# CRIMINAL LAW BULLETIN

Volume 43, Number 2

**Monitors & IPSIGS: Emergence of a New Criminal Justice Role**

James B. Jacobs and Ronald Goldstock

# Monitors & IPSIGS: Emergence of a New Criminal Justice Role

## James B. Jacobs* and Ronald Goldstock**

It is not every day that a new criminal justice institution is born. But that is what has happened in New York City where we have seen the increasing use of private sector monitors and IPSIGs (Independent Private Sector Inspectors General) to promote corporate integrity, prevent fraud in public contracting and to supervise the reform of corporations and other entities targeted for criminal prosecution.

All IPSIGs are monitors, but all monitors are not IPSIGs. According to the International Association of IPSIGs:

> An Independent Private Sector Inspector General (IPSIG) is an independent, private sector firm with legal, auditing, investigative, management and loss prevention skills, employed by an organization (voluntarily or by compulsory process) to ensure compliance with relevant law and regulations, and to deter, prevent, uncover and report unethical and illegal conduct by, within and against the organization. The IPSIG may, in addition, be a major participant with management in enhancing the economy, efficiency and effectiveness of the organization.[1]

Government agencies have called upon monitors to perform a variety of tasks that might be ordered along an "intervention continuum" ranging from passive information receiving to more active inspecting to aggressive implementation of organizational reform. The full-blown IPSIG is an aggressive organizational change agent as well as an aggressive investigator.

A corps of IPSIG providers, many former prosecutors, has found strong and increasing demand for their services in New York City and else where in the U.S. and abroad. In turn, the publicizing and promotion of monitoring and IPSIG services has further fueled demand. The market will likely grow even more rapidly in the future because of prosecutors' recent use of IPSIG and IPSIG-like monitors in a number of high profile deferred prosecutions and plea bargains, including cases involving huge public corporations and partnerships like Computer Associates, Con Edison, Merrill Lynch, and KPMG as well as the boom in private sector firms' use of monitors to comply

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[1] *See* IAIPSIG Code of Ethics, *available at* http://www.iaipsig.org/ethics.html.

with the Federal Sentencing Organizational Guidelines.[2] Moreover, prompted by widespread fraud in the administration of aid to victims of Hurricane Katrina,[3] fifty members of Congress proposed a bill that would require the U.S. Department of Homeland Security to study the applicability of the IPSIG model to future disaster recovery efforts.[4]

## Evolution of the Ipsig Role

The IPSIG role is patterned after the federal inspectors general created by the Inspector General Act of 1978 (IG Act),[5] the post-Watergate law that assigned inspectors general to each major federal agency and tasked them with preventing waste, fraud and abuse and promoting economy, efficiency and effectiveness.[6] In order to ensure the independence of Inspectors General (IG), the IG Act provided for their presidentially appointed and senatorially confirmed to report to Congress as well as to their agency head. Today, there are IGs assigned to fifty-seven federal executive and independent agencies.

The law did not intend for the IGs to function merely as police; rather, the law was predicated on the belief that agency officials would recognize that good management and operations are enhanced through the prevention of fraud, waste, and abuse. A well-functioning IG should work with agency officials to identify and control corruption vulnerabilities. However, when differences of opinion arise, the IG's top priority is to ferret out past and present wrongdoing and prevent future wrongdoing. The agency head may choose to reject the IG's warning or recommendation, but that is unlikely to happen often or lightly, given the career consequences of a corruption scandal and the inevitable questioning by the relevant oversight committee once the IG, as required by law, notifies Congress of that rejection.

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[2] The Federal Sentencing Commission promulgated Organizational Guidelines in November, 1991. *See* Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines For Corporations: Their Development and Theoretical Underpinnings and Some Thoughts About Their Future,* 71 WASH. U. L. Q. 205 (1993). Recent amendments to the Guidelines were adopted in response to the Sarbanes-Oxley Act's direction to promulgate new Guidelines that could better deter corporate wrongdoing. *See* 2006 FEDERAL SENTENCING GUIDELINES, ch. 8, pt. B — Remedying Harm From Criminal Conduct, and Effective Compliance and Ethics Program, *available at* http://www.ussc.gov/ 2005guid/8b2_1.htm.

[3] In September, 2005, fraud in various post-Katrina recovery programs prompted the U.S. Attorney General to establish a Hurricane Katrina Fraud Task Force. *See* http://www.usdoj.gov/katrina/Katrina_Fraud/.

[4] *See* proposed National Emergency Management Reform and Enhancement Act of 2006, H.R. 5351, 109th Cong. (2006), summarized in H.R. REP. 109-712, pt. I, *available at* http://en.wikipedia.org/wiki/entrapment.

[5] While originally passed in 1978, the IG Act was later amended to extend IGs to more federal agencies. The current law can be found at 5 U.S.C. app. § 1 (2001).

[6] For the politics and legislative history leading up to the Act, see MARK MORE & MARGARET GATES, INSPECTORS-GENERAL: JUNK-YARD DOGS OR MAN'S BEST FRIEND (1986).

The 1990 *New York State Organized Crime Task Force's Final Report on Corruption and Racketeering in the New York City Construction Industry*[7] first publicly raised the idea of adapting the IG concept to government contractors in order to prevent fraud on public construction projects, including contractors' fraud against the government, employees and other firms.[8] The report recommended that in carrying out public works projects, New York City agencies require general contractors to hire private sector "certified investigative auditing firms" (CIAFs) to prevent and uncover fraud and to help contractors comply with laws, regulations and accounting procedures. The CIAF would have to respond aggressively to evidence of corruption, report wrongdoing to city officials and, with those officials' approval, work with contractors to eliminate corruption hazards and the report stated:

> CIAFs would be independent firms, licensed by DOI [New York City Department of Investigation], with investigative, auditing, loss prevention, engineering and others skills necessary to oversee on-site construction activity and record keeping practice . . ..
> The CIAF would serve as a private sector inspector general, hired by general or prime contractors on large public construction projects to insure compliance with relevant laws and regulations and to deter, prevent, uncover and expose unethical or illegal conduct. The CIAF's would play the same kind of role that lawyers, accountants, and private investigators have increasingly performed for public and private corporations desiring protection against intentional or inadvertent violations of laws and regulations.[9]

As the above passage indicates, the CIAF idea was grounded in a number of precedents. In addition to building on the federal IGs as a model, OCTF (New York State Organized Crime Task Force) envisioned the CIAF concept building on the model of independent auditors who monitor public corporations (i.e., corporations that sell securities on the national exchanges). The securities laws require public corporations annually to submit to the Securities and Exchange Commission (SEC) comprehensive financial information, which has been certified by an independent auditor as conforming to generally accepted accounting principles. These independent auditors, who came to be organized into huge international partnerships, have an incentive to carry out their auditing work vigorously and independently because of their commitment to professional standards and their need to retain the confidence of the SEC and the investing public.[10] OCTF recommended that the CIAF working on a New York City construction project be required, like an inde-

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[7] NEW YORK STATE ORGANIZED CRIME TASK FORCE, FINAL REPORT ON CORRUPTION AND RACKETEERING IN THE NEW YORK CITY CONSTRUCTION INDUSTRY (1990).

