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INTEGRITY AND EFFICIENCY

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Council of Inspectors General on Integrity and Efficiency

Members of the Council

The *Inspector General Reform Act of 2008* created the Council of Inspectors General on Integrity and Efficiency. This statutory council supersedes the former President's Council on Integrity and Efficiency and Executive Council on Integrity and Efficiency, established under Executive Order 12805.

The CIGIE mission is to address integrity, economy, and effectiveness issues that transcend individual government agencies and increase the professionalism and effectiveness of personnel by developing policies, standards, and approaches to aid in the establishment of a well-trained and highly skilled workforce in the Offices of Inspectors General.

CIGIE is led by Chair Phyllis K. Fong, Inspector General of the U.S. Department of Agriculture, and Vice Chair Carl Clinefelter, Inspector General of the Farm Credit Administration. The membership of the CIGIE includes 73 inspectors general from the following federal agencies:

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Department of Agriculture	U.S. International Trade Commission
Amtrak	Department of Justice
Appalachian Regional Commission	Department of Labor
Architect of the Capitol	Legal Services Corporation
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Election Assistance Commission	Office of Personnel Management
Department of Energy	Peace Corps
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Farm Credit Administration	Railroad Retirement Board
Federal Communications Commission	Securities and Exchange Commission
Federal Deposit Insurance Corporation	Small Business Administration
Federal Election Commission	Smithsonian Institution
Federal Housing Finance Board	Social Security Administration
Federal Labor Relations Authority	Special Inspector General for Afghanistan Reconstruction
Federal Maritime Commission	Special Inspector General for Iraq Reconstruction
Federal Reserve Board	Department of State
Federal Trade Commission	Tennessee Valley Authority
General Services Administration	Department of Transportation
Government Accountability Office	Department of Treasury
Government Printing Office	Treasury Inspector General for Tax Administration
Department of Health and Human Services	Special Inspector General for the Troubled Asset Relief Program
Department of Homeland Security	Department of Veterans Affairs
Department of Housing and Urban Development	

LETTER FROM THE EDITOR-IN-CHIEF

Time and information are prevailing currencies in the digital age. The federal government capitalizes on technological advancements to create a more efficient environment and provides value for the American public through transparency and timeliness. This issue of the *Journal of Public Inquiry* showcases nine articles and one congressional testimony filled with innovative ideas from across the spectrum of inspectors general on how to best leverage new capabilities while effectively utilizing current ones — and ultimately working to ensure that the federal government is a responsible steward of taxpayer dollars.

Developments in technology have created opportunities for outreach and collaboration within the federal government and the IG community. Barriers of time and distance have been broken down, allowing people to come together to solve problems and spot trends. The rewards of new technology are innumerable; however, it is not without risk. While the IG community continues to embrace technology as a means to further its mission, we must analyze risks and take the necessary steps to safeguard information and protect privacy.

CIGIE has made great strides in this area over the past year. The Information Technology Committee has explored cloud computing contract concerns and developed recommended language to allow for IG access to data, has worked to identify IG community capabilities and needs in the area of computer forensics, and developed a new checklist for assessing conformity with computer forensics standards. The Homeland Security Roundtable has produced the Management Advisory Report on Cybersecurity, as well as a report on Recommended Practices for Office of Inspectors General Use of New Media, and is continuing with work in both of these areas. These initiatives are significant contributions that facilitate the ability of the IG community to analyze risk and leverage technology.

Several articles in this issue of the *Journal* explore opportunities to incorporate technology as a way to bring together individuals in non-traditional formats to enact positive change and develop department-wide best practices.

This issue also highlights the need to adapt the best practices of private industry sectors to government operations. Private industry incentivizes streamlining and simplifying business processes — “do more with less.” OIGs and their respective departments can address efficiencies in order to establish leaner business operations.

Offices of Inspectors General should not forget the tools already available while looking toward the future. The effective usage of suspension and debarment programs discussed in this issue reiterates the value of administrative actions as well as dispelling common myths. Suspensions and debarments protect government interests by excluding companies and individuals that are not responsible from participating in federal contracts.

This issue emphasizes the diverse areas of oversight of the IG community and our shared endeavor to detect and deter fraud, waste, and abuse, and promote economy, efficiency, and effectiveness in the federal government.

I would like to thank the authors and editorial board for contributing their insight and expertise to this edition of the *Journal*.



Lynne M. Halbrooks
Acting Inspector General
Department of Defense



Journal of Public Inquiry

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Council of the
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☞ Denotes the end of an article.

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Returning America's Art to America

By Inspector General Brian Miller

During the New Deal era, the U.S. government paid artists to produce art as part of several federal art programs, most notable of which is the Works Progress Administration, Federal Art Project. In the intervening decades, however, many of the remaining works of art have been lost or stolen and are scattered throughout the country. Since the U.S. government commissioned the artwork, these pieces are the rightful property of the United States and its citizens. To restore America's art to America, the General Services Administration Office of Inspector General has undertaken a far-reaching effort to recover these historically invaluable artworks. GSA OIG has been working closely with GSA's Fine Arts Program, creating important alliances that are valuable not just to this effort, but also to OIG's other oversight activities. GSA OIG has also been working to increase awareness of the artwork recovery efforts through outreach to the public. Outreach to the public on this topic of general interest has led to the recovery of several artworks that can now be admired by the public. This project also helped to establish better understanding and appreciation of the vital oversight functions of the Office of Inspector General. To date, our awareness efforts, cooperation and dedication to restoring this heritage have led to the recovery of 78 pieces of art.

BACKGROUND OF NEW DEAL FEDERAL ART PROGRAMS

During the New Deal era from 1933 to 1943, federal art programs had several different methods to create works of art for public use. Some programs were set up to provide economic relief and paid artists an hourly wage. In 1934, an artist was paid up to \$42 per week, as long as he or she turned in a finished piece of art each week. Other programs involved competitions to commission murals and sculptures for specific sites within public buildings. These programs generated

an abundance of New Deal art, much of which is still in existence today. GSA, as the custodian of personal property belonging to the United States, is now the official custodian of that artwork. For a variety of reasons, however, much of that artwork has been misplaced. In many cases, the artwork was given as unauthorized gifts or simply abandoned.

"...our awareness efforts, cooperation, and dedication to restoring this heritage have led to the recovery of 78 pieces of art."

INITIAL INVESTIGATIVE EFFORTS

When we began this program, it was based largely on tips and regular checks at auction sites and Internet sites such as e-Bay for WPA art.

We have been working closely with the FAP at GSA, the Federal Bureau of Investigations and the fine art community to locate, identify and recover the missing artwork. When OIG identifies a potential New Deal artwork, we contact the possessor of the artwork and provide a legal explanation of the federal government's claim to the artwork. We ask the possessor to maintain care and possession of the artwork until title research is complete. We notify the Department of Justice in case assistance is necessary. If we determine that the artwork is federal property, OIG and FAP will work with the possessor to return the art, which is then placed at a public location for all to enjoy.

We quickly realized that maintaining 70- or 80-year-old artwork is no small feat and we would not be able to retrieve these pieces if it were not for the care and efforts of those who preserved them. We also came to realize that we needed more public out-

reach to have a larger impact and that we would get more tips, including people voluntarily returning art, if we could more effectively get our message out.

GETTING THE MESSAGE OUT

We reached out to the public using the two following means:

- First, we worked closely with GSA to produce a 22-minute documentary film on the New Deal Art Recovery Project entitled “Returning America’s Art to America.” Charles Osgood, radio and television commentator, agreed to narrate the 2010 film, which includes interviews with those who have participated in this project, such as those who have returned New Deal artwork they possessed, art historians, investigators, Public Art Program staff and federal prosecutors.

The film was released at a premiere at the Detroit Institute of Art in October 2010, and in November 2010, the film was part of an anniversary celebration at the Roosevelt Museum in Hyde Park, N.Y. In 2011, the film won a bronze “Telly” award in the government relations cate-

gory. The Telly awards honor the finest video and film productions. The film is available at <http://www.gsa.gov/portal/content/194049>.

- Second, we appeared on the *Antiques Roadshow* episode in Washington, DC, over the 2011 Memorial Day weekend. The show included interviews that explained the WPA and our efforts to recover lost art. To highlight our message, a WPA painting was valued at \$725,000 during that show.

