COSMOS
Navigate the Compliance Universe

# The Complete Compliance and Ethics Manual 2023
# Corporate Probation: The Use of Independent Monitors to Improve Compliance and Prevent Fraud

By Vincent L. DiCianni, Esq. and Eric R. Feldman, CFE, CIG, CCEP-I[1]

The last several years have constituted something of a "perfect storm" in public contracting and oversight: decreasing public contract dollars, dramatic increases in contracting fraud at the federal, state, and municipal levels; declining public resources available for audit, investigation, oversight, and prosecution; and a rapidly diminishing public tolerance for the waste of limited taxpayer dollars and for "big government." Calls for tougher sanctions against corporate fraud from the media, politicians, and the public are met with countervailing criticism that many law enforcement, regulatory, and prosecutorial agencies are perpetuating an "anti-business" environment that is not in the best interest of job creation and stimulating an economy. Consequently, every decision about how to handle a problem contractor has become a balancing act of protecting the public from harm; respecting the rights of contractors in a free market economy; trying not to drive good contractors out of business; and sending a message that fraud or regulatory violations will not be tolerated.

The enforcement options granted to most agencies to achieve these goals are often limited and basic: They can prosecute an individual or a company with the hope of seeking a conviction, fines, and/or penalties; or they can decline prosecution in lieu of agency suspension or debarment action. At the federal level the approach is designed to protect the public by ensuring a contractor's "present responsibility." Contractors facing the scrutiny of government customers or regulators are confronted with a daunting choice. Acknowledging deficiencies in their company can lead to the imposition of sanctions that can affect their ability to continue to compete for public contracts, and/or their favorable status with a regulatory agency, either of which can further impact their ability to continue at all. These opposing forces have in many ways forced costly, lengthy and divisive litigation between government agencies, the Department of Justice, and government contractors, often clogging up the justice system but doing little to help *prevent* fraud or improve the overall accountability and performance of public contractors or regulated industries.

Government regulators and federal and state prosecutors are searching for effective alternatives to prosecutions. They are increasingly using deferred prosecution agreements (DPAs) or non-prosecution agreements (NPAs), as well as civil settlement agreements, which include some form of independent oversight to improve the contractor's internal controls, performance and transparency. Independent monitoring offers an approach that is also being used with even greater frequency in a variety of administrative settings across the country as a remedial, less punitive alternative to other forms of government action. For example, independent monitoring has been used as an alternative to resolve proposed suspension or debarment from government contracting; in lieu of license suspension or revocation for regulated professionals such as doctors, dentists, chiropractors or pharmacists; or in place of loss of network provider status, including closure, of much-needed hospitals, nursing homes, or other facilities. The inclusion of this remedial alternative in agreements as part of a comprehensive resolution can lead to quicker and more beneficial solutions for all sides. Using the independent monitoring approach fulfills the government's responsibility to protect the taxpayer, and the regulatory agencies' mission of protecting public health, safety, and welfare. At the same time, this option allows businesses and professionals to continue to operate, implement improvement where deficiencies are noted, and demonstrate, over time, that they have indeed fixed the problem that resulted in government concerns and scrutiny.

Copyright © 2024 by Society of Corporate Compliance and Ethics (SCCE) & Health Care Compliance Association (HCCA). No claim to original US Government works. All rights reserved. Usage is governed under this website's Terms of Use.

## Independent Monitoring: Not a New Concept

Although applied more often today, independent monitoring is not a new concept. It has roots in the monitoring programs created in the late 1960s to help rehabilitate juveniles and first offenders. Pilot programs in Washington, DC and New York City provided offenders with counseling, training, and job placement in lieu of prosecution, in the hope that such programs would reduce recidivism.[2] Corporate monitoring was further inspired by the federal Inspector General Act of 1978, which created an inspector general to prevent and detect fraud, waste, and abuse for each of 12 major federal civilian agencies (now up to 73 federal agencies with the 2008 amendments).[3]