[8] Actually, the OCTF first publicly raised the idea in its 1987 Interim Report and it experimented with IPSIGs in cooperation agreements as early as 1983.

[9] NEW YORK STATE ORGANIZED CRIME TASK FORCE, *supra* note 7, at 168.

[10] The 1990's accounting scandals, especially the ENRON debacle, cast grave doubt over the accounting firms' independence from the corporations they audited. These scandals demonstrated that the accounting firms were compromised and co-opted by the huge consulting fees that they received from their auditing clients. IP-

pendent auditor and public sector inspector general, to report evidence of wrongdoing to the New York City Department of Investigation (DOI) or to the appropriate New York City inspector general.[11]

The CIAF (later called IPSIG)[12] concept predated the U.S. Sentencing Commission's November 1991 Federal Sentencing Guidelines for Organizations. The Guidelines provided that, in the event of corporate criminal wrongdoing, a corporation that had, with good faith and due diligence implemented an ethics and compliance program, was entitled to leniency.[13] The Guidelines required that in order to claim such leniency: (5) The organization shall take reasonable steps— (A) to ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct; (B) to evaluate periodically the effectiveness of the organization's compliance and ethics program; and (C) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation. (6) The organization's compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct. (7) After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal

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SIGs were not blind to that issue and sought to avoid the problem. *See infra*. There is a growing library of books on the accounting scandals. *See, e.g.,* BETHANY MCCLEAN & PETER ELKIND, THE SMARTEST GUYS IN THE ROOM: THE RISE AND SCANDALOUS FALL OF ENRON (2003); KURT EICHENWALD, CONSPIRACY OF FOOLS (2005); DENNIS COLLINS, BEHAVING BADLY: ETHICAL LESSONS FROM ENRON (2005); BARBARA LEY TOFFLER & JENNIFER REINGOLD, FINAL ACCOUNTING: AMBITION, GREED, AND THE FALL OF ARTHUR ANDERSON (2004).

[11] New York City is unique among American cities in having an executive (mayoral) agency, the Department of Investigation, dedicated to investigating and preventing corruption throughout city government. For background on DOI, see FRANK ANECHIARICO & JAMES B. JACOBS, THE PURSUIT OF ABSOLUTE INTEGRITY ch. 6 (1996).

[12] The term "investigating auditing firm" was used instead of "private inspector general" on account of the latter's unfortunate acronym (PIG). Ultimately, because of the inherent ambiguity of CIAF, the term Independent Private Sector Inspector General (IPSIG) was adopted. That name stuck but, in negotiations over deferred prosecution agreements, defendants seem to prefer the softer sounding "Independent Monitor" or simple "Monitor." The role of such monitors, as defined in the deferred prosecution agreements, is often identical to or conforms closely to a full-fledged IPSIG. *See* New York Racing Association case *infra* text.

[13] *See* 2006 FEDERAL SENTENCING GUIDELINES, *supra* note 2, at ch. 8, pt. B.

conduct, including making any necessary modifications to the organization's compliance and ethics program.[14]

Many corporations, seeking the protection of this "safe harbor," either contracted with law firms or specialist corporate compliance firms to establish such qualifying ethics, monitoring, and compliance programs; some hired former prosecutors to serve as corporate compliance officers.[15] Working in corporate compliance gave many former prosecutors valuable corporate experience and contacts that could later be called on in undertaking monitoring and IPSIG assignments. Moreover, corporate compliance officers have convinced many corporate officers that former prosecutors, forensic accountants, and criminal investigators can provide value to the corporation by preventing fraud, waste and abuse. At a minimum, corporate ethics and compliance programs served as a door through which former criminal lawyers and criminal investigators entered the corporation. While the corporate compliance officer works only for the company that pays her salary, the Federal Organizational Sentencing Guidelines require that a bona fides corporate compliance program report serious wrongdoing to the government in order to be eligible for sentencing discounts in the event of future criminal violations.

Another criminal justice system role that provided a precedent for the emergence of the new generation of monitors and IPSIGs is that of the special master, trustee, or court liaison officer, who played a prominent role in jail/prison litigation of the 1970's and 1980's and in civil RICO[16] labor racketeering litigation in the 1980's and 1990's.[17] In jail and prison litigation challenging unconstitutional conditions of confinement, court decrees and negotiated settlements frequently included a requirement that the jail or prison hire a court-appointed special master to supervise the institution's or agency's reform.[18] The jail or prison agency pays these special masters, usually lawyers but sometimes former prison/jail officials, but they work for the judge overseeing the case. Where along the monitoring continuum their role falls depends, in each case, upon the court decree or terms of the settlement. Many special masters have exercised broad powers (always in the name of the court) of organizational reform. For example, they often brought in

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[14] *See* 2006 FEDERAL SENTENCING GUIDELINES, *supra* note 2, at ch. 8, pt. B.

[15] A search of the worldwide web will reveal scores of firms offering corporate compliance programs and services. There is even a professional association, the Society of Corporate Compliance and Ethics. *See* http://www.corporatecompliance.org/about /about.html.

[16] Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1965.

[17] *See* MALCOLM FEELEY & EDWARD RUBIN, JUDICIAL POLICYMAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1998); Margo Schlanger, *Civil Rights Injunctions Over Time; A Case Study of Jail and Prison Court Orders*, 81 N.Y.U.L. REV. 550 (2006).

[18] James B. Jacobs, *Judicial Impact on Prison Reform*, *in* PUNISHMENT AND SOCIAL CONTROL 389, 389-402 (Thomas G. Blomberg & Stanley Cohen eds., 2d ed. 2003).

experts to propose and implement reforms in health services, sanitation, recreation, security and discipline. Some of these remedial efforts extended over a decade or more.[19]

Former prosecutors, auditors, and criminal investigators, acting as court-supervised investigators/disciplinary officers, election supervisors and court liaison officers, have played a crucial role in the Department of Justice's (DOJ's) twenty-plus-year effort to purge organized crime's influence from racketeer-ridden labor unions and to foster union democracy in those unions.[20] By requiring unions to pay for their own investigation and reformation, DOJ has been able to leverage its limited resources over a large number of cases and achieve reform greater than would have been possible had only DOJ and court personnel been employed as change agents. DOJ filed the first civil RICO suit aimed at purging organized crime from a labor union in 1982. Since then, twenty more suits have been filed. They all have been resolved favorably to DOJ and have all included appointment of a court-supervised "trustee," "monitor," or "court liaison officer." The unions pay their salaries, but cannot fire or otherwise direct them. Because these cases involve organized crime, almost all of the court appointed monitors are former organized crime prosecutors.

The unions targeted for civil RICO suits had long histories of organized crime domination. These were not cases where a monitor, at least initially, could work with the organization's leadership to ferret out corruption and lessen corruption vulnerabilities. The leadership had to be changed and the conditions for the emergence of new leadership had to be created. Civil-RICO-generated union monitors have been empowered to continue investigating organized crime's influence and most have had responsibility for bringing and adjudicating disciplinary charges against union officers and members believed to be members of or to be knowingly associating with organized crime figures. Some, in a role analogous to an IPSIG, have shouldered responsibility for revamping the union's operations and administration and reforming its governance and election procedures. In a few cases, the trustee exercised powers analogous to those of a receiver in bankruptcy, running the union's day to day operations, including negotiating collective bargaining agreements.