These efforts significantly increased our outreach, serving as a kind of “wanted poster” for lost art and led to other individuals contacting us to return lost artwork.

SIGNIFICANT EXAMPLES OF RECOVERIES

OIG and FAP have recovered New Deal art that had been purchased for \$7 at a yard sale, sold on eBay, bought at antique shops and found in attics.

“GULLS AT MONHEGAN”

Andrew Winter’s “Gulls at Monhegan” was recovered after the United States filed a writ of replevin. A rela-



GULLS AT MONHEGAN

tive of a former U.S. ambassador to Costa Rica came into possession of this painting, which had hung in the U.S. Embassy at San Jose. Apparently the painting was given to the ambassador when he retired.

When the relative attempted to sell the painting through an auction house, GSA OIG intervened to stop the sale. The auction house disputed federal ownership, arguing that the United States had abandoned its property.

GSA OIG worked with an assistant U.S. attorney to file a lawsuit in federal court in Portland, Maine, seeking a judgment from the court that the painting is the property of the federal government.

The court granted the United States the provisional remedy of “replevin” to safeguard the painting until ownership was determined. The auction house subsequently agreed to return the painting to the United States.

As part of the Department of State “Art in Embassies” program, the painting will next go to the U.S. Embassy in Croatia.

“FOURTEENTH STREET AT SIXTH AVENUE”

John Sloan’s painting is the one that was valued at \$750,000 during the Antiques Road Show. The history of this painting is illustrative of the convoluted path that WPA art can take. This painting hung in the office of Senator Royal S. Copeland until his death in 1938. When Senator James Byrnes took over Senator Copeland’s office, the painting was no longer there. A congressional staffer found the unframed painting in a pile of trash next to a dumpster and took it home. When the staffer died, his sister acquired the painting. She did not know that the painting was WPA art that belonged to the United States until 2003, when we learned about the painting, and the United States entered into an agreement under which the painting is on long-term loan to a museum.

“IRIS GARDEN”

The recovery of Anne Fletcher’s “Iris Garden” illustrates the effectiveness of our publicity efforts. This painting was originally sent for display to the Home Economics Center in Berryville, Va., in 1939.



FOURTEENTH STREET AT SIXTH AVENUE

In 1970, the building housing the Berryville High School was set to be demolished and the county school board invited representatives from each school in the county to visit the high school and take whatever they wanted from the building for use in their own schools. The man who returned the painting was then a student at nearby Boyce Elementary School. His school principal asked two twelve-year-old students – our hero and a friend – to help load items from the high school that would be useful at Boyce Elementary. As a reward, the principal told the students that they could keep whatever they could carry

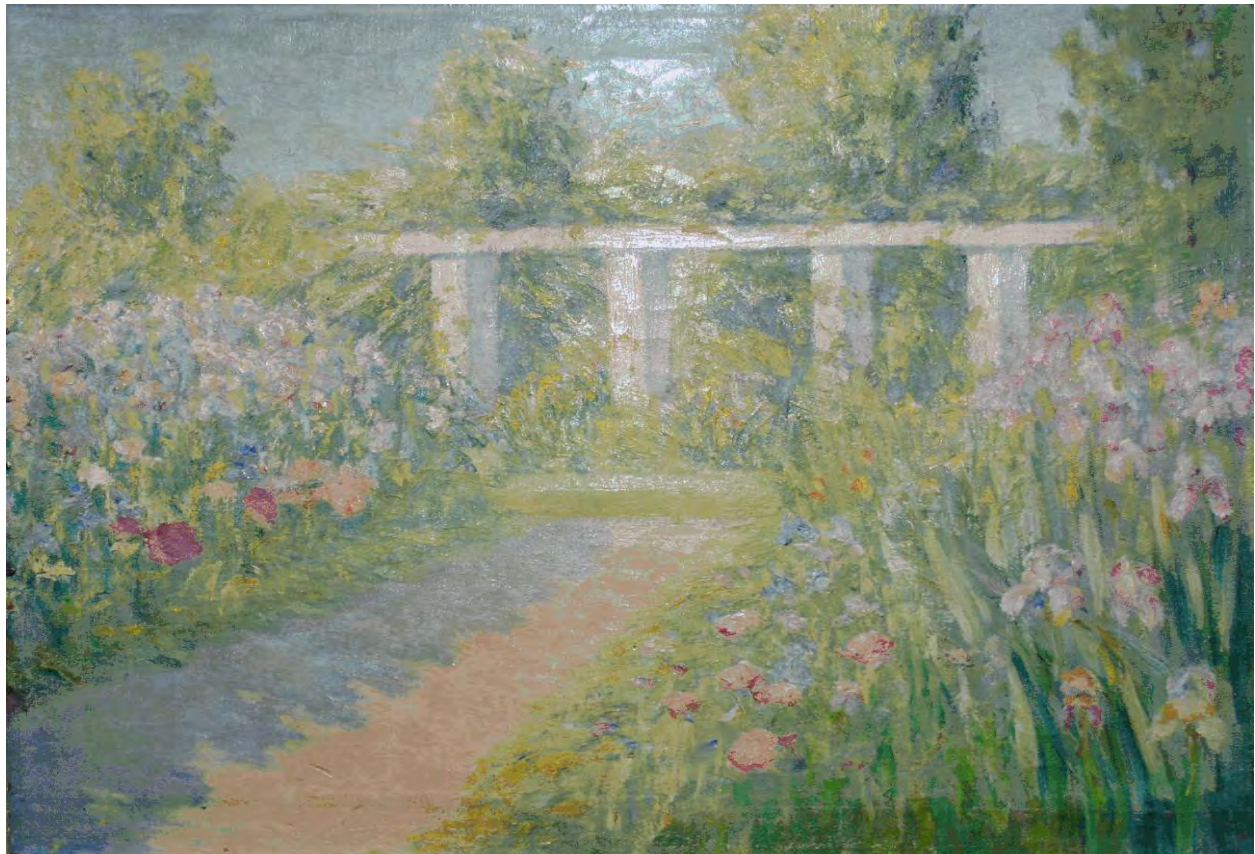
“Not only is there a financial benefit to the taxpayers, but we are protecting cultural treasures that capture a period of American history in artistic form”

out of the building in one trip. Our hero selected a framed print of the famous unfinished Gilbert Stuart portrait of George Washington that graces the one-dollar bill and an unsigned painting entitled “Iris Garden,” which he kept.

After watching the *Antiques Roadshow*, he realized that the painting was actually a WPA piece. He contacted OIG and offered to return the painting. On June 21, 2011, an OIG agent picked up the painting and deposited it with the GSA FAP office for cataloguing before it is put on display. The citizen who returned it has proposed that the painting be exhibited at the Museum of the Shenandoah Valley in Winchester, Va. FAP has not yet determined an estimated value of the painting.

CONCLUSION

We have been able to recover valuable paintings bought by American taxpayers. Not only is there a financial benefit to the taxpayers, but we are protecting cultural treasures that capture a period of American history in artistic form. The project is also an ex-



IRIS GARDEN

cellent opportunity to partner with our agency. GSA gets to see immediate benefits from working directly with our office and to observe first-hand the quality of our fine special agents, counsel and staff. Many times, our work benefits the agency in the long run by pointing out inefficiencies and problems. This work benefits the agency immediately.

The benefits to the taxpayer and to the American public are obvious. The number and value of the paintings and sculptures recovered continues to rise. The 78 items we have recovered have an estimated value of over \$1.15 million.¹ I am glad that we have the opportunity to serve the public in partnership with GSA in returning America's art to America. ✎



Brian Miller

The U.S. Senate confirmed Brian D. Miller as inspector general of the U.S. General Services Administration on July 22, 2005.

Prior to becoming inspector general, Mr. Miller worked for the U.S. Department of Justice for 15 years, beginning in the Office of Policy Development. Attorney General Janet Reno appointed him as an assistant U.S. attorney for the Eastern District of Virginia, where he concentrated on procurement, grant and health care fraud cases. In 2001, Mr. Miller served as the senior counsel to the deputy attorney general and special counsel for health care fraud for the U.S. Department of Justice. In 2002, he returned to the U.S. Attorney's Office to serve as counsel to the United States attorney, while continuing grand jury, trial, and appellate responsibilities as an assistant U.S. attorney.

