelines are circulated to, read by and complied with by all personnel who will be involved in providing legal service to Amtrak.

Amtrak is a private corporation, created by Congress and partially funded by taxpayers, that performs the important function of providing a nationwide system of intercity passenger rail transportation. Because Amtrak operates in the public interest and in the public light, we require our outside counsel to conform to the highest standards of ethical and professional behavior, including in all dealings with courts, opposing counsel, government officials and the public. Amtrak expects its outside counsel to know and comply strictly with all applicable rules of ethics and professional conduct and all rules of court, including local rules. Counsel are also expected to cooperate with the Law Department in responding to audit and/or information requests from federal agencies, congressional staffs and the company's Inspector General.

Any questions regarding these Guidelines should be addressed to the Law Department attorney responsible for managing the particular legal matter for which you have been engaged ("the Managing Attorney"), or to Amtrak's General Counsel. We welcome helpful comments or suggestions, and look forward to working with you.

## **LAW DEPARTMENT MANAGING ATTORNEY**

All Amtrak legal matters referred to outside counsel are actively managed by a Managing Attorney, except certain claims cases, discussed below, that are managed by a Claims Director. (Where a matter is being managed by a Claims Director, all obligations owed by outside counsel to a Managing Attorney under these Guidelines apply equally to the Claims Director.) In almost every instance, the Managing Attorney will be a lawyer with substantial experience in the type of matter being referred. The Managing Attorney should be your principal point of contact with Amtrak. Copies of all important documents generated in the course of the engagement, such as pleadings, motions, drafts of contracts, advice and opinion memoranda, and non-routine correspondence should be sent to the Managing Attorney. All significant decisions in the course of the legal matter should be discussed with and approved by the Managing Attorney in advance. No settlement offer or negotiation offer or concession may be made or responded to without express authorization from the Managing Attorney.

## **FEES, EXPENSES AND DISBURSEMENTS**

**Rates.** Amtrak expects to receive a substantial discount from outside counsel's normal fee structure. In general, Amtrak anticipates that it will receive at least the same discount offered to a firm's government or other large corporate clients, whichever is lower. Any increase in rates during the course of an engagement must be discussed with and approved in advance by the Managing Attorney. Amtrak welcomes proposals involving non-traditional and innovative fee structures.

**Unacceptable Professional Costs.** Amtrak retains outside counsel based on a demonstrated expertise in handling particular types of matters. Accordingly, Amtrak cannot pay for:

- the cost of outside counsel becoming familiar with the general statutory and case law relating to Amtrak;
- the cost of educating junior attorneys in the substantive law relating to the particular matter which is the subject of the engagement; or
- the cost of bringing a new attorney "up to speed" should changes in the initial staffing of a matter become necessary.

Similarly, Amtrak considers professional time spent on certain administrative tasks to be a cost of doing business. Thus, Amtrak cannot pay for:

- time spent clearing conflicts of interest, including time spent obtaining conflict waivers; or
- time spent in preparing or negotiating bills or budgets, or in responding to requests for clarification or explanation of an item on a budget or a bill.

**Unacceptable Expenses and Disbursements.** Amtrak assumes that profit and overhead are included in outside counsel's quoted billing rates. In particular, unless expressly agreed otherwise, Amtrak assumes that the following items are costs of doing business and cannot pay for:

- secretarial or word processing services and overtime;
- transmittal letters;
- in-house photocopying at more than ten cents per page;
- time spent photocopying;
- time spent in routine file review or maintenance;
- time spent opening or closing a file;
- local telephone calls;

-- office supplies;

-- telecopy or facsimile charges, other than the actual cost of a long distance phone call.

**Reimbursement at Actual Cost Only.** Disbursements will be reimbursed only at outside counsel's actual cost. In particular, there should be no mark-up for items such as computerized legal research services (LEXIS and Westlaw); long-distance telephone calls; outside photocopying; overnight courier or messenger service; and goods or services provided by outside vendors or consultants.

**Use of Amtrak In-House Document Management Capability.** Amtrak has substantial in-house document management capability, including high-volume copying equipment. You should consult with the Managing Attorney before incurring any substantial copying or document management costs to determine if the project can be more efficiently undertaken by Amtrak in-house staff.

**Sales Tax Exemption.** Amtrak is exempt from state sales and other taxes. Before sending substantial photocopying and other document jobs to outside vendors, consult the Managing Attorney. Frequently Amtrak can provide a tax exemption certificate or number for jobs requested in Amtrak's name by agents and not incur sales tax.

## **BILLING**

The Law Department makes every effort to process outside counsel bills expeditiously. You can help us turn your bills around more quickly by observing the following guidelines:

**Frequency and De Minimis Amount.** Unless otherwise agreed, invoices should be sent to Amtrak on a monthly basis, to the attention of the Managing Attorney. However, because of the prohibitive administrative costs of processing and paying small bills, no bill should be submitted for an amount less than five hundred dollars, unless it is the final bill for a matter. In the event that fees and costs in a given month on a matter total less than five hundred dollars, those fees and costs should be carried forward and billed the following month.

**Time Increments.** Attorney and other professional time should be billed in 0.1 hour (six minute) increments. Amtrak will pay only for actual time incurred. Amtrak will not pay any "minimum charge" per activity, such as 0.2 hour per phone call regardless of actual length.

**Block Billing Prohibited.** Amtrak requires that invoices identify the time expended on each activity included in the bill. Amtrak will not process invoices prepared in a "block billing" format, in which total time spent on a number of activities during the course of a day is aggregated.

### **Example:**

**Acceptable:** Telephone conference with opposing counsel regarding outstanding discovery (0.3); research regarding estoppel (1.5); begin draft of motion for summary judgment (2.0).

**Unacceptable:** Telephone conference with opposing counsel regarding outstanding discovery; research regarding estoppel; begin draft of motion for summary judgment. Total: 3.8 hours.

**Detail.** Description of services and costs should be complete and precise. For example, "prepared deposition summary" and "telephone conference with Joe Smith" are insufficient, while "summarized first volume of deposition of plaintiff John Jones" and "telephone conference with Joe Smith to discuss scheduling of Jones deposition" are acceptable. Invoices should state the name and billing rate of each attorney, paralegal or other professional who billed time to the matter that month. In addition to the amount billed during the billing period, all invoices should list the cumulative total for all fees billed on the matter to date. All invoices should include your firm's taxpayer identification number and should separately itemize all disbursements and costs.

**Audits.** Amtrak may, from time to time, in its sole discretion, audit outside counsel bills. Amtrak is itself audited from time to time by the General Accounting Office, the company's own Inspector General and other external auditors, usually at the request of Congress or a Congressional Committee. By undertaking to provide legal services to Amtrak, outside counsel agrees to cooperate fully with all such audits.

## **BUDGETS**

**Initial Budget.** Within thirty days of the assignment of a new legal matter (or in advance if requested by the Managing Attorney), outside counsel should prepare and submit to the Managing Attorney for approval a budget estimating the fees and expenses expected to be incurred through the matter's conclusion. Budgets are not required for litigation matters that will be completed within 30 days or for which the estimated fees and expenses do not exceed \$5,000. For complex matters in which estimated fees and expenses exceed \$50,000, the budget should be broken down into "phases," tracking the matter from inception to conclusion. For example, the "phases" of a complex litigation matter might include: pre-litigation investigation; preparation of pleadings; discovery; dispositive motions; preparation for trial; trial; and post-trial motions. The budget should include the estimated completion time for the matter or for each phase of the matter. The initial budget should identify the name and billing rate for each attorney, paralegal or other professional who will bill time to the matter.

**Updated Budgets.** Amtrak uses budgets for both business planning and tracking of the progress of a matter and its cost-effectiveness. Therefore, outside counsel should attempt to make initial estimates as realistic as possible. At the same time, Amtrak recognizes the difficulty of estimating legal fees and expenses at the beginning of a matter, and understands that estimates can change as a matter progresses. Amtrak therefore requests counsel to prepare and submit an amended budget whenever circumstances change to the point that the estimated cost for a matter or a phase of a matter increases or decreases significantly. In any event, the budget should be reviewed and an update submitted every six months. In addition, with certain types of litigation, the claims and strategic defenses of a lawsuit can change dramatically depending upon information revealed during discovery, and such changes ultimately affect the bottom-line of a lawsuit. Consequently, the Managing Attorney may ask you to provide us with a quarterly budget. This does not eliminate your responsibility to provide more frequent updates either in writing or by telephone, as appropriate.

## **STAFFING**

As noted above, in most instances, Amtrak retains particular lawyers, not law firms, because we believe those lawyers possess exceptional knowledge, skills and experience and will provide first-class legal representation to the Corporation. Accordingly, the need for any change in the staffing of a matter should be discussed in advance with and approved by the Managing Attorney. In general,

Amtrak believes that most legal matters it refers to outside counsel can be adequately and appropriately staffed by one partner and one associate, supported by one paralegal. If you believe that a particular matter requires additional staffing, you should discuss your reasoning in advance with the Managing Attorney. If you wish to have a junior attorney accompany a more experienced lawyer to a meeting, negotiation, deposition or hearing as a learning experience, the junior attorney's time and travel expenses should not be billed to Amtrak.

## **TRAVEL**

**General Rules.** Outside counsel should travel on Amtrak business only when necessary. Where possible, conference calls, telephonic hearings and the like should be utilized instead of in-person meetings and appearances. Travel by more than one attorney is usually unnecessary, and must be approved in advance. In no event will Amtrak will pay for first class airfare. Amtrak expects outside counsel to take advantage of cost-effective discounts and special airfare and hotel rates to the maximum extent possible.

**Travel by Train.** Where practical and cost-effective, outside counsel is encouraged to travel by train. Unless otherwise agreed in advance, travel by train is required between Washington, D.C., Baltimore, Philadelphia, and New York.

**Reimbursement Rates.** Amtrak will pay outside counsel's full hourly rate only for travel time during which the attorney is actually performing work for Amtrak. The work being performed during travel should be specifically identified on the bill. Other travel time will be reimbursed at 50% of the full hourly rate. Under no circumstances, however, should Amtrak be billed for travel time during which outside counsel is performing work which may be billed to another client, even though the outside counsel may be traveling on Amtrak business.

**Food and Lodging.** Expenses for food and lodging should be moderate, and incurred in a prudent manner. The cost of staying at luxury hotels and of meals at unusually expensive restaurants will not be reimbursed.

## **MISCELLANEOUS**

**Confidentiality.** You should not discuss any aspect of your representation of Amtrak with anyone outside your firm, including other clients or the press; even the fact of your representation of Amtrak in specific matters should not be disclosed without prior permission. All inquiries from the press, members of the public and others regarding an Amtrak legal matter should, with no further comment, be referred to the Managing Attorney.

**Legal Research.** Research can be one of the most costly aspects of legal services. Major research projects (any research requiring more than 2 or 3 hours) should not be commenced without approval from the Managing Attorney. In many instances, useful information will be contained in the Law Department's files, or there will be an attorney in the Law Department who has substantial experience in or knowledge of a particular subject. Copies of any memoranda developed in the course of research should be provided to the Managing Attorney.

**Amtrak Employee Contacts.** Unless otherwise instructed, all contacts between outside counsel and Amtrak personnel, including former Amtrak employees, should be arranged through the Managing Attorney. All requests for legal advice or services by Amtrak employees outside the Law Department



should be communicated to the Managing Attorney prior to undertaking such services. In communicating with Amtrak personnel in the course of litigation, you should not assume familiarity with either the particular case or the litigation process. When seeking to schedule Amtrak employees for meetings, depositions or trial testimony, please give as much advance notice as possible.

## **ADVICE AND NON-LITIGATION MATTERS**

For all requests for legal advice and services relating to transactional, contractual, commercial, non-litigation contract claims, and other corporate projects and matters, the following requirements shall supplement these Guidelines and shall govern to the extent they differ from the requirements set forth in other sections.

**Estimates.** Estimates of fees and expenses expected to be incurred on an advice or non-litigation matter and estimates of when such services could be completed should be submitted to the Managing Attorney upon request for such legal services and prior to commencing any work on the matter. When requested, such estimates should be submitted in writing. If the matter can be separated into phases, estimated budget and completion times should be identified for each phase. The Managing Attorney must be advised before a budget or time estimate is exceeded, and a revised estimate should be provided.

**Separate Bills.** Frequently, transactional and other non-litigation matters are supervised by Law Department attorneys but are not paid out of the Law Department budget or require segregated accounting. In such instances, separate bills for multiple projects handled by a law firm are required. To expedite processing your bills, the need for separate billing should be discussed with the Managing Attorney when each new matter is undertaken.

**Written Advice/Memoranda.** In most instances, legal advice should be conveyed orally to the Managing Attorney. The cost of preparing written advice, opinions of counsel, and memoranda will not be paid for by Amtrak unless, and then only to the extent, explicitly requested or authorized by the Managing Attorney.

## **CONDUCT OF LITIGATION**

**Objectives and Philosophy.** Amtrak believes that litigation should be pursued in an aggressive but straight-forward manner, keeping in mind the overall objective of expeditious and cost-effective dispute resolution. In its unique role as a private corporation created and partially funded by taxpayers to carry out an important public purpose, Amtrak is in the public eye. Outside counsel will be seen as a representative of Amtrak, and outside counsel's conduct can reflect either positively or negatively on the Corporation. Amtrak therefore requires outside counsel to conduct themselves in litigation at the highest ethical and professional level.

**Deadlines and Filing Requirements.** The Engagement Attorney is responsible for insuring compliance with all court rules, schedules and deadlines, and for keeping informed of changes and additions to federal, state and local rules, as well as any rules that may be imposed by individual courts and judges.

**Settlement and Alternative Dispute Resolution.** The possibility of settlement and/or the use of Alternate Dispute Resolution ("ADR") should be considered early in the course of litigation, and

reevaluated often. Early settlements of valid cases can often save considerable resources and costs. Amtrak also recognizes that many times plaintiffs and/or their attorneys are unable to estimate the true value of a case because of the personal and emotional issues involved. Often, a neutral, third party is useful in assisting the parties in evaluating their positions and the realistic value of their respective cases. Accordingly, you should consider the advisability of employing alternative dispute resolution techniques such as voluntary mediation, binding or non-binding arbitration, and the like. All settlement offers or proposals, as well as requests from the opposing counsel or the court for ADR proceedings, should be promptly communicated to the Managing Attorney.

**Prohibited Tactics.** The Law Department does not sanction the taking of extreme advocacy positions or the use of coercive, delaying or obstructive tactics. In particular, discovery should be undertaken in a prudent manner, and should never be used to harass or unduly burden the opposing party or counsel. The use of early dispositive motions to narrow or simplify the issues in a complex case is strongly encouraged.

**Removal.** As a general rule, all lawsuits brought against Amtrak in state court should be removed to federal court whenever possible. If you believe that removal is not in Amtrak's best interest in a particular matter, you should discuss your reasoning with the Managing Attorney.

**Law Department Review of Filings.** Except in extreme emergency situations (and for claims cases, as discussed below), all substantive pleadings, motions or court filings should be provided to the Managing Attorney sufficiently in advance of the filing deadline to permit an opportunity for meaningful review.

**Experts.** The need for as well as the selection and retention of experts should be discussed in advance with the Managing Attorney. The Law Department is familiar with a broad range of experts and should always be your first source of inquiry. Except in unusual circumstances, experts should be retained in writing with the terms of the engagement, including absolute confidentiality, specifically stated. Examples of acceptable retention letters are available from the Law Department. Experts should be advised that they will be required to submit monthly invoices itemizing time and expenses in the same manner as outside counsel. Amtrak's billing and travel guidelines should be communicated to all experts promptly upon retention.

**Appeals and Bonds.** Outside counsel are not authorized to file a notice of appeal or obtain a bond without consulting with and obtaining approval from the Managing Attorney. You should contact the Managing Attorney immediately upon entry of any judgment against Amtrak to discuss the necessity and advisability of filing a notice of appeal and of obtaining a bond. Similarly, you should contact the Managing Attorney immediately upon the filing of a notice of appeal by any other party. Drafts of appellate briefs should be provided to the Managing Attorney for review at least one week in advance of the filing date.

**Individually Named Defendants.** In certain circumstances, a plaintiff may sue company employees in their individual capacities. When an employee's conduct arguably falls outside the scope of his or her management authority, as well as in other circumstances -- e.g., regulatory or other enforcement proceedings -- a conflict of interest could arise in the context of your representation of Amtrak and individually-named defendants. Accordingly, we ask that you thoroughly investigate and evaluate such lawsuits at the onset of your engagement and be prepared to recommend whether all named defendants should be required to enter into a joint representation agreement.

## **ADDITIONAL RULES FOR CLAIMS LITIGATION**

At any given time, the Law Department is managing more than two thousand matters involving claims for personal injury, death, and/or property damage against Amtrak or a railroad to which Amtrak is contractually obligated to provide indemnification. In order to manage this large caseload effectively and efficiently, the Law Department has prepared the following special rules for claims cases. These rules supplement the general guidelines set out in this document, and will govern most claims engagements.

For major claims matters, Amtrak may impose special document handling, case review and case management requirements. For instance, in such cases we will probably make special requests for information and require that all pleadings be reviewed before they are filed. Moreover, any time you have a case you believe involves a legal principle that could set an important precedent for Amtrak or its business operations, you should bring that matter to the attention of the Managing Attorney/Claims Director.

**Initiation of Claims Engagements.** In most instances, responsibility for supervising claims cases rests with a Managing Attorney. In certain cases, that responsibility will be delegated to one of the Law Department's Claims Directors. Where a Claims Director is supervising a matter, the Claims Director has the same authority and responsibilities as a Managing Attorney. When you are engaged as outside counsel for a claims case, you will receive an engagement letter. The letter will identify who is supervising that particular case and the Amtrak case number. At the same time, you will receive the suit papers. The investigation file will be forwarded to you by the claims agent.

**Communications with Law Department Staff.** All correspondence and communications pertaining to the case should be addressed to the Managing Attorney/Claims Director, with a copy to the claims agent, except that communications relating to further investigation or to discovery should be addressed directly to the claims agent identified in the assignment letter, with a copy to the Managing Attorney/Claims Director. The original or a single copy of any correspondence or document directed to the Managing Attorney/Claims Director is sufficient for our records. In no case should duplicates be sent to more than one member of the law or claims staff in Washington, although claims personnel in the field should be copied as indicated above. However, all bills for legal services and expenses, irrespective of who is supervising the matter is, should be sent to Amtrak headquarters in Washington, with the Managing Attorney/Claims Director being identified on the bill.

**Document Management.** In order to manage effectively the extremely large volume of documents generated by our claims caseload, the Law Department has determined that, in most instances, it is unnecessary to forward to Amtrak much of the paper that is routinely generated in the course of claims litigation. Unless otherwise instructed, the following rules should be followed:

### **Do Forward:**

- Motions in limine, to dismiss or for summary judgment, with supporting memoranda and affidavits, and any orders or opinions entered thereon;
- Narrative medical reports and summaries, reports of non-medical experts (or a summary), reports of rehabilitation evaluations, reports of accident reconstruction experts, etc.;
- Copies or summaries of documents, other than those identified below, that bear significantly on liability or damages;

- Trial briefs, pre-trial statements, witness lists, pre-trial orders, verdicts, judgments, opinions, substantive orders, findings of fact and conclusions of law, post-trial motions and supporting briefs, notices of appeal and appellate briefs and decisions;
- Releases, dismissals, settlement orders, and satisfactions of judgment.

**Do Not Forward Unless Specially Requested:**

- Copies of Answers (unless there is some unique feature to the Complaint or Answer deserving our attention);
- Discovery propounded to plaintiff;
- Interrogatories or requests for production propounded to defendant, unless our assistance is required in the preparation of responses. However, significant new information developed in answering plaintiff's discovery requests that may aid in our evaluation of the case should be forwarded in narrative form;
- Notices of depositions;
- Copies of depositions;
- Copies of documents produced;
- Copies of motions for enlargement of time, for further answers to interrogatories, to compel production, for compulsory physical examination, and court orders entered on the same unless our attention or assistance is required;
- Pleadings, documents or court orders of a procedural nature not material to our evaluation or case management;
- Medical records, except in unusual circumstances;
- Copies of routine correspondence.

**Settlements.** Our general practice is that a claims agent, and not outside counsel, negotiates settlements. The Managing Attorney/Claims Director may delegate this function to outside counsel under appropriate circumstances. Generally, you should solicit early demands from plaintiff's counsel. Claims cases tend to get more expensive as they age and only a small percentage ultimately go to trial. We expect your cooperation in aggressively pursuing case preparation and resolution and avoiding continuances, thereby lessening expense. Give serious consideration to the use of structured settlements and vocational rehabilitation experts. Again, we have found these to be cost effective in damages mitigation.

**Removal and Venue.** Non-FELA cases should be removed to federal court whenever possible. If you believe doing so is not advisable in a particular case, you should discuss your reasoning with the Managing Attorney/Claims Director. As a general rule, you should seek to have FELA cases litigated in a venue as close as possible to the place where the accident occurred. Plaintiff's attorneys normally seek venues known for sympathetic juries and high verdicts; moreover, it is expensive for Amtrak to bring witnesses to locations remote from the area of the accident. Again, if you believe this is not advisable in a particular case, discuss your reasoning with the Managing Attorney/Claims Director.

- **Return to Work.** In FELA cases, make every effort to assist Amtrak in returning the plaintiff/employee to work.

#### **Conduct of Case.**

**Case and Plaintiff Identification.** You should put plaintiff's full name and Amtrak's case number(s) on all correspondence. You should provide plaintiff's home address, social security number and date of birth when requesting a draft for settlement or satisfaction of judgment.

**Discovery Efficiency.** You should review discovery requests to ascertain what can be answered from the investigation file prior to requesting assistance from the claims agent. Please retain for future use copies of documents or materials that are routinely requested.

**Surveillance.** Give early and serious consideration to the use of surveillance. We have found this to be one of our most cost-effective investigative tools. Prior to ordering any surveillance, however, you must obtain approval from the claims agent.

**Significant Pleadings.** You must get the prior permission of the Managing Attorney/Claims Director before proceeding to file a cross-claim, a counterclaim, third party pleadings, a motion to dismiss, a motion for summary judgment, a motion for new trial or an appeal.

**Special Verdict Forms and Interrogatories.** To the extent possible, you should make use of special verdict forms or interrogatories. If you do not believe this is appropriate in a specific case, you should contact the Managing Attorney/Claims Director.

**Bonds.** You should consult with the Managing Attorney/Claims Director before obtaining any necessary bonds.

**Summaries.** Do not prepare summaries of medical records or depositions, interrogatories or other discovery materials unless there is a specific reason to do so, such as preparation for an upcoming deposition or trial. Significant information developed through discovery that is material to case evaluation should be included in your Status Report(s).

**Retention of Experts.** You may not hire any consultant or expert witness, except a doctor to perform an IME of the plaintiff, without permission of the Managing Attorney/Claims Director. You should furnish a reasonably accurate projection of total charges when requesting such permission.

**Depositions.** No depositions should be taken in a claims matter without the prior approval of the Managing Attorney/Claims Director. In the event it is determined that depositions are appropriate, the following guidelines should be followed:

**Plaintiff.** With the exception of small claims and de minimis cases, plaintiff's deposition should generally be taken as soon as possible under your local rules. However, in cases where the investigation file provides a reasonably thorough picture of plaintiff's version of liability and damages, discuss with the Managing

Attorney/Claims Director whether the plaintiff's deposition should be foregone for tactical reasons.

**Amtrak Employees.** Amtrak-noticed depositions of Amtrak employees are not authorized. Such witnesses should be interviewed and/or a statement taken.

**Non-Employee Fact Witnesses.** Depositions of fact witnesses should be taken only to preserve testimony for trial in situations where the witness's availability is questionable and the testimony is potentially important. Otherwise, from both a strategic and an expense viewpoint, interviews and/or statements are preferable.