Some of these monitorships have not been completed successfully; some have failed. Experience shows that success depends upon the monitor functioning as an aggressive organizational change agent, i.e., like an IPSIG, but not like a receiver in a bankruptcy case.[21] The optimal powers for these monitors might vary from case to case. Unfortunately, without comprehensive evaluation it is not possible to say what works and what does not. Moreover, resources have varied from case to case so that the failure of a particular monitorship might be attributable to the inadequacies of the monitor's powers, the monitor's competency or the monitor's resources.

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[19] *See* FEELEY & RUBIN, *supra* note 17.

[20] JAMES B. JACOBS, MOBSTERS, UNIONS AND FEDS: THE MAFIA AND THE AMERICAN LABOR MOVEMENT (2006).

[21] *See* JACOBS, *supra* note 20.

## IMPLEMENTING THE IPSIG IDEA

Not surprisingly, OCTF pioneered the first use of IPSIGs. In some cases OCTF required companies engaged in wrongdoing to hire an IPSIG as one condition of a cooperation agreement.[22] The agreements provided for the IPSIG to thoroughly examine the cooperating firm's books and records, interview its employees and investigate its operations. The IPSIG worked with the firm's officers to design and implement internal controls, compliance procedures and an ethics code. The IPSIG reported regularly to the OCTF on the monitored-company's cooperation and progress. Of course, any evidence of company wrongdoing had to be reported. In addition, if the company's wrongdoing had resulted in losses to third parties, the IPSIG had to determine the extent of the loss and ensure appropriate restitution.

Thereafter, the New York City School Construction Authority (SCA) demonstrated how the IPSIG concept could be used effectively in public contracting. In 1988, the New York State Legislature established the SCA and assigned it responsibility for taking over the New York City Board of Education's scandal-ridden school construction process at a time when there were billions of dollars of new school construction in the pipeline or on the drawing board. The SCA's leadership was determined to avoid the kind of corruption scandals that had plagued New York City school construction for many years. As a result, the SCA established a fifty-person Inspector General Office with sweeping powers, and appointed as IG a former top OCTF official. The Office utilized a strategy for attacking institutional corruption and racketeering that drew heavily on use of IPSIGs. Contractors, who faced debarment from government contracts on integrity grounds could nonetheless be awarded contracts if they agreed to retain an IPSIG that would report to the SCA IG.[23]

The SCA's IG's first use of an IPSIG is instructive. E.W. Howell, a 100-year-old firm with hundreds of employees, was the low bidder by two million dollars on a school building contract. There was no question that Howell could technically perform the job since it had carried out school construction work in the past, but at the time it was a potential subject of a grand jury investigation. Disqualifying the firm would have left the SCA having to pay more to the next highest bidder; of course Howell and its employees would suffer from exclusion from public works projects. In a "win win solution," Howell and the SCA IG agreed that Howell could remain an SCA contractor if it hired an IPSIG that would (1) work with management to

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[22] These cooperation agreements were confidential when signed and mostly remain under seal.

[23] The SCA's IG's use of IPSIG's was noted by the *New York Times*, which referred to them as "a growing community of private watchdogs." Diana Henriquez, *New York City Builds a Better Watchdog*, N.Y. TIMES, May 14, 1996, at B1; *see also* Thomas D. Thacher II, *The New York City School Construction Authority Office of Inspector General: A Successful New Strategy for Reforming Public Construction in the Construction Industry*, 3 CIV. PROSECUTION NEWS (Clark Boardman Callaghan) (Spring/Summer 1995).

develop a code of Business conduct; (2) design and implement internal controls to prevent fraud, waste, and abuse; (3) perform compliance audits, and (4) establish, promote and manage an integrity hotline available to employees and others to anonymously report instances of illegal behavior by the company.

The SCA got the job done at the lowest cost and Howell remained eligible to bid on school construction projects. The company concluded that the IPSIG had saved the company money by reducing waste and abuse and voluntarily decided to retain the IPSIG after the projected was completed. After this success, the SCA required dozens of other contractors to hire IPSIGs.

Shortly thereafter, other public authorities and New York City agencies adopted the practice. Three of the nation's largest public authorities, the Metropolitan Transit Authority, the Port Authority of New York and New Jersey and the Dormitory Authority of the State of New York began requiring certain contractors to hire IPSIGs; so did other jurisdictions including the Westchester County Solid Waste Commission, New Jersey's School Construction Authority and Miami-Dade County, Florida.[24] Agencies with wide-ranging investigative and audit responsibility like New York City's Department of Investigation (DOI)[25] and New York State's Office of the Comptroller have recommended and, in some cases, required executive agencies to impose IPSIGs on certain contracts and contractors.

DOI is responsible for investigating possible corruption throughout New York City government and recommending corruption prevention strategies to City agencies. In pursuing this task, the DOI assigns inspectors general to major City agencies.[26] In the early 1990's, the DOI embraced the IPSIG concept and went farther than any other agency in promulgating comprehensive standards covering [1) the contractor's responsibility for cooperating with an IPSIG and [2) the IPSIG's role as investigator and implementer of corruption prevention initiatives. These standards are quite lengthy, but the following provisions provide a flavor: 3 (A1) Contractor agrees that, at its sole expense, it shall retain an IPSIG, to be selected by the City [DOI] to perform all the functions, duties, and responsibilities set forth in this agreement [between the City and the contractor]. 3(C) Contractor authorizes and consents to the performance of the following duties by the IPSIG, the performance of which the Contractor shall have no right to direct or control: (a) Design and implement a corruption prevention program for Contractor (b) Audit, examine, and monitor the implementation of the corruption prevention program and ensure that in connection with the entire Contractor's work . . . that said corruption program is adhered to, particularly with reference

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[24] In Miami-Dade County, the authority to require IPSIGs on public contracts is vested in the County's Inspector General. *See* MIAMI DADE OFFICE OF THE INSPECTOR GENERAL, OIG ORDINANCES, § 2-1076 (D12), *available at* http:// www.miamidadeig. org/ igordinances.html.

[25] NEW YORK, N.Y., CITY CHARTER § 801.

[26] NEW YORK, N.Y., CITY CHARTER § 807.

to matters implicating improper relationships, if any, between public or labor officials and Contractor's representatives. (c) Monitor and investigate actions, conduct, operations, or omissions of Contractor, or any of its key people, employees, subcontractors, consultants . . .. (D1) Contractor agrees that it will cooperate fully and completely with the IPSIG (D2) Contractor shall grant the IPSIG the right to examine all books, records, files, accounts, computer records, documents and correspondence . . .. (E1) Contractor agrees that the IPSIG shall report to the City, through DOI, any suspected or actual criminal activity, or any suspected or actual unethical or irregular business activity . . ..[27]

Any lack of contractor cooperation with the IPSIG could result in the contract's cancellation and the imposition of heavy financial penalties on the contractor.