As inspector general, Mr. Miller leads over 300 auditors, special agents, lawyers, and support staff in conducting nationwide audits and investigations. He strives to provide aggressive, strategic and creative leadership by developing new ways to fight fraud. As a national leader in the fight against procurement fraud, Mr. Miller participates in the U.S. attorney general's financial fraud enforcement task force and partners with federal, state and local officials to share information to detect, investigate and prevent procurement, Recovery Act and grant fraud. Mr. Miller is a frequent speaker at conferences, task force meetings, and regional working groups, and he testifies regularly before Congress.

Mr. Miller has received notable recognition for his service as inspector general. *Ethisphere* magazine recognized him as the 12th "most influential person in business ethics" by a worldwide panel of experts. He was named among "Those Who Dared: 30 Officials Who Stood Up for Our Country," a special report of Citizens for Responsibility and Ethics in Washington, a national advocacy organization. Mr. Miller also received the Attorney General's Distinguished Service Award.

1) These 78 pieces of artwork are not able to be accurately valued since they are unsellable items. However, if available for public sale, comparable values indicate their value would be in excess of \$1.15 million.



OIG Launches Innovative Practices Website Tool

By Misha King

Fairly or not, individuals visited by the Office of Inspector General usually convince themselves that the auditors or inspectors are there to shine a light on those things that show them at their worst. “Gotcha,” we say with glee as we document and cross-reference examples of waste, fraud and abuse – in happy adherence to yellow or blue book standards.

However, this view overlooks a key component of effective oversight – identifying ways to mitigate challenges and help colleagues work better and smarter. Sometimes it takes a lot of digging. Sometimes it is right there on the surface. Nevertheless, when you find a gem, it is worth all the effort.

In order to highlight these “gems” and promote some of the good things happening within the Department of State, DoS OIG launched an interactive Web resource called “Innovative Practices” in February 2011. The intranet Web page features exceptional initiatives identified by inspection and audit teams who visit various embassies, diplomatic posts, bureaus and international broadcasting installations throughout the world.

An IP is very much like a “best practice” in that it reliably achieves good results and maximizes productivity with available resources. However, the term “best practice” is often applied to something that has worked well in a specific place at a specific time. To be truly useful, it needs to be adaptable and applicable to a range of issues and circumstances – something *replicable* and genuinely *innovative*.

In establishing this new portal, OIG’s goal was to provide an open forum where department employees can “meet,” discuss and work together to solve problems, overcome challenges and implement *proven* creative solutions.

“Our teams don’t play ‘gotcha,’” Deputy Inspector General Harold Geisel said. “Our role is to recommend constructive solutions and offer expert

assistance to improve department and Broadcasting Board of Governors operations.”

Geisel is excited about this interactive site’s potential. “With this new IP tool, OIG can share creative approaches that actually work and address some of the department’s most persistent challenges.” Just as important, employees and staff across the globe will be able to interact with each other as they share ideas and feedback, which ultimately benefits the department as a whole.

To be considered an innovative practice, an initiative must be something new and innovative, it must be proven as *effective*, and it must be *replicable*. On the site, the IPs are set up as individual case studies and are broken down by mission (domestic or overseas) and category, which include policy and program implementation, interagency coordination, public diplomacy, green initiatives, management



and logistics, information technology, procurement, consular, safety and security, and quality of life/employee morale.

OIG home > Innovative Practices

Welcome to Innovative Practices

This site was formed to showcase and discuss innovative practices that have been implemented by various embassies, diplomatic posts, bureaus, and international broadcasting operations throughout the world. Do you know of an innovative practice in action? Let us know what you think of the site—or join a discussion on the “Feedback Forum” featured on each case study page.

To be considered an **Innovative Practice**, an initiative must meet the following criteria: it must be something truly **new** and **innovative**; it must be proven as **effective**; and it must be **replicable**.

To view the case studies, please click on a category tab below.

All Categories		Policy & Program Implementation	Interagency Coordination	Public Diplomacy	Consular	Safety & Security	Quality of Life/Employee Morale
Type	Title	Originating Report Name	Originating Report Number	Report Number	Report Date		
1	Privatized Structure	Audit of Construction and Transfer of Ownership of the President's Emergency Plan for AIDS Relief (PEPFAR) Overseas Construction	Interagency Coordination: Management & Logistics; Procurement; Green Initiatives	Overseas	AUD/SP-11-14	6/30/2011	
2	Solar Energy for PEPFAR Facilities in Africa	Audit of Construction and Transfer of Ownership of the President's Emergency Plan for AIDS Relief (PEPFAR) Overseas Construction	Green Initiatives	Overseas	AUD/SP-11-14	6/30/2011	
3	Embassy Security Field Days	Inspection of Embassy Astoria, Kazakhstan	Safety & Security	Overseas	SP-5-08-11A	1/14/2009	
4	Toll-Free Access to Voice of America News	Inspection of Embassy Asunción, Paraguay	Public Diplomacy	Overseas	SP-4-08-57A	6/30/2008	
5	Emergency Vehicle Fly-Away Kits	Inspection of Embassy Athens, Greece	Safety & Security	Overseas	SP-5-11-15A	1/11/2011	
6	NAS Police Scholarship Program-Colombian Ethnic Minorities	Inspection of Embassy Bogotá, Colombia	Policy & Program Implementation	Overseas	SP-5-11-45A	6/30/2011	

To identify the qualifying criteria and ensure consistency in application throughout the offices, representatives from various OIG offices formed a committee to develop a standard definition of an IP and identified the pertinent data fields that comprise each case study. These fields include the issue/challenge; background of the issue; the actual innovative practice; the benefit; and contact information at the post or bureau. To keep IP examples as concise, readable and as useful as possible, the committee agreed to limit the number of words in each data field and developed a fillable PDF template

for the offices to use that includes built-in character restrictions and a button to send the form directly to the OIG webmaster for posting.

Discuss this Topic...

View Entire Discussion | Add Thread to Discussion

DAMASCUS - SYRIA

Title: Social Networking via American Idioms Text Messages

Report Number: ISP-I-10-34A

Mission: Overseas

Category: Public Diplomacy

Sub Category:

Issue/Challenge: Outreach is difficult in an authoritarian society, where the government controls access to information.

Background: How could Embassy Damascus reach out to Syrians, when the Syrian government closed both the American Cultural Center and the Information Resources Center in November 2008 and blocks social networking sites like Facebook, YouTube, and Twitter?

Innovative Practice: Embassy Damascus sends weekly, free text messages to subscribers' cell phones, providing an example of American Idiom and how it is used in a sentence - and making other short announcements. It advertises the service through partner institutions, American Corners, and English language schools.

Benefit: The embassy has built up a growing client base of more than 200 text message service subscribers, who have voluntarily provided their biographic information and cell phone numbers. Embassy Phnom Penh has emulated this initiative.

Contact: damasweb-meny@state.gov or damasweb@state.gov

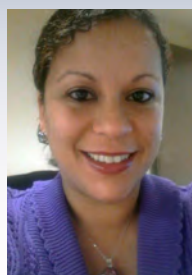
A unique feature of the site is a discussion thread included on each case study page. It is monitored by the implementing post or bureau and offers department employees an opportunity to ask questions, provide feedback and share their ideas about any given innovative practice. Anyone within the department can join any of the threads, thus opening the door for “out of the box” brainstorming and leading to true creative thinking and genuinely innovative solutions.



From each IP homepage, a site visitor can see a snapshot of the most recent comments, or click on links to add a thread to the discussion or view the entire discussion.



As word spread about the IP site, OIG received numerous emails and phone calls from various offices within the department expressing their interest in the IP initiative. One office in particular, whose two case studies are featured on the site, said it is eager to adopt some of the other posted IPs. In doing so, it hopes to leverage the experience of others to improve its own performance. At the same time, the office is helping meet OIG's goal in identifying innovative practices, as well as that of the department—bringing people together to continually develop more efficient and effective frameworks on which to promote security, democracy and prosperity. 



Misha King

Misha King has been a public affairs specialist/webmaster for the Office of Congressional and Public Affairs at the Department of State Office of Inspector General since November 2010. Prior to her current position, Ms. King was a writer/editor and webmaster for the DoS OIG Office of Policy, Planning and Reports.