**Economists and Vocational Rehabilitation Experts.** Amtrak-noticed depositions of economists and vocational rehabilitation experts are not authorized unless and until a report and the concurrence of the Managing Attorney/Claims Director have been obtained.

**Attending Physicians.** Amtrak-noticed depositions of treating physicians are authorized only to preserve favorable trial testimony, only after a report has first been obtained, and only after the Managing Attorney/Claims Director has concurred.

**Crossing Accident Experts.** The advisability of deposing plaintiff's crossing expert depends upon a number of factors: the identity of the particular expert witness and counsel's familiarity with the expert; the ability to secure background information on the witness through the NARTC; the subject matter of the testimony and its importance to the case; and the scope of damages at stake. If you believe such a deposition is advisable, you should seek approval from the Managing Attorney/Claims Director.

**Other Experts.** Expert depositions are always costly and often uninformative. They often have the effect of forcing the expert and opposing counsel to prepare more thoroughly than they otherwise might. If you believe that such depositions are advisable, you should seek prior approval from the Managing Attorney/Claims Director.

#### Reports.

**Initial Case Evaluation.** Within 30 days after receipt of the investigation file and prior to beginning discovery, send the Managing Attorney/Claims Director and the claims agent your initial case evaluation, using the Amtrak Status Report Form, a copy of which is attached to these Guidelines as Attachment 1. These evaluations often lead to expeditious settlements.

**Updated Status Report Following Plaintiff's Deposition.** Unless otherwise instructed, you should send an updated Case Status Report to the claims agent and the Managing Attorney/Claims Director immediately following the plaintiff's deposition.

**Quarterly Status Reports.** You should send an updated Status Report to the claims agent and the Managing Attorney/Claims Director on at least a quarterly basis.

**Pretrial Report.** When discovery is reasonably complete, and as far in advance as feasible (not less than 30 days) of a final pretrial conference, a trial date, or a settlement conference, you should fax to the Managing Attorney/Claims Director and the claims agent an Amtrak Pretrial Report Form, a copy of which is attached to these Guidelines as Attachment 2. In the event that a pretrial conference, settlement conference or trial date is set on short notice, we expect immediate telephonic notification.

**Daily Trial Reports.** Together with the claims agent, you should call the Managing Attorney/Claims Director with a report at the conclusion of each day of trial.

**Final Trial Report.** Within one working day of the conclusion of trial, whether by verdict, settlement, motion or otherwise, you should fax a completed Amtrak Trial Report Form, a copy of which is attached to these Guidelines as Attachment 3, to the Managing Attorney/Claims Director and to the Deputy General Counsel, Tort Litigation at (202) 906-2019.

#### **Fees and Expenses.**

**Expenses for Outside Service Providers.** Expenses for outside service providers incurred in the investigation and evaluation of fact issues or in assisting in claims handling (e.g., accident reconstructionists, crossing experts, consulting engineers, doctors, investigators, vocational rehabilitation consultants and nurses, ergonomists, photographers, etc.) should not be included in your bill. Rather you should indicate your approval of such invoices and forward them to the Managing Attorney/Claims Director who will arrange to pay the provider directly.

**Cumulative Fees and Costs.** You should include a cumulative total of legal fees and expenses to date for each case for which you send us a bill.

#### **Miscellaneous.**

**Routine Use of Mail.** You should not routinely use expedited or overnight mail delivery. First class mail is preferred as the most economical method of correspondence.

**Non-Claims Issues.** You should contact the Managing Attorney/Claims Director when non-claims issues, such as labor, personnel, contract, corporate, or environmental arise in a claims case. The Law Department has lawyers available for assistance in these and many other areas.

**Travel.** Do not travel to distant depositions or interviews without the permission of the Managing Attorney/Claims Director. Any billing for travel must be specific as to the purpose and subject matter.

March 1998





**NATIONAL RAILROAD PASSENGER CORPORATION**  
**PRETRIAL REPORT**

(FAX to the supervisory person and the claims agent 30 days prior to a settlement conference, a pretrial conference, or a trial.)

Case Name: \_\_\_\_\_ Type of Case: \_\_\_\_\_ Date of Report: \_\_\_\_\_  
Amtrak File No: \_\_\_\_\_ Date Lawsuit Filed: \_\_\_\_\_

Amtrak Trial Atty: \_\_\_\_\_ Claims Agent: \_\_\_\_\_  
Amtrak Supv. Person: \_\_\_\_\_ Judge: \_\_\_\_\_  
Opposing Trial Atty: \_\_\_\_\_  
Court: \_\_\_\_\_  
Other Parties: \_\_\_\_\_ Age: \_\_\_\_\_ Employment: \_\_\_\_\_  
Injured Person: \_\_\_\_\_  
Date of Incident: \_\_\_\_\_ Anticipated Trial Date: \_\_\_\_\_  
Liability Facts: \_\_\_\_\_

Injuries and Dates of Disability:

Medical Treatment:

Plaintiff Key Contentions:

Defendant Key Contentions:

	Past	Pltf.	Def.	Future	Pltf.	Def.
Wage Loss:	Past			Future		
Medical Expense:	Past			Future		
Other Special Damages:						

Probable Outcome on Liability:

Probable Verdict Range: \_\_\_\_\_ Highest Likely Verdict: \_\_\_\_\_  
Estimated Fees and Costs Through Discovery:  
Estimated Fees and Costs Through Trial:  
Suggested Amtrak Experts and Estimated Costs:  
Significant Procedural Dates:

Negotiations:

Settlement Recommendation:  
Maximum You Would Recommend In Lieu of Trial to Verdict:  
Strengths & Weaknesses:

Investigation Needed:

Discovery Needed:

Additional Comments:

\_\_\_\_\_  
Prepared By

\_\_\_\_\_  
Direct Dial Telephone No.

ATTACHMENT II

Comparison of Side Agreements with Amtrak Outside Counsel Guidelines (1998)							
Comparison & Impact of Side Agreements							
Topic	Original 1998 Guideline Features	Manatt April 2003 Side Agreement	Manatt July 2005 Side Agreement	Morgan Lewis February 2006 Side Agreement	McCarthy Leonard August 2005 Side Agreement	Howd Ludorf Sept. 2005 Side Agreement	Adams Reese June 2005 Side Agreement
Relationship	Amtrak seeks a close working relationship, like co-counsel or joint representation. Amtrak is hiring particular lawyers, not entire firms. The engagement attorney is to work with a specific Amtrak "Managing Attorney." All "important documents" are to be copied to the Managing Attorney, who must also be consulted and approve all "significant decisions."	No apparent reason for Amtrak to sign this agreement. Signed by Ms. Serfaty for Amtrak. Relationship between side agreement and Guidelines is uncertain. A provision attempts to spread this agreement across all new matters and to prior Kalkinnes matters.	No apparent reason for Amtrak to sign this agreement. Signed by Ms. Milner for Amtrak. Relationship between side agreement and Guidelines is uncertain. Contains all the issues noted for 2003 Side Agreement, plus items noted below.	No apparent reason for Amtrak to sign this agreement. Signed by Mr. Herrmann for Amtrak. Incorporates Guidelines by reference, but unclear about impact if terms diverge. Provision attempts to apply this agreement to all other matters.	No apparent reason for Amtrak to sign this agreement. Addressed to Ms. Milner for Amtrak. Relationship between side agreement and Guidelines is uncertain. No reference to Amtrak Guidelines. Copy I saw is unsigned by Amtrak.	No apparent reason for Amtrak to sign this agreement. Addressed to Ms. Milner for Amtrak. Relationship between side agreement and Guidelines is uncertain. No reference to Amtrak Guidelines. Copy I saw is unsigned by Amtrak.	No apparent reason for Amtrak to sign this agreement. Signed by Ms. Milner for Amtrak. No reference to Amtrak Guidelines. Relationship between side agreement and Guidelines is uncertain.
Hourly Rates	Amtrak "expects to receive a substantial discount" from "normal fee structure." Amtrak expects to "receive at least the same discount offered" to other gov't or corporate clients. Rate increases must be "discussed" and "approved" by Amtrak in advance. Amtrak is open to non-hourly arrangements.	An apparent typo lists \$225/hour as the lowest rate for paralegals -- which is absurdly high. Undocumented 15% discount is stated. Manatt gives itself unilateral discretion to change rates -- eliminates Guideline control on unapproved increases.	Discount is lowered to 10% and only applies to lawyer fees (not paralegals). Assurance that Amtrak rates are comparable to similar clients is deleted from this side agreement. Manatt gives itself unilateral discretion to change rates -- eliminates Guideline control on unapproved increases. Rates increased 10% at the top and 50% at the bottom in two years.	Schedule of 2006 "Amtrak Rates" does not reference any discount or comparable client rates. Rates are high and include a team of 7 partners and 8 associates.	Attempts to pass through temp or contract timekeepers at firm's rates, not actual cost, with no apparently notice to Amtrak. Provision for periodic hourly rate changes overrides Amtrak requirement for advance approval. Hourly rates are quoted without reference to any discount or comparable client guarantee.	Hourly rates quoted are very low, but do not reference any discount or comparable client guarantee.	Hourly rates are quoted, without reference to discounts or comparable client guarantee. Contains statement that Amtrak has agreed in advance to annual rate adjustments without any limit set.
Unacceptable Charges	Amtrak has a list of discouraged charges, like basic research, junior attorney training time, transition time. Amtrak also declines to pay for administrative activity, like conflicts checks and billing discussions. Amtrak declines to pay for overhead items, giving examples for clerical work, routine copying, file review, local calls, supplies, and part of fax charges. Amtrak has a basic rule that it will pay only actual cost, i.e., no profit on expenses.	Manatt circumvents Guideline prohibition of "in-house administrative service" charges. Contains a vague reference to the Guidelines.	New provisions reverse various restrictions in the Guidelines, like no word processing, some faxes, overtime and other internal expenses are charged at Manatt's own "standard rate." The "standard rate" provision avoids the Guidelines and Manatt's ethical obligations not to profit from expenses. Vague reference in 2003 side agreement to the Guidelines is eliminated altogether here.	Some prohibited or regulated charges from Guidelines are listed as charges firm will make.	List of fee items (para. 1) includes items like "file review" and travel that are excluded or limited by Guidelines. List of charges includes 20 cents per page for some copying, which should be higher than cost.		List of charges includes high charge for copies (25 cents) and all faxes (\$1.25 per page), circumventing Amtrak restrictions.
Billing	Amtrak has a list of billing formalities, including a preference for monthly bills and tenth hour actual time increments (no minimum charges). Block billing is expressly prohibited, with examples of good and bad entries given. "Complete and precise" billing descriptions are required. Expenses must be itemized. Each invoice should have a running or cumulative total of fees billed on that matter to date. Firms are warned that Amtrak may audit their bills or be audited itself.	Payment required in 30 days, with aggressive collection and termination terms triggered by late payment. Amtrak must contact Manatt "immediately" with any billing problem or Manatt will take silence as acceptance of the bill. This circumvents, e.g., the Guideline bill audit provision. Side agreement attempts to give Manatt upper hand in any dispute, referencing mediation or arbitration.	Payment required in 20 days, with even more aggressive bill collection and termination terms. Late charge of 12% added. Manatt may attach Amtrak funds it holds for other purposes to pay its bill. Attempts to obtain Amtrak's advance approval to withdraw in a dispute. Any fee dispute is submitted to binding arbitration before a DC Bar panel. Two odd terms in the arbitration: (1) Manatt gets its own in-house fees for prosecuting a fee dispute, (2) Manatt gets its current, undiscounted rates if it wins, even for lower, discounted time. Other terms are comparable to 2003 side agreement.	Contains a provision giving the firm the unilateral authority to retroactively increase fees over quoted and billed hourly rates if firm determines it deserves more, e.g., in complex, valuable, or otherwise extraordinary matters. Firm expects payment in 30 days, and questions about bills should be raised "promptly." Attempts to authorize firm to stop work on "non-emergency" matters for non-payment, which implicates ethical rules. Late payment charge of 1%/month. Specifies binding AAA arbitration of fee disputes.	Provides for shifting of fees and expenses of prevailing party in event of a fee dispute.	Firm expects payment in 30 days. Amtrak expected to review bill and contact firm with questions.	Attempts to obtain Amtrak's advance approval to withdrawal if fees are not paid within 45 days. Firm expects payment in 30 days. Interest on unpaid bills is 6%.
Budgets	Amtrak requires an initial budget within 30 days of retention, then updates at least once every six months, more often if something significant comes up. Budgets for larger matters must be broken down. Budgets go through the entire matter. There is a small matter exception. The initial budget is supposed to identify all staff and give their rates, which dovetails with the staffing requirements.	Manatt circumvents the budget provisions of the Guidelines by making estimates optional and non-binding.	Similar to 2003, but Manatt now includes caveats about results not being guaranteed.				

Comparison of Side Agreements with Amtrak Outside Counsel Guidelines (1998)							
Comparison & Impact of Side Agreements							
Topic	Original 1998 Guideline Features	Manatt April 2003 Side Agreement	Manatt July 2005 Side Agreement	Morgan Lewis February 2006 Side Agreement	McCarthy Leonard August 2005 Side Agreement	Howd Ludorf Sept. 2005 Side Agreement	Adams Reese June 2005 Side Agreement
Staffing	Amtrak emphasizes that it selects particular attorneys for their expertise. Staffing changes must be discussed and approved by Amtrak in advance. Amtrak expresses a preference for no more than one partner, one associate, and one paralegal for support. Amtrak suggests that, if the firm wishes to have more than one attorney attend an event, that should not be billed to Amtrak.		Manatt gives itself unilateral control over staffing.	Schedule of rates lists 7 partners and 8 associates, which is a large, top heavy team.	Provision in Para. 1 apparently contemplates unapproved staffing changes.		Identified staff is limited to 2, but left open.
Travel	Amtrak discourages unnecessary travel, with advance approval required for more than one attorney to travel. Travel by train is encouraged. Travel time is paid at 50% rates, unless actual work is being done -- nothing should be billed to Amtrak if work is being done for others. Travels costs are expected to be kept modest, not at first class or luxury rates.						
Legal Research	Recognizing that research can be expensive, Amtrak requires prior approval before firms undertake research projects more than 3 hours. Copies of the research product are to be provided to Amtrak, which aspires to provide a central resource.		Restrictions on recovering Amtrak files are imposed -- and Amtrak does not own the work product it is paying for.				Firm may dispose files in accordance with its unstated document retention policy.
Non-Litigation	For transactional and other non-litigation work, Amtrak requests estimates, which cannot be exceeded without approval. Written memos are discouraged -- advice is not to be given in writing unless otherwise approved.						
Litigation Tactics	Amtrak has a series of statements about its attitude toward litigation and its prosecution. Amtrak wants aggressive, but expeditious and cost-effective resolution. As an entity partially funded by taxpayers, Amtrak expects its lawyers to behave ethically and comply with court rules and deadlines. Amtrak encourages early discussion of settlement. Buried in this section is a requirement that all court filings be provided to Amtrak in advance for review. Specific rules are provided for retaining experts, noticing appeals, and individual defendants.						
Claims Litigation	Amtrak has a separate set of rules for handling claims litigation, which tend to be more numerous, but more routine, litigation. Notable provisions include a requirement for an initial case evaluation and other reports at specified milestones. Some of the most wasteful practices, like routine use of dispositive motions and depositions, are curtailed.	N/A	N/A				
Other Provisions	N/A		Manatt adds waiver of Amtrak's rights regarding conflicts of interest. Amtrak even agrees in advance that Manatt has disclosed all future conflicts -- even though that cannot happen until the future. Only conflict Manatt recognizes is against representing opponent in same litigation. Manatt has no obligation to disclose the actual conflicts when they occur.	Contains advance waiver of some future conflicts, with exceptions for overlapping subject matter. Firm required to notify Amtrak of future conflicts.			Contains conflict waiver of some unrelated cases.

April 1, 2003

Alicia Serfaty  
General Counsel  
Amtrak  
60 Massachusetts Ave, NE  
Washington, DC 20002

Re: Engagement for Legal Services

Dear Alicia:

This letter confirms the terms of our existing relationship. Manatt, Phelps & Phillips, LLP, formerly Kalkines, Arky, Zall & Bernstein LLP ("we" or "us") represent and advise the National Railroad Passenger Corporation ("you") in connection with various matters, including the high speed trainset and electrification projects, the Farley project, and New York ventilation projects. Unless otherwise agreed in writing, the terms described in this letter also applies to any additional matters we agree to handle on your behalf or at your direction. If this agreement is acceptable to you, please sign and return one original to me. The other original is for your files.

#### Rates

You agree to pay our fees for services, which are determined by multiplying the number of hours we spend working on your matters by the hourly rates then in effect for the professional providing such services. Currently, these hourly rates vary from \$225 for the most junior legal assistant to \$396 for the most senior professional likely to perform services for you. These rates represent an approximate 15% discount from our customary rates, and are the same rates that we typically charge to other governmental and not-for-profit clients. We review our hourly rates annually and any changes normally become effective on January 1. I will be primarily responsible for representing you. Other partners working on Amtrak matters currently include Leslie Schultz, Paul Gangsei, Carol Rosenthal, Nancy Feinrider and Alan Epstein.

In addition to fees for services, you agree to pay all expenses incurred on your behalf and for certain in-house administrative services. These will be paid in accordance with the National Railroad Passenger Corporation Guidelines for Outside Counsel dated March 30, 1998.

Exhibit D

Alicia Serfaty

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### **Billing Practices**

We submit bills on a monthly basis shortly after services are rendered so you will have a ready means of monitoring and controlling the expenses you are incurring. Our bills itemize the services performed by date, time required, and the professional performing the services. Payment is due within thirty (30) days of your receipt of the bill. If you believe the expenses are mounting too rapidly, please contact us immediately so we can discuss and evaluate your options. When we do not hear from you, we assume you approve of the overall level of activity on our part in this matter on your behalf.

### **Estimates**

You may from time to time receive an estimate of the fees and expenses likely to be incurred by you in connection with the services we are providing. An estimate is not a fixed fee and does not constitute a commitment by us to perform services for that amount or an obligation by you to pay that amount. The fees and expenses required ultimately are a function of many conditions over which we have little or no control and may be more or less than any estimate. You will be responsible for the actual fees and expenses on the basis described in this agreement.

### **Termination of Engagement**

We may terminate this engagement, and we shall be relieved of the responsibility of performing further work on your behalf, in the event any monthly statement rendered by us to you is not paid in a timely manner, or a significant disagreement arises as to strategy, or as otherwise permitted by the applicable law regulating our conduct as attorneys. Of course, you may terminate this engagement for any reason at any time by written instruction. Upon termination of this engagement, you will remain responsible for the payment of all fees and expenses incurred on account of the representation.

### **Dispute Resolution**

New York Court Rules provide for arbitration or mediation of certain disputes concerning attorney's fees for legal services. In the event a dispute arises between us concerning fees, we will provide you with information about the fee dispute resolution program sponsored by the New York State Bar.

Please confirm your agreement to the terms of this engagement letter by signing and returning the enclosed copy of this letter with the required retainer at your earliest opportunity. For your convenience, we have enclosed a self-addressed, stamped envelope.

Alicia Serfaty

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**Application to Previous Work**

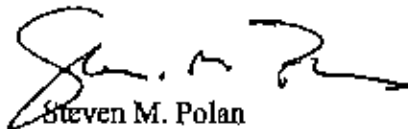
This retainer agreement encompasses work previously performed by Kalkines, Arky, Zall & Bernstein LLP prior to January 1, 2003.

Alicia Serfaty

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We appreciate this opportunity to be of service to you.

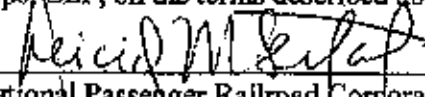
Very truly yours,



Steven M. Polan  
Manatt, Phelps & Phillips, LLP

I hereby agree to retain Manatt, Phelps & Phillips, LLP, on the terms described above.

Dated: 4/14/03

  
\_\_\_\_\_  
National Passenger Railroad Corporation

March 8, 2005

Marilyn J. Milner, Esq.  
Associate General Counsel  
National Railroad Passenger Corporation  
Union Station - North Hall  
Washington, D.C. 20002

*Original sent to  
Blaine 8/10/05*

Re: Engagement for Legal Services

Dear Marilyn:

This letter describes the terms of our relationship. Manatt, Phelps & Phillips, LLP ("we" or "us") will represent and advise the National Railroad Passenger Corporation, also known as Amtrak ("Amtrak" or "you") in connection with initiating a claim analysis and possible litigation pertaining to R&R Visual, for its defective work on Amtrak sleeper cars' plumbing pipes. For purposes of this engagement, we will be representing you only and we will not be deemed to represent any of your affiliates, subsidiaries, parent companies, joint ventures, officers, directors, partners, principals, investors or employees (collectively, "Your Affiliates"), unless otherwise agreed to in writing. Accordingly, we will be free to represent other firm clients adverse to or involving Your Affiliates or their interests. Unless otherwise agreed in writing, the terms of this letter also will apply to any additional matters we agree to handle on your behalf or at your direction. If this agreement is acceptable to you, please sign and return the original to me. The enclosed copy is for your files. In addition, please send a copy of the signed agreement to me by facsimile at 202-585-6600. When you sign this letter, it becomes a contract between us.

**Rates.** You agree to pay our fees for services, which are primarily determined by multiplying the number of hours we spend working on your matters by the hourly rates then in effect for the professional providing such services. Currently, these hourly rates vary from \$255.00 for the associate attorneys to \$590.00 for the most senior professionals likely to perform services for you. We review our hourly rates annually and any changes normally become effective on January 1. I will be primarily responsible for representing you. My current hourly rate is \$590.00. I will initially be assisted by my partner, Steve Neal, whose hourly rate is \$495. It may be necessary or desirable, from time to time, to utilize other professionals and personnel employed by or associated with us to perform the services you require. We will apply a 10% discount on the attorney fees expended for services provided on Amtrak's behalf.

In addition to fees for services, you agree to pay all expenses incurred on your behalf and for certain in-house administrative services. Expenses such as court filing fees, filing and



Marilyn J. Milner, Esq.

March 8, 2005

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recording fees of other government agencies, fees and expenses of accountants or other experts retained on your behalf, and charges for transcripts, depositions, parking, and travel expenses generally will be billed at the actual cost incurred by us. Expenses such as document reproduction, on-line computerized research, long-distance telephone, telecopies and fax transmissions, mileage, word processing, staff overtime required to meet your imposed deadlines, and messenger services will be charged at our standard rate in effect at the time the expense is incurred.

**Billing Practices.** We submit bills on a monthly basis shortly after services are rendered so you will have a ready means of monitoring and controlling the expenses you are incurring. Our bills itemize the services performed by date, time required, and the professional performing the services. Payment is due within twenty (20) days of your receipt of the bill. If, in the course of our representation, we anticipate a significant increase in the level of our activity on your behalf, we may bill you on a basis more frequent than monthly. If you believe the expenses are mounting too rapidly, please contact us immediately so we can discuss and evaluate your options. When we do not hear from you, we assume you approve of the overall level of activity on our part in this matter on your behalf.

We understand that you may request that we submit our invoices electronically through a designated e-billing vendor. While we will endeavor to accommodate any such request, we cannot guarantee that we will be able to comply with all of the technical or other procedure requirements of your designated vendor. We will consider any such request on a case-by-case basis, and conversion to e-billing shall remain subject to our mutual agreement. In addition, please note our submission to e-billing procedures will not alter our current billing cycle as explained above.