## THE EMERGENCE OF AN IPSIG SECTOR

In New York City, a number of IPSIG-providing private investigation firms and law firms quickly emerged; for most, IPSIG work was a natural extension (sometimes not even an extension) of the corporate compliance and internal investigations services they were already offering. Some of the OCTF's and the SCA's IG's officials retired from public service and established specialized (boutique) firms offering IPSIG and monitoring services. In addition, some individuals, typically former judges or high-level prosecutors, held themselves out as available for monitoring and IPSIG assignments.

A brief Internet search for "IPSIG" turns up dozens of firms that advertise IPSIG services. Consider the following promotional material from a corporate investigations firm's website:

> As a member of the International Association of Independent Private Inspectors General (IPSIG), [name of firm] is often engaged by organizations to ensure compliance with relevant laws and regulations and to deter, prevent and uncover unethical and illegal conduct.
>
> We provide independent monitoring services for government agencies and others that have concerns involving a particular contractor's affiliation with organized crime, concerns about past illegal activities, prevailing wage violations or potential conflicts of interest. We develop a code of ethics, an integrity audit plan and business ethics training for the employees of the company, which includes setting up our Ethics Hotline to report suspicious activity. Through the implementation of these policies designed and drafted by us, the company in question confirms and demonstrates to others in the community and, when appropriate, the government, that the company is committed to complying with contractual agreements.[28]

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[27] These standards are set forth in a DOI document entitled "Monitoring Agreement." *See* CITY BAR CENTER FOR CONTINUING LEGAL EDUCATION, WHAT EVERY CRIMINAL AND CORPORATE LAWYER NEEDS TO KNOW ABOUT MONITORS, Dec. 6, 2005, at 45-63.

[28] *See* http://www.corporateresolutions.com/page/services/ipsig.

Or to take another example from a different firm's website:

> If you want to prevent the occurrence or reoccurrence of illegal or unethical business practices, follow the lead of major companies around the globe, and rely on [name of firm's] monitoring services. We'll appoint an independent private sector inspector general (IPSIG) to oversee the fulfillment of contractual obligations, deter the reappearance of fraudulent activity, and provide you with the peace of mind that comes when you know strict standards of compliance are being imposed and maintained.
> [The firm's] legal, investigation, and accounting teams work together to expose and correct previous illegal activity. Our years of experience detecting fraudulent or unethical behavior make us an especially capable watchdog, and allow us to prevent the development of unwanted activity in the future. Clients around the world rely on [firm's] monitoring services through an independent private sector inspector general (IPSIG) to guarantee the legality of their own business practices or the practices of the companies they do business with.[29]

## THE INTERNATIONAL ASSOCIATION OF INDEPENDENT PRIVATE SECTOR INSPECTORS GENERAL

In the late 1990's, a number of leading IPSIG proponents established a professional organization, the International Association of IPSIGs (IAIPSIG), with the purpose of promoting use of IPSIGs and developing IPSIG ethical standards and best practices.[30] The IAIPSIG Code of Ethics is an excellent statement of the aspirations of the "IPSIG movement." Its preamble is worth quoting at length:

> Independent Private Sector Inspector General (IPSIG) is an independent, private sector firm with legal, auditing, investigative, management and loss prevention skills, employed by an organization (voluntarily or by compulsory process) to ensure compliance with relevant law and regulations, and to deter, prevent, uncover and report unethical and illegal conduct by, within and against the organization.
> The "independence" of IPSIGs is their hallmark: they must report any unethical and illegal conduct they uncover both to the organization and, independently of the organization, to a reporting entity. The reporting entity may, or may not, be an agency of government. If the reporting entity is not an agency of government, it must, in both appearance and fact, be independent of the host organization, and have a fiduciary responsibility, or otherwise be legally accountable, for ensuring that the mandate of the IPSIG, as defined by the agreement between the IPSIG and the host organization and as set forth herein, is appropriately effectuated. In addition, the reporting entity must ensure that the host organization, after becoming aware of an offense, reports that offense to appropriate governmental officials without unreasonable delay and in a manner that is satisfactory to the IPSIG. Endowed with this position of trust and public responsibility, IPSIGs must be strongly committed to ethical standards, in particular to the values of diligence and impartiality.
> Members of the International Association of IPSIGs (IAIPSIG) believe

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[29] *See* http://www.investigation.com/private_inspector_general.html

[30] The International Association of IPSIGs' website is http://www.iaipsig.org/.

> that adherence by individual IPSIGs to the values of integrity, honesty, impartiality and professionalism are fundamental to the effectiveness and credibility, and hence the prosperity, of the IPSIG profession. IAIPSIG members believe that the IPSIG profession will stand on its dedication to ethical principles and standards of conduct.[31]

The Code of Ethics emphasizes the importance of the IPSIG's dual reporting responsibilities (to the government agency and to the monitored entity) and its need to be scrupulously independent. The authors of the Code were well aware of the risk to the IPSIG's role posed by conflicts of interests of the sort that disgraced the Arthur Andersen accounting/auditing firm in the 1990's.[32] Indeed, the IAIPSIG Ethics Code provides the following examples of prohibited conflicts-of-interest that IPSIGs must avoid:

> i. an IPSIG or an IPSIG member uses an IPSIG assignment as a means of nurturing a future professional relationship with or within the host organization or the reporting entity that is unrelated to the assignment.
> ii. an IPSIG undertakes an assignment with less than complete diligence in order to either provide, or acquire a reputation for providing, host organizations with a clean bill of health.
> iii. an IPSIG accepts an assignment with an organization that has previously retained the IPSIG or one of its members on another matter in circumstances giving rise to the potential for or appearance that the IPSIG's objectivity may be at risk.
> iv. an IPSIG accepts an assignment with an organization and the reporting entity is not in fact and appearance independent, or continues in an assignment in which the reporting entity does not maintain its independence in fact and appearance.[33]

The IAIPSIG website lists a membership of approximately 100 individuals, and over forty law, investigations, accounting and consulting firms. Any individual or firm with the required credentials (holding a license to practice law, accounting, or investigative services and claiming an ability to provide the other professional services) may join as long as it affirms its commitment to the IAIPSIG code of ethics and pays the modest yearly dues. The IAIPSIG does not license nor regulate IPSIGs, but its ethics committee can recommend to the Board of Directors the expulsion of an individual or firm from the organization. A few government agencies, like New York City's Department of Investigation, pre-certify firms as qualified to provide IPSIGs services for government contracts let under its auspices; these agencies may consider IAIPSIG membership and the concomitant obligation to adhere to its code of ethics a prerequisite, or at least a factor, in the certification decision.

Unlike the American Bar Association or the Joint Commission on Heath Care and Accreditation of Health Organizations, the IAIPSIG does not promulgate practice standards. It does provide a useful place for consumers of IPSIG services to post requests for proposals and for IPSIG providers to

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[31] *See* IAIPSIG Code of Ethics, *available at* http://www.iaipsig.org/ethics.html.

[32] *See, e.g.*, TOFFLER & REINGOLD, *supra* note 10.