Before joining DoS OIG in December 2007, Ms. King served in the U.S. Army. In 2000, she enlisted in the Army Reserve as a broadcast journalist. In 2002, she served as an instructor at the Defense Information School at Ft. Meade, Md., teaching basic announcing skills. In 2003, Ms. King joined the Active Guard Reserve program, where she cross-trained as a print journalist and was stationed in Richmond, Va.

In December 2004, Ms. King deployed for a year to Iraq in support of Operation Iraqi Freedom, where she served under the Combined Press Information Center in Baghdad as a media desk officer and editor of the weekly newspaper, the *Scimitar*. Six months after returning from overseas, Ms. King deployed again, this time serving under the American Forces Network - Iraq. During the first half of her tour, Ms. King was the radio news editor, writing, editing and delivering live and prerecorded news on AFN's Freedom Radio. Ms. King spent the second half of her tour as the editor and occasional anchor for AFN's daily newscast Freedom Journal Iraq.

Prior to her military service, Ms. King was the U.S. general manager and liaison of an Italian pipe and humidor company in Atlanta, Ga.

assistance



Improving Contracting Opportunities for Veteran-Owned Small Businesses

By Belinda Finn and James O'Neill

Testimony before the Subcommittee on Oversight and Investigations, Committee on Veterans' Affairs, U.S. House of Representatives, July 28, 2011

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to discuss the Office of Inspector General's work related to the Department of Veterans Affairs' Veteran-Owned and Service-Disabled Veteran-Owned Small Business programs. Recently, we issued an audit report, *Audit of the Veteran-Owned and Service-Disabled Veteran-Owned Small Business Programs* that found that 76 percent of the businesses we reviewed were ineligible for either the program and/or the specific VOSB or SDVOSB contract award, potentially resulting in \$2.5 billion awarded to ineligible businesses over the next five years. I am accompanied by Mr. James J. O'Neill, assistant inspector general for investigations, whose office's work recently resulted in the successful prosecution of a chief executive officer of a business that was awarded SDVOSB set-aside construction contracts for which the company was not eligible. The CEO was convicted of fraud against the United States, mail fraud, witness tampering and making false statements.

BACKGROUND

On December 22, 2006, Public Law (P.L.) 109-461, *Veterans Benefits, Health Care and Information Technology Act of 2006*, established participation goals and other requirements to increase VA contracting opportunities for veteran-owned small businesses. VA implemented these requirements by establishing the Veterans First Contracting program. The program placed SDVOSBs and VOSBs first and second in VA's hierarchy of socioeconomic contracting preferences and required businesses to register in VA's VetBiz Vendor Information Pages to

be eligible for contract awards. VetBiz VIP is VA's congressionally-mandated database of businesses that are eligible to participate in its VOSB and SDVOSB programs. VA's Office of Small and Disadvantaged Business Utilization monitors VA's implementation and execution of socioeconomic programs, including the VOSB and SDVOSB contracting programs. The Center for Veterans Enterprise within OSDDBU verifies the eligibility of veteran-owned businesses and maintains VetBiz VIP as required by P.L. 109-461. VA is the only agency within the federal government that verifies the status of veteran-owned businesses participating in its VOSB and SDVOSB programs.

With the introduction of the Veterans First Contracting program, VA's VOSB and SDVOSB programs have grown significantly from \$2.1 billion in fiscal year 2008 to \$3.5 billion in FY 2010, an increase from 15 to 23 percent of VA's total procurement dollars. The VOSB and SDVOSB contracting programs increase contracting and subcontracting opportunities for veterans and service-disabled veterans, and ensure that these businesses receive fair consideration when VA purchases goods and services.

Growth in the VOSB and SDVOSB programs has also spurred growing concerns that veteran-owned businesses may not be receiving the full benefit of these contracting programs. As a result, the OIG initiated an audit of the VOSB and SDVOSB programs, and began investigating an increasing number of referrals alleging that businesses have misrepresented themselves as veteran-owned businesses to obtain VA contracts. Our audit work disclosed that VA has awarded numerous VOSB and SDVOSB sole-source and set-aside contracts to businesses that do not meet program and contract requirements. In addition, we are pursuing numerous other investigations involving alleged "pass throughs"

where a VOSB wins a contract, performs little to none of the work and passes through the contract to an ineligible company for a fee or percentage of the award. To date, our investigative work has resulted in the indictment and conviction of one company official for falsely self-certifying a business as an eligible VOSB and SDVOSB, and we are actively pursuing 91 investigations.

AUDIT OF THE VOSB AND SDVOSB PROGRAMS

In our recently issued report, *Audit of the Veteran-Owned and Service-Disabled Veteran-Owned Small Business Programs* (July 25, 2011), we examined VA's VOSB and SDVOSB programs to determine if businesses that received contracts under these programs met program and contract eligibility requirements and if program controls were effective. We found that 76 percent of the businesses we reviewed were ineligible for either the program and/or the specific VOSB or SDVOSB contract award. From the 42 statistically selected businesses we reviewed, 32 ineligible businesses received \$46.5 million in VOSB and SDVOSB contracts. These awards included \$26.7 million in Recovery Act funded contracts.

We projected that VA annually awards at least 1,400 VOSB and SDVOSB sole-source and set-aside contracts valued at \$500 million to ineligible businesses and that it will award a minimum of \$2.5 billion over the next five years if VOSB and SDVOSB verification and program controls are not strengthened. Further, the award of VOSB

and SDVOSB contracts to ineligible businesses reduced the funding available to eligible businesses and the accuracy of VA's reported socioeconomic goal accomplishment data. For FY 2010, OSDBU reported that VA procurements totaled \$15.4 billion, of which \$3.5 billion went to VOSBs and of that \$3.5 billion, \$3 billion went to SDVOSBs. Our audit results indicate that VA awards somewhere between \$500 million to \$2.6 billion in VOSB and SDVOSB contracts to ineligible businesses during a 12-month period. If we adjust the goal data for our findings, VA's reported FY 2010 VOSB and SDVOSB procurement dollars would decrease somewhere between 3 to 17 percent. VA, in reality, may be barely meeting the secretary's VOSB and SDVOSB procurement goals of 12 and 10 percent.

PROGRAM AND CONTRACT ELIGIBILITY DEFICIENCIES

The audit reported two major areas of risk in VA's assessment of VOSB and SDVOSB eligibility: the verification of ownership and control to establish the eligibility of the business for the programs and the review of subcontracting and partnering agreements at the time of award to establish the eligibility of the business for the contract. We found that veterans either did not own or control the businesses or veteran-owned businesses "passed through" or subcontracted more work to nonveteran-owned businesses than allowed under federal regulations. In some instances, businesses had multiple ownership, control and subcontracting issues that made them ineligible.

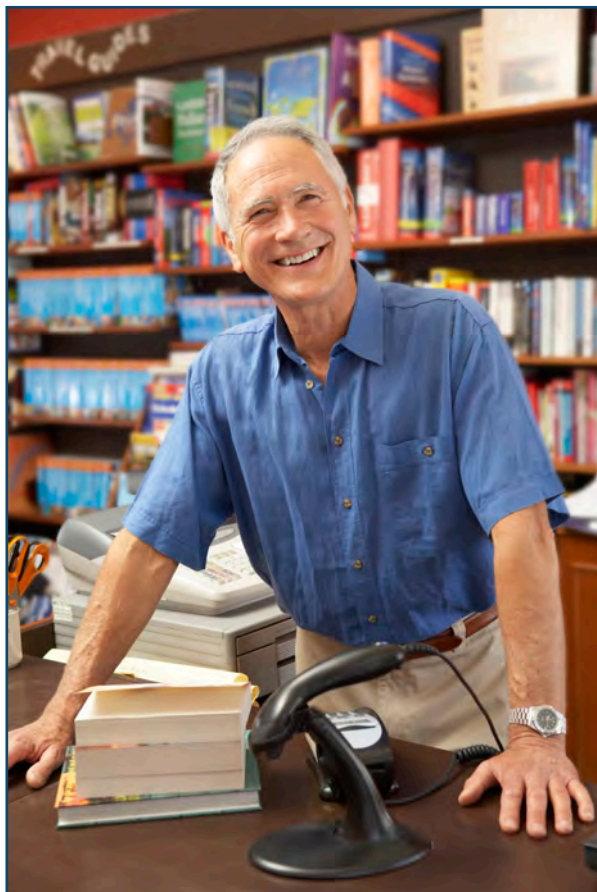
VETERANS DID NOT OWN OR CONTROL BUSINESSES

Thirty-eight percent of the reviewed businesses were ineligible for the programs because veterans did not own and/or control the businesses. Sixteen ineligible businesses improperly received 28 VOSB and SDVOSB sole-source and set-aside contracts valued at \$8.5 million. To be eligible for the programs, Title 38, Code of Federal Regulations, Part 74.1, requires one or more veterans or service-disabled veterans to unconditionally and directly own at least 51 percent of the business and to manage and control the operations of the business concern. Further, veterans must be involved in long-term decision-making and day-to-day management of the business operations, hold the highest officer position in the business



(president or chief executive officer) and must have managerial experience commensurate with the extent and complexity needed to operate the business.