**Estimates.** You may from time to time receive an estimate of the fees and expenses likely to be incurred by you in connection with the services we are providing. An estimate is not a fixed fee and does not constitute a commitment by us to perform services for that amount or an obligation by you to pay that amount. The fees and expenses required ultimately are a function of many conditions over which we have little or no control and may be more or less than any estimate. You will be responsible for the actual fees and expenses on the basis described in this agreement. Further, your obligation to pay such fees and expenses is not contingent upon successful completion of any project.

**No Guarantee of Results.** Bither at the beginning or during the course of our representation, we may express our opinions or beliefs concerning the matter or various courses of action and the results that might be anticipated. Any such statement made by any attorney or employee of our firm is intended to be an expression of opinion only, based on information available to us at the time, and must not be construed by you as a promise or guarantee of any

Marilyn J. Milner, Esq.  
March 8, 2005  
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particular result. In addition, the advice and communications we render on your behalf are not intended to be disseminated to or relied upon by any other parties without our prior written consent.

**Late Charges.** Each month we send to clients who have amounts outstanding an Unpaid Statement notice listing all such amounts. A client will be assessed a late charge equal to one percent (1%) of the amount included on each notice that has been outstanding more than sixty (60) days. The amount of this late charge will be set forth on the notice. This late charge will be imposed each month on amounts that continue to be outstanding for more than sixty (60) days, including unpaid late charges. Unless a payment applies to a particular invoice, payments are applied to statements that have been outstanding the longest period of time. The costs associated with late payments go beyond a mere cost of funds calculation and make it impracticable or extremely difficult to quantify the actual costs incurred in connection with late payments, and you and we agree that this late charge is presumed to be the cost of a payment that is not made on time. We also note that this late charge provision is not intended to provide our clients with a means of financing their bills, and instead we continue to expect and require prompt payment of our billing statements.

As security for the payment of the fees, costs and disbursements incurred on your behalf, and without prejudice to any other rights, recourse or remedies we may have, you hereby grant us a security interest in and lien upon any sum or sums that may be on deposit from time to time in our client trust and/or retainer account(s) in connection with any engagement covered by this letter. In addition, as to any matters covered by this letter which involve litigation or threatened litigation, or any administrative or alternative dispute resolution proceeding, you hereby grant us a security interest in and a lien upon any sum or sums that may be recovered or received by you or on your behalf (or to which you are, or become, entitled to recover or receive) in connection with such litigation, threatened litigation or other proceeding, from any source or for any reason, including without limitation pursuant to any judgment, arbitration decision, settlement or insurance policy. You expressly authorize us to take appropriate action to perfect these security interests or liens, if necessary, and to resort to such security interests or liens to obtain partial or total satisfaction of any obligation or debt that you may have to us arising from this engagement.

**Termination of Engagement.** Either of us can terminate this relationship at any time, but if we find it necessary to terminate the relationship, we will, of course, comply with our ethical obligations to protect your interests in the process of withdrawing. Upon termination of this engagement, you will remain responsible for the payment of all fees and expenses incurred on account of the representation. You also agree that we may apply to the court or other tribunal to withdraw as your counsel in such matter(s) and you hereby consent to such withdrawal and to cooperate fully and promptly in freeing us of any obligation to perform further work, including

Marylin J. Milner, Esq.

March 8, 2005

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the execution and delivery of a substitution of attorney form. In addition, you agree to immediately advise the appropriate court or tribunal of replacement counsel.

**Client Files.** At the conclusion of our engagement, upon your request, we will turn over documents in the file(s) for this matter to your custody. If you do not request the file, we will retain it for a period of at least seven (7) years after the matter has concluded. If you do not request delivery of the file before the end of the seven-year period, we will have no further obligation to retain the file and may, at our sole discretion, destroy the file without further notice to you. In addition, you acknowledge and agree that the firm will own the firm's work product and may, at our sole election, provide you with copies of our work product.

**Policy Regarding Sarbanes-Oxley Section 307.** Please be advised that our firm has a policy regarding compliance with Section 307 of the Sarbanes-Oxley Act of 2002, SEC Release No. 33-8185, 17 CFR, Chapter II, Part 205. A copy of this policy is available for your review upon request.

**Conflicts of Interest.** We currently represent, and anticipate that we will represent in the future, a large number and variety of clients across a wide array of industries and businesses. Given the scope of our practice, it is possible that we may be representing, or may be asked to represent, one or more of these other clients in matters adverse to you or your interests. By executing this letter, you acknowledge that we have disclosed to you that we represent, and will represent in the future, clients who directly, or through an affiliate, are or may be adverse parties to you in current or future transactions, negotiations, regulatory, legislative and public policy matters. You hereby acknowledge and agree that you have no objection to our representing such clients adverse to you or your interests in connection with any matter not directly related to those matters for which we are representing or have represented you, and you waive any conflict of interest that may exist by virtue of any such adverse representation. This consent and waiver does not permit us to use any confidential information obtained during the course of our representation of you in any matter, nor does it extend to our engaging in litigation, arbitration or other formal dispute resolution proceedings adverse to you without your consent.

**Arbitration of Fee Dispute.** By signing this letter, you agree that, in the event of any fee and expense dispute arising out of or relating to this agreement, our relationship, or the services performed, such dispute shall be resolved by submission to binding arbitration pursuant to the Attorney Client Arbitration Board ("ACAB") established by the District of Columbia Bar. The prevailing party in such arbitration shall be entitled to recover from the losing party an amount equal to the reasonable value of the attorney services (including the time of our own attorneys representing us in such dispute) and costs, and the arbitrators shall be authorized to enter such an award in favor of the prevailing party. The value of attorneys' reasonable services shall be calculated on the basis of the attorneys' prevailing hourly rates at the time of the arbitration. We

manatt

manatt | phelps | phillips

Marylin J. Milner, Esq.

March 8, 2005

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encourage you to contact the ACAB for a copy of the ACAB rules at (202) 737-4700, extension 238 and for counseling and other information pertaining to the process prior to executing this agreement.

Wire Transfer. You may remit any monthly payments to us via wire transfer as follows:

Comerica Bank- California

10900 Wilshire Boulevard

Los Angeles, CA 90024

Routing number: 121137522

For credit to the account of Manatt, Phelps & Phillips, LLP

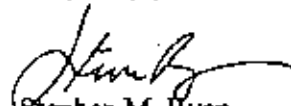
Account number: 1890693698

**Effective Date.** This agreement will not take effect, and we will have no obligation to provide services to you, until you return a signed copy of this agreement, but the effective date of this agreement will be retroactive to the date we first provided legal services to you. Even if this agreement is not executed and returned by you, you will be obligated to pay the reasonable value of any services we may have performed for you at your direction. No modification to this agreement will be effective unless it is in writing and signed by both of you and us. Facsimile signatures are as effective as original signatures.

Please confirm your agreement to the terms of this engagement letter by signing and returning this letter at your earliest opportunity. For your convenience, you can fax it to me at 310.312.4224.

We appreciate this opportunity to be of service to you.

Very truly yours,



Stephen M. Ryan

Manatt, Phelps & Phillips, LLP

I hereby agree to retain Manatt, Phelps & Phillips, LLP, on the terms described above.

Dated: March 11, 2005



Marylin J. Milner

Associate General Counsel

April 22, 2005

*Original signed  
letter (Milner  
Ryan) sent to  
Shane Platos*

Marilyn J. Milner, Esq.  
Associate General Counsel  
National Railroad Passenger Corporation  
Union Station - North Hall  
Washington, D.C. 20002

**Re: Engagement for Legal Services**

Dear Marilyn:

This letter describes the terms of our relationship. Manatt, Phelps & Phillips, LLP ("we" or "us") will represent and advise the National Railroad Passenger Corporation, also known as Amtrak ("Amtrak" or "you") in connection with evaluating options to maximize Amtrak's recovery from Private Label Travel ("PLT"), including litigation, petitioning for involuntary bankruptcy, piercing the corporate veil, and negotiated settlement with PLT. For purposes of this engagement, we will be representing you only and we will not be deemed to represent any of your affiliates, subsidiaries, parent companies, joint ventures, officers, directors, partners, principals, investors or employees (collectively, "Your Affiliates"), unless otherwise agreed to in writing. Accordingly, we will be free to represent other firm clients adverse to or involving Your Affiliates or their interests. Unless otherwise agreed in writing, the terms of this letter also will apply to any additional matters we agree to handle on your behalf or at your direction. If this agreement is acceptable to you, please sign and return the original to me. The enclosed copy is for your files. In addition, please send a copy of the signed agreement to me by facsimile at 202-585-6600. When you sign this letter, it becomes a contract between us.

**Rates.** You agree to pay our fees for services, which are primarily determined by multiplying the number of hours we spend working on your matters by the hourly rates then in effect for the professional providing such services. Currently, these hourly rates vary from \$255.00 for the associate attorneys to \$590.00 for the most senior professionals likely to perform services for you. We review our hourly rates annually and any changes normally become effective on January 1. I will be primarily responsible for representing you. My current hourly rate is \$590.00. I will initially be assisted by my partner, Steve Neal, whose hourly rate is \$495. It may be necessary or desirable, from time to time, to utilize other professionals and personnel employed by or associated with us to perform the services you require. We will apply a 10% discount on the attorney fees expended for services provided on Amtrak's behalf.

Marilyn J. Milner, Esq.  
April 22, 2005  
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In addition to fees for services, you agree to pay all expenses incurred on your behalf and for certain in-house administrative services. Expenses such as court filing fees, filing and recording fees of other government agencies, fees and expenses of accountants or other experts retained on your behalf, and charges for transcripts, depositions, parking, and travel expenses generally will be billed at the actual cost incurred by us. Expenses such as document reproduction, on-line computerized research, long-distance telephone, teletypes and fax transmissions, mileage, word processing, staff overtime required to meet your imposed deadlines, and messenger services will be charged at our standard rate in effect at the time the expense is incurred.

**Billing Practices.** We submit bills on a monthly basis shortly after services are rendered so you will have a ready means of monitoring and controlling the expenses you are incurring. Our bills itemize the services performed by date, time required, and the professional performing the services. Payment is due within twenty (20) days of your receipt of the bill. If, in the course of our representation, we anticipate a significant increase in the level of our activity on your behalf, we may bill you on a basis more frequent than monthly. If you believe the expenses are mounting too rapidly, please contact us immediately so we can discuss and evaluate your options. When we do not hear from you, we assume you approve of the overall level of activity on our part in this matter on your behalf.

We understand that you may request that we submit our invoices electronically through a designated e-billing vendor. While we will endeavor to accommodate any such request, we cannot guarantee that we will be able to comply with all of the technical or other procedure requirements of your designated vendor. We will consider any such request on a case-by-case basis, and conversion to e-billing shall remain subject to our mutual agreement. In addition, please note our submission to e-billing procedures will not alter our current billing cycle as explained above.

**Estimates.** You may from time to time receive an estimate of the fees and expenses likely to be incurred by you in connection with the services we are providing. An estimate is not a fixed fee and does not constitute a commitment by us to perform services for that amount or an obligation by you to pay that amount. The fees and expenses required ultimately are a function of many conditions over which we have little or no control and may be more or less than any estimate. You will be responsible for the actual fees and expenses on the basis described in this agreement. Further, your obligation to pay such fees and expenses is not contingent upon successful completion of any project.

**No Guarantee of Results.** Either at the beginning or during the course of our representation, we may express our opinions or beliefs concerning the matter or various courses of action and the results that might be anticipated. Any such statement made by any attorney or

Marylin J. Milner, Esq.

April 22, 2005

Page 3

employee of our firm is intended to be an expression of opinion only, based on information available to us at the time, and must not be construed by you as a promise or guarantee of any particular result. In addition, the advice and communications we render on your behalf are not intended to be disseminated to or relied upon by any other parties without our prior written consent.

**Late Charges.** Each month we send to clients who have amounts outstanding an Unpaid Statement notice listing all such amounts. A client will be assessed a late charge equal to one percent (1%) of the amount included on each notice that has been outstanding more than sixty (60) days. The amount of this late charge will be set forth on the notice. This late charge will be imposed each month on amounts that continue to be outstanding for more than sixty (60) days, including unpaid late charges. Unless a payment applies to a particular invoice, payments are applied to statements that have been outstanding the longest period of time. The costs associated with late payments go beyond a mere cost of funds calculation and make it impracticable or extremely difficult to quantify the actual costs incurred in connection with late payments, and you and we agree that this late charge is presumed to be the cost of a payment that is not made on time. We also note that this late charge provision is not intended to provide our clients with a means of financing their bills, and instead we continue to expect and require prompt payment of our billing statements.

As security for the payment of the fees, costs and disbursements incurred on your behalf, and without prejudice to any other rights, recourse or remedies we may have, you hereby grant us a security interest in and lien upon any sum or sums that may be on deposit from time to time in our client trust and/or retainer account(s) in connection with any engagement covered by this letter. In addition, as to any matters covered by this letter which involve litigation or threatened litigation, or any administrative or alternative dispute resolution proceeding, you hereby grant us a security interest in and a lien upon any sum or sums that may be recovered or received by you or on your behalf (or to which you are, or become, entitled to recover or receive) in connection with such litigation, threatened litigation or other proceeding, from any source or for any reason, including without limitation pursuant to any judgment, arbitration decision, settlement or insurance policy. You expressly authorize us to take appropriate action to perfect these security interests or liens, if necessary, and to resort to such security interests or liens to obtain partial or total satisfaction of any obligation or debt that you may have to us arising from this engagement.

**Termination of Engagement.** Either of us can terminate this relationship at any time, but if we find it necessary to terminate the relationship, we will, of course, comply with our ethical obligations to protect your interests in the process of withdrawing. Upon termination of this engagement, you will remain responsible for the payment of all fees and expenses incurred on account of the representation. You also agree that we may apply to the court or other tribunal to withdraw as your counsel in such matter(s) and you hereby consent to such withdrawal and to

Marilyn J. Milner, Esq.

April 22, 2005

Page 4

cooperate fully and promptly in freeing us of any obligation to perform further work, including the execution and delivery of a substitution of attorney form. In addition, you agree to immediately advise the appropriate court or tribunal of replacement counsel.

**Client Files.** At the conclusion of our engagement, upon your request, we will turn over documents in the file(s) for this matter to your custody. If you do not request the file, we will retain it for a period of at least seven (7) years after the matter has concluded. If you do not request delivery of the file before the end of the seven-year period, we will have no further obligation to retain the file and may, at our sole discretion, destroy the file without further notice to you. In addition, you acknowledge and agree that the firm will own the firm's work product and may, at our sole election, provide you with copies of our work product.

**Policy Regarding Sarbanes-Oxley Section 307.** Please be advised that our firm has a policy regarding compliance with Section 307 of the Sarbanes-Oxley Act of 2002, SEC Release No. 33-8185, 17 CFR, Chapter II, Part 205. A copy of this policy is available for your review upon request.

**Conflicts of Interest.** We currently represent, and anticipate that we will represent in the future, a large number and variety of clients across a wide array of industries and businesses. Given the scope of our practice, it is possible that we may be representing, or may be asked to represent, one or more of these other clients in matters adverse to you or your interests. By executing this letter, you acknowledge that we have disclosed to you that we represent, and will represent in the future, clients who directly, or through an affiliate, are or may be adverse parties to you in current or future transactions, negotiations, regulatory, legislative and public policy matters. You hereby acknowledge and agree that you have no objection to our representing such clients adverse to you or your interests in connection with any matter not directly related to those matters for which we are representing or have represented you, and you waive any conflict of interest that may exist by virtue of any such adverse representation. This consent and waiver does not permit us to use any confidential information obtained during the course of our representation of you in any matter, nor does it extend to our engaging in litigation, arbitration or other formal dispute resolution proceedings adverse to you without your consent.

**Arbitration of Fee Dispute.** By signing this letter, you agree that, in the event of any fee and expense dispute arising out of or relating to this agreement, our relationship, or the services performed, such dispute shall be resolved by submission to binding arbitration pursuant to the Attorney Client Arbitration Board ("ACAB") established by the District of Columbia Bar. The prevailing party in such arbitration shall be entitled to recover from the losing party an amount equal to the reasonable value of the attorney services (including the time of our own attorneys representing us in such dispute) and costs, and the arbitrators shall be authorized to enter such an award in favor of the prevailing party. The value of attorneys' reasonable services shall be



Marilyn J. Milner, Esq.

April 22, 2005

Page 5

calculated on the basis of the attorneys' prevailing hourly rates at the time of the arbitration. We encourage you to contact the ACAB for a copy of the ACAB rules at (202) 737-4700, extension 238 and for counseling and other information pertaining to the process prior to executing this agreement.

**Wire Transfer.** You may remit any monthly payments to us via wire transfer as follows:

**Comerica Bank- California**

10900 Wilshire Boulevard

Los Angeles, CA 90024

Routing number: 121137522

For credit to the account of Manatt, Phelps & Phillips, LLP


Account number: 1890693698

**Effective Date.** This agreement will not take effect, and we will have no obligation to provide services to you, until you return a signed copy of this agreement, but the effective date of this agreement will be retroactive to the date we first provided legal services to you. Even if this agreement is not executed and returned by you, you will be obligated to pay the reasonable value of any services we may have performed for you at your direction. No modification to this agreement will be effective unless it is in writing and signed by both of you and us. Facsimile signatures are as effective as original signatures.

Please confirm your agreement to the terms of this engagement letter by signing and returning this letter at your earliest opportunity. For your convenience, you can fax it to me at 310.312.4224.

We appreciate this opportunity to be of service to you.

Very truly yours,

  
Stephen M. Ryan  
Manatt, Phelps & Phillips, LLP

I hereby agree to retain Manatt, Phelps & Phillips, LLP, on the terms described above.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Marilyn J. Milner  
Associate General Counsel

**manatt**  
manatt | phelps | phillips

Stephen M. Ryan  
Manatt, Phelps & Phillips, LLP  
Direct Dial: (202) 585-8550  
E-mail: sryan@manatt.com

July 20, 2005

Marilyn J. Milner, Esq.  
Associate General Counsel  
National Railroad Passenger Corporation  
Union Station - North Hall  
Washington, D.C. 20002

*Original  
sent to Alana 8/16/05*

Re: **Engagement for Legal Services**

Dear Marilyn:

This letter describes the terms of our relationship. Manatt, Phelps & Phillips, LLP ("we" or "us") will represent and advise the National Railroad Passenger Corporation, also known as Amtrak ("Amtrak" or "you") in connection with preparation of a complaint against Colonial Pipeline for wrongful use of Amtrak's real property. For purposes of this engagement, we will be representing you only and we will not be deemed to represent any of your affiliates, subsidiaries, parent companies, joint ventures, officers, directors, partners, principals, investors or employees (collectively, "Your Affiliates"), unless otherwise agreed to in writing. Accordingly, we will be free to represent other firm clients adverse to or involving Your Affiliates or their interests. Unless otherwise agreed in writing, the terms of this letter also will apply to any additional matters we agree to handle on your behalf or at your direction. If this agreement is acceptable to you, please sign and return the original to me. The enclosed copy is for your files. In addition, please send a copy of the signed agreement to me by facsimile at 202-585-6600. When you sign this letter, it becomes a contract between us.

**Rates.** You agree to pay our fees for services, which are primarily determined by multiplying the number of hours we spend working on your matters by the hourly rates then in effect for the professional providing such services. Currently, these hourly rates vary from \$255.00 for the associate attorneys to \$590.00 for the most senior professionals likely to perform services for you. We review our hourly rates annually and any changes normally become effective on January 1. I will be primarily responsible for representing you. My current hourly rate is \$590.00. I will initially be assisted by my partner, Steve Neal, whose hourly rate is \$495.00. It may be necessary or desirable, from time to time, to utilize other professionals and personnel employed by or associated with us to perform the services you require. We will apply a 10% discount on the attorney fees expended for services provided on Amtrak's behalf.

In addition to fees for services, you agree to pay all expenses incurred on your behalf and for certain in-house administrative services. Expenses such as court filing fees, filing and

700 12th Street, N.W., Suite 1100, Washington, District of Columbia 20005 Telephone: 202.585.6500 Fax: 202.585.6800  
Albany | Los Angeles | Mexico City | New York | Orange County | Palo Alto | Sacramento | Washington, D.C.

CONFIDENTIAL--INCLUDES PRIVILEGED AND CONFIDENTIAL MATERIALS  
SUBJECT TO AGREEMENT WITH CONGRESSIONAL STAFF

Marilyn J. Milner, Esq.

July 20, 2005

Page 2

recording fees of other government agencies, fees and expenses of accountants or other experts retained on your behalf, and charges for transcripts, depositions, parking, and travel expenses generally will be billed at the actual cost incurred by us. Expenses such as document reproduction, on-line computerized research, long-distance telephone, telecopies and fax transmissions, mileage, word processing, staff overtime required to meet your imposed deadlines, and messenger services will be charged at our standard rate in effect at the time the expense is incurred.

**Billing Practices.** We submit bills on a monthly basis shortly after services are rendered so you will have a ready means of monitoring and controlling the expenses you are incurring. Our bills itemize the services performed by date, time required, and the professional performing the services. Payment is due within twenty (20) days of your receipt of the bill. If, in the course of our representation, we anticipate a significant increase in the level of our activity on your behalf, we may bill you on a basis more frequent than monthly. If you believe the expenses are mounting too rapidly, please contact us immediately so we can discuss and evaluate your options. When we do not hear from you, we assume you approve of the overall level of activity on our part in this matter on your behalf.

We understand that you may request that we submit our invoices electronically through a designated e-billing vendor. While we will endeavor to accommodate any such request, we cannot guarantee that we will be able to comply with all of the technical or other procedure requirements of your designated vendor. We will consider any such request on a case-by-case basis, and conversion to e-billing shall remain subject to our mutual agreement. In addition, please note our submission to e-billing procedures will not alter our current billing cycle as explained above.

**Estimates.** You may from time to time receive an estimate of the fees and expenses likely to be incurred by you in connection with the services we are providing. An estimate is not a fixed fee and does not constitute a commitment by us to perform services for that amount or an obligation by you to pay that amount. The fees and expenses required ultimately are a function of many conditions over which we have little or no control and may be more or less than any estimate. You will be responsible for the actual fees and expenses on the basis described in this agreement. Further, your obligation to pay such fees and expenses is not contingent upon successful completion of any project.

**No Guarantee of Results.** Either at the beginning or during the course of our representation, we may express our opinions or beliefs concerning the matter or various courses of action and the results that might be anticipated. Any such statement made by any attorney or employee of our firm is intended to be an expression of opinion only, based on information available to us at the time, and must not be construed by you as a promise or guarantee of any

Marilyn J. Milner, Esq.

July 20, 2005

Page 3

particular result. In addition, the advice and communications we render on your behalf are not intended to be disseminated to or relied upon by any other parties without our prior written consent.

**Late Charges.** Each month we send to clients who have amounts outstanding an Unpaid Statement notice listing all such amounts. A client will be assessed a late charge equal to one percent (1%) of the amount included on each notice that has been outstanding more than sixty (60) days. The amount of this late charge will be set forth on the notice. This late charge will be imposed each month on amounts that continue to be outstanding for more than sixty (60) days, including unpaid late charges. Unless a payment applies to a particular invoice, payments are applied to statements that have been outstanding the longest period of time. The costs associated with late payments go beyond a mere cost of funds calculation and make it impracticable or extremely difficult to quantify the actual costs incurred in connection with late payments, and you and we agree that this late charge is presumed to be the cost of a payment that is not made on time. We also note that this late charge provision is not intended to provide our clients with a means of financing their bills, and instead we continue to expect and require prompt payment of our billing statements.