[33] The IAIPSIG Code of Ethics: Independence is on the worldwide web at http://www.iaipsig.org/ethics_indep.html.

find such requests. The IAIPSIG also serves as a forum for developing ideas about such matters as model contracts and conflicts of interests. Because there is no "how to" book that describes how the professional capabilities of lawyers, investigators, forensic accountants, loss prevention specialists, researchers, analysts, and industry-specific professionals should be combined to fulfill any particular IPSIG assignment, the IAIPSIG serves to further exchange of ideas on best practices.

The IAIPSIG's lack of authority to regulate the qualifications of IPSIG providers and the quality of IPSIG services poses a problem for the successful expansion of the IPSIG concept. Any firm could hold itself out to do IPSIG work and, by performing incompetently or corruptly, tarnish the IPSIG community and the concept itself. For the foreseeable future, good public administration and market forces will have to be relied upon to keep IPSIG practice at a high level.

Government agencies have every reason to select those IPSIG providers who can best assure prevention of fraud and other forms of corruption. IPSIGs with proven track records of cost effective and honest service ought to be in high demand. But this requires government officials to be sophisticated consumers of IPSIG services. For both public and private sector consumers of IPSIG services it would be very useful to have good evaluations of IPSIG providers' previous assignments. Who could/should evaluate IPSIG assignments and where and how such evaluations could/should be available are questions yet to be addressed.

## EXPANDING USE OF IPSIGS: THE WORLD TRADE CENTER CLEAN-UP

The September 11th terrorist attack on New York City's World Trade Center devastated a whole section of lower Manhattan. The destruction at Ground Zero was so great that no single contractor had the capacity to clear the debris in a timely and safe manner. Therefore, Mayor Giuliani and others decided to divide the site into quadrants and hire four general contractors to conduct the clean-up.

City, state and federal officials were concerned about the potential for fraud in the removal process. First, the contracts were let without competitive bidding as "time and material" work; the City would not pay a fixed price but rather reimburse the contractors for their labor and material costs plus a percentage for overhead and profit. Such contracts can be easily abused. Moreover, two of the selected general contractors had previous integrity problems. Second, early clean-up work had been tainted by charges of theft and fraud, some of it perpetrated by organized-crime figures.[34] For these reasons, the New York City Department of Investigation (DOI)

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[34] *See* John Miller, *Profiting From Tragedy: Mob Scavenges Ruins of World Trade Center*, ABC NEWS CENTER, Oct. 4, 2001, *available at* http://abcnews.go.com/sections/wnt/WorldNewTonight/WTC_mafia-groundzero/011004.html.

required each general contractor to hire a DOI-selected IPSIG.[35] The IPSIGS maintained continuous presence at the site assuring that there was no improper payroll and labor billing, no improper markup of subcontractors' costs, no improper materials billing, no safety and environmental violations and no theft of property and materials from the site. The IPSIGS made sure that the debris claimed to be removed actually originated at the World Trade Center site and that it was actually removed and properly disposed of. These IPSIGs were hired and paid by New York City. They reported to DOI and, when directed to DOI, to the contractors whom they were monitoring.

The cleanup effort has drawn high praise from practically all participants and observers. There were no scandals or charges of significant corruption after the IPSIGs became involved.[36] The DOI Commissioner testified before Congress that:

> Indeed, corroborating the fact that the Monitors [IPSIGs] served as a deterrent, early on during the clean-up, DOI was advised by a local prosecutor of an intercepted conversation between two organized crime associates in which they lamented that the on-site presence of the Monitors at the World Trade center site was making it impossible for anyone to overbill the City via the usual scams, because the site was closely scrutinized.[37]

The Staff Report of the House Subcommittee on Management, Integration and Oversight of the Committee on Homeland Security concluded that:

> Private integrity monitors had never previously been deployed on such a large scale and, by all accounts, their deployment in the debris removal context was an overwhelming success. Private integrity monitors identified a number of contractors with ties to organized crime which were subsequently removed from the site, found trucks cooping [idling] while on the clock, flagged several attempted frauds that were referred for

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[35] In her testimony before the U.S. House of Representatives' Committee on Homeland Security, Subcommittee on Management, Investigation and Oversight, July 12, 2006, New York City's Commissioner of Investigation [head of DOI] provided a good explanation of the use of IPSIGs in the World Trade Center clean-up process. *See* http://72.14.209.104/search?q=cache:xB2-zp2lVbYJ:homeland.house.gov/hearings/109_060712_911pt1/TestimonyHearn.pdf+World+Trade+Center.+Cleanup+Corruption+Organized+Crime&hl=en&gl=us&ct=clnk&cd=1.

[36] *See* Subcommittee on Management, Integration and Oversight of the H. Comm. on Homeland Security, H.R., 109th Cong. (July 12, 2006) (testimony of Neil V. Getnick); 9/11 Federal Assistance to New York: Lessons Learned in Fraud Detection, Prevention and Control, *available at* http://72.14.209.104/search?q=cache:xvjdSEsZ8L0J:hsc.house.govhearings/109_060712_911pt1/TestimonyGetnick.pdf+International+Association+IPSIGS+Code+of+Ethics&hl=en&gl=us&ct=clnk&cd=1; *see also* Frank Anechiarico & Ronald Goldstock, *Monitoring Integrity and Performance: An Assessment of the Independent Private Sector Inspector General*, 9 PUB. INTEGRITY (forthcoming 2007).

[37] Subcommittee on Management, Integration and Oversight of the H. Comm. on Homeland Security, Staff Rep. at 4, H.R., 109th Cong. (2006) (testimony of Rose Gill Hearn, New York City Commissioner of Investigation).

prosecution, recovered $47 million in over-billing by contractors and subcontractors, and saved immeasurably more money by deterring fraud.[38]

## PROSECUTORS UTILIZE IPSIGS

While the OCTF conceived of IPSIGs being widely deployed in the public contracting context, it also utilized IPSIGs in the context of cooperation agreements and plea bargains. Companies alleged to have been making illicit payments, laundering money, and engaging in environmentally-related offenses were offered favorable plea or cooperation agreements conditioned on their acceptance of an IPSIG to help in reforming their corporate culture, internal controls and operating procedures. Within several years after the OCTF Report was issued, the Manhattan District Attorney's Office, the New York State Attorney General[39] and federal prosecutors in the Eastern District of New York (Brooklyn), the Southern District of New York (Manhattan) and the District of New Jersey used IPSIGs to resolve major corporate criminal prosecutions or potential prosecutions. According to the leading study of the subject, independent monitors were included in twenty-two DOJ agreements between 2003-2006.[40] Sometimes, a corporate criminal defendant was offered a non-prosecution or deferred-prosecution agreement if, among other things, it agreed to hire an IPSIG to carry out a program of organizational ethics reform and corruption prevention.[41]

In some cases, IPSIGS have been imposed as part of plea agreements. From the DOJ's perspective, both procedures advance the same strategy: prevent future wrongdoing in and by the corporation by means of a multi-year monitor authorized to conduct investigations and make (usually bind-

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[38] Subcommittee on Management, Integration and Oversight of the H. Comm. on Homeland Security, Staff Rep. at 21, H.R., 109th Cong. (2006).