In many cases, the self-certifications for the businesses on VetBiz VIP, the Central Contractor Registration, the Online Representations and Certifications Application and other documents indicated a veteran owned the business. However, two of the 16 businesses that CVE had previously verified as eligible for the program through their review of available online documents such as the CCR, Dun and Bradstreet reports, and obligation amounts from the USA Spending website, were, in fact, ineligible. Our interviews and observations often showed that business managers or nonveteran family members managed, operated and controlled the day-to-day business operations.



We concluded that online document reviews were insufficient to establish program eligibility and ensure businesses met federal ownership and control requirements. Instead, we believe interviews with veteran owners and business managers, and the review of documents such as corporate bylaws, stock

certificates, tax returns, resumes and negotiated checks during onsite visits are critical to establishing a veteran's ownership and control of a business. For example, in the case of an SDVOSB that provided VA duct cleaning and maintenance services, reviews of key documents such as the past three years of tax returns, showed that the veteran's spouse received 100 percent of the business' profits and owned the business instead of the veteran.

Businesses "Passed Through" Contracts or Did Not Meet Subcontracting Requirements

Fifty-seven percent of the reviewed businesses were ineligible for the awarded VOSB and SDVOSB contracts because the businesses did not meet federal incurred cost and subcontracting performance thresholds. The 24 ineligible businesses received 57 VOSB and SDVOSB sole-source and set-aside contracts valued at \$39.3 million. Federal regulations at 13 CFR 125.6(b) and 48 CFR 52.219-27(c) prescribe thresholds and limitations on subcontracting for VOSB and SDVOSB contracts. For service contracts, the VOSB or SDVOSB must incur at least 50 percent of the cost of the contract using its own employees. For general construction contracts, the VOSB or SDVOSB must incur at least 15 percent of the cost of the contract using its own employees. In addition, VOSBs and SDVOSBs are required to submit partnering agreements with their bid proposals so contracting officers can review them prior to award.

Despite these requirements, 18 businesses with 42 VOSB and SDVOSB contracts valued at \$35 million had passed through the majority of the contracts' work requirements and funds to nonveteran-owned businesses. Pass through contracts occur when businesses or joint venture/partnerships list veterans or service-disabled veterans as the majority owners of the business, but the nonveteran-owned business either performs or manages the majority of the work and receives the majority of the contracts' funds. Six additional businesses with 15 SDVOSB contracts valued at \$4.3 million also exceeded the VOSB and SDVOSB subcontracting thresholds or limitations established in federal regulations. These thresholds deter pass through arrangements because they limit the amount of work that can be subcontracted to other businesses and establish the minimum amount of work to be completed by the veteran-owned business. All 24 of the businesses

generally lacked the technical expertise and/or the resources to complete the required amount of work on the contracts. For example, the resume of a veteran-owner of an SDVOSB showed that he lacked the technical expertise to manage and control a construction business because he had no experience in construction. Instead, the veteran-owner's resume indicated that he had 31 years of experience in the banking industry where he served as a senior officer, president and CEO of various financial organizations.

From our discussions with business owners, we concluded that these types of subcontracting agreements were common practice. VOSBs and SDVOSBs solicit partnerships with nonveteran-owned businesses that possess the technical capability to do the work. Likewise, ineligible nonveteran-owned businesses initiate relationships with VOSBs and SDVOSBs to gain access to federal VOSB and SDVOSB contracts. We believe partnerships and mentoring relationships between VOSBs, SDVOSBs and other businesses are valuable in promoting the development and advancement of veteran-owned businesses. However, VOSBs and SDVOSBs need to adhere to federal incurred cost and subcontracting performance requirements. This will ensure, in keeping with the goals of the VOSB and SDVOSB socioeconomic programs, that eligible businesses perform the specified amount of contract work and receive a commensurate amount of the funds and benefits from the contract awards.

VOSBS IMPROPERLY USED THE SDVOSB STATUS PREFERENCE

Two VOSBs also improperly used the service-disabled veteran preference to obtain 13 set-aside and sole source contracts valued at \$5.6 million. To be eligible for SDVOSB contracts, the federal regulations define a service-disabled veteran as a veteran with a VA service-connected disability rating between 0 and 100 percent. The veteran owners of these two businesses self-certified in the CCR and VetBiz VIP that they had service-connected disabilities and requested CVE verification to participate in the SDVOSB program. CVE could not verify the claimed service-connected disabilities in the Veterans Benefits Administration's Beneficiary Identification Records Locator Subsystem and sent letters to the two businesses informing the veteran owners that it could not verify that they were service-connected veterans. At that time, legislation allowed CVE to

accept the businesses' self-certifications and did not require CVE to remove businesses from the VetBiz VIP database. Because CVE did not remove these two businesses from view in the VetBiz VIP database, the VOSBs improperly benefitted from the receipt of SDVOSB contracts and potentially blocked eligible SDVOSBs from receiving these contracts.

FACTORS CONTRIBUTING TO AWARDS TO INELIGIBLE BUSINESSES

Several factors within VA facilitated the award of VOSB and SDVOSB contracts to ineligible businesses. In general, OSDBU lacked the management controls needed to effectively oversee the VOSB and SDVOSB programs, to ensure the effectiveness of CVE verification processes and to coordinate the oversight of contracting officers with VA's major acquisition offices. Inadequate OSDBU program oversight and the lack of coordination with VA's Office of Acquisition and Logistics and the Veterans Health Administration's Procurement and Logistics Office contributed to the improper award of VOSB and SDVOSB contracts to ineligible businesses. OSDBU's coordination with VA's acquisition community should have addressed issues such as the need to review VOSB and SDVOSB subcontracting and partnering agreements that can result in pass-throughs to nonveteran-owned businesses.

OSDBU LACKED EFFECTIVE MANAGEMENT CONTROLS

OSDBU and CVE lacked a formal organizational structure and an accurate, updated organizational chart. Further, staff performing business verifications lacked documented duties, roles and responsibilities and some staff lacked job descriptions that accurately described their current job functions. In addition, OSDBU and CVE did not have current policies and procedures for the administration of the verification program. CVE had last updated its verification program policies and procedures in August 2009. Thus, its policies and procedures did not address changes in VetBiz VIP and revised verification processes needed to comply with the *Veterans Benefits Act of 2010* (P.L. 111-275). On April 15, 2011, CVE issued updated internal policies and procedures for its verification processes. However, neither OSDBU nor CVE have yet developed additional guidance needed for management oversight functions such

as accountability for the completion of assigned verification duties and responsibilities, and the establishment of verification performance measures and reporting requirements.

Finally, OSDBU and CVE also lacked an effective performance management system to effectively monitor and evaluate staff performance and CVE business verification processes. OSDBU and CVE's weekly performance monitoring meetings focused on the progress made on the verifications but did not address the timeliness and quality of staff performance and verifications, and the maintenance of VetBiz VIP data. In conclusion, we found that OSDBU lacked the management processes needed to determine if it has the right staff, resources and processes in place to timely implement and monitor current VOSB and SDVOSB program requirements and possible future process improvements.

CVE LACKED EFFECTIVE VERIFICATION PROCESSES

CVE verification processes needed strengthening to reduce the number of ineligible businesses participating in the programs. Until recently, CVE's verification processes consisted of limited electronic document reviews to assess ownership and control, and the selective completion of on-site reviews for businesses deemed high-risk. This verification process allowed businesses to self-certify as VOSBs or SDVOSBs with little supporting documentation and little chance of an on-site review. At the same time, CVE did not properly maintain the VetBiz VIP database. For example, CVE staff did not remove a business from VetBiz VIP after OSDBU sustained a protest of the business' veteran-owned status, thus allowing the ineligible business to continue receiving VOSB and SDVOSB sole-source and set-aside contracts.