As security for the payment of the fees, costs and disbursements incurred on your behalf, and without prejudice to any other rights, recourse or remedies we may have, you hereby grant us a security interest in and lien upon any sum or sums that may be on deposit from time to time in our client trust and/or retainer account(s) in connection with any engagement covered by this letter. In addition, as to any matters covered by this letter which involve litigation or threatened litigation, or any administrative or alternative dispute resolution proceeding, you hereby grant us a security interest in and a lien upon any sum or sums that may be recovered or received by you or on your behalf (or to which you are, or become, entitled to recover or receive) in connection with such litigation, threatened litigation or other proceeding, from any source or for any reason, including without limitation pursuant to any judgment, arbitration decision, settlement or insurance policy. You expressly authorize us to take appropriate action to perfect these security interests or liens, if necessary, and to resort to such security interests or liens to obtain partial or total satisfaction of any obligation or debt that you may have to us arising from this engagement.

**Termination of Engagement.** Either of us can terminate this relationship at any time, but if we find it necessary to terminate the relationship, we will, of course, comply with our ethical obligations to protect your interests in the process of withdrawing. Upon termination of this engagement, you will remain responsible for the payment of all fees and expenses incurred on account of the representation. You also agree that we may apply to the court or other tribunal to withdraw as your counsel in such matter(s) and you hereby consent to such withdrawal and to cooperate fully and promptly in freeing us of any obligation to perform further work, including

Marylin J. Milner, Esq.

July 20, 2005

Page 4

the execution and delivery of a substitution of attorney form. In addition, you agree to immediately advise the appropriate court or tribunal of replacement counsel.

**Client Files.** At the conclusion of our engagement, upon your request, we will turn over documents in the file(s) for this matter to your custody. If you do not request the file, we will retain it for a period of at least seven (7) years after the matter has concluded. If you do not request delivery of the file before the end of the seven-year period, we will have no further obligation to retain the file and may, at our sole discretion, destroy the file without further notice to you. In addition, you acknowledge and agree that the firm will own the firm's work product and may, at our sole election, provide you with copies of our work product.

**Policy Regarding Sarbanes-Oxley Section 307.** Please be advised that our firm has a policy regarding compliance with Section 307 of the Sarbanes-Oxley Act of 2002, SEC Release No. 33-8185, 17 CFR, Chapter II, Part 205. A copy of this policy is available for your review upon request.

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**Arbitration of Fee Dispute.** By signing this letter, you agree that, in the event of any fee and expense dispute arising out of or relating to this agreement, our relationship, or the services performed, such dispute shall be resolved by submission to binding arbitration pursuant to the Attorney Client Arbitration Board ("ACAB") established by the District of Columbia Bar. The prevailing party in such arbitration shall be entitled to recover from the losing party an amount equal to the reasonable value of the attorney services (including the time of our own attorneys representing us in such dispute) and costs, and the arbitrators shall be authorized to enter such an award in favor of the prevailing party. The value of attorneys' reasonable services shall be calculated on the basis of the attorneys' prevailing hourly rates at the time of the arbitration. We

manatt

manatt | phelps | phillips

Marilyn J. Milner, Esq.

July 20, 2005

Page 5

encourage you to contact the ACAB for a copy of the ACAB rules at (202) 737-4700, extension 238 and for counseling and other information pertaining to the process prior to executing this agreement.

**Wire Transfer.** You may remit any monthly payments to us via wire transfer as follows:

**Comerica Bank- California**

10900 Wilshire Boulevard

Los Angeles, CA 90024

Routing number: 121137522

For credit to the account of Manatt, Phelps & Phillips, LLP

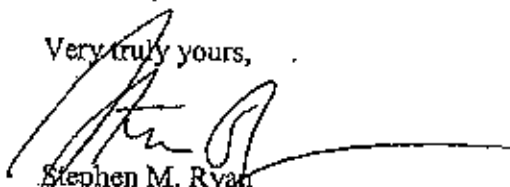
Account number: 1890693698

**Effective Date.** This agreement will not take effect, and we will have no obligation to provide services to you, until you return a signed copy of this agreement, but the effective date of this agreement will be retroactive to the date we first provided legal services to you. Even if this agreement is not executed and returned by you, you will be obligated to pay the reasonable value of any services we may have performed for you at your direction. No modification to this agreement will be effective unless it is in writing and signed by both of you and us. Facsimile signatures are as effective as original signatures.

Please confirm your agreement to the terms of this engagement letter by signing and returning this letter at your earliest opportunity. For your convenience, you can fax it to me at 310.312.4224.

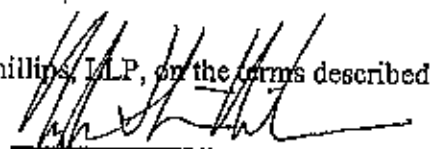
We appreciate this opportunity to be of service to you.

Very truly yours,

  
Stephen M. Ryan  
Manatt, Phelps & Phillips, LLP

I hereby agree to retain Manatt, Phelps & Phillips, LLP, on the terms described above.

Dated: 7/25/05

  
Marilyn J. Milner  
Associate General Counsel

Morgan, Lewis & Bockius LLP  
1111 Pennsylvania Avenue, NW  
Washington, DC 20004  
Tel: 202.739.3000  
Fax: 202.739.3001  
www.morganlewis.com

**Morgan Lewis**  
C O U N S E L O R S   A T   L A W

Thomas E. Reinert Jr.  
202-739-5084  
treinert@morganlewis.com

February 17, 2006

**VIA HAND DELIVERY**

National Railroad Passenger Corporation ("Amtrak")  
60 Massachusetts Avenue, N.E.  
Washington, DC 20002

Attention: William Herrmann

Re: Representation in Labor and Employment Matters

Dear Mr. Herrmann:

Morgan, Lewis & Bockius LLP appreciates the opportunity to continue to provide legal services to National Railroad Passenger Corporation ("Amtrak"), in connection with labor and employment matters. While we have represented Amtrak for a number of years in a variety of labor and employment matters, this letter is intended to address two specific new projects:

Representation with respect to labor negotiations and possible Presidential Emergency Board proceedings.

Representation in employee benefit matters.

This letter will also provide the framework for other future matters, subject to supplementation at the time of retention on specific matters. In accordance with Firm and Amtrak policy, this letter sets forth our understanding as to the terms upon which we have been retained. You also have provided us with a copy of Amtrak's Guidelines for Outside Counsel which are incorporated by reference as part of this retention letter.

**MUTUAL RESPONSIBILITIES**

We will provide the legal services that, in our professional judgment, are appropriate for this matter and in accordance with applicable legal and ethical standards. You agree that appropriate representatives of Amtrak will be reasonably available to confer with us upon request, will

National Railroad Passenger Corporation  
Attn: William Herrmann  
February 17, 2006  
Page 2 of 6

provide us with such documents and information as you may possess relating to the matter, will disclose all facts and circumstances of which you are aware that may bear upon our handling of the matter, will promptly pay our fees in accordance with the terms of this letter, and will otherwise assist our efforts as we reasonably request.

### **SCOPE OF REPRESENTATION**

We are confident that our services in this matter will prove beneficial and we hope that you will continue to seek our assistance with other matters. However, our present agreement to provide legal services to Amtrak is limited to these and other matters for which you have engaged us. As you are aware, we are a large law firm, and we represent many other companies and individuals. It is possible that some of our present or future clients will have disputes or other dealings with Amtrak during the time that we are representing Amtrak. Accordingly, as a condition of our undertaking this matter for you, you agree that this Firm may undertake in the future to represent, existing or new clients in any matter, excluding litigation, that is not substantially related to our work for Amtrak, even if the interests of such clients in those other matters are directly adverse to Amtrak. We will notify you of each such representation as it arises in order to give Amtrak an opportunity to state any objection to such representation, and the Firm will not undertake any new representation adverse to Amtrak without such notice. We agree, however, that your prospective consent to conflicting representations shall not apply in any instance where, as the result of our representation of Amtrak, we have obtained sensitive, proprietary or other confidential information of a non-public nature that, if known to another client of ours, could be used to the material disadvantage of Amtrak in a matter in which we represent, or in the future are asked to undertake representation of, that client.

In particular, but without limiting the prior paragraph, we have advised you of, and you agree that we may continue in, the following representations involving matters unrelated to our present representation of Amtrak: representation of the National Railway Labor Conference, the Association of American Railroads, and their constituent freight railroads; representation of various entities with real estate interests in the Northeast Corridor.

We are confident that you will find our services beneficial, and we hope that you will seek our assistance in other areas in the future. In that event, the above arrangement would, of course, be subject to review.



National Railroad Passenger Corporation  
Attn: William Herrmann  
February 17, 2006  
Page 3 of 6

### **DETERMINATION OF FEE**

Our fees are determined, in accordance with applicable ethical rules, by considering a number of factors, including the amount of time that our lawyers, legal assistants and staff devote to the matter, the experience and expertise of the professionals who perform the services, the complexity, novelty and difficulty of the questions involved, the magnitude of the matter, any time limitations or other special demands presented, and the results obtained.

Generally, our fees are based primarily upon the time spent on the matter in accordance with hourly rates assigned to the particular lawyers and legal assistants performing the work. Appended to this letter is a schedule of hourly rates for 2006. These rates are subject to periodic adjustment upon notice and mutual agreement. However, the reasonableness of a fee for our services is not always properly reflected by time charges. Where this is the case, we will make an adjustment by either increasing or decreasing our fee from that which would be determined based strictly upon time charges. Such adjustments might be warranted by, for example, the complexity and difficulty of the problems presented by your matter, the amount and value of the matters involved, the demands made upon our skill and time, or other extraordinary circumstances pertaining to your matter.

In addition to our fees, we will bill you for any expenditures which we make or expenses we incur for you or on your behalf. These may include computer-based legal research costs, the costs of reproducing documents, long distance telephone charges, parking and travel costs, expenses which we incur while we are away from our office on your business, fees which accountants or consultants retained on your behalf charge us, and other similar expenditures. Where such expenditures are significant in amount, we may ask you to make payment directly to the provider of goods or services. You will advise us where for specific services you require us to use certain vendors.

### **STATEMENTS**

We will send you statements for services rendered and for expenditures which we have made for you on a monthly basis. The amounts set forth in the statements are due within thirty days after the statement is mailed. We will continue to utilize electronic billing according to a system compatible for both Amtrak and the Firm. If you have any questions about any statement, please call me promptly to discuss it.

If your account becomes delinquent, we have established collection procedures which may include stopping all legal services of a non-emergency nature and, where consistent with our ethical obligations, withdrawing from this representation. We also reserve the right to ask you for reasonable security for past due balances and work required in the near future. As a

National Railroad Passenger Corporation  
Attn: William Herrmann  
February 17, 2006  
Page 4 of 6

condition of our undertaking this representation, you agree to provide such security to us upon request.

In fairness to the majority of our clients who pay our statements promptly, we have established late payment charges designed to charge to the late payors the costs of carrying their overdue accounts. We reserve the right, to the extent permitted by law, to add a late payment charge of 1% per month to your past due account. These late charges will accrue from the due date of the bill until the date it is paid.

### **ARBITRATION OF FEE DISPUTES**

We seldom have disagreements with our clients concerning our fees, but some occasionally do occur. It is our desire to resolve any such disagreement through amicable discussion; unfortunately, such disputes cannot always be resolved in that way. Our experience is that in such instances it is in the best interest of both the client and our Firm that the dispute be resolved through binding arbitration rather than by legal action and the courts. To that end, you and we agree that any dispute under this representation agreement that cannot be resolved in a reasonable time through discussions between us shall be submitted to binding arbitration before the American Arbitration Association pursuant to its rules. It is agreed that the site of such arbitrations shall be Washington, D.C. Any arbitration award will be final, binding and enforceable in Washington, D.C. You acknowledge that this agreement is entered into after we have advised you of your right to have this agreement reviewed by independent counsel and allowed you sufficient time to avail yourself of that right.

### **TERMINATION**

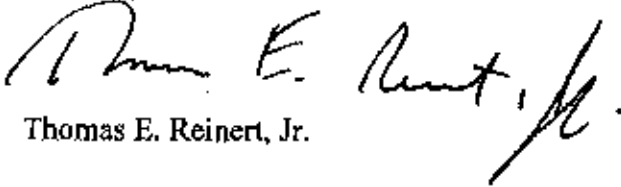
We anticipate a continued long and mutually satisfactory relationship. However, you have the right to terminate our engagement at any time by giving us written notice of termination. We also have the right, subject to our responsibilities under applicable ethical rules, to terminate our engagement by giving you written notice if you fail to cooperate with us or to pay our bills when due or if we determine that continuing to represent you would be unethical, impractical or improper. If our relationship is terminated by either of us, you will remain obligated to pay us in full for our past services and for costs and expenses in accordance with the terms of this letter.

This agreement will apply to any additional matters we agree to undertake upon your behalf unless we enter into an express written agreement reflecting an alternate arrangement. We mutually intend upon undertaking substantial new matters to supplement this letter with any specific conditions applicable to the new representation.

National Railroad Passenger Corporation  
Attn: William Herrmann  
February 17, 2006  
Page 5 of 6

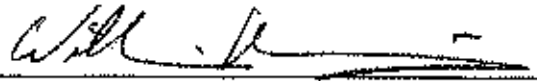
Please review this letter carefully, and raise and discuss with me any questions which you may have. If this letter accurately reflects your understanding of our attorney-client relationship, please indicate your approval and acceptance by dating and signing the enclosed duplicate of the letter and returning it to me. Your signature indicates your authority to act on behalf of Amtrak.

Sincerely,

  
Thomas E. Reinert, Jr.

Attachment

APPROVED AND ACCEPTED

By: 

Title: Deputy Gen'l. Counsel

Date: Feb 17, 2006

**2006 Amtrak Rates**

PARTNERS

Speights, G.	\$560
Rissetto, H.	\$535
Reinert, T.	\$510
Harris, J.	\$470
Needles, G.	\$470
Johnsrud, B.	\$430
Delany, W.	\$425

ASSOCIATES

Black, R.	\$400
Gray, K.	\$350
Hinsch, C.	\$345
Gebhart, H.	\$285
Bloom, T.	\$315
Donahue, R.	\$280
Wynn, J.	\$230
Ackley, C.	\$205

# ADAMS AND REESE LLP

Attorneys at Law

Baton Rouge

Birmingham

Houston

Jackson

Mobile

Nashville

New Orleans

Washington, DC

June 23, 2005

*Via Federal Express*

Ms. Marilyn Milner

NATIONAL RAILROAD PASSENGER CORPORATION

60 Massachusetts Avenue, NE

Washington, DC 20002

F. Lee Butler

Direct (713) 308-0100

E-Fax (713) 308-4010

lee.butler@arlaw.com

Re: Engagement of Adams and Reese LLP  
New Orleans Building Corp. v National Railroad Passenger Corporation

Docket No. 05-2432 "N" (5), In the United States District Court for the Eastern  
District of Louisiana

Dear Marilyn:

We are pleased to have been asked to serve as counsel for National Railroad Passenger Corporation ("Amtrak") in this case. This letter will confirm our discussions and will describe the terms on which our firm will provide legal services to Amtrak.

Accordingly, we submit for your approval the following provisions governing our engagement. If you are in agreement, please sign the enclosed copy of this letter in the space provided at bottom. If you have any questions about these provisions, please do not hesitate to call. Again, we are pleased to have the opportunity to serve you.

- (a) Client: Scope of Representation. Our client in this matter is Amtrak. We confirm here that none of Amtrak's affiliated corporations will be considered our client in this matter. Our representation is limited to the defense of the claims asserted against Amtrak by New Orleans Building Corp. in the lawsuit identified above. The services that Amtrak has requested that our Firm provide are strictly legal in nature.
- (b) Lawyers Providing Services. I will be the primary contact on this matter here at the Firm, but there will be a team of lawyers and staff working on this case. At this point, the other lawyers working on the case include Gregg Barrios. Should this matter involve a formal opinion letter or should you at any point request that we provide an audit response to a third party, you agree that, consistent with our Firm's policy of involving lawyers especially experienced in these matters, other lawyers may become involved for these specific purposes.

Ms. Marilyn Milner  
June 23, 2005  
Page 2

- (c) Communications Regarding Case. We will report to and take direction from you. If you ever want us to report directly to another person at Amtrak or coordinate with other counsel currently handling legal matters for Amtrak we will be happy to do so. Of course, we will be pleased to answer any questions you may ever have of us.
- (d) Preserving Confidences. We appreciate that we will be privy to confidential information and we will take steps to maintain this confidentiality, all in compliance with the applicable rules of professional conduct. We confirm that you have approved the use of internet e-mail communication without encryption.
- (e) Term of Engagement. Either of us may terminate the engagement at any time for any reason by written notice, subject on our part to the applicable rules of professional conduct. Additionally, we reserve the right to terminate our representation if payment is not received within 45 days of the date of a statement, and you agree that we may withdraw from your representation, and that you will not oppose our withdrawal, if payment has not been received within this period. In the event that we terminate the engagement, we will take reasonable steps to protect your interests in the above matter.
- (f) Conclusion of Representation: Retention and Disposition of Documents. Unless previously terminated, our representation of Amtrak will terminate upon our sending you our final statement for services rendered in this matter. Following such termination, any nonpublic information you have supplied to us will be kept confidential in accordance with applicable rules of professional conduct. For various reasons, including minimization of unnecessary storage expenses, we reserve the right to dispose of file materials according to our document retention procedures absent contrary, written instructions from you.
- (g) Conflicts. You are aware that our Firm represents many other companies and individuals. We confirm that Amtrak does not object to our undertaking to represent clients in other matters that are not substantially related to our work for Amtrak even if the interests of such clients in those other matters are adverse to Amtrak. We agree, however, that this prospective consent to conflicting representation shall not apply in any instance where as the result of our representation of Amtrak we have obtained sensitive, proprietary or otherwise confidential information that, if known to any such other client of ours, could be used to the disadvantage of Amtrak. Also, consistent with our agreement that Amtrak and not any of its affiliated corporations, will be our client in this matter, we confirm that we will not consider any of these affiliated corporations as a client for purposes of checking future conflicts.

Ms. Marilyn Milner  
June 23, 2005  
Page 3

- (h) Fees and Expenses. Our fees will be based on the billing rate for each attorney and legal assistant devoting time to this matter. Our billing rates for attorneys currently range from \$165.00 per hour for new associates to \$400.00 per hour for our most senior partners. Time billed by legal assistants is charged at \$120.00 per hour. Of the lawyers working on this case at present, my rate is \$360.00 per hour and Gregg Barrios' rate is \$250.00 per hour. Our current hourly fees are adjusted annually at the end of the calendar year, and you have agreed that our hourly fee may reflect such annual adjustment.

Our statements will be provided monthly for work performed and expenses recorded during the previous month. On occasion expenses will take more than a month to appear on our invoices, particularly where they are charged by a third-party vendor. We will include on our statements separate charges for performing services such as photocopying, messenger and delivery service, computerized research, travel, long-distance telephone, telefax, and filing fees. Our charge for photocopies will be 25¢ per page and our charge for telefaxes will be \$1.25 per page. Fees and expenses of others (such as consultants and experts) generally will not be paid by us, but will be billed directly to you.

- (i) Interest on Past Due Accounts. We confirm that the Firm charges interest on past due accounts receivable. Payment is due within 30 days of the invoice date. Interest will begin to accrue on all balances 60 days after the invoice date, i.e., not until they are 30 days past due. The rate of interest will be 6% simple interest.

Please acknowledge your agreement to these terms by signing below and returning this letter to us at your earliest convenience. Once again, we are pleased to have this opportunity to work with you. With kindest regards, I am

Very truly yours,  
ADAMS AND REESE LLP

  
R. Lee Butler

Agreed and accepted:

NATIONAL RAILROAD PASSENGER CORPORATION

By: 

Title: Associate General Counsel

Date: 6/24/05

# HOWD & LUDORF, LLC

ATTORNEYS AT LAW

65 WETHERSFIELD AVENUE  
HARTFORD, CT 06114-1150  
(860) 249-1361  
(860) 249-7665 (FAX)

www.hl-law.com

JOHN J. BOGDANSKI\*  
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CHRISTOPHER M. VOSSLER‡  
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DAVID S. MONASTERBSKY  
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MELINDA A. POWELL  
PAUL ERICKSON\*\*  
DANIEL C. DEMERCHANT‡  
ALEXANDRIA L. VOCCIO‡  
BEATRICE S. JORDAN  
JAY T. DONFRANCISCO  
JOHN J. RADSHAW, III  
MARTHA A. SHAW\*

MELANIE A. DILLON  
MAGDALENA F. CAFASSO  
CHRISTOPHER J. PICARD  
JASON E. INDOMENICO  
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KRISTAN M. MAGGINI

\*ALSO ADMITTED IN MASSACHUSETTS  
†ALSO ADMITTED IN RHODE ISLAND  
‡ALSO ADMITTED IN NEW YORK  
§ALSO ADMITTED IN FLORIDA  
¶ALSO ADMITTED IN ILLINOIS  
⊞ALSO ADMITTED IN NEW JERSEY

September 22, 2005

Marilyn J. Milner, Esquire  
Associate General Counsel  
National Railroad Passenger Corporation (AMTRAK)  
60 Massachusetts Avenue, NE  
Washington, DC 20002

Re: Cedar Hill Associates v. National Rail Road Passenger Corporation  
Docket No. FBT-CV-05-4010466-S  
H&L File No.: 179-14393

Dear Attorney Milner:

It was a pleasure speaking with you regarding this matter. This will confirm your retention of Howd & Ludorf, LLC to defend the National Railroad Passenger Corporation (AMTRAK) in the civil claim brought against it by Cedar Hill Associates in the Judicial District of Fairfield at Bridgeport with a docket number of FBT-CV-05-4010466-S.

Our fees for legal services to be performed in connection with this matter will be based upon the amount of time expended by members and associates of the firm. Our rates are as follows: Partners - \$145 per hour; Associates - \$125 per hour; and Paralegals - \$55 per hour.

AMTRAK will also be responsible for payment of costs and expenses incurred in the defense of AMTRAK. This may include court fees, sheriff's fees, deposition fees, outside copying fees, expert witness fees, and other expenses reasonably incurred in the handling of this matter. We will not incur any significant expenses without prior approval of AMTRAK. In addition, we will not retain any expert witness without notifying you of our recommendation to obtain such expert and our receipt of your consent to do so. The amount expended in costs would be due when incurred and will be payable within thirty (30) days after rendering a statement to you.

AMTRAK will be billed monthly and will pay bills upon receipt. AMTRAK agrees that its failure to comply with this provision will be grounds for Howd & Ludorf, LLC to cease its representation of AMTRAK in the above-referenced civil action.



**HOWD & LUDORE, LLC**

Marilyn J. Milner, Esquire

Re: Cedar Hill Associates v. National Rail Road Passenger Corporation

September 22, 2005

Page - 2

When you receive your bill for services, please review it carefully. If you find any discrepancies, or question any part of the bill, please call us to discuss the same.

Attorney Mark J. Clafin and I will be working directly on this case. We look forward to working with you toward a successful resolution of this matter.

If the terms of our representation are satisfactory to AMTRAK, kindly execute the copy enclosed and return to me in the post-prepaid envelope provided. Do not hesitate to contact me if you have any additional questions or concerns.

Very truly yours,

  
John J. Radshaw, III

JJR/ecb  
Enclosures

National Railroad Passenger Corporation  
(AMTRAK)

By: \_\_\_\_\_  
Marilyn J. Milner, Esquire  
Associate General Counsel

**SCHEDULE 1**  
**EFFECTIVE JANUARY 1, 2005**

**Legal and Paralegal Services - Employees and Contractors**

**Attorneys:**

Brian E. McGovern           \$240.00 per hour

Associates Range       \$180.00 - \$150.00 per hour

Law Clerks:               \$ 55.00 per hour

Paralegals:               \$ 75.00 per hour

**Other services:**

Reproduction               As charged by vendor or \$.20 per page for large projects done  
in the office. No charge for smaller projects.