[39] The New York State Attorney General and the officials from the U.S. Department of Labor settled an enforcement action against New York City Plumbers Local 1 by requiring the union to hire an IPSIG to investigate and deter corruption of and criminal influence over Local 1. http://www.uniondemocracy.com/UDR/115-the%20eternal%20quest%20for%20fair%20hiring%20in%20construction.htm.

[40] Brandon L. Garrett, *Structural Reform Prosecution*, 92 VA. L. REV. (forthcoming, June 2007); *see also Crime Without Conviction: The Rise of Deferred and Non-prosecution Agreements*, CORP. CRIME RPT, Dec. 28, 2005, *available at* http://www.corporatecrime reporter.com/deffedreport.htm.

[41] For a recent example of a deferred prosecution agreement, requiring the defendant Statoil ASA to hire an independent compliance consultant'' for three years, see U.S. Attorney, Southern District of New York, Press Release, Oct. 13, 2006, *U.S. Resolves Probe Against Oil Company that Bribed Iranian Official*. In a critical report, ''Crime Without Conviction: The Rise of Deferred and Non-Prosecution Agreements,'' the *Corporate Crime Reporter* argues that there has been a sea change in DOJ's approach to corporate criminal misconduct; DOJ has moved away from criminally prosecuting corporations in favor of non-prosecution and deferred prosecution agreements. *See* http://www.corporatecrimereporter.com/report122805.htm.

ing) recommendations for organizational reform.[42] The DOJ retains the option of going back to court (criminal prosecution, contempt, other remedies) if the IPSIG reports the corporation's lack of cooperation or continued wrongdoing.

• **Avianca Airlines Case.** In the wake of serious drug trafficking prosecutions involving employees of Avianca Airlines (Colombia's National Airlines),[43] the U.S. Attorney of the Southern District of New York brought a civil forfeiture action against the airline seeking the forfeiture of aircraft that had been used to transport cocaine into the United States.[44] This forfeiture action was settled on October 19, 2004, when the government and Avianca agreed that ''Avianca [would hire for two years] a ''screening monitor'' to assess, monitor, report upon and oversee Avianca's efforts to prevent the transport of narcotics, explosives, weapons, and/or other dangerous contraband with respect to all of its aircraft flying into the United States.''[45]

The U.S. Attorney's Office solicited proposals from individuals and firms desiring to serve as ''screening monitor.''[46] It encouraged bidders to form teams that included: 1) former prosecutors, 2) aviation security experts, and 3) businessmen with experience in South America. The settlement provided that the screening monitor would have authority to examine all books, records and files; have unfettered access to all Avianca facilities, aircraft, equipment; the right to interview any director, officer, employee, agent or consultant; and to employ legal counsel, consultants, investigators, experts and other personnel necessary to assist in the proper discharge of its

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[42] Professor Brandon L. Garrett's study provides a comprehensive list of all federal prosecutions that have resulted in cooperation agreements, non-prosecution agreements, deferred prosecution agreements. It does not cover plea bargains or government-initiated civil litigation that required the defendant to employ an IPSIG. *See supra* note 37. *See also* Christopher J. Christie & Robert M. Hanna, *A Push Down the Road Of Good Corporate Citizenship: The Deferred Prosecution Agreement Between the U.S. Attorney For the District of New Jersey and Bristol-Meyers Squibb Co.*, 43 AM. CRIM. L. REV. 1043 (2006).

[43] The government alleged that since September 1999, ''there have been approximately 30 seizures at JFK [Airport] of narcotics that were smuggled aboard Avianca aircraft in a manner that indicates complicity of Avianca employees and/or a departure from established screening procedures.'' U.S. v. the Leasehold Interests Held By Aerovias Nacionales de Columbia S.A. Avianca in Various Boeing 767 Aircraft, 04 Civ. 8199 (Oct. 19, 2004) [hereinafter *Leasehold Interests*, 04 Civ. 8199 (LMM)]. The U.S. Attorney's summary of the charges can be found at http://64.233.161.104/search?q=cache:i86k AXyxk38J:www.usdoj.gov/usao/nys/pressreleases/April06/eldoradoarrestspr.pdf+Avianca+Airlines+indict&hl=en&gl=us&ct=clnk&cd=2.

[44] *Leasehold Interests*, 04 Civ. 8199 (LMM), *supra* note 43.

[45] *Leasehold Interests*, 04 Civ. 8199 (LMM), *supra* note 43.

[46] In a number of its deferred prosecution agreements, the U.S. Attorney's Office in this district has set out the powers and duties of the ''monitor'' in terms that exactly track the IAIPSIG code of ethics. The U.S. Attorneys have so far avoided use of the term ''IPSIG'' although the monitoring role worked out in a number of cases is identical to or closely resembles an IPSIG role.

responsibilities. According to the settlement, the screening monitor would, as soon as practicable, undertake a comprehensive study of Avianca's efforts to prevent the transportation of narcotics, weapons and other dangerous contraband and make whatever recommendations, if any, deemed necessary to prevent the transportation of illegal contraband on Avianca aircraft. Avianca, in turn, agreed to implement whatever recommendations, if any, the screening monitor proposed, subject only to the district court's review in the event that Avianca objects to implementing a particular recommendation. The parties agreed that the intent of the agreement was that the monitor would undertake "intensive monitoring" for the first year and less intensive monitoring for the second year. If the district court finds that Avianca has breached its obligations under the agreement

> the district court would set a time certain by which such breach must be cured. If the court finds that Avianca failed to cure the breach within the prescribed period, the court may at its discretion impose a monetary judgment against Avianca up to $3,000,000 . . .. Avianca acknowledges that [even in the event of such a breach and monetary judgment] it would remain obliged to perform its obligations under the agreement.[47]

• **The KPMG Case.** Federal prosecutors accused the international accounting firm, KPMG, and several of its high-level officers of marketing abusive and illegal tax shelters. Several officers were prosecuted,[48] but desiring not to repeat the disintegration of an international accounting firm, as occurred in the Arthur Andersen case, the U.S. Attorney's Office for the Southern District of New York entered into a deferred prosecution agreement with KPMG in August, 2005. This agreement provides that:

> [T]he prosecution of the criminal charge against KPMG will be deferred until Dec. 31, 2006 if specified conditions—including payment of the $456 million in fines, restitution, and penalties—are met. The $456 million penalty includes: $100 million in civil fines for failure to register the tax shelters with the IRS; $128 million in criminal fines representing disgorgement of fees earned by KPMG on the four shelters; and $228 million in criminal restitution representing lost taxes to the IRS as a result of KPMG's intransigence in turning over documents and information to the IRS that caused the statute of limitations to run. If KPMG has fully complied with all the terms of the deferred prosecution agreement at the end of the deferral period, the government will dismiss the criminal information.[49]

In order to monitor compliance with this agreement, KPMG agreed to hire an "Independent Monitor" empowered to obtain information from the corporation and its employees and to enforce the agreement for an initial pe-

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[47] *Leasehold Interests*, 04 Civ. 8199 (LMM), *supra* note 43.