Laws and regulatory changes enacted since May 2010 (the end period for the obligation amounts and businesses in our sample that we reviewed) now require CVE to verify each small business concern listed in the VetBiz VIP database to ensure a veteran or a service-disabled veteran owns and controls the business. Further, as of September 2010, all prospective VOSB and SDVOSB awardees are required to apply and undergo verification by CVE prior to receiving a contract award. To comply with these requirements, CVE initiated a Fast Track program to verify businesses with pending awards

within 21 business days, implemented additional verification documentation requirements and notified businesses of the new requirements. The additional document reviews CVE has recently implemented have stopped businesses from self-certifying as VOSBs and SDVOSBs, and required the businesses to provide evidence of veteran ownership. However, OSDBU and CVE still need to develop strategies and risk analyses to better identify high-risk businesses and conduct on-site reviews when they identify high-risk or potentially ineligible businesses.

CONTRACTING OFFICERS LACKED OVERSIGHT WHEN AWARDING VOSB AND SDVOSB CONTRACTS

OSDBU's lack of program oversight and coordination with OA&L and P&LO also contributed to the high number of ineligible businesses awarded VOSB and SDVOSB sole-source and set-aside contracts. OSDBU did not coordinate the monitoring of contracting officers with OA&L and P&LO to ensure they complied with VOSB and SDVOSB contracting requirements. As a result, contracting officers did not adequately assess the eligibility of the business for the VOSB and SDVOSB contracts as required by the Federal Acquisition Regulation and VA Acquisition Regulation during the contract award process. Fifty-seven percent of the reviewed businesses were ineligible for \$39.3 million in VOSB and SDVOSB contracts because contracting officers either did not review or properly assess the businesses' subcontracting and partnering agreements at the time of award. Moreover, contracting officers often did not check VetBiz VIP or the business' North American Industry Classification System codes assigned by the Small Business Administration to ensure businesses met program and size eligibility requirements.

ELIGIBILITY AND CONTRACTING DEFICIENCIES IN RECOVERY ACT CONTRACTS

We also reported that 14 of the 42 statistically selected businesses had received 24 VOSB and SDVOSB contracts funded with \$27.3 million from the American Recovery and Reinvestment Act. We noted that 13 of the 42 businesses had improperly received \$26.7 million in VOSB and SDVOSB contracts funded by the Recovery Act. As discussed previously, these businesses were ineligible due to a lack of demonstrated ownership and/or control,

improper subcontracting practices, improper use of SDVOSB status, or a combination of these factors. Contracting officers also awarded nine businesses 10 VOSB and SDVOSB Recovery Act contracts valued at \$5.3 million that had at least one contracting deficiency.

REPORT RECOMMENDATIONS AND ACTION PLANS

We recommended VA and OSDDBU implement effective management and program controls, enhance verification processes and implement a coordinated contract monitoring activity for VOSB and SDVOSB contracts to ensure the long-term success of the VOSB and SDVOSB programs. The deputy under secretary for health; the executive director of the Office of Small and Disadvantaged Business Utilization; and the executive director of the Office of Acquisition, Logistics and Construction agreed with our report's findings and recommendations provided acceptable action plans. Nevertheless, VA will need to address P&LO, OA&L and OSDDBU's shared and interrelated responsibilities in administering and overseeing VA's VOSB and SDVOSB programs as it develops an enterprise-wide strategy to reduce the number of ineligible businesses receiving contract awards. The effectiveness, and ultimately the success, of an enterprise-wide strategy will depend on OSDDBU, P&LO and OA&L's continued collaboration, coordination and follow through on the planned corrective actions. We plan to monitor the implementation and coordination of the offices' respective action plans as we follow up on the report's recommendations and monitor the VOSB and SDVOSB programs.

OIG INVESTIGATIVE WORK RELATED TO VOSBS AND SDVOSBS

The OIG's Office of Investigations is aggressively pursuing allegations and referrals regarding ineligible businesses that obtain VOSB and SDVOSB contract awards. As of July 2011, we have 91 open investigations and have issued approximately 268 subpoenas and executed 19 search warrants. Our efforts have resulted in the indictment and conviction of one business official, and we anticipate additional prosecutions in the future.

The CEO of a construction management and general contracting business that received SDVOSB set-aside construction contracts, was convicted

of committing fraud against the United States, mail fraud, witness tampering and making false statements. An OIG joint investigation with SBA OIG and the Army Criminal Investigations Division revealed that the CEO falsely self-certified that his business was an eligible VOSB and SDVOSB in order to obtain over \$16 million in contracts from these programs. During the investigation, the defendant made false statements to a federal agent claiming that another person who had served in the military was the majority owner of his business. He is awaiting sentencing, but he and the company have been debarred from doing business with the federal government.



Most of our investigations involve “pass through” schemes where an ineligible large business has allegedly created an SDVOSB with the assistance of a service-disabled veteran. The SDVOSB owned by the service-disabled veteran then wins SDVOSB sole-source and set-aside contract awards, but does not perform any of the work. The SDVOSB simply functions as a shell business and “passes through” the work to the ineligible large business.

CONCLUSION

To fix the problems identified, VA must ensure that legitimate veteran-owned businesses are receiving the contracts intended for them. VA is currently the only federal agency that verifies the status of veteran-owned businesses, yet many contracts are still going to companies that are ineligible for the program or do not meet the specific contract requirements. VA is taking actions to strengthen its CVE verification and its contracting practices. Collaboration between

OSDBU, OA&L and P&LO in the development of a management control system for VA's VOSB and SDVOSB procurements should promote the participation of eligible businesses and ensure VA has adequate VOSB and SDVOSB program and contract oversight from the time of award through contract performance. We will monitor the implementation of VA's corrective actions and perform follow-up work



Belinda Finn

Belinda J. Finn joined the Department of Veterans Affairs Office of Inspector General in January 2007. During her career as a government auditor and analyst, Ms. Finn has worked for both the executive and legislative branches of the federal government, starting

as an administrative employee for the U.S. Air Force and Internal Revenue Service. Before joining VA, Ms. Finn was a deputy assistant inspector general for the Department of Homeland Security. Her early experience included work as an accountant and auditor with the Department of Treasury, Bureau of Public Debt, Naval Audit Service, Department of Defense Inspector General, Department of Energy Inspector General, and U.S. House of Representatives Inspector General.

In 1981, Belinda graduated summa cum laude from the University of Maryland, College Park, with a Bachelor of Science degree in accounting. In 2002, she earned a Master of Science in information resource management from the University of Maryland, University College. She is a former fellow with the Council for Excellence in Government. In addition, she earned certifications as a certified public accountant, certified internal auditor, certified government financial manager and certified information systems auditor.

Belinda is a member of the Institute of Internal Auditors and the Association of Government Accountants.

to assess the effectiveness of the future verification and contracting practices.

Mr. Chairman, thank you for the opportunity to discuss the OIG's work related to VA's VOSB and SDVOSB programs. We would be pleased to answer any questions that you or other members of the subcommittee may have. ☞



James O'Neill

In July 2006, Jim O'Neill was appointed assistant deputy inspector general for investigations after serving nearly three years as deputy AIG. He is responsible for planning and directing investigations of alleged criminal activities related to VA programs and operations,

as well as allegations of non-criminal misconduct committed by senior VA officials. Mr. O'Neill led the criminal and administrative investigations of the Montgomery County data loss in May 2006.

From 1999 until 2003, Jim served as the VA OIG's chief information officer where he led efforts to modernize the information technology program, which culminated in the successful deployment of the OIG's first corporate management information system, the Master Case Index.

Prior to joining the VA OIG in 1999, Mr. O'Neill completed a successful 23-year career with the U.S. Secret Service as deputy assistant director for the Office of Training. In 1997, he was appointed as special agent in charge in the Forensic Services Division and led the successful effort to gain the lab's first accreditation by the American Society of Crime Lab Directors. Since 1988, he held managerial positions in a variety of investigative, protective, and information technology divisions. He served as a special agent in the Philadelphia field office and the Presidential Protective Division, and as an instructor in the Office of Training.

In 1971, Mr. O'Neill earned a B.A. in political science from La Salle University in Philadelphia, Pa. Prior to joining the U.S. Secret Service, he was employed as a high school teacher in Philadelphia public schools. In 2008, Jim received a Presidential Rank Award for Meritorious Service.