Services from Vendors:     As charged

Long Distance Telephone:   No charge

Long Distance Facsimile:   As charged

Computer Legal Research:   As charged

## STATEMENT OF FINANCIAL AGREEMENTS

As of January 15, 2005

1. Fees. Fees billed to clients reflect our judgment of the fair value of those legal services reasonably required. We account for our time in tenths of an hour and fees are calculated by applying hourly rates assigned to our attorneys and other staff. Activities for which you will be charged include but are not limited to the following:

- Meetings between you/your representatives and our attorneys or other staff members;
- Inter-office meetings related specifically to this matter;
- Telephone conferences between you/your representatives and attorneys or other staff members;
- Telephone conferences with parties outside this firm which relate specifically to this matter;
- Time required to prepare for necessary meetings, negotiations, depositions, hearings, and/or trial;
- Attendance at necessary meetings, negotiations, depositions, hearings, and/or trial including necessary travel time;
- Time required to dictate correspondence on your behalf;
- Time required to prepare court pleadings, contracts, agreements and other documents as necessary to protect your rights and interests;
- Necessary review of this matter and documents related to this matter.

On occasion, we may contract to have legal and paralegal services provided by others. In such cases you will be billed at an hourly rate that represents the then current rate applicable to our professional staff regardless of the amount and the method of charge to us. All rates are reviewed annually and may be adjusted periodically. The current range of rates and the rate for the specific members of our professional staff who will be involved at this time are set forth on Schedule 1. Changes in staffing may occur which could affect rates.

2. Other Charges. Circumstances that differ with each matter may require usage of various support systems and outside services. Therefore, you may incur costs in addition to professional fees. Certain charges and disbursements are billed to a client's account when such services are utilized. Examples of fees and charges are court reporting, expert witnesses, messenger services, travel expenses, long distance telephone and facsimile, overnight delivery, express mail, reproductions of large projects and computer research. We may also request that clients directly pay invoices of some vendors and some governmental fees.
3. Retainer. It is our policy to request new and, on occasion, existing clients to advance a retainer against our anticipated fees and costs. The retainer will be held in our general client trust account and any interest earned will be paid as required by law to a special Missouri State Bar fund. We are authorized at any time to apply the retainer to payment of outstanding invoices.
4. Billing Procedure. Ordinarily we will bill clients on a monthly basis, and, in any event, promptly upon request. Each invoice will separately state the amount of fees and costs. Because there is normally a lapse of time between rendering our services and mailing invoices, the full amount of each invoice is due upon receipt by the client. Although we seek to include all charges for a billing period, it is not uncommon for certain time and cost items from a prior billing period to appear in a subsequent invoice. If any time or costs are not included in an invoice, they may be included in a future invoice. Matters such as probate and trust services and certain financial transactions may involve billing at specified times other than monthly, as mutually agreed upon by the client and our firm. If fees are paid from a retainer, the client will be notified on a monthly basis.
5. Responses to Audit Letters. If a client engages an accountant to audit the client's financial statements, it is likely the accountant will request, during the audit, that we provide a written description of all pending or threatened claims or lawsuits to which we have given substantive attention on the client's behalf. This request is typically a standardized letter provided by the accountant which the client is requested to send to us. Our services in responding to these requests will be billed to the client in accordance with the regular hourly rates and other charges applicable to other legal services for the client.
6. Other Matters. Clients may terminate our legal services at any time effective upon delivery of written notice to the firm, provided that we shall be entitled to payment for all fees and costs incurred to the date of termination. Our right to terminate services is subject to certain Rules of Professional conduct (a) requiring reasonable steps by us to avoid foreseeable prejudice to the client from our withdrawal, and (b) establishing standards for mandatory and permissive withdrawal under certain circumstances. If a disagreement concerning our fees or charges results in arbitration or litigation, the prevailing party in the proceeding shall be entitled to reasonable attorney's fees and costs from the non-prevailing party.

McCarthy, Leonard, Kaemmerer,  
Owen, McGovern & Striler, L.C.  
ATTORNEYS AT LAW  
400 SOUTH WOODSMILL ROAD, SUITE 250  
ST. LOUIS, (CHESTERFIELD), MISSOURI 63017-0743  
(314-392-5200)  
FAX (314-392-5221)  
www.mlkllaw.com

THOMAS W. MCCARTHY III  
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ANDREW B. LEONARD  
JAMES C. OWEN  
BRIAN E. MCGOVERN\*\*  
ROBERT L. STRILER\*  
JAMES P. TOWEY, JR.\*  
TODD A. MASSA\*  
ROBERT W. HOFFMAN  
KATHERINE S. WALSH  
KEVIN T. MCLAUGHLIN  
ROBERT A. MILLER\*  
JAMES R. WALSH\*\*

KEISTEN L. MALY\*\*  
TRENTON K. BOND  
BRYAN K. KAEMMERER  
TIMOTHY J. ABERNETHY/STERSBARUMER

\* ALSO LICENSED IN ILLINOIS  
\*\* ALSO LICENSED IN INDIANA

August 15, 2005

PRIVILEGED & CONFIDENTIAL

Marilyn Jenkins Milner  
Associate General Counsel  
National Railroad Passenger Corporation  
60 Massachusetts Avenue, NE  
Washington, DC 20002

Re: Engagement Letter

Dear Ms. Milner:

We appreciate the opportunity to represent you regarding the dispute with St. Louis Station Partners and any other issues that may arise. We look forward to working with you on this matter.

Although we would prefer a less formal beginning to this relationship, written confirmation of our terms is required for many clients, and can be useful in all cases to prevent misunderstandings. We therefore enclose a copy of our Statement of Financial Agreements which I ask you to review.

We often require clients to provide an advance deposit against anticipated legal services; however, we do not believe that is necessary in this instance. We will bill you monthly and you agree to pay those invoices promptly.

Please indicate that you have read and understood the terms of this retention agreement and the specifics contained in the attached Statement of Financial Agreement by dating, signing and returning to me the enclosed copy of this letter.

I will have overall responsibility for this matter. McCarthy, Leonard, Kaemmerer, Owen, McGovern & Striler, L.C. values its relationship with you, and I encourage you to communicate closely to assist us in providing the best possible legal services in the most efficient manner.

August 15, 2005

Page 2

For your records, our Federal I.D. # is 43-1329176.

Please do not hesitate to contact me regarding any questions or suggestions you may have.

McCARTHY, LEONARD, KAEMMERER,  
OWEN, McGOVERN & STRILER, L.C.

By:

  
BRIAN E. McGOVERN

Accepted on the \_\_\_\_\_ day of \_\_\_\_\_, 2005.

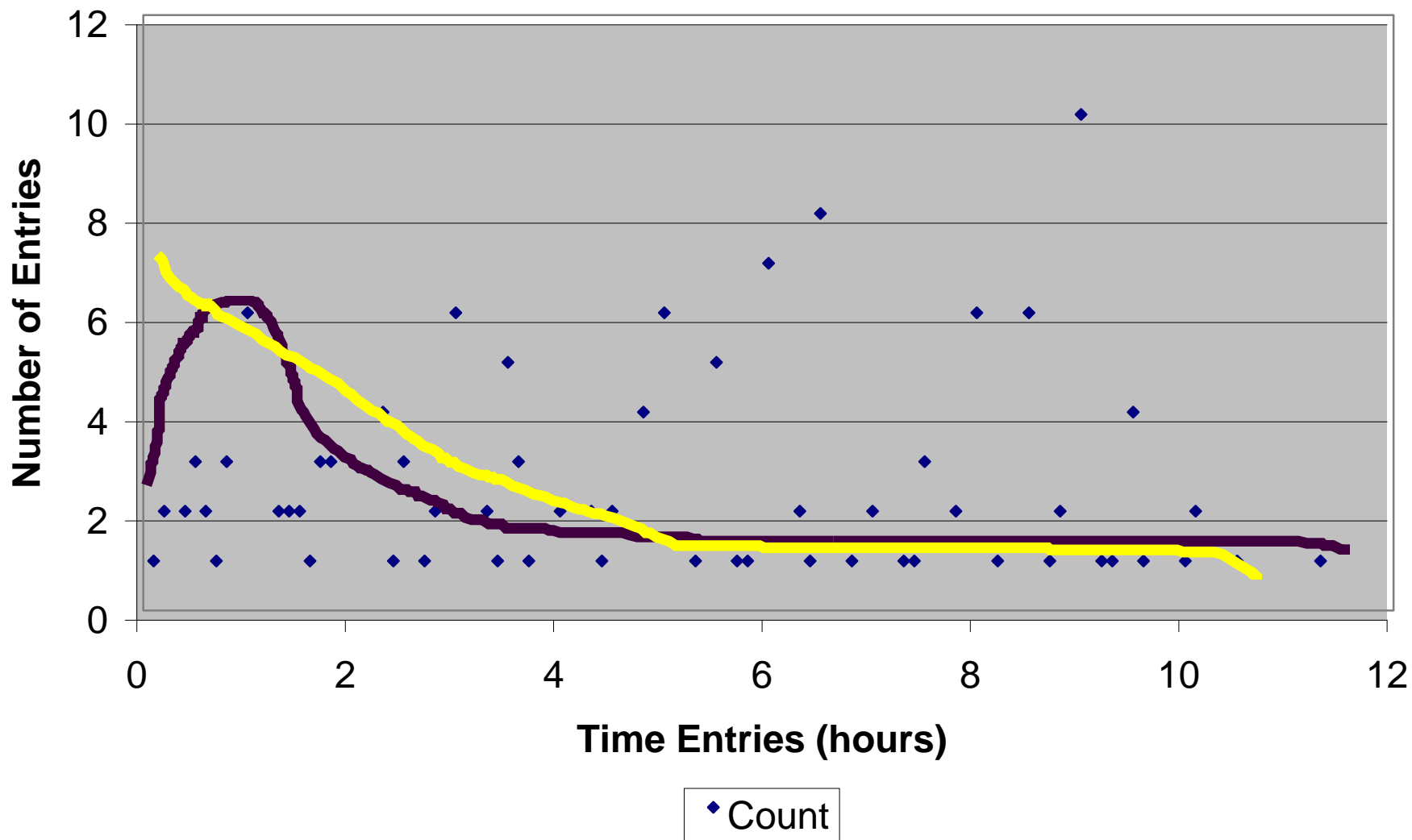
**NATIONAL RAILROAD PASSENGER CORPORATION**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

# Manatt: Distribution of Time Entries



# EXHIBIT 11



NATIONAL RAILROAD PASSENGER CORPORATION

PROCEDURES MANUAL

SECTION: EXEC-1  
PAGE: 1 OF 7  
ISSUE DATE: JUNE, 1992 *F. E. Weiderhold*  
ISSUED BY: F.E. WEIDERHOLD, JR.  
APPROVED BY: W.G. CLAYTOR, JR. *W. G. Claytor*

SUBJECT: DEPARTMENT OF INTERNAL AFFAIRS (OFFICE OF INSPECTOR GENERAL)

I. INTRODUCTION

Policy Statement

Amtrak has established the Department of Internal Affairs (Office of Inspector General) to conduct independent audits and investigations to promote the economy, efficiency and effectiveness of Amtrak operations, and prevent and detect fraud, waste and mismanagement.

Purpose

The purpose of this policy is to define the scope, authority and responsibilities of the Department of Internal Affairs (Office of Inspector General).

Scope

All Amtrak employees and operations.

Responsibility

The President and Inspector General are responsible for the interpretation and administration of this policy.

II. SCOPE OF INSPECTOR GENERAL ACTIVITIES

The scope of Department's activities include:

- Reviewing the reliability and integrity of financial and operating information.
- Reviewing the systems established to ensure compliance with policies, plans, procedures, laws and regulations, and determining the extent of non-compliance, if any.
- Reviewing security of assets and, as appropriate, verifying the existence of such assets.

NATIONAL RAILROAD PASSENGER CORPORATION

PROCEDURES MANUAL

SECTION: EXEC-1  
PAGE: 2 OF 7  
ISSUE DATE: JUNE, 1992 *F.E. Weiderhold*  
ISSUED BY: F.E. WEIDERHOLD, JR.  
APPROVED BY: W.G. CLAYTOR, JR.

SUBJECT: DEPARTMENT OF INTERNAL AFFAIRS (OFFICE OF INSPECTOR GENERAL)

- Appraising the economy and efficiency with which resources are employed.
- Receiving and investigating complaints or information from employees.
- Reviewing operations or programs to ascertain whether results are consistent with established objectives and goals and the operations or programs are conducted as planned.
- Performing internal investigations to detect and prevent fraud, waste and abuse within Amtrak activities.
- Conducting criminal investigations of fraud and white-collar crime.
- Conducting special examinations and investigations at the request of management and approved by the President.
- In coordination with Amtrak's Law and Government & Public Affairs Departments, reviewing existing and proposed legislation and regulations relating to Amtrak's economy and efficiency and the prevention and detection of waste, fraud, or abuse.

III. AUTHORITY

The Department of Internal Affairs (OIG) shall report to the President and have direct access to the Audit Committee of the Board of Directors to discuss significant audit matters.

The Department of Internal Affairs (OIG) is authorized full, free and unrestricted access to all Amtrak records, property or other materials necessary to conduct audits and investigations that are within the scope of the Inspector General's duties. In order to preserve confidentiality, appropriate internal procedures have been established to safeguard and maintain personal information obtained during investigations. The Inspector General is authorized to subpoena records and

NATIONAL RAILROAD PASSENGER CORPORATION

PROCEDURES MANUAL

SECTION: EXEC-1  
PAGE: 3 OF 7  
ISSUE DATE: JUNE, 1992 *N. Weiderhold*  
ISSUED BY: F.E. WEIDERHOLD, JR.  
APPROVED BY: W.G. CLAYTOR, JR.

SUBJECT: DEPARTMENT OF INTERNAL AFFAIRS (OFFICE OF INSPECTOR GENERAL)

other information necessary in the performance of such audits and investigations from entities other than Amtrak and federal agencies, and to obtain documents and information from federal agencies by methods other than subpoena.

IV. OBTAINING INFORMATION

All employees are responsible for providing requested assistance and information to the Inspector General in connection with the Inspector General's responsibilities. Such cooperation includes providing access to and, if necessary, the originals of all records, reports, audits, reviews, documents, papers, recommendations, or other materials which relate to OIG audits and investigations.

Amtrak employees at all levels will:

- (a) Be available for OIG interviews. Taking into consideration the need to preserve confidentiality and the identity of prospective witnesses, OIG staff will attempt to arrange a time for interviews so as to minimize disruptions to employees' work schedules.
- (b) Cooperate fully by disclosing complete and accurate information pertaining to matters under review;
- (c) In furtherance of Amtrak's Rules of Conduct, completely inform the OIG about matters of which they have knowledge or information related to fraud, waste, abuse or mismanagement in Amtrak programs.
- (d) Not conceal information or obstruct inspections, audits, special inquiries or investigations.
- (e) Be informed of their right under the Inspector General Act to be free from reprisal and retaliation.

NATIONAL RAILROAD PASSENGER CORPORATION

PROCEDURES MANUAL

SECTION: EXEC-1

PAGE: 4 OF 7

ISSUE DATE: JUNE, 1992 *W. G. Claytor, Jr.*

ISSUED BY: F.E. WEIDERHOLD, JR.

APPROVED BY: W.G. CLAYTOR, JR.

SUBJECT: DEPARTMENT OF INTERNAL AFFAIRS (OFFICE OF INSPECTOR GENERAL)

Employees are expected to provide complete information in response to questions and requests for documents. The failure to cooperate or furnishing of false or misleading information may result in disciplinary action against the employee.

V. RESPONSIBILITIES

The OIG is responsible for:

- Complying with the Government Audit Standards established by the Comptroller General of the United States as such may apply to Amtrak and other generally accepted auditing standards.
- Coordinating audit coverage with other audit/inspection units within Amtrak, Amtrak's public accountants and government audit agencies.
- Submitting annual plans to the President and Audit Committee.
- Reporting the results of audits and investigations to management, with recommendations for improvement.
- Reviewing plans or actions taken to correct reported findings.
- Providing the President and Audit Committee with quarterly activity reports highlighting significant accomplishments, findings, recommendations and administrative matters.
- Preparing semi-annual reports summarizing the activities of the Department of Internal Affairs in accordance with legislative requirements and format.
- Protecting the rights of employees under the Inspector General Act to be free from reprisal as a result of their cooperation with the OIG.

NATIONAL RAILROAD PASSENGER CORPORATION

PROCEDURES MANUAL

SECTION: EXEC-1  
PAGE: 5 OF 7  
ISSUE DATE: JUNE, 1992  
ISSUED BY: F.E. WEIDERHOLD, JR. *[Signature]*  
APPROVED BY: W.G. CLAYTOR, JR.

SUBJECT: DEPARTMENT OF INTERNAL AFFAIRS (OFFICE OF INSPECTOR GENERAL)

VI. ADMINISTRATIVE REPORTS

If an OIG investigation reveals employee conduct for which a disciplinary measure may be imposed, the procedures set forth below will be followed:

- The OIG will prepare an Administrative Report which summarizes the information ascertained during the investigation. However, before the OIG report is released, the OIG will interview the employee(s) involved to give the employee(s) an opportunity to respond to the allegation(s).
- Upon receipt of an OIG Administrative Report, the department head (or designee) of the employee's unit, shall consider the findings presented in the report and inform the OIG in writing, within the timeframe established by the Inspector General, of any subsequent decision acting on report recommendations.
- Prior to deciding on disciplinary action, the department head (or designee) will, however, give the affected employee an opportunity to discuss or otherwise respond to the applicable allegations in the OIG report and the applicable findings and recommendations that are set forth in the report. Any disciplinary action will be handled in accordance with applicable policies and/or procedures. Final decisions regarding discipline are entrusted to the department heads in which the individual is employed.

Management Disagreements with OIG Findings

If the OIG and management do not agree about the response to the Report findings, and after further discussion but not to exceed thirty days, the disagreement cannot be resolved, then the department head and/or Inspector General may request the President to review the bases for disagreement. The President will review all findings, recommendations, and related management and OIG comments, and will, thereafter, establish the company's position on the disputed issues.

NATIONAL RAILROAD PASSENGER CORPORATION

PROCEDURES MANUAL

SECTION: EXEC-1  
PAGE: 6 OF 7  
ISSUE DATE: JUNE, 1992 *F. E. Weiderhold, Jr.*  
ISSUED BY: F.E. WEIDERHOLD, JR.  
APPROVED BY: W.G. CLAYTOR, JR.

SUBJECT: DEPARTMENT OF INTERNAL AFFAIRS (OFFICE OF INSPECTOR GENERAL)

VII. FREEDOM FROM REPRISAL

Every employee has the responsibility to ask questions about and report suspected violations of the law or company policy which may result in fraud, waste, abuse or mismanagement. Employees are encouraged to report any concerns about wrongdoing to their supervisors where practicable; however, the OIG will receive all reports and ensure the employee(s) is free from reprisal.

- Employees shall be free from restraint, interference, coercion, or reprisal at any stage of the OIG's inquiry for communicating directly or indirectly (or from being perceived as communicating) information about which they reasonably believe indicates violations of law or company policy which may result in fraud, waste, abuse or mismanagement. Any employee who believes reprisal actions are being taken should immediately inform the OIG.
- Former employees who allege that action was taken against them as reprisal for protected disclosures to the OIG while they were employed at Amtrak may request the OIG to investigate their reprisal allegations.
- In those instances in which the Inspector General deems it necessary, the Inspector General, after advising the President of the relevant facts, may recommend actions which ensure employees are protected from reprisals.
- Any employee who makes a complaint(s) to the OIG with the knowledge that the complaint(s) is false, or the statement is made with willful disregard to the truth or falsity of the information, will be held accountable for such statements and subject to disciplinary action.

NATIONAL RAILROAD PASSENGER CORPORATION

PROCEDURES MANUAL

SECTION: EXEC-1  
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ISSUE DATE: JUNE, 1992 *F.E. Weidertold, Jr.*  
ISSUED BY: F.E. WEIDERTOLD, JR.  
APPROVED BY: W.G. CLAYTOR, JR.

SUBJECT: DEPARTMENT OF INTERNAL AFFAIRS (OFFICE OF INSPECTOR GENERAL)

VIII. RESPONSIBILITY FOR CORRECTIVE ACTION

Management is ultimately responsible for ensuring that reports of unsatisfactory conditions made by the Department of Internal Affairs (OIG) are properly evaluated for determining what action, if any, is to be taken in response; and for ensuring that necessary corrective action is taken. A written response outlining action taken or planned in response to reported unsatisfactory conditions must be submitted to the OIG within 30 days from receipt of audit or investigation reports or as otherwise directed.

# EXHIBIT 12



# WILLKIE FARR & GALLAGHER<sup>LLP</sup>

ROBERT J. MEYER  
202 303 1123  
rmeyer@willkie.com

1875 K Street, NW  
Washington, DC 20006-1238  
Tel: 202 303 1000  
Fax: 202 303 2000

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

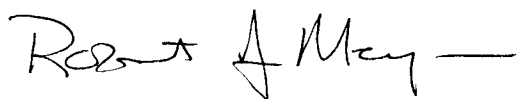
Re: Report on Matters Impairing the Effectiveness and Independence of the Office of  
Inspector General of the National Railroad Passenger Corporation (Amtrak)

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

**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.<sup>1</sup> 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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<sup>1</sup> 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.<sup>2</sup>

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."<sup>3</sup> Indeed, it is axiomatic that "[p]roblems with independence or conflicts of interest may impair objectivity."<sup>4</sup> 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."<sup>5</sup>

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<sup>2</sup> 155 Cong. Rec. S5132 (daily ed. May 8, 2009) (statement of Sen. Grassley).

<sup>3</sup> GAO Report, *Gov't Auditing Standards*, GAO-07-731G, at 27 n.19 (July 2007).

<sup>4</sup> *Id.*

<sup>5</sup> 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."<sup>6</sup> 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.<sup>7</sup>

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<sup>6</sup> H.R. Rep. No. 110-354, at 9 (2007).

<sup>7</sup> 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."<sup>8</sup>

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."<sup>9</sup>

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.<sup>10</sup> 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:<sup>11</sup>

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<sup>8</sup> S. Rep. No. 100-150, at 2 (1987).

<sup>9</sup> *Id.* (citing Pub. L. No. 784, 81st Cong.).

<sup>10</sup> *Id.* at 3.

<sup>11</sup> 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.”<sup>12</sup>
- 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.”<sup>13</sup>
- 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.”<sup>14</sup>

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.”<sup>15</sup> 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.<sup>16</sup>

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<sup>12</sup> 124 Cong. Rec. H10922 (daily ed. Sept. 27, 1978) (statement of Rep. Fountain).

<sup>13</sup> H.R. Rep. No. 100-1027, *supra* note 11, at 4.

<sup>14</sup> 124 Cong. Rec. S15870 (daily ed. Sept. 22, 1978) (statement of Sen. Eagleton).

<sup>15</sup> *Id.*

<sup>16</sup> 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.”<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> 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 . . . .”<sup>20</sup>

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.”<sup>21</sup>

## **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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<sup>17</sup> H.R. Rep. No. 100-1027, *supra* note 11, at 5.

<sup>18</sup> H.R. Rep. No. 110-354, at 9.

<sup>19</sup> *See generally* H.R. Rep. No. 100-1027, *supra* note 11.

<sup>20</sup> H.R. Rep. No. 110-354, *supra* note 18, at 9.

<sup>21</sup> 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](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.<sup>22</sup>

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.<sup>23</sup>

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.<sup>24</sup>

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").<sup>25</sup> Anticipating the

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<sup>22</sup> *Legislation to Establish Offices of Inspector General—H.R. 8588: Hearings before the Sen. Comm. on Gov't Affs.*, 95th Cong. 15 (1978).

<sup>23</sup> *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).

<sup>24</sup> 124 Cong. Rec. H2949 (daily ed. Apr. 18, 1978).