[48] Jonathan Glater, *Inquiry Into KPMG Over Tax Shelter Sales*, N.Y. TIMES, Aug. 15, 2005, *available at* http://www.library.uiuc.edu/blog/bellog/archives/2005/08/business__news__i.html.

[49] U.S. Department of the Treasury, Internal Revenue Service, Press Release, *KPMG to pay $456 For Criminal Violations*, Aug. 29, 2005, *available at* http://www.irs.gov/newsroom/article/0,,id=146999,00.html.

riod of three years.[50] The deferred prosecution agreement specifies the monitor's authority as follows:

> (1) review and monitor KPMG's compliance with this Agreement and make such recommendations as the Monitor believes are necessary to comply with this Agreement. [In another section of the agreement, KPMG agrees to implement all of the Monitor's recommendations.]
> (2) review and monitor KPMG's maintenance and execution of the Compliance and Ethics Program and recommend such changes as are necessary to ensure conformity with the Sentencing Guidelines and this Agreement, and that are necessary to ensure that the Program is effective;
> (3) review and monitor the implementation and execution of personnel decisions regarding individuals who engaged in or were responsible (either by act or omission) for the illegal conduct described in the Information [i.e. the criminal charge] and may require any personnel action, including termination, regarding any such individuals review and monitor the operation and decisions of any practice area involving "reportable" or "listed" transactions to ensure that those practices are complying with the restrictions outlined in paragraph 6 above and all applicable laws.[51]

DOJ selected a former Securities and Exchange Commission Chairman as independent monitor. The agreement authorizes the Monitor to hire legal counsel, consultants, investigators, experts "and other personnel necessary to assist in the proper discharge of the Monitor's duties."[52] After the monitorship ends, the Internal Revenue Service will monitor KPMG's tax practice and adherence to elevated standards for two years. Should KPMG violate the agreement, it may be prosecuted for conspiracy, or the government may extend the period of deferral and/or the monitorship.

• **The New York Racing Association case.** In 2004, federal prosecutors in the Eastern District of New York obtained indictments against the New York Racing Association (NYRA), a non-profit association franchised by New York State to conduct horse racing and pari-mutuel betting at the state's three major thoroughbred race tracks and against several of its top officials. The prosecutors charged that two former directors of NYRA's Pari-Mutuel Department and four former pari-mutuel tellers had participated in a scheme from 1980 through 1999 that enabled pari-mutuel employees to deduct from their federal and state taxable income millions of dollars for purported unreimbursed employee expenses over a period of nineteen years. The prosecutors charged NYRA with one count of conspiracy and three counts of aiding and abetting false tax filings. Pursuant to the terms of the deferred prosecution agreement between the DOJ and the NYRA:

> NYRA accepted responsibility for its conduct as alleged in the indictment, pledged full cooperation with the government's investigation, and agreed to, among other things, (i) the payment of $3 million in fines and costs of

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[50] Ironically, a different division of KPMG itself offers IPSIG services.

[51] *See* http://www.usdoj.gov/usao/nys/Press%20Releases/August%2005/KPMG%20dp%20AGMT.pdf [hereinafter KPMG Deferred Prosecution Agreement].

[52] KPMG Deferred Prosecution Agreement, *supra* note 51.

> prosecution, (ii) the restructuring of its management, and (iii) the appointment of an *independent monitor* by the Court to ensure full compliance with the agreement.[53]

Under the terms of the deferred prosecution agreement, if the NYRA fully complies with the terms of the agreement, after eighteen months, the U.S. Attorney will move to dismiss the charges. In a further innovation, in order to conserve its limited resources, the United States Attorney requested, the New York State Comptroller's Investigations Division to be the primary authority to which the monitor would report.

The U.S. Attorney, with the active participation and assistance of the New York State Comptroller's Office, chose as "special monitor" a former prosecutor who currently serves as the IAIPSIG's president. This special monitor, despite the appellation, conceived of his role as that of an IPSIG.[54] The independent monitor fielded a multi-disciplinary team including lawyers, investigators and forensic accounts.[55] At the end of eighteen months, the monitor reported that the NYRA had made a complete turnaround. Substantial progress had been made in many areas, including:

- New leadership. There is a new president and new co-chairs of the board, a new code of ethics and new rules for controlling cash handled by pari-mutuel clerks.
- Safeguards against horse drugging. NYRA is now an industry leader
  o Before races, horses are kept under strict observation in monitoring barns to prevent improper drugging.
  o Tests are now administered to expose "milkshaking," a process by which an alkalizing agent is administered to horses to artificially reduce fatigue and enhance performance.
- Ending ties to rebate shops. NYRA cut its business with offshore boiler room operations associated with tax evasion, money laundering and cheating on races. NYRA is [now] a leader in banning these operations; the NYS Racing and wagering Board (the regulatory agency) has followed the NYRA policy.
- Preventing money laundering. Training for staff and new policies will prevent money laundering and tax evasion.
- Improved financial reporting. NYRA's financial statements provide more and more easily understood information about its financial conditions.

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[53] Press release, Robert Nardoza, U.S. Attorney's Office, May 6, 2004, *available at* http://www.justice.gov/tax/usaopress/2004/txdv042004may06.htm.

[54] *See* MONITOR'S FINAL REPORT: PART I, PUBLIC REPORT, U.S. v. NEW YORK STATE RACING ASSOCIATION CR. 03-1295 (ADS), at 24 [hereinafter MONITOR'S FINAL REPORT], *available at* http://www.osc.state.ny.us/reports/nyra/nyrareport905.pdf. "In understanding the role of the IPSIG-style monitor it is helpful to go the primary definition of an Independent Private Sector Inspector General which is the following . . .." Lesley Skillen et. al., *The Independent Private Sector Inspector General, in* REPORT OF THE CIVIL PROSECUTIONS COMMITTEE OF THE NEW YORK STATE BAR ASSOCIATION, COMMERCIAL AND FEDERAL LITIGATION §§ 1-2 (1994).

[55] *See* MONITOR'S FINAL REPORT, *supra* note 54, at 24.

- Simulcast Asset Maximization. By positioning its simulcast signal as a strategic asset, NYRA generated an immediate multi-million dollar cash flow that will continue into the future.
- Funding for the Horseman's Account. Historically, NYRA had used for its own account funds it was supposed to be holding for the benefit of horse owners. Those funds are now being properly accounted for.[56]

## VOLUNTARY IPSIGS

Not only do former prosecutors, auditors, FBI agents and police investigators seek to persuade government contracting agencies, regulators and prosecutors that IPSIGs are cost effective and reduce the risk of corruption scandals, they also seek to persuade corporations that voluntarily hiring an IPSIG is good preventative medicine. IPSIGs claim that just as federal IGs have been shown to save money for government agencies by preventing fraud, waste and abuse, the corporate use of IPSIGs can result in substantial savings to the host organization. Moreover, IPSIGs argue that their presence can serve as a significant marketing tool since companies employing IPSIGs will be more attractive to potential business partners and financiers who prefer to deal with firms whose integrity is vouched for.