Innovative Approach to Audit Issues

The Cooperative Audit Resolution and Oversight Initiative

By Richard Rasa

New ideas are conceived by looking at things from a different and unconventional perspective. Such was the case when the U.S. Department of Education Office of Inspector General worked with ED to create the Cooperative Audit Resolution and Oversight Initiative. CAROI began with the realization that programs improve when federal, state, and local education officials work together across perspectives (audit, program, fiscal, legal, and information technology) to resolve issues identified through audits. It is a collaborative method that provides alternative and creative approaches to resolve audit findings and their underlying causes. It focuses on communication and on developing a sense of trust among government officials. CAROI helps to identify the underlying cause of findings and empowers the people who know programs best to chart a course for program improvement.

As evidenced by the Association of Government Accountants' recent sponsorship of a project and resulting guide on implementing the initiative, CAROI is a concrete tool that can be used by any government agency in its efforts to address programmatic and fiscal challenges, and improve operations. It is a resource for the auditing and IG community, as it helps ensure that oversight, whether it comes from audits, monitoring, or technical assistance activities, inform managers of critical issues that need to be corrected or improved to ensure program performance and accountability.

CAROI – A DIFFERENT APPROACH

In 1995, ED officials reviewed audit resolution practices. The review disclosed that audits with questioned costs were often subject to lengthy legal battles that in many instances produced insignificant monetary recoveries, but developed significant ill will. Additionally, the review identified numerous

instances in which the causes of the findings did not receive permanent corrective action and, consequently, subsequent audit reports identified the same findings and problems. With these recurring conditions, programs suffered and as such, so did the most important of our clients including students and taxpayers.

ED needed a new approach to audit resolution – one that moved away from an adversarial resolution process that was not helping people fix the problems, to a process where people worked together to find the right solutions. Through a collaborative effort by ED OIG, and state and local partners, CAROI was created.

The four original goals of CAROI were to: 1) create and maintain a dialogue with states; 2) resolve audits cooperatively; 3) improve the single audit; and 4) coordinate audit, monitoring, and technical assistance activities.

These goals led to the six CAROI principles: 1) improve audit resolution; 2) improve communication; 3) foster collaboration; 4) promote trust; 5) develop understanding; and 6) enhance performance.

CAROI was put to the test in Florida, Mississippi, Pennsylvania, and Washington. Meetings were held with relevant state officials to discuss strategies to improve audit resolution where they outlined specific target areas for resolution, the plan for resolution, and the responsibilities each federal and state partner would take on to reach those targets. The most ambitious CAROI project began in Pennsylvania in the summer of 1997. The state was facing a backlog of 119 single-audit findings – some dating back to 1990. As the traditional methods of reaching agreements and addressing problems were failing, the parties involved decided to give CAROI a try. An aggressive 6-month timetable was established to resolve all 119 findings by the target date of

February 27, 1998. All 119 findings were resolved within six months of the start date. CAROI was a success. “The CAROI process represents a giant step forward in audit resolution,” stated Harvey Eckert, deputy secretary for comptroller operations for the Commonwealth of Pennsylvania. “CAROI teams are now in position to address and resolve future issues as soon as they are discovered or reported.”

Nevertheless, ED’s CAROI process did not stop with audit resolution: it also tackled oversight, including coordinating audits, program monitoring, technical assistance, data collection, and review activities. CAROI team members were then actively involved in the department’s production of guidance related to specific programs authorized under the *Elementary and Secondary Education Act of 1965*, as amended, and the Office of Management and Budget’s A-133 compliance supplement.¹ This included incorporating all perspectives into the drafting of the compliance supplement and making the it more accessible to everyone. As a result of its success in audit resolution and program oversight, Congress authorized the expenditure of funds to implement the CAROI process when it reauthorized the ESEA in 2001.

BEYOND EDUCATION PROGRAMS – CAROI HAS BROAD APPLICABILITY

When utilized, CAROI has led to better decisions about grant and program management and oversight, and more effective strategies for monitoring, corrective action and the identification of appropriate technical assistance at ED. CAROI is not limited to education programs and operations, as it is built on the belief that government programs improve when officials from all levels work together to resolve issues identified through audits using coordinated, data-driven oversight practices, thus it can be used by any government agency in its efforts to address programmatic and fiscal challenges.

Designed to avoid costly litigation, lengthy adversarial discussion and nonproductive impasses, as well as to make permanent corrective action the norm, the CAROI process maximizes dialogue among federal, state, and local levels; promotes creativity and innovation in identifying solutions to problems; fosters continuous improvement of the audit process; improves the efficiency and effectiveness of all oversight activities; and minimizes

stereotypical, traditional, and bureaucratic methods of audit resolution. For all government entities, CAROI offers:

- **Applicability:** CAROI can be used by federal, state, and local government agencies and can address compliance issues identified by a variety of oversight and monitoring mechanisms, including a wide range of internal and external monitoring processes, audits and management letters.
- **Flexibility:** CAROI can be tailored to address a variety of findings, regardless of whether the findings cover many agencies or just one program.
- **Saves Money, Time, and Resources:** CAROI helps to avoid costly, lengthy, and adversarial litigation by identifying and addressing the root causes of the audit findings. It can save audit and oversight costs by breaking the repeating cycles of unresolved audit findings. Investments in CAROI result in lower future costs and recurring benefits by identifying the root causes of findings and by developing mutually agreeable solutions.
- **Open Environment:** CAROI relies on impartiality by operating in a non-threatening, open environment of cooperation.
- **Accountability:** CAROI requires that all parties commit to a consensus solution with clearly understood roles and responsibilities. The CAROI agreement thereby establishes accountability for all parties through one common corrective action plan.

CAROI CAN HELP ADDRESS TODAY’S CHALLENGES

CAROI can contribute to the success of today’s most visible initiatives. This includes the identification of significant deficiencies and material weaknesses in internal controls in the expenditure of American Recovery and Reinvestment Act funds; the requirement to implement the principles of transparency, participation, and collaboration under the president’s open government directive; and the recent executive order to reduce erroneous payments. Given its consultative, collaborative nature, CAROI can be applied to a wide variety of management issues. As such, the CAROI concept is expanding and being applied to many different facets of government accountability:

1) P.L. 89-10, 20 U.S.C. Ch 70

- In 2010, under the auspices of the AGA, the Intergovernmental Partnership Project on CAROI was formed to draw upon the success of ED's CAROI process. It took a fresh look at how the CAROI process should be considered and implemented across the federal as well as state and local government settings. Under the leadership of state and federal co-chairs, and volunteers from the federal, state and local governments, the project team looked to develop a guide that would expand and improve the audit resolution process, and demonstrate how oversight can add definite value in ensuring that Recovery Act and other programs are carried out in the most efficient and effective manner. This resulted in a CAROI guide, published by the AGA in May 2010, which sets forth clear and concise information designed to assist all levels of government in using the CAROI process. It contains information regarding the applicability of CAROI, the structure and content of CAROI agreements, CAROI tools and resources, and challenges to using CAROI. One of the most important additions to the CAROI process in the AGA guide is a section on the role of the independent auditor that addresses how auditors can and should participate in the CAROI process without sacrificing their independence. It explains that the CAROI process is applied to efficiently and effectively address compliance issues identified by oversight and monitoring mechanisms, especially independent audits. When the independent auditor is knowledgeable about the noncompliance issues and has significant insight into the causes and potential solutions for the issue, the auditor can be an especially valuable resource to management in the audit resolution process. However, when participating in a CAROI process, the AGA guide cautions that the auditor must not participate in making the decision, which is a management function. The guide has since been used by the National Science Foundation to rethink their audit resolution process.
- In 2011, as part of implementing the presidential memorandum on administrative flexibility for state, local, and tribal governments, CAROI was put forward as a recommendation to reduce the burden associated with administering federal programs. An intergovernmental workgroup

coordinated through OMB developed four recommendations under the CAROI concept. They include 1) use the CAROI principles to improve program performance; 2) issue a broad policy statement to federal agency heads and governors that implementing the CAROI principles can drive change and improve program performance; 3) improve the collection, analysis, and dissemination of audit and oversight findings; and 4) pilot test revisions to the Single audit compliance supplement to test only the requirements that are critical to program success and integrity.