<sup>25</sup> 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.<sup>26</sup>

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.”<sup>27</sup> 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.<sup>28</sup> 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 . . . .”<sup>29</sup> The IG Reform Act made this standard explicit.<sup>30</sup>

Whether appointed by the President or the DFE head, IGs were not limited to a fixed term of office.<sup>31</sup> 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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<sup>26</sup> *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.

<sup>27</sup> *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.

<sup>28</sup> *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).

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

<sup>30</sup> The Inspector General Reform Act, Pub. L. No. 110-409, § 2, 122 Stat. 4305 (2008).

<sup>31</sup> 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."<sup>32</sup> 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.<sup>33</sup>

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[er]na during the course of any audit or investigation."<sup>34</sup>

**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.<sup>35</sup> 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.<sup>36</sup>

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.<sup>37</sup> 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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<sup>32</sup> 5 U.S.C. app. 3 § 8G(d).

<sup>33</sup> *Id.* § 6(a)(6).

<sup>34</sup> *Id.* § 8G(d).

<sup>35</sup> *Id.* § 5(b).

<sup>36</sup> *Id.* § 5(b)(1)

<sup>37</sup> *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.<sup>38</sup> 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.<sup>39</sup>

The committee also noted with approval that “inspectors general report extensive informal contact and reporting to the Congress during day-to-day operations.”<sup>40</sup> 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.”<sup>41</sup> 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.”<sup>42</sup>

**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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<sup>38</sup> H.R. Rep. No. 100-1027, *supra* note 11, at 21-22.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 23 (citing staff interviews with inspectors general).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

programs and operations of the [agency or DFE] as are, in the judgment of the Inspector General, necessary or desirable.”<sup>43</sup> 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.<sup>44</sup>

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.<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup>

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<sup>43</sup> 5 U.S.C. app. 3 § 6(a)(2).

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

<sup>45</sup> *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 Intergov’t Rel. & Human Res.).

<sup>46</sup> H.R. Rep. No. 95-584, at 6 (1977).

<sup>47</sup> *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.”<sup>48</sup>

**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.”<sup>49</sup>

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.<sup>50</sup>

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.<sup>51</sup> Congress enacted this provision in response to recommendations by GAO and others

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

<sup>49</sup> *Inspectors General: Action Needed to Strengthen OIGs at Designated Federal Entities*, *supra* note 44, at 5.

<sup>50</sup> 5 U.S.C. app. 3 § 8G(g)(2).

<sup>51</sup> 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.<sup>52</sup>

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 . . . .<sup>53</sup>

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.<sup>54</sup> 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<sup>55</sup> 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.<sup>56</sup> 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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<sup>52</sup> *Inspectors General: Independence of Legal Services Provided to IGs*, *supra* note 48, at 1.

<sup>53</sup> 5 U.S.C. app. 3 § 6(a)(1).

<sup>54</sup> *Id.* § 6(b)(2).

<sup>55</sup> *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.*

<sup>56</sup> 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.<sup>57</sup> 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.”<sup>58</sup>

This provision has consistently been interpreted to mean that the IG has *direct* access to information the IG is seeking.<sup>59</sup> 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.<sup>60</sup>

**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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<sup>57</sup> 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”).

<sup>58</sup> S. Rep. No. 100-150, *supra* note 8, at 5 (emphasis added).

<sup>59</sup> 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).

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



the Department.<sup>61</sup> 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.”<sup>62</sup>

**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.”<sup>63</sup> 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.<sup>64</sup> The *Auditing Standards* also set forth in detail the specific elements that characterize such independence, among them the following:<sup>65</sup>

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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<sup>61</sup> H. Rep. No. 95-584, *supra* note 46, at 6.

<sup>62</sup> 5 U.S.C. app. 3 § 4(d).

<sup>63</sup> *Id.* § 4(b)(1)(A).

<sup>64</sup> *Gov't Auditing Standards*, *supra* note 3, at Ch. 3.

<sup>65</sup> *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.<sup>66</sup> 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.”<sup>67</sup> 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.”<sup>68</sup> 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.<sup>69</sup> 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.<sup>70</sup> Nevertheless, the Senate report also noted that GAO had found that the existing

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<sup>66</sup> *Id.* at 30 (Sec. 3.04).

<sup>67</sup> 5 U.S.C. app. 3 § 7.

<sup>68</sup> *Id.* § 6(a)(9).

<sup>69</sup> *Id.* § 6(a)(3).

<sup>70</sup> 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.”<sup>71</sup> In another report, GAO listed Amtrak among the “agencies” not meeting government audit standards because of the organizational placement of its audit staff.<sup>72</sup> 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.<sup>73</sup> 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.<sup>74</sup>

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.”<sup>75</sup> 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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<sup>71</sup> 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).

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

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 30.

<sup>75</sup> 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**

<b>PRESIDENTIALLY APPOINTED IGS</b>	<b>DFE IGS</b>
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.<sup>76</sup> 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.<sup>77</sup>

The Councils did not have any authority to enforce the congressionally mandated safeguards in the Act for IG independence.<sup>78</sup> 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”).<sup>79</sup> Although the

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<sup>76</sup> 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>.

<sup>77</sup> *Id.* at 22.

<sup>78</sup> 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.

<sup>79</sup> 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.<sup>80</sup>
- Entity heads cannot delegate budget formulation and budget execution decisions regarding the IG to an officer or employee subordinate to the entity head.<sup>81</sup>
- 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.<sup>82</sup>
- 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.<sup>83</sup>

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.”<sup>84</sup>

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.<sup>85</sup> Among

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<sup>80</sup> *Id.* at 6.

<sup>81</sup> *Id.* at 6-7.

<sup>82</sup> *Id.* at 8.

<sup>83</sup> *Id.* at 9.

<sup>84</sup> 5 U.S.C. app. 3 § 4(b)(1)(A).

<sup>85</sup> *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.<sup>86</sup> Other problems cited by GAO involved unproductive relationships between IGs and their agencies' Offices of General Counsel.<sup>87</sup>

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.<sup>88</sup> 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.<sup>89</sup>

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."<sup>90</sup>
- 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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<sup>86</sup> GAO Report, *Inspectors General: Action Needed to Strengthen OIGs at Designated Federal Entities*, *supra* note 44, at 4.

<sup>87</sup> 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).

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

<sup>89</sup> *Gov't Auditing Standards*, *supra* note 3, at 29.

<sup>90</sup> 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."<sup>91</sup>

- **Organizational independence:** GAO has observed that IGs at DFEs such as Amtrak have the characteristics of internal auditors rather than external auditors.<sup>92</sup> 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.<sup>93</sup> 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."<sup>94</sup>

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.<sup>95</sup> 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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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 5.

<sup>93</sup> *Gov't Auditing Standards*, *supra* note 3, at 39.

<sup>94</sup> *Id.* at 40.

<sup>95</sup> *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.”<sup>96</sup>

- “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.”<sup>97</sup>
- “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 . . . .”<sup>98</sup>
- 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.”<sup>99</sup>
- 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 . . . .”<sup>100</sup>
- 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.”<sup>101</sup>
- OCIG “evaluates the legal sufficiency of OIG recommendations and develops formal legal opinions to support these recommendations. When appropriate, the

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.* 20,148.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* 20,149.

<sup>101</sup> *Id.*

office coordinates formal legal opinions with the HHS Office of the General Counsel.”<sup>102</sup>

- 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.<sup>103</sup>

#### **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 Wilkie 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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<sup>102</sup> *Id.*

<sup>103</sup> *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.<sup>104</sup> 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.<sup>105</sup> 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.<sup>106</sup> 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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<sup>104</sup> 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).

<sup>105</sup> *Amtrak Management – Systemic Problems Requiring Actions to Improve Efficiency, Effectiveness, and Accountability*, *supra*, at 118-123.

<sup>106</sup> 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*.<sup>107</sup>

- 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.<sup>108</sup> 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.<sup>109</sup>

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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<sup>107</sup> *Id.* at 10.

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

<sup>109</sup> 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.<sup>110</sup> 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,”<sup>111</sup> 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<sup>112</sup> and the JRT's report was publicly released.<sup>113</sup> 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.<sup>114</sup> 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.”<sup>115</sup> 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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<sup>110</sup> Undated draft letter from Fred Weiderhold to Chairman Young and Rep Mica at 2.

<sup>111</sup> Oct. 24, 2006 Letter from Fred Weiderhold to John W. Toothman.

<sup>112</sup> Anna Palmer, *Report Shows Law Firms' Railroad Ties*, Legal Times, Nov. 7, 2006.

<sup>113</sup> Offices of Inspector General: Joint Review Team, Review of Amtrak's Management of Outside Legal Services, *supra* note 104.

<sup>114</sup> Palmer, *supra* note 112.

<sup>115</sup> 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").<sup>116</sup> 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.<sup>117</sup> Amtrak's Law Department subsequently received copies of both referral letters from a Legal Times reporter.<sup>118</sup>

Upon learning about the congressional referral letters to DOJ, Amtrak's then General Counsel Alicia Serfaty, concerned about the allegations of unlawful conduct,<sup>119</sup> sought, under section VI of Amtrak's 1992 "EXEC-1" (Amtrak's internal procedures relating to the OIG),<sup>120</sup> "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,<sup>121</sup> 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."<sup>122</sup>

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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<sup>116</sup> Nov. 17, 2006 Letter from Chairman Young and Rep. Mica to OIG.

<sup>117</sup> Dec. 4, 2006 Letter from Chairman Young & Rep. Mica to the Attorney General.

<sup>118</sup> Memorandum from Alicia Serfaty to Fred Weiderhold on the Joint Review (Dec. 12, 2006).

<sup>119</sup> *Id.*

<sup>120</sup> See section IV.C *infra*.

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

<sup>122</sup> *Id.*

Board of Directors with prompt notifications and reports at the conclusion of investigations where Board or management action “may be warranted.”<sup>123</sup>

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.<sup>124</sup> 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.<sup>125</sup>

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.<sup>126</sup> 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.<sup>127</sup> 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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<sup>123</sup> Memorandum from Hamilton Peterson to David Laney on Your Memorandum of Dec. 20, 2006, Request for Information & Supporting Documentation (Dec. 28, 2006).

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

<sup>125</sup> Feb. 22, 2007 Letter from Zuckerman Spaeder LLP to OIG; Mar. 28, 2007 Letter from OIG to Zuckerman Spaeder LLP.

<sup>126</sup> Conversation with D. Hamilton Peterson memo.

<sup>127</sup> *Id.*

Law Department.<sup>128</sup> 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.<sup>129</sup> 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.<sup>130</sup>

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

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*; Draft Memorandum of Understanding Regarding Privileged Materials (undated).

<sup>130</sup> Draft Fried Frank Revision of the Memorandum of Understanding Regarding Privileged Materials (May 16, 2007).

<sup>131</sup> Peterson conversation, *supra* note 126.

<sup>132</sup> Oct. 2, 2007 handwritten note from Eleanor Acheson to Fred Weiderhold.

<sup>133</sup> Oct. 10, 2007 e-mail from David Laney to Fred Weiderhold.

<sup>134</sup> 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.<sup>135</sup> Ultimately, the IG believed he had no choice and signed the protocol on October 10, 2007.<sup>136</sup>

### 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.<sup>137</sup> 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 its work—except where notification would be “inappropriate.” It also states that the OIG

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<sup>135</sup> *Id.*

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

<sup>137</sup> *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.”<sup>138</sup>

**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.<sup>139</sup> Kerrine responded that “it was necessary for him to speak with Eleanor Acheson, General Counsel, prior to releasing the records to the OIG.”<sup>140</sup> 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.<sup>141</sup> 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.<sup>142</sup> According to the OIG, the Claims Department had “previously provided similar information to the New York Times pursuant to a FOIA request.”<sup>143</sup> Black was informed by Amtrak Deputy General Counsel Charles Mandolia that the request

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<sup>138</sup> 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.*

<sup>139</sup> *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.

<sup>140</sup> Kerrine memo, *supra*.

<sup>141</sup> Memorandum from James Tatum to Colin Carriere on Law Department at 2 (Aug. 2008).

<sup>142</sup> Undated note from Jeff Black to Charles Mandolia.

<sup>143</sup> *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."<sup>144</sup>

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.<sup>145</sup> 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.<sup>146</sup> 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.<sup>147</sup>

In August 2008, an OIG agent scheduled an interview with Kerrine regarding "an investigatory matter."<sup>148</sup> 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.<sup>149</sup> 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,<sup>150</sup> and that the Law

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> July 2, 2008 e-mail from Eleanor Acheson to Colin Carriere.

<sup>147</sup> 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.

<sup>148</sup> Tatum memo, *supra* note 141, at 6.

<sup>149</sup> Memorandum from OIG answering questions regarding Defeased Leases issue.

<sup>150</sup> *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.<sup>151</sup>

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.<sup>152</sup> 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.<sup>153</sup> OIG Counsel Colin Carriere replied that it was unacceptable for Babcock & Brown to permit the Law Department to review the documents to be produced,<sup>154</sup> 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.<sup>155</sup> 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."<sup>156</sup> On February 20, 2009, O'Melveny & Myers produced to the OIG documents responsive to the subpoena following the Law Department review.<sup>157</sup>

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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<sup>151</sup> Sept. 9, 2008 e-mail from Fred Weiderhold to Steve Patterson.

<sup>152</sup> OIG Subpoena No. 08-47 (Dec. 29, 2008).

<sup>153</sup> Feb. 11, 2009 Letter from O'Melveny & Myers LLP to OIG.

<sup>154</sup> Feb. 13, 2009 Letter from OIG to O'Melveny & Myers LLP.

<sup>155</sup> Feb. 13, 2009 Letter from Law Dep't to O'Melveny & Myers LLP.

<sup>156</sup> *Id.*

<sup>157</sup> Feb. 20, 2009 Letter from O'Melveny & Myers LLP to OIG.

copies to the Amtrak Law Department for a privilege review.<sup>158</sup> The documents eventually were provided to OIG after Law Department review.<sup>159</sup>

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.<sup>160</sup> 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."<sup>161</sup> 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.<sup>162</sup> 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.<sup>163</sup> On March 31, 2009, the OIG received the documents from Kobre & Kim.<sup>164</sup>

### 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.<sup>165</sup> 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.<sup>166</sup>

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<sup>158</sup> Jan. 21, 2009 e-mail from Patton Boggs LLP to OIG.

<sup>159</sup> Memorandum from OIG answering questions regarding Defeased Leases issue.

<sup>160</sup> Mar. 3, 2009 e-mail from Kobre & Kim LLP to OIG.

<sup>161</sup> Mar. 4, 2009 e-mail from Kobre & Kim LLP to OIG.

<sup>162</sup> Memorandum from OIG to Law Department on Defeased Loans Amount Requested (Mar. 26, 2009).

<sup>163</sup> Mar. 30, 2009 e-mail and memorandum from Law Department to OIG.

<sup>164</sup> Mar. 31, 2009 e-mail from Kobre & Kim LLP to OIG.

<sup>165</sup> Referral Memorandum from John Grimes to Alex Kummant (Oct. 24, 2008).

<sup>166</sup> *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.<sup>167</sup> 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.<sup>168</sup> On August 15, 2008, General Counsel Acheson called Grimes to inform him that she had the personnel documents he had requested.<sup>169</sup> On August 22, 2008, Grimes picked up the documents, which he identified as two Board meeting minutes, one of which had been redacted.<sup>170</sup>

#### 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.<sup>171</sup>

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.<sup>172</sup> 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."<sup>173</sup> Scheffler's efforts to obtain the information continued throughout July.<sup>174</sup> On August 4, 2008, the Strategic Partnerships Department forwarded several responsive e-mails to the OIG and

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<sup>167</sup> Memorandum from John Grimes to Phyllis Sciacca on Moynihan Station Project Manager Investigation Docs (May 5, 2009).

<sup>168</sup> June 26, 2008 e-mail from Anne Witt to John Grimes.

<sup>169</sup> Grimes memo, *supra* note 167.

<sup>170</sup> *Id.*

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

<sup>172</sup> *Id.*

<sup>173</sup> July 2, 2008 e-mail from Amtrak Strategic Partnerships Department to OIG.

<sup>174</sup> 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.<sup>175</sup> 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.<sup>176</sup> The whistleblower provided documents to substantiate the allegations.<sup>177</sup> RSI retained Decker, Hallman, Barber & Briggs ("Decker") to represent it in the investigation.<sup>178</sup>

In connection with the investigation, the OIG made a number of document requests to RSI<sup>179</sup> 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."<sup>180</sup> 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.<sup>181</sup>

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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<sup>175</sup> Aug. 4, 2008 e-mail from Strategic Partnerships Department to OIG.

<sup>176</sup> Memorandum Regarding Response to Rail Sciences Issues provided by OIG (undated).

<sup>177</sup> *Id.*

<sup>178</sup> Weiderhold memo, *supra* note 1.

<sup>179</sup> Subpoena issued by OIG to RSI Custodian of Records (Dec. 14, 2007).

<sup>180</sup> Jan. 30, 2008 Letter from OIG to Decker at 3.

<sup>181</sup> Mar. 24, 2008 Letter from Decker to OIG at 1.

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

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.<sup>184</sup>

#### 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.<sup>185</sup> 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.<sup>186</sup> 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."<sup>187</sup> 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.<sup>188</sup>

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

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<sup>182</sup> Mar. 31, 2008 Letter from Law Department to Decker and OIG at 1.

<sup>183</sup> *Id.* at 2.

<sup>184</sup> Apr. 14, 2008 Letter from Decker to OIG and Law Department at 2.

<sup>185</sup> Jan. 28, 2008 e-mail from OIG to Engineering Department.

<sup>186</sup> Memorandum from OIG providing information for Rocla Audit Write-Up at 1 (May 6, 2009).

<sup>187</sup> Feb. 11, 2009 e-mail from Engineering to OIG.

<sup>188</sup> Memorandum from Cheryl Chambers to Kathi Ranowsky on Rocla - Request for Information (Aug. 7, 2008).

<sup>189</sup> 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.<sup>190</sup>

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.<sup>191</sup> 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.”<sup>192</sup>

On June 17, 2008, the Law Department provided documents responsive to the OIG’s June 5, 2008 request but the production was incomplete.<sup>193</sup> 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.<sup>194</sup> In addition, the production designated certain documents as “privileged, confidential, proprietary.”<sup>195</sup> 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.”<sup>196</sup>

#### 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.<sup>197</sup> Amtrak’s CFO is the designated point of contact for all ARRA

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<sup>190</sup> June 5, 2008 e-mail from Law Department to OIG.

<sup>191</sup> June 10, 2008 e-mail from Law Department to OIG.

<sup>192</sup> *Id.*

<sup>193</sup> June 17, 2008 Letter from Law Department to OIG; Weiderhold memo, *supra* note 1, at 6.

<sup>194</sup> Weiderhold memo, *supra* note 1.

<sup>195</sup> June 17, 2008 Letter from Law Department to OIG.

<sup>196</sup> *Id.*

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

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

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.<sup>200</sup> The OIG did not agree to this protocol or participate in its formulation.<sup>201</sup> The Law Department was then copied on various transmittals of documents and information from the CFO to the OIG.<sup>202</sup> 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.<sup>203</sup>

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

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<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> Mar. 23, 2009 e-mail from DJ Stadtler to Fred Weiderhold; OIG memorandum of ARRA issues.

<sup>201</sup> May 6, 2009 e-mail from K. Ranowsky to K. Elias.

<sup>202</sup> *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 Documentation #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).

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

<sup>204</sup> OIG memorandum of ARRA issues.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*; *see also* May 11, 2009 e-mail from Law Department to OIG.

<sup>208</sup> 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.<sup>209</sup> To partially address this issue, the Law Department has offered to permit the OIG access to the documents via the third party's website;<sup>210</sup> however, such access would be monitored by the third party.<sup>211</sup>

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.<sup>212</sup> 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.<sup>213</sup>

#### *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 . . ." <sup>214</sup> 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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<sup>209</sup> May 6, 2009 e-mail from Law Department to OIG; OIG memorandum of ARRA issues.

<sup>210</sup> OIG memorandum of ARRA issues.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> 5 U.S.C. app. 3 § 8G(g)(2).

working relationship between the OIG and the HR Department with respect to OIG personnel.<sup>215</sup> 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.”<sup>216</sup> 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).<sup>217</sup> 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 . . . .”<sup>218</sup>

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.<sup>219</sup> However, the 2008 IG Reform Act established new and specific parameters and adjustments for the salary levels of DFE IGs.<sup>220</sup> 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.<sup>221</sup> 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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<sup>215</sup> Memorandum of Understanding Concerning Human Resources Authorities and Services Between Amtrak’s Office of the Inspector General and Human Resources (June 1999) (“1999 MOU”).

<sup>216</sup> *Id.* at 1.

<sup>217</sup> *Id.* at 1, 3.

<sup>218</sup> *Id.* at 2.

<sup>219</sup> *See* 1999 MOU at 1; 5 U.S.C. app. 3 § 8G(d).

<sup>220</sup> Pub. L. No. 110-409 § 4(b), *supra* note 30.

<sup>221</sup> *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.<sup>222</sup> The IG has routinely exercised independent authority over OIG staffing and compensation in the past.<sup>223</sup> 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.<sup>224</sup> 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."<sup>225</sup> 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."<sup>226</sup> 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.<sup>227</sup>

## *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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<sup>222</sup> 1999 MOU § 2.

<sup>223</sup> See Jan. 15, 2009 e-mail from Donna McLean to Lorraine Green.

<sup>224</sup> Jan. 8, 2009 e-mail from Eleanor Acheson to Bret Coulson.

<sup>225</sup> Signing Statement for H.R. 928, Inspector General Reform Act of 2008 (Oct. 14, 2008).

<sup>226</sup> *Id.*

<sup>227</sup> 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.<sup>228</sup>

## **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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<sup>228</sup> 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 its 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.<sup>229</sup>

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<sup>229</sup> 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.<sup>230</sup> 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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<sup>230</sup> 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.<sup>231</sup> 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.<sup>232</sup>

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,<sup>233</sup> and documents transferred to an OIG in connection with an audit or investigation remain privileged, proprietary, confidential, and classified.<sup>234</sup>

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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<sup>231</sup> Statement of Sen. Eagleton, *supra* note 14; statement of Rep. Fountain, *supra* note 12.

<sup>232</sup> 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.

<sup>233</sup> 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).

<sup>234</sup> 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.<sup>235</sup>

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,<sup>236</sup> 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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<sup>235</sup> June 19, 2007 Letter from Fried Frank LLP to OIG.

<sup>236</sup> 5 U.S.C. app. 3 § 8G(d).

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

**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.<sup>239</sup>

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<sup>237</sup> 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.").

<sup>238</sup> 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>.

<sup>239</sup> *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.<sup>240</sup> 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.<sup>241</sup> 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."<sup>242</sup> 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."<sup>243</sup>

### **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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<sup>240</sup> 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.

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

<sup>242</sup> 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).

<sup>243</sup> Jan. 8, 2009 e-mail from Eleanor Acheson to Bret Coulson.

it wants to restrict an agency's spending flexibility."<sup>244</sup> 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."<sup>245</sup> 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."<sup>246</sup> 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.<sup>247</sup> 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.<sup>248</sup>

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

<sup>245</sup> Tobias A. Dorsey, *Legislative Drafter's Deskbook* §6.55 (2006).

<sup>246</sup> *Id.*

<sup>247</sup> OMB *Guidance*, *supra* note 79.

<sup>248</sup> 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.<sup>249</sup> 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.<sup>250</sup> In turn, an essential component of an inspector general's independence is unfettered access to documents and information.<sup>251</sup> 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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<sup>249</sup> 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.

<sup>250</sup> *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.