These arguments have resulted in the institution of a voluntary IPSIG program where the host organization seeks a "compliance program on steroids." The ordinary internal compliance program is supervised by compliance officer who owes his future career opportunities to the firm that employs her, frequently oversees the activities of friends and colleagues, and is herself a product of that firm's culture.[57] However, for the voluntary IPSIG, pleasing a single client, even an important one, is not the highest priority; the IPSIG knows that even a single failure due to lack of diligence is likely to result in the loss of future IPSIG contracts, at least where a government agency chooses or has to sign off on the IPSIG.

Under some circumstances, companies may prefer to hire a "PSIG," an IPSIG who lacks independence, i.e., a monitor who does not have an obligation to report to an external (normally, governmental) body. In such cases, the company's general counsel may direct, supervise and control the PSIG's internal investigations and other monitoring functions. This would enable the company to claim that any information uncovered by the PSIG is protected by the attorney client privilege and work product doctrine. But the company following this tack would risk losing any advantage offered by the safe-harbor provisions of the Federal Sentencing Organizational Guidelines.

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[56] News from the Office of the New York State Comptroller Allan G. Hevesi, *Reform at NYRA Means Racing Franchise Should be Worth Much More to State When it is Put Out to Bid*, Sept. 13, 2005, *available at* http://www.osc.state.ny.us/press/releases/sept05/091305.htm.

[57] For some skepticism about the effectiveness of corporate compliance programs led by officers who are not independent, see William Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343 (1999).

## THE FUTURE OF IPSIGS

Both the demand side and the supply side of the IPSIG market are likely to see significant growth in the future. There are strong incentives for a government executive agency or regulator to require private firms with whom they do business or regulate to hire an IPSIG. Shifting the cost of regulation to a contractor or regulated entity makes good sense; it also lessens the risk of the government agency being blamed for or embarrassed by a corruption scandal. Moreover, once some government agencies use IPSIGs, it may be risky for other agencies not to require them. In the event of a corruption scandal, editorialists and political opponents will excoriate the agency as negligent (or worse) for not requiring an IPSIG at an early date. It is therefore hardly surprising to find that fifty Congresspersons cosponsored a bill that would require the U.S. Department of Homeland Security to study how IPSIGs could be used to avert the kind of widespread fraud that plagued the post-Hurricane Katrina recovery effort and that a candidate for the Maryland legislature recently proposed that IPSIGs be required on Maryland's huge Inter-County Connector project in order to prevent the kind of cost over-runs, shoddy construction, and dangerous accidents that plagued Boston's Big Dig.[58] Northern Ireland's Department of Finance and Personnel, Central Procurement Directorate recently launched a pilot project to see whether and, if at all, to what extent, IPSIGs could be successfully used to prevent criminal exploitation of the construction industry.[59]

Prosecutors are increasingly turning to monitors and IPSIGs in corporate and organizational crime cases. This has the advantage of attacking organizational criminality with a systemic long-term remedy paid for by the defendant. It is an appealing remedy for a fundamentally legitimate organization that is willing, even eager, to put its wrongdoing behind it and to change its operations and culture.[60] There is wide recognition by federal, state and local prosecutors in the New York City metropolitan area that they can leverage their limited resources by shifting the cost of monitoring, re-

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[58] *See* http://www.mikeryman4mdsenate.com/news.html.

[59] *See* ORGANISED CRIME TASK FORCE, ORGANISED CRIME IN NORTHERN IRELAND, THREAT ASSESSMENT 2006, at 20, *available at* http://64.233.161.104/search?q=cache: HnTydQ4pzBMJ:www.octf.gov.uk/publications/PDF/OCTF%2520Annual%2520Report%2520and%2520Threat%2520Assessment%25202006.pdf+Northern+ireland+Department+of+Finance+and+personnel+central+procurement+directorate+IPSIG&hl=en&gl=us&ct=clnk&cd=2.

[60] In its definition of the IPSIG's role, the New York State Bar Association's Commercial and Federal Litigation Section's Civil Prosecution Committee noted: "Where the culture of the organization is primarily legitimate or amenable to reform, the IPSIG may, in addition to the prevention and control of illegal and unethical conduct, be a major participant with management in enhancing the economy, efficiency and effectiveness of the organization. Where the culture is primarily illegitimate and hostile to change, the IPSIG's role may be essentially adversarial, limited to instituting controls and monitoring organizational activities. *See* NEW YORK STATE BAR ASSOCIATION'S COMMERCIAL AND FEDERAL LITIGATION SECTION'S

structuring and reforming to the defendant firm. Perhaps prosecutors have been slower to appreciate the difference between an investigative monitor and a full-fledged IPSIG, but in the last several years monitors imposed via deferred prosecution agreements are looking a lot like IPSIGs.[61]

It is also likely that more corporations will be persuaded that voluntarily hiring an IPSIG is good preventative medicine because the IPSIG can make a corporation more corruption-resistant and consequently improve the corporation's image with shareholders, regulatory agencies and potential business partners. Moreover, the IPSIG may well pay for itself if, like the federal IGs, it prevents fraud, waste and abuse.

The greatest threat to the IPSIG movement is that firms holding themselves out as IPSIGs will give the IPSIG concept a bad name. This could happen if the IPSIG provider performs incompetently or compromises its independence by currying favor with the monitored entity. This is exactly what happened in the case of the international accounting and auditing firm, Arthur Andersen, in the 1990's.

The IPSIG Code of Ethics seeks to head off that problem by prohibiting an IPSIG from engaging in other business with the monitored company. But the IAIPSIG does not have any enforcement authority and, on account of anti-trust concerns, is unlikely to seek such authority in the future. That means that any law firm, investigations firm, or other firm can hold itself out as an IPSIG and perform its duties without fear of sanctions. This possibility will be substantially reduced if the government agencies that require contractors or defendants to hire IPSIGs are sophisticated in choosing IPSIGs, require that IPSIGs adhere to the IAIPSIG Code of Ethics and monitor their performance. There is no incentive for a government agency to choose an incompetent or unethical IPSIG, but incompetent or overburdened government officials might fail to choose and utilize IPSIGs prudently. By contrast, a company which has a choice in the selection of an IPSIG might have an incentive to hire the least aggressive IPSIG, cynically desiring to reap the reputational advantage that derives from the IPSIG's presence while keeping the IPSIG in the dark about illegal activities.

The IPSIG experiment will be undermined if government officials choose or approve the wrong IPSIGs, if they fail to permit or allow IPSIGs to be compensated properly so that they can competently carry out their work and if they fail to respond appropriately to IPSIG reports of wrongdoing by the monitored-entity. Moreover, if the government agency over-uses IPSIGs or burdens the host organization with excessive IPSIG expenses and investigations, it could weaken or even destroy the company as well as undermine the IPSIG concept. The IPSIG is not a panacea, but it is a late 20th century and early 21st century innovation that, if properly deployed, carries great promise for preventing future organizational corruption.

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CIVIL PROSECUTION COMMITTEE, THE INDEPENDENT PRIVATE SECTOR INSPECTOR GENERAL (1994), *available at* www.getnicklaw.com/media/article__27. html.

[61] Indeed, in several cases federal prosecutors, in describing the role of an "independent monitor," have adopted verbatim the IAIPSIG definition of an IPSIG.