Effective independent monitoring involves incorporation of oversight through auditing and investigative tools of a business or practice by a third party.[4] One prominent model has been used for more than 25 years in public school building projects in New York.[5] Perhaps the most successful pioneering program for corporate monitoring is the Independent Private Sector Inspector General (IPSIG) program developed in New York in response to the 1989 report, *Corruption and Racketeering in the New York City Construction Industry*.[6] In 1991, the Federal Sentencing Guidelines shifted policing responsibilities from the government to the defendant corporation, which had the effect of promoting independent monitoring and IPSIG models by offering less stringent penalties for companies that took steps to detect and prevent fraud, report misconduct promptly, and create a culture in which high-level officials did not participate in or condone criminal activity.[7]

The IPSIG program, which was used to investigate the theft of scrap materials from The World Trade Center site after 9/11, created an ongoing monitoring program for construction companies with large state contracts. It requires the contractors to maintain a 24-hour hotline that employees and others can use to report any wrongdoing; it also provides monitors with ongoing access to financial reports and other records, as well as to employees. IPSIG monitors professionals in the healthcare, accounting, and insurance industries, and businesses and individuals that contract with the state government. The IPSIG model utilizes private sector resources and expertise as an independent, private sector firm (as opposed to a governmental agency) that possesses legal, auditing, investigative, and loss prevention skills, that is employed by an organization (1) to ensure that organization's compliance with relevant laws and regulations, and (2) to deter, prevent, uncover, and report unethical and illegal conduct committed by the organization itself, occurring within the organization, or committed against the organization. Notably, an IPSIG may be hired voluntarily by an organization or it may be imposed upon an organization by compulsory process such as a licensing order issued by a governmental agency, by court order, or pursuant to the terms of a deferred prosecution agreement.[8]

The independent monitoring model that has evolved in federal contracting, as well as with licensed and regulated industries around the country, differs somewhat from the IPSIG model, which has been criticized by some who feel that IPSIGs can be too intrusive into areas of a company that have nothing to do with the matter at hand.

The increased focus on corporate scrutiny resulting from the 2001 Enron scandal, and more recently a series of corporate frauds associated with both the financial services and automobile industries, have increased public attention to the challenges of addressing corporate business ethics in our country. Strengthening of the Civil False Claims Act legislation federally and in many states, and the increased use of DPAs, NPAs and Civil Settlement Agreements have furthered the impetus to use corporate monitors to help address the costs of litigation and reduce the backlog of corporate fraud prosecutions in a manner that protects the public.

In the past, "a prosecutor's choices when faced with corporate wrongdoing, were essentially binary: he or she could either bring charges or decline prosecution, with no middle ground allowing for continued supervision or

Copyright © 2024 by Society of Corporate Compliance and Ethics (SCCE) & Health Care Compliance Association (HCCA). No claim to original US Government works. All rights reserved. Usage is governed under this website's Terms of Use.

enforced remediation."[9] Because of the rigidity of existing standards, prosecutors sought "a way that would enable them to exercise their discretion not to charge a corporation in appropriate circumstances but that would, at the same time, give them sufficient leverage to require significant changes in corporate culture, compliance and controls and, as importantly, monitor those changes for a reasonable period of time. Thus was born the corporate deferred prosecution agreement (DPA) and its adjunct, the Independent Monitor."[10]

Monitors are commonly associated with DPAs and other pretrial agreements, which "have been used with more frequency recently to resolve a wide variety of criminal investigations, ranging from accounting fraud to tax fraud to violations of the Foreign Corrupt Practices Act (FCPA). [11] Monitors have been used in cases involving well-known companies such as Volkswagon, Teva, Odebrecht, Braskem, and Microsoft. The Securities and Exchange Commission (SEC) is also using them frequently in enforcement actions, such as in its action against WorldCom. The use of monitors is increasingly common in state courts as well, and they are sometimes used in cases when there is no prosecution involved. Monitors have been used in high-profile cases, such as the 2002 case against Arthur Andersen executives involved with Enron, and in the recent BP oil spill settlement.

**This document is only available to subscribers. Please log in or purchase access.**

Purchase Login

Copyright © 2024 by Society of Corporate Compliance and Ethics (SCCE) & Health Care Compliance Association (HCCA). No claim to original US Government works. All rights reserved. Usage is governed under this website's Terms of Use.