<sup>251</sup> 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.<sup>252</sup> 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.<sup>253</sup>

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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<sup>252</sup> 5 U.S.C. app. 3 § 8G(d).

<sup>253</sup> 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.<sup>254</sup>

**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 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."<sup>255</sup>

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.<sup>256</sup> 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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<sup>254</sup> 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.

<sup>255</sup> *Inspectors General: Many Lack Essential Tools for Independence*, *supra* note 238, at 3, 32.

<sup>256</sup> *Id.* at 18-21.

even an agency head is limited in the measures it may take to limit an inspector general's spending.<sup>257</sup>

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 . . . ."<sup>258</sup> 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.<sup>259</sup> 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."<sup>260</sup> 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.<sup>261</sup>

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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<sup>257</sup> *Id.* at 19 (discussing agency "micromanagement" of inspector general spending as a potential violation of the IG Act).

<sup>258</sup> 5 U.S.C. app. 3 § 8G(g)(2).

<sup>259</sup> *Id.* § 8G(d).

<sup>260</sup> 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.

<sup>261</sup> *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."<sup>262</sup> We recommend that such meetings occur in

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<sup>262</sup> 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.

# **EXHIBIT A**

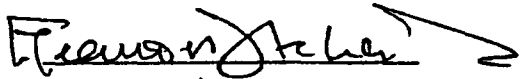
**AGREED PROTOCOL OF THE AMTRAK OFFICE OF INSPECTOR GENERAL AND LAW DEPARTMENT  
REGARDING DISCLOSURE OF PRIVILEGED, CLASSIFIED, PROPRIETARY OR OTHER CONFIDENTIAL  
INFORMATION**

October 10, 2007

1. It is in the best interests of Amtrak that Amtrak's Office of Inspector General ("OIG") and Law Department work cooperatively to facilitate and to expedite OIG investigations, audits and reviews (collectively, "investigations"), and to the extent legally permissible, to limit disclosure of any privileged, classified, proprietary or other confidential information and materials obtained or developed in such investigations to the extent reasonably necessary to protect the interests of Amtrak. This memo outlines the protocol adopted by the OIG and the Law Department to that effect.
2. In connection with any investigation undertaken by the OIG, the OIG is entitled to obtain and review any and all information from any Amtrak department that the OIG considers necessary or appropriate to the conduct of such investigation.
3. The OIG shall not disclose to any third party any Amtrak information obtained or reviewed in connection with an investigation, except
  - a. To the Department of Justice ("DOJ"), in response to a request from the DOJ or in connection with a referral to, or discussion with, the DOJ from the OIG;
  - b. As required of the OIG by applicable law or regulation, to any third party ; provided that prior to any such disclosure, the OIG shall notify the Law Department of such request (consistent with applicable law), and afford the Law Department reasonable opportunity to
    - i. review the information to be disclosed for purposes of identifying privileged, classified or proprietary information, and
    - ii. take action appropriate to restrict or limit disclosure of such information. The OIG and Law Department recognize that under certain circumstances the legal duty of the OIG to disclose may not afford an opportunity for prior review and protective action by the Law Department; under any such circumstance, the OIG will use its best efforts to work with the third party to whom such disclosure is to be made to develop such opportunity. Any prior review and action by the Law Department shall be on an expedited basis.

4. In connection with any such prior review, it shall be the responsibility and duty of the Law Department to determine whether information subject to any disclosure request under 3(b) above is privileged, classified, proprietary or confidential to Amtrak.

  
Fred E. Weiderhold  
Amtrak Inspector General

  
Eleanor D. Acheson  
Amtrak General Counsel  
October 15, 2007



# **EXHIBIT B**

SUBJECT	CLASSIFICATION	DATE APPROVED	P/I NUMBER
Office of the Inspector General	Inspector General	November 5, 2007	2.1.1

1.0 PURPOSE

The purpose of this policy is to summarize the scope, authority, responsibilities and oversight of the OIG and that of Amtrak personnel in cooperating with or responding to the OIG. This policy is intended to clarify the duties and responsibilities of the OIG and of Amtrak personnel in connection with OIG activities; it is not intended to limit or otherwise derogate in any manner the statutory authority, obligations or rights of the OIG.

2.0 SCOPE

The policies contained herein shall apply to all Amtrak personnel and operations.

3.0 STATEMENT OF POLICY

3.1 Pursuant to the Inspector General Act of 1978, as amended, Congress has required that Amtrak establish an independent and objective Office of Inspector General ("OIG") in order to:

- (a) provide policy direction for, and to conduct, supervise and coordinate, audits and investigations relating to programs and operations of Amtrak;
- (b) recommend policies for, and to conduct, supervise or coordinate, other activities carried out or financed by Amtrak for the purpose of promoting economy and efficiency in the administration of, or preventing and detecting fraud and abuse in, Amtrak's programs and operations;
- (c) conduct independent reviews, audits, inspections and investigations to prevent, detect and deter fraud, waste, abuse and mismanagement in Amtrak programs and operations;
- (d) recommend policies for, and to conduct, supervise or coordinate, relationships between Amtrak and other Federal, State and local governmental agencies and nongovernmental entities with respect to (i) all matters relating to the promotion of economy and efficiency in the administration of, or the prevention and detection of fraud and abuse in, programs and operations administered or financed by Amtrak or (ii) the identification and prosecution of participants in such fraud or abuse;
- (e) keep the head of Amtrak (as defined by the IG Act) and the Congress fully and currently informed concerning fraud and other serious problems, abuses and deficiencies at Amtrak, to recommend corrective action concerning such matters and to report on progress made in implementing such corrective action; and
- (f) perform such other duties as may be otherwise provided in the IG Act.

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#### 4.0 RESPONSIBILITY

The head of Amtrak and the Amtrak Inspector General ("Inspector General") are responsible for the interpretation and administration of this policy. As of the date of this policy, the "head" of Amtrak is defined as the Chairperson of the Board of Directors of Amtrak (the "Chair").

#### 5.0 AUTHORITY

- 5.1 Primary Reporting Responsibility; Access. The Inspector General shall report to and be under the general supervision of the Chair but shall not report to or be subject to supervision by any other officer or employee of Amtrak. The Chair shall not prevent or prohibit the Inspector General from initiating, carrying out or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation. The OIG shall have direct access to all Board Committees to discuss significant matters within the scope of the Committees' responsibilities.
- 5.2 Access to Information. 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.
- 5.3 Privileged and Confidential Information. With respect to Amtrak information obtained or developed by the OIG in connection with any review, audit, inspection or investigation that is confidential, classified, proprietary or privileged, no such information shall be disclosed by the OIG to any third party unless the OIG is legally required to do so; provided, that under no circumstances (except as may be required by law) shall the OIG release, report or disclose any privileged or classified information to any third party without the Inspector General informing the Amtrak General Counsel in such a manner as to provide the Amtrak Law Department with reasonable opportunity to protect any applicable privileged or classified information. The Inspector General and the Amtrak General Counsel may from time to time develop and implement a more detailed protocol regarding the management and disclosure of confidential, classified, proprietary or privileged information consistent with this paragraph.

#### 6.0 OVERSIGHT

- 6.1 Reports. Pursuant to the IG Act, the Inspector General is required to keep the Chair fully and currently informed by means of reports and other briefings concerning fraud and other serious problems, abuses and deficiencies relating to the administration of programs and operations of Amtrak, to recommend corrective action concerning such problems, abuses, and deficiencies and to report on the progress made in implementing such corrective action. In that regard, the Inspector General shall:

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SUBJECT	CLASSIFICATION	DATE APPROVED	P/I NUMBER
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- (a) Annual OIG Budget. At least 90 days prior to the end of each fiscal year of Amtrak, furnish the Chair with a draft OIG departmental budget for the ensuing year. Such budget shall be accompanied by actual year-to-date information comparing current year performance to budget and to prior year performance and shall detail year-by-year activity levels and changes in headcount and aggregate department compensation (including benefits);
- (b) Semiannual Reports. Provide the Chair with a preliminary draft of the semiannual reports required to be transmitted to Congress pursuant to Section 5 of the IG Act, no later than April 15 and October 16 of each year;
- (c) Regular Reports to Chair. Meet with the Chair no less than quarterly, and more frequently as the Chair shall direct, to keep the Chair fully and currently informed concerning the ongoing activities of the OIG, including fraud and other serious problems, abuses and deficiencies relating to the administration of programs and operations administered or financed by Amtrak; to recommend corrective action concerning such problems, abuses, and deficiencies; and to report on the progress made in implementing such corrective action; and
- (d) Immediate Reports to Chair. Report immediately to the Chair whenever the Inspector General becomes aware of particularly serious or flagrant problems, abuses or deficiencies relating to Amtrak programs or operations, or whenever, in the judgment of the Inspector General, information or assistance requested by the OIG is unreasonably refused or not provided by Amtrak personnel or from any Federal, State or local governmental agency.
- 6.2 Conflicts. In any case in which the Chair is or could become involved in any review, audit, inspection or investigation by the OIG, the Inspector General shall provide the reports or notices otherwise required by the IG Act or this policy to a Vice Chair of the Amtrak Board of Directors. In any case in which the Chair and the Vice Chairs are or could become involved in any review, audit, inspection or investigation by the OIG, the Inspector General shall provide the reports or notices otherwise required by the IG Act or this policy to the head of the Audit and Finance Committee of the Amtrak Board of Directors.
- 6.3 Publicity. No representative of the OIG shall participate in any public announcement, presentation or other disclosure of an Amtrak review, audit, inspection or investigation, or any contents, conclusions or recommendations thereof, without prior approval from the Inspector General and without the Inspector General providing reasonable prior notice to the Chair.

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## 7.0 OBTAINING INFORMATION

- 7.1 OIG Access to Information; Amtrak Employee Responsibilities. All employees are responsible for providing requested assistance and information to the OIG in connection with the duties and responsibilities of the OIG. Such cooperation includes providing timely and complete access to, copies of and, if necessary, original records, reports, audits, reviews, documents, papers, recommendations or other tangible materials that relate to OIG reviews, audits, inspections and investigations. In particular, Amtrak personnel at all levels shall:
- (a) be available for OIG interviews;
  - (b) cooperate fully by disclosing complete and accurate information pertaining to matters under review;
  - (c) completely and truthfully inform the OIG about matters of which they have knowledge or information related to fraud, waste, abuse or mismanagement in Amtrak programs;
  - (d) not conceal information or obstruct or mislead inspections, audits or special inquiries or investigations; and
  - (e) be informed of the provision under the IG Act providing protection from reprisal and retaliation.
- 7.2 Failure to Cooperate. The failure to cooperate with or the intentional furnishing of false or misleading information to the OIG by Amtrak employees, contract personnel or representatives may result in disciplinary action, contract termination and other sanctions.
- 7.3 Informing Department Heads and Managers. In connection with any review, audit, inspection or investigation that requires representatives of the OIG to identify, review or collect information through Amtrak employees, the OIG shall first notify (unless, in the judgment of the Inspector General, such notification would be inappropriate under the circumstances) the head of the Amtrak department in which such employees work of such activity and, without impeding the nature, focus or pace of such review, audit, inspection or investigation, shall use its best efforts to minimize the disruption of normal operations in such department. The OIG may require that the department head maintain any necessary confidentiality. When appropriate, the OIG should keep department heads and managers informed, through initial and periodic briefings or interim reports, of the purpose, nature and content of OIG activities concerning their respective programs or operations.

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8.0 DEPUTY TO REPORT: FREEDOM FROM REPRISAL

- 8.1 Reporting Responsibility. Every Amtrak employee has the responsibility to report suspected violations of the law or Amtrak policy that could result in fraud, waste, abuse or mismanagement.
- 8.2 No Reprisal. All Amtrak employees shall be free from restraint, interference, coercion or reprisal at any stage of any OIG inquiry for communicating directly or indirectly (or from being perceived as communicating) information about which they reasonably believe indicates violations of law or company policy which could result in fraud, waste, abuse or mismanagement. Any Amtrak employee who believes that action has been or is being taken constituting restraint, interference, coercion or reprisal as a result of cooperating with the OIG should immediately inform the OIG of such action.
- 8.3 Former Employees. Former employees who allege that action was taken against them as reprisal for protected disclosures to the OIG while they were employed at Amtrak may request the OIG to investigate their reprisal allegations.
- 8.4 False Complaints. Any employee who makes a complaint to the OIG with the knowledge that the complaint is false or that it is made with willful disregard for the truth of the information may be held accountable for such statements and may be subject to disciplinary action.

9.0 COMMUNICATING RESULTS

- 9.1 Review by Department Head. Upon receipt of a report arising from a review, audit, inspection or investigation and any related OIG conclusions and recommendations, the appropriate department head(s) shall consider the findings presented in such report and inform the OIG in writing, within the timeframe established by the Inspector General, of any disagreement with or acceptance of, and any decisions or actions taken in response to, conclusions and recommendations contained in that report.
- 9.2 Resolution of Disputed Issues and Recommendations. If the OIG and department head do not agree regarding conclusions or recommendations contained in an OIG report arising from a review, audit, inspection or investigation or regarding the appropriate management response to the OIG's findings, and, after further discussion but not to exceed thirty (30) days from the date the response was due, such disagreement as to corrective actions cannot be resolved, then the department head and/or Inspector General shall refer the matter(s) to the President of Amtrak for resolution. The President shall have the authority to fully and finally resolve any disputed issues and shall do so within thirty (30) days following receipt of any matter so referred.

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- 9.3 Corrective Action. Management is ultimately responsible for ensuring that reports or findings of unsatisfactory performance or conditions made by the OIG are properly evaluated for determining what action, if any, is to be taken in response to the OIG's findings and recommendations and for ensuring all necessary and appropriate corrective action is taken.

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# **EXHIBIT C**



NATIONAL RAILROAD PASSENGER CORPORATION

PROCEDURES MANUAL

SECTION: EXEC-1  
PAGE: 1 OF 7  
ISSUE DATE: JUNE, 1992 *F. E. Weiderhold*  
ISSUED BY: F.E. WEIDERHOLD, JR.  
APPROVED BY: W.G. CLAYTOR, JR. *W. G. Claytor*

SUBJECT: DEPARTMENT OF INTERNAL AFFAIRS (OFFICE OF INSPECTOR GENERAL)

I. INTRODUCTION

Policy Statement

Amtrak has established the Department of Internal Affairs (Office of Inspector General) to conduct independent audits and investigations to promote the economy, efficiency and effectiveness of Amtrak operations, and prevent and detect fraud, waste and mismanagement.

Purpose

The purpose of this policy is to define the scope, authority and responsibilities of the Department of Internal Affairs (Office of Inspector General).

Scope

All Amtrak employees and operations.

Responsibility

The President and Inspector General are responsible for the interpretation and administration of this policy.

II. SCOPE OF INSPECTOR GENERAL ACTIVITIES

The scope of Department's activities include:

- Reviewing the reliability and integrity of financial and operating information.
- Reviewing the systems established to ensure compliance with policies, plans, procedures, laws and regulations, and determining the extent of non-compliance, if any.
- Reviewing security of assets and, as appropriate, verifying the existence of such assets.

NATIONAL RAILROAD PASSENGER CORPORATION

PROCEDURES MANUAL

SECTION: EXEC-1  
PAGE: 2 OF 7  
ISSUE DATE: JUNE, 1992 *F.E. Weiderhold*  
ISSUED BY: F.E. WEIDERHOLD, JR.  
APPROVED BY: W.G. CLAYTOR, JR.

SUBJECT: DEPARTMENT OF INTERNAL AFFAIRS (OFFICE OF INSPECTOR GENERAL)

- Appraising the economy and efficiency with which resources are employed.
- Receiving and investigating complaints or information from employees.
- Reviewing operations or programs to ascertain whether results are consistent with established objectives and goals and the operations or programs are conducted as planned.
- Performing internal investigations to detect and prevent fraud, waste and abuse within Amtrak activities.
- Conducting criminal investigations of fraud and white-collar crime.
- Conducting special examinations and investigations at the request of management and approved by the President.
- In coordination with Amtrak's Law and Government & Public Affairs Departments, reviewing existing and proposed legislation and regulations relating to Amtrak's economy and efficiency and the prevention and detection of waste, fraud, or abuse.

III. AUTHORITY

The Department of Internal Affairs (OIG) shall report to the President and have direct access to the Audit Committee of the Board of Directors to discuss significant audit matters.

The Department of Internal Affairs (OIG) is authorized full, free and unrestricted access to all Amtrak records, property or other materials necessary to conduct audits and investigations that are within the scope of the Inspector General's duties. In order to preserve confidentiality, appropriate internal procedures have been established to safeguard and maintain personal information obtained during investigations. The Inspector General is authorized to subpoena records and

NATIONAL RAILROAD PASSENGER CORPORATION

PROCEDURES MANUAL

SECTION: EXEC-1  
PAGE: 3 OF 7  
ISSUE DATE: JUNE, 1992 *F. E. Weiderhold, Jr.*  
ISSUED BY: F.E. WEIDERHOLD, JR.  
APPROVED BY: W.G. CLAYTOR, JR.

SUBJECT: DEPARTMENT OF INTERNAL AFFAIRS (OFFICE OF INSPECTOR GENERAL)

other information necessary in the performance of such audits and investigations from entities other than Amtrak and federal agencies, and to obtain documents and information from federal agencies by methods other than subpoena.

IV. OBTAINING INFORMATION

All employees are responsible for providing requested assistance and information to the Inspector General in connection with the Inspector General's responsibilities. Such cooperation includes providing access to and, if necessary, the originals of all records, reports, audits, reviews, documents, papers, recommendations, or other materials which relate to OIG audits and investigations.

Amtrak employees at all levels will:

- (a) Be available for OIG interviews. Taking into consideration the need to preserve confidentiality and the identity of prospective witnesses, OIG staff will attempt to arrange a time for interviews so as to minimize disruptions to employees' work schedules.
- (b) Cooperate fully by disclosing complete and accurate information pertaining to matters under review;
- (c) In furtherance of Amtrak's Rules of Conduct, completely inform the OIG about matters of which they have knowledge or information related to fraud, waste, abuse or mismanagement in Amtrak programs.
- (d) Not conceal information or obstruct inspections, audits, special inquiries or investigations.
- (e) Be informed of their right under the Inspector General Act to be free from reprisal and retaliation.

NATIONAL RAILROAD PASSENGER CORPORATION

PROCEDURES MANUAL

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ISSUE DATE: JUNE, 1992 *W. G. Claytor, Jr.*

ISSUED BY: F.E. WEIDERHOLD, JR.

APPROVED BY: W.G. CLAYTOR, JR.

SUBJECT: DEPARTMENT OF INTERNAL AFFAIRS (OFFICE OF INSPECTOR GENERAL)

Employees are expected to provide complete information in response to questions and requests for documents. The failure to cooperate or furnishing of false or misleading information may result in disciplinary action against the employee.

V. RESPONSIBILITIES

The OIG is responsible for:

- Complying with the Government Audit Standards established by the Comptroller General of the United States as such may apply to Amtrak and other generally accepted auditing standards.
- Coordinating audit coverage with other audit/inspection units within Amtrak, Amtrak's public accountants and government audit agencies.
- Submitting annual plans to the President and Audit Committee.
- Reporting the results of audits and investigations to management, with recommendations for improvement.
- Reviewing plans or actions taken to correct reported findings.
- Providing the President and Audit Committee with quarterly activity reports highlighting significant accomplishments, findings, recommendations and administrative matters.
- Preparing semi-annual reports summarizing the activities of the Department of Internal Affairs in accordance with legislative requirements and format.
- Protecting the rights of employees under the Inspector General Act to be free from reprisal as a result of their cooperation with the OIG.

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ISSUED BY: F.E. WEIDERHOLD, JR. *F. E. Weiderhold*  
APPROVED BY: W.G. CLAYTOR, JR.

SUBJECT: DEPARTMENT OF INTERNAL AFFAIRS (OFFICE OF INSPECTOR GENERAL)

VI. ADMINISTRATIVE REPORTS

If an OIG investigation reveals employee conduct for which a disciplinary measure may be imposed, the procedures set forth below will be followed:

- The OIG will prepare an Administrative Report which summarizes the information ascertained during the investigation. However, before the OIG report is released, the OIG will interview the employee(s) involved to give the employee(s) an opportunity to respond to the allegation(s).
- Upon receipt of an OIG Administrative Report, the department head (or designee) of the employee's unit, shall consider the findings presented in the report and inform the OIG in writing, within the timeframe established by the Inspector General, of any subsequent decision acting on report recommendations.
- Prior to deciding on disciplinary action, the department head (or designee) will, however, give the affected employee an opportunity to discuss or otherwise respond to the applicable allegations in the OIG report and the applicable findings and recommendations that are set forth in the report. Any disciplinary action will be handled in accordance with applicable policies and/or procedures. Final decisions regarding discipline are entrusted to the department heads in which the individual is employed.

Management Disagreements with OIG Findings

If the OIG and management do not agree about the response to the Report findings, and after further discussion but not to exceed thirty days, the disagreement cannot be resolved, then the department head and/or Inspector General may request the President to review the bases for disagreement. The President will review all findings, recommendations, and related management and OIG comments, and will, thereafter, establish the company's position on the disputed issues.

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ISSUED BY: F.E. WEIDERHOLD, JR.  
APPROVED BY: W.G. CLAYTOR, JR.

SUBJECT: DEPARTMENT OF INTERNAL AFFAIRS (OFFICE OF INSPECTOR GENERAL)

VII. FREEDOM FROM REPRISAL

Every employee has the responsibility to ask questions about and report suspected violations of the law or company policy which may result in fraud, waste, abuse or mismanagement. Employees are encouraged to report any concerns about wrongdoing to their supervisors where practicable; however, the OIG will receive all reports and ensure the employee(s) is free from reprisal.

- Employees shall be free from restraint, interference, coercion, or reprisal at any stage of the OIG's inquiry for communicating directly or indirectly (or from being perceived as communicating) information about which they reasonably believe indicates violations of law or company policy which may result in fraud, waste, abuse or mismanagement. Any employee who believes reprisal actions are being taken should immediately inform the OIG.
- Former employees who allege that action was taken against them as reprisal for protected disclosures to the OIG while they were employed at Amtrak may request the OIG to investigate their reprisal allegations.
- In those instances in which the Inspector General deems it necessary, the Inspector General, after advising the President of the relevant facts, may recommend actions which ensure employees are protected from reprisals.
- Any employee who makes a complaint(s) to the OIG with the knowledge that the complaint(s) is false, or the statement is made with willful disregard to the truth or falsity of the information, will be held accountable for such statements and subject to disciplinary action.

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SECTION: EXEC-1  
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ISSUE DATE: JUNE, 1992 *[Signature]*  
ISSUED BY: F.E. WEIDENHOLD, JR.  
APPROVED BY: W.G. CLAYTOR, JR.

SUBJECT: DEPARTMENT OF INTERNAL AFFAIRS (OFFICE OF INSPECTOR GENERAL)

VIII. RESPONSIBILITY FOR CORRECTIVE ACTION

Management is ultimately responsible for ensuring that reports of unsatisfactory conditions made by the Department of Internal Affairs (OIG) are properly evaluated for determining what action, if any, is to be taken in response; and for ensuring that necessary corrective action is taken. A written response outlining action taken or planned in response to reported unsatisfactory conditions must be submitted to the OIG within 30 days from receipt of audit or investigation reports or as otherwise directed.

# **EXHIBIT D**



SUBJECT	CLASSIFICATION	DATE APPROVED	P/I NUMBER
Office of the Inspector General	Inspector General	September, __, 2008	2.1.1

## 1.0 INTRODUCTION POLICY STATEMENT

Pursuant to Chapter 5 of the United States Code, Appendix 3, Congress required that Amtrak establish an Office of Inspector General (“OIG”) to conduct independent audits, inspections, and investigations to promote the economy, efficiency, and effectiveness of Amtrak operations, and to prevent, detect, and deter fraud, waste, abuse, and mismanagement. This policy (Exec -1) is not intended to derogate or lessen the OIG’s statutory powers, obligations, or rights.

## 2.0 PURPOSE

The purpose of this policy is to summarize the scope, authority, and responsibilities of the Office of Inspector General, and that of Amtrak employees and contractors in cooperating with or responding to the OIG.

## 3.0 SCOPE

The policies contained herein shall apply to all Amtrak personnel and operations.

## 4.0 RESPONSIBILITY

The head of Amtrak, or the “Chair,” and the Amtrak Inspector General (“Inspector General”) are responsible for the interpretation and administration of this policy.

## 5.0 AUTHORITY

5.1 The Office of Inspector General (OIG) shall report to the Chairman of the Board of Directors and have direct access to the Audit Committee of the Board of Directors to discuss significant audit matters.

5.2 The Inspector General (OIG) is authorized full, free, and unrestricted access to all Amtrak records, property, or other materials necessary to conduct audits, inspections, and investigations that are within the scope of the Inspector General’s duties.

## 6.0 OBTAINING INFORMATION

6.1 OIG Access to Information: Amtrak Employee Responsibilities. All employees and contractors are responsible for providing requested assistance and information to the OIG in connection with the duties and responsibilities of the OIG. Such cooperation includes providing timely and complete access to, copies of, and, if necessary, original records, reports, audits, reviews, documents, papers, recommendations, or other tangible materials that relate to OIG reviews, audits, inspections and investigations. In

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particular, Amtrak personnel at all levels shall:

- (a) be available for OIG interviews;
- (b) give requested information, including the provision of a signed sworn statement, to authorized representatives of the OIG when called upon during an inquiry related to official matters;
- (c) cooperate fully by disclosing complete and accurate information pertaining to matters under review;
- (d) completely and truthfully inform the OIG about matters of which they have knowledge or information related to fraud, waste, abuse, or mismanagement in Amtrak programs;
- (e) not conceal information or obstruct or mislead inspections, audits, or special inquiries or investigations;
- (f) be informed of the provision under the IG Act providing for protection from reprisal and retaliation;
- (g) keep confidential the requests made by the OIG for records, files, and information, unless otherwise authorized by the OIG or unless disclosure is necessary to the performance of official duties; and
- (h) not discuss any pending or ongoing OIG investigation with the subject or subjects of the investigation or their representatives without approval of the OIG.

6.2 Failure to Cooperate. The failure to cooperate with or the intentional furnishing of false or misleading information to the OIG by Amtrak employees, contract personnel or representatives, may result in disciplinary action, contract termination, and/or other sanctions.

6.3 Instructions to Maintain Confidentiality. At the conclusion of an interview, OIG agents may request that an employee interviewee and, if present, his or her representative, not discuss the nature of the interview or investigation with any other persons except the interviewee's counsel.

6.4 Request for Counsel by Employees. While case law does not demand it, as a matter of OIG policy, an OIG agent will honor an employee's request that counsel be present during the interview. The counsel may not be another employee of Amtrak, a potential subject, or witness in the case.

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6.5 Scheduling Interviews. An interview of an employee normally will be scheduled directly with the employee. However, where the OIG may determine it necessary, and not adverse to the integrity of the investigation, the interviewing agent may schedule the interview through, with notice to, and or assistance from, the employee's supervisor.

## 7.0 DUTY TO REPORT; FREEDOM FROM REPRISAL

7.1 Reporting Responsibility. Every Amtrak employee, contractor or subcontractor has the responsibility to report suspected violations of the law or Amtrak policy that could result in fraud, waste, abuse, or mismanagement.

7.2 No Reprisal. All Amtrak employees shall be free from restraint, interference, coercion, or reprisal at any stage of any OIG inquiry for communicating directly or indirectly (or from being perceived as communicating) information about which they reasonably believe indicates violations of law or company policy which could result in fraud, waste, abuse, or mismanagement. Any Amtrak employee who believes that action has been or is being taken constituting restraint, interference, coercion, or reprisal as a result of cooperating with the OIG should immediately inform the OIG of such action.

7.3 Former Employees. Former employees who allege that action was taken against them as reprisal for protected disclosures to the OIG while they were employed at Amtrak may request the OIG to investigate their reprisal allegations.

7.4 False Complaints. Any employee who makes a complaint to the OIG with the knowledge that the complaint is false or that it is made with willful disregard for the truth of the information may be held accountable for such statements and may be subject to disciplinary action.

## 8.0 COMMUNICATING RESULTS

8.1 Review by Department Head. Upon receipt of a report arising from a review, audit, inspection, or investigation and any related OIG conclusions and recommendations, the appropriate department head(s) shall consider the findings presented in such report and inform the OIG in writing, within the timeframe established by the Inspector General, of any disagreement with or acceptance of, and any decisions or actions taken in response to, conclusions and recommendations contained in that report. The department heads will provide adequate documentation to support their conclusions.

8.2 Resolution of Disputed Issues and Recommendations. If the OIG and department head do not agree regarding conclusions or recommendations contained in an OIG report arising from a review, audit, inspection, or investigation or regarding the appropriate management response to the OIG's findings the following procedure shall take place. First, management and the OIG shall engage in further discussion, not to exceed thirty

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(30) days from the date the response was due. If such disagreement as to corrective actions cannot be resolved, then the department head and/or Inspector General shall refer the matter(s) to the President of Amtrak for resolution. The President shall have the authority to fully and finally resolve any disputed issues by stating management's position and shall do so within thirty (30) days following receipt of any matter so referred.

- 8.3 Corrective Action. Management is ultimately responsible for ensuring that reports or findings of unsatisfactory performance or conditions made by the OIG are properly evaluated for determining what action, if any, is to be taken in response to the OIG's findings and recommendations and for ensuring all necessary and appropriate corrective action is taken.

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Donna McLean Chairman, Board of Directors	1	2.1.0	4 of 4

# **EXHIBIT E**

September \_\_\_\_, 2008

**MEMORANDUM FROM THE BOARD OF DIRECTORS**

**TO: All Amtrak Departments and Employees**

**SUBJECT: Cooperation with the Office of Inspector General**

Amtrak's Office of Inspector General (OIG) serves an important mission in helping the Company detect and prevent fraud, waste, abuse and mismanagement. The OIG conducts independent and objective investigations, audits and inspections, which help us improve the quality and efficiency of Amtrak's activities. To perform its work effectively and comply with the Inspector General Act (Act), it is important that we all respond to the OIG's requests for documents and information timely, fully and completely. Cooperation with the OIG also is the responsible thing to do, and the Board of Directors has an obligation under the Act to ensure that OIG requests for information are complied with.

To avoid delays that hinder or prevent the OIG from discharging its responsibilities and to ensure that the Company is complying fully with OIG requests, when the OIG requests any records or information, all employees are expected to respond promptly, other than as described below, and to provide all data whether or not privileged or confidential. For purposes of integrity of OIG investigations, OIG requests for information are to be considered confidential and employees should respond directly to the OIG without interference or review by, or notification to, any other Amtrak Department.<sup>1</sup>

The OIG has the discretion whether to place its requests for documents or information in writing and whether its requests should be maintained confidentially. We request that you cooperate fully with OIG requests whether or not the request is in writing. To the extent that you are unclear regarding the information requested by the OIG, you should request clarification from the OIG representative making the request. Employees are not expected to report OIG requests to supervisors or others.

The OIG has important obligations in the conduct of its audits, investigations and inspections and will coordinate with the Board prior to the release of privileged information to ensure that privileged and sensitive data are protected from production outside the Company, consistent with the requirements of law.

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<sup>1</sup> This Directive supersedes any existing company policy or practice to the extent that it conflicts with this directive.

# EXHIBIT 13

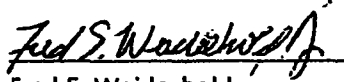
**AGREED PROTOCOL OF THE AMTRAK OFFICE OF INSPECTOR GENERAL AND LAW DEPARTMENT  
REGARDING DISCLOSURE OF PRIVILEGED, CLASSIFIED, PROPRIETARY OR OTHER CONFIDENTIAL  
INFORMATION**

October 10, 2007

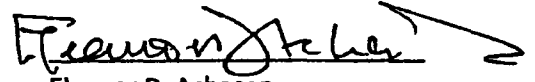
1. It is in the best interests of Amtrak that Amtrak's Office of Inspector General ("OIG") and Law Department work cooperatively to facilitate and to expedite OIG investigations, audits and reviews (collectively, "investigations"), and to the extent legally permissible, to limit disclosure of any privileged, classified, proprietary or other confidential information and materials obtained or developed in such investigations to the extent reasonably necessary to protect the interests of Amtrak. This memo outlines the protocol adopted by the OIG and the Law Department to that effect.
2. In connection with any investigation undertaken by the OIG, the OIG is entitled to obtain and review any and all information from any Amtrak department that the OIG considers necessary or appropriate to the conduct of such investigation.
3. The OIG shall not disclose to any third party any Amtrak information obtained or reviewed in connection with an investigation, except
  - a. To the Department of Justice ("DOJ"), in response to a request from the DOJ or in connection with a referral to, or discussion with, the DOJ from the OIG;
  - b. As required of the OIG by applicable law or regulation, to any third party ; provided that prior to any such disclosure, the OIG shall notify the Law Department of such request (consistent with applicable law), and afford the Law Department reasonable opportunity to
    - i. review the information to be disclosed for purposes of identifying privileged, classified or proprietary information, and
    - ii. take action appropriate to restrict or limit disclosure of such information. The OIG and Law Department recognize that under certain circumstances the legal duty of the OIG to disclose may not afford an opportunity for prior review and protective action by the Law Department; under any such circumstance, the OIG will use its best efforts to work with the third party to whom such disclosure is to be made to develop such opportunity. Any prior review and action by the Law Department shall be on an expedited basis.



4. In connection with any such prior review, it shall be the responsibility and duty of the Law Department to determine whether information subject to any disclosure request under 3(b) above is privileged, classified, proprietary or confidential to Amtrak.



Fred E. Weiderhold  
Amtrak Inspector General



Eleanor D. Acheson  
Amtrak General Counsel

October 15, 2007

# EXHIBIT 14

**Donna Mclean**

---

**From:** Donna Mclean  
**Sent:** Wednesday, October 10, 2007 11:36 PM  
**To:** [REDACTED]  
**Subject:** Re: Agreed Protocol

Geeeze

Are you OK with the agreement with your changes? I understand its not your preference - but is it workable?

Sorry this has been so difficult.....

----- Original Message -----

**From:** Weiderhold, Fred [REDACTED]  
**To:** Donna Mclean  
**Sent:** Wed Oct 10 15:21:40 2007  
**Subject:** FW: Agreed Protocol

Donna: As you can see from a few e-mails below, Laney has "directed" me to comment on his draft versus reading what Eldie and I had already agreed to --- this is a "set up" --- I am trying one last time to get an MOU w/o compromising the IG Act. I asked Joe B. to keep me informed if Laney tries to take any action with the Board, although I think he believes he can act unilaterally. Sad day.

-----Original Message-----

**From:** Weiderhold, Fred  
**Sent:** Wednesday, October 10, 2007 3:15 PM  
**To:** [REDACTED]  
**Subject:** RE: Agreed Protocol

I took your draft, added the points we discussed about informal DOJ discussions, deleted the OGC determination of privilege to be "conclusive" (per our discussion), OGC asserts all privileges. And "upon written request from such third parties" 3(b). Otherwise, no changes. Basically, your draft with those changes. Hope this works.

-----Original Message-----

**From:** [REDACTED]  
**Sent:** Wednesday, October 10, 2007 2:40 PM  
**To:** Weiderhold, Fred  
**Subject:** Re: Agreed Protocol

Here is my directive to you -- take what I sent, review it now, tell me what parts of it are impediments for. you. Now, please. dml

Sent via BlackBerry by AT&T

-----Original Message-----

**From:** "Weiderhold, Fred" [REDACTED]

**Date:** Wed, 10 Oct 2007 14:29:30

**To:** [REDACTED]

**Subject:** Agreed Protocol

CONFIDENTIAL--INCLUDES PRIVILEGED AND CONFIDENTIAL MATERIALS  
SUBJECT TO AGREEMENT WITH CONGRESSIONAL STAFF

Amtrak 3932

David:

I told you yesterday afternoon that I would simplify the document along the lines we discussed. So I revisited the July 4 e-mail from Eldie to me, because we were very close to the 'gentleman's agreement' in that language.

I am attaching an MOU, that is mostly drawn from Eldie's proposed (simpler) MOU. I think this captures the essence of what we all agree to, without all the legalese. I have signed the MOU, which is attached.

-----Original Message-----

From: [REDACTED]  
Sent: Wednesday, October 10, 2007 1:24 PM  
To: Weiderhold, Fred  
Subject: Re:

No, Fred, you told me that you would take a look at what I had written and provided you, and let me know what in it you had problems with...it's not long...let me hear ASAP. Thanks.  
dml

Sent via BlackBerry by AT&T

-----Original Message-----

From: "Weiderhold, Fred" [REDACTED]  
Date: Wed, 10 Oct 2007 12:10:15  
To: "David Laney" [REDACTED]  
Subject: RE:

David: I agreed that I would write a simplified MOU, one that incorporated the issues we spoke to yesterday --- I can have that by COB. I just opened your e-mail at 12:08.

-----

From: David Laney [REDACTED]  
Sent: Wednesday, October 10, 2007 11:32 AM  
To: Weiderhold, Fred  
Subject:

Fred -- please get your response to me as to your thoughts on the protocol before noon.  
Thanks. dml

--  
David M. Laney  
901 Main Street  
Suite 3601  
Dallas, TX 75202  
Tel 214-761-3004

# EXHIBIT 15

<b>SUBJECT</b>	<b>CLASSIFICATION</b>	<b>DATE APPROVED</b>	<b>P/I NUMBER</b>
Office of the Inspector General	Inspector General	November 5, 2007	2.1.1

**1.0 PURPOSE**

The purpose of this policy is to summarize the scope, authority, responsibilities and oversight of the OIG and that of Amtrak personnel in cooperating with or responding to the OIG. This policy is intended to clarify the duties and responsibilities of the OIG and of Amtrak personnel in connection with OIG activities; it is not intended to limit or otherwise derogate in any manner the statutory authority, obligations or rights of the OIG.

**2.0 SCOPE**

The policies contained herein shall apply to all Amtrak personnel and operations.

**3.0 STATEMENT OF POLICY**

3.1 Pursuant to the Inspector General Act of 1978, as amended, Congress has required that Amtrak establish an independent and objective Office of Inspector General ("OIG") in order to:

- (a) provide policy direction for, and to conduct, supervise and coordinate, audits and investigations relating to programs and operations of Amtrak;
- (b) recommend policies for, and to conduct, supervise or coordinate, other activities carried out or financed by Amtrak for the purpose of promoting economy and efficiency in the administration of, or preventing and detecting fraud and abuse in, Amtrak's programs and operations;
- (c) conduct independent reviews, audits, inspections and investigations to prevent, detect and deter fraud, waste, abuse and mismanagement in Amtrak programs and operations;
- (d) recommend policies for, and to conduct, supervise or coordinate, relationships between Amtrak and other Federal, State and local governmental agencies and nongovernmental entities with respect to (i) all matters relating to the promotion of economy and efficiency in the administration of, or the prevention and detection of fraud and abuse in, programs and operations administered or financed by Amtrak or (ii) the identification and prosecution of participants in such fraud or abuse;
- (e) keep the head of Amtrak (as defined by the IG Act) and the Congress fully and currently informed concerning fraud and other serious problems, abuses and deficiencies at Amtrak, to recommend corrective action concerning such matters and to report on progress made in implementing such corrective action; and
- (f) perform such other duties as may be otherwise provided in the IG Act.

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#### 4.0 RESPONSIBILITY

The head of Amtrak and the Amtrak Inspector General (“Inspector General”) are responsible for the interpretation and administration of this policy. As of the date of this policy, the “head” of Amtrak is defined as the Chairperson of the Board of Directors of Amtrak (the “Chair”).

#### 5.0 AUTHORITY

- 5.1 Primary Reporting Responsibility; Access. The Inspector General shall report to and be under the general supervision of the Chair but shall not report to or be subject to supervision by any other officer or employee of Amtrak. The Chair shall not prevent or prohibit the Inspector General from initiating, carrying out or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation. The OIG shall have direct access to all Board Committees to discuss significant matters within the scope of the Committees’ responsibilities.
- 5.2 Access to Information. 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.
- 5.3 Privileged and Confidential Information. With respect to Amtrak information obtained or developed by the OIG in connection with any review, audit, inspection or investigation that is confidential, classified, proprietary or privileged, no such information shall be disclosed by the OIG to any third party unless the OIG is legally required to do so; provided, that under no circumstances (except as may be required by law) shall the OIG release, report or disclose any privileged or classified information to any third party without the Inspector General informing the Amtrak General Counsel in such a manner as to provide the Amtrak Law Department with reasonable opportunity to protect any applicable privileged or classified information. The Inspector General and the Amtrak General Counsel may from time to time develop and implement a more detailed protocol regarding the management and disclosure of confidential, classified, proprietary or privileged information consistent with this paragraph.

#### 6.0 OVERSIGHT

- 6.1 Reports. Pursuant to the IG Act, the Inspector General is required to keep the Chair fully and currently informed by means of reports and other briefings concerning fraud and other serious problems, abuses and deficiencies relating to the administration of programs and operations of Amtrak, to recommend corrective action concerning such problems, abuses, and deficiencies and to report on the progress made in implementing such corrective action. In that regard, the Inspector General shall:

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- (a) Annual OIG Budget. At least 90 days prior to the end of each fiscal year of Amtrak, furnish the Chair with a draft OIG departmental budget for the ensuing year. Such budget shall be accompanied by actual year-to-date information comparing current year performance to budget and to prior year performance and shall detail year-by-year activity levels and changes in headcount and aggregate department compensation (including benefits);
  - (b) Semiannual Reports. Provide the Chair with a preliminary draft of the semiannual reports required to be transmitted to Congress pursuant to Section 5 of the IG Act, no later than April 15 and October 16 of each year;
  - (c) Regular Reports to Chair. Meet with the Chair no less than quarterly, and more frequently as the Chair shall direct, to keep the Chair fully and currently informed concerning the ongoing activities of the OIG, including fraud and other serious problems, abuses and deficiencies relating to the administration of programs and operations administered or financed by Amtrak; to recommend corrective action concerning such problems, abuses, and deficiencies; and to report on the progress made in implementing such corrective action; and
  - (d) Immediate Reports to Chair. Report immediately to the Chair whenever the Inspector General becomes aware of particularly serious or flagrant problems, abuses or deficiencies relating to Amtrak programs or operations, or whenever, in the judgment of the Inspector General, information or assistance requested by the OIG is unreasonably refused or not provided by Amtrak personnel or from any Federal, State or local governmental agency.
- 6.2 Conflicts. In any case in which the Chair is or could become involved in any review, audit, inspection or investigation by the OIG, the Inspector General shall provide the reports or notices otherwise required by the IG Act or this policy to a Vice Chair of the Amtrak Board of Directors. In any case in which the Chair and the Vice Chairs are or could become involved in any review, audit, inspection or investigation by the OIG, the Inspector General shall provide the reports or notices otherwise required by the IG Act or this policy to the head of the Audit and Finance Committee of the Amtrak Board of Directors.
- 6.3 Publicity. No representative of the OIG shall participate in any public announcement, presentation or other disclosure of an Amtrak review, audit, inspection or investigation, or any contents, conclusions or recommendations thereof, without prior approval from the Inspector General and without the Inspector General providing reasonable prior notice to the Chair.

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**7.0 OBTAINING INFORMATION**

- 7.1 **OIG Access to Information; Amtrak Employee Responsibilities.** All employees are responsible for providing requested assistance and information to the OIG in connection with the duties and responsibilities of the OIG. Such cooperation includes providing timely and complete access to, copies of and, if necessary, original records, reports, audits, reviews, documents, papers, recommendations or other tangible materials that relate to OIG reviews, audits, inspections and investigations. In particular, Amtrak personnel at all levels shall:
- (a) be available for OIG interviews;
  - (b) cooperate fully by disclosing complete and accurate information pertaining to matters under review;
  - (c) completely and truthfully inform the OIG about matters of which they have knowledge or information related to fraud, waste, abuse or mismanagement in Amtrak programs;
  - (d) not conceal information or obstruct or mislead inspections, audits or special inquiries or investigations; and
  - (e) be informed of the provision under the IG Act providing protection from reprisal and retaliation.
- 7.2 **Failure to Cooperate.** The failure to cooperate with or the intentional furnishing of false or misleading information to the OIG by Amtrak employees, contract personnel or representatives may result in disciplinary action, contract termination and other sanctions.
- 7.3 **Informing Department Heads and Managers.** In connection with any review, audit, inspection or investigation that requires representatives of the OIG to identify, review or collect information through Amtrak employees, the OIG shall first notify (unless, in the judgment of the Inspector General, such notification would be inappropriate under the circumstances) the head of the Amtrak department in which such employees work of such activity and, without impeding the nature, focus or pace of such review, audit, inspection or investigation, shall use its best efforts to minimize the disruption of normal operations in such department. The OIG may require that the department head maintain any necessary confidentiality. When appropriate, the OIG should keep department heads and managers informed, through initial and periodic briefings or interim reports, of the purpose, nature and content of OIG activities concerning their respective programs or operations.

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8.0 DEPUTY TO REPORT; FREEDOM FROM REPRISAL

- 8.1 Reporting Responsibility. Every Amtrak employee has the responsibility to report suspected violations of the law or Amtrak policy that could result in fraud, waste, abuse or mismanagement.
- 8.2 No Reprisal. All Amtrak employees shall be free from restraint, interference, coercion or reprisal at any stage of any OIG inquiry for communicating directly or indirectly (or from being perceived as communicating) information about which they reasonably believe indicates violations of law or company policy which could result in fraud, waste, abuse or mismanagement. Any Amtrak employee who believes that action has been or is being taken constituting restraint, interference, coercion or reprisal as a result of cooperating with the OIG should immediately inform the OIG of such action.
- 8.3 Former Employees. Former employees who allege that action was taken against them as reprisal for protected disclosures to the OIG while they were employed at Amtrak may request the OIG to investigate their reprisal allegations.
- 8.4 False Complaints. Any employee who makes a complaint to the OIG with the knowledge that the complaint is false or that it is made with willful disregard for the truth of the information may be held accountable for such statements and may be subject to disciplinary action.

9.0 COMMUNICATING RESULTS

- 9.1 Review by Department Head. Upon receipt of a report arising from a review, audit, inspection or investigation and any related OIG conclusions and recommendations, the appropriate department head(s) shall consider the findings presented in such report and inform the OIG in writing, within the timeframe established by the Inspector General, of any disagreement with or acceptance of, and any decisions or actions taken in response to, conclusions and recommendations contained in that report.
- 9.2 Resolution of Disputed Issues and Recommendations. If the OIG and department head do not agree regarding conclusions or recommendations contained in an OIG report arising from a review, audit, inspection or investigation or regarding the appropriate management response to the OIG's findings, and, after further discussion but not to exceed thirty (30) days from the date the response was due, such disagreement as to corrective actions cannot be resolved, then the department head and/or Inspector General shall refer the matter(s) to the President of Amtrak for resolution. The President shall have the authority to fully and finally resolve any disputed issues and shall do so within thirty (30) days following receipt of any matter so referred.

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- 9.3 Corrective Action. Management is ultimately responsible for ensuring that reports or findings of unsatisfactory performance or conditions made by the OIG are properly evaluated for determining what action, if any, is to be taken in response to the OIG's findings and recommendations and for ensuring all necessary and appropriate corrective action is taken.

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