MAKING CAROI YOUR OWN

One of the major strengths of the CAROI process is its flexibility. CAROI will “look” different from organization to organization, and sometimes from one activity to another within the same organization, depending on the need and the circumstances of the issues involved. The common elements are commitment to the process and a willingness to explore alternative, yet collaborative solutions to persistent problems.

Once an organization has embraced the concept of CAROI, the organization – whether a federal, state or local agency, can craft a format and a process that works within the confines of their organizational structure and meets their unique needs. The OIG website and the AGA guide include information to help organizations get started with the process along with tools and guidance for implementation. The AGA guide also includes answers to frequently asked questions regarding initiating and participating in the process, an implementation checklist that provides general guidance on when it might be appropriate to use CAROI, and information on creating CAROI agreements. Below is a summary of that information.

FREQUENTLY ASKED QUESTIONS

How is the CAROI process initiated?

Answer: Anyone who wants to initiate the CAROI process should contact those who are likely to be instrumental in reaching a resolution on a specific issue. If federal funds are involved, it is important to involve the federal grantor agency, even if the matter(s) to be resolved is between a state and a local government.

Who should lead the CAROI team?

Answer: The CAROI team determines the scope of the CAROI project and develops the resolution agreement. The person initiating the process may assume the role of the CAROI team lead, or someone else may assume the lead. Leadership will vary with each team and is subject to the issues under review, the personalities involved, and the organizational climate and structure of the participating organizations.

What are some specific steps involved in implementing the CAROI process?

Answer:

1. Establish the CAROI team – identify who will be on the CAROI team, what their roles and responsibilities will be, and who will sign the CAROI resolution agreement.
2. Hold regularly scheduled meetings or conference calls.
3. Conduct analyses of audit and monitoring issues – clarify which issues the CAROI team will address.
4. Develop a means of staying in contact with team members.
5. Formalize CAROI scope agreements including the scope of the project; who is involved; statement as to why CAROI would be useful; identification of documentation that will be reviewed; ground rules for negotiation among CAROI team members;

potential for recovery of funds (questioned costs); identification of the need for work groups that may examine specific findings or issues, and if so, parameters of work group meetings; timelines for reporting negotiated results; and signatures of CAROI team members.

IMPLEMENTATION CHECKLIST

- Is someone willing to initiate the CAROI process and stay actively engaged with the process through its conclusion?
- Does the “climate” or “atmosphere” in the organization lend itself to the use of CAROI?
- Is it possible to get the support and involvement of the appropriate offices within your agency (program, legal, fiscal, audit, etc.)?

CAROI team members should then be identified and the team should convene to discuss its vision of how CAROI would work, identify the organizational goals, and begin to structure the framework for future activities.

When all of the essential elements of a CAROI process have been identified, the process can be easily adapted to any oversight function that the organization employs to manage its grants process. It is crucial to define and agree on the roles of those on the CAROI team. Although certain components of a CAROI agreement may be standard, as described below, each agreement will be unique to the organization and issue(s) involved.

ELEMENTS OF CAROI AGREEMENTS

SCOPE AGREEMENT	RESOLUTION AGREEMENT
• Issues to be resolved. A matrix can help the reader understand the issues and timing when there is more than one issue to resolve, and can also serve as the working document for future discussion or negotiation. • Parties to be involved and their roles/responsibilities during the process. • Identification of documentation for review. • Ground rules for negotiation. • Potential for recovery of funds (questioned costs). • Identification of the need for work groups, and if so, parameters of work group meetings. • Timelines for reporting negotiated results. • Statement as to why CAROI would be useful.	• Approval of corrective action plans. • Recovery of funds and repayment options/methods. • Consequences of noncompliance with the agreement. • Option to revise agreement upon mutual agreement. • Personnel to be involved in the resolution process. • Signatures/dates of each party to the agreement. • Identify measurements for accountability, including timelines for the implementation of corrective actions. • Post-agreement follow up and a plan for evaluating the CAROI process. Determination of a process for monitoring grantee for specific issues, and provision for targeted technical assistance, as appropriate.

CAROI AGREEMENTS

CAROI agreements are essential. There are two types of CAROI agreements. The first type, known as the “scope” agreement, is a blueprint for the resolution of compliance issues, and a commitment on the part of all participants. It establishes the issues to be resolved, the timeline, the ground rules for negotiation, the parties involved and their roles throughout the process. Without a scope agreement, CAROI teams will lack firm direction and purpose, can take longer than necessary with no definable and lasting results, and risk that the process will not produce its intended objectives.

The second type of agreement is the “resolution” agreement, which addresses how oversight findings will be resolved. Resolution agreements are likely to list specific corrective actions that will be implemented, state whether funds will be recovered, state how follow up will occur, detail how accountability is going to be measured, and list which personnel are going to be involved in the process.

The CAROI resolution agreement can be developed to address one or more issues in an audit, monitoring report, or other oversight report. Like the scope agreement, it is a commitment on the part of all parties to implement the resolution plan in good faith. CAROI agreements are developed to be specific to the situation(s) presented by the participating parties. Depending on the complexity of the issue(s), each type of agreement can be one to several pages in length. The table on page 23 lists elements that can be included in each type of agreement, regardless of the complexity or the number of issues:

More details about CAROI agreements as well as templates for both Scope and Resolution Agreements can be found in the AGA guide, now available on the AGA website at: www.agacgfm.org/intergovernmental/downloads/CAROI.pdf

TO LEARN MORE ABOUT CAROI

A distinct alternative to the traditional audit resolution processes, CAROI is an example of a highly effective and successful collaboration among the federal, state, and local participants who set about to improve the audit resolution process with innovation and successful implementation. To find out more about how your agency can incorporate CAROI into your audit resolution and oversight activities, visit the OIG or AGA websites today.

OIG – www.ed.gov/office/oig

AGA – www.agacgfm.org



Richard Rasa

Rich Rasa has been with ED OIG for more than 29 years, starting as an auditor and becoming the director of the ED OIG State and local advisory and assistance staff since 1991. Mr. Rasa led the effort to create CAROI, and he and his staff have participated in the initiative since its inception in 1994. Prior to coming to ED, Mr. Rasa was an auditor and an inspector for the U.S. Department of Agriculture, Office of Inspector General, foreign operations staff and conducted audits and inspections of U.S. Agriculture programs primarily overseas. Prior to his tenure at USDA, he was an accountant for the Bechtel Power Corporation.

Mr. Rasa is a certified government financial manager. He is the past president of the Institute of Internal Auditors, District of Columbia Chapter and held various positions in the chapter, including vice president for professional development and membership. Mr. Rasa was awarded the National Association of Federal Education Program Administrators Distinguished Service Award in 2006 for his work with state and local education programs. Previous award recipients have been Members of Congress, a secretary of education, and title I directors. Mr. Rasa has participated as a member of the steering committee for the Association of Government Accountant's Partnership for Intergovernmental Management and Accountability since its inception in 2007. In 2010, Mr. Rasa was awarded the President's Award from the Association of Government Accountants for his work on the intergovernmental partnership.



The Role of the Postal Service In the Digital Age

By David Asher and Bruce Marsh

The U.S. Postal Service Office of Inspector General Risk Analysis Research Center initiated a project to study the impact of the digital revolution on the future of the American postal ecosystem,¹ an industry that is valued at approximately a trillion dollars and employs more than eight million individuals across the United States.² RARC, which reports directly to the inspector general, has a core mission to conduct research on public policy and strategic issues pertinent to the Postal Service. The findings from this study have been delivered in a series of white papers released to key stakeholders, including the Postal Service Board of Governors, senior Postal Service executives, Congress and other parts of the Postal ecosystem with the intent of presenting a “strategic positioning” for consideration during this critical period in the organization’s history.

The Internet and the digital economy are fundamentally changing the world of communications, transportation and commerce. Since the dot-com boom and bust of the early 2000s, the digital economy has continued to grow at a staggering rate, as both consumers and businesses adopt electronic processes across multiple domains. New digital technologies have been “disruptive innovations”³ for traditional businesses and their business models. These disruptions, in combination with the great recession of 2008 to 2009, have had a significant impact on postal organizations all over the world, resulting in a steep decline in the volumes of personal, business and advertising mail. The diversion to digital channels is real and accelerating. As one leading new media expert proclaimed, “If it can go digital, it will.”⁴

1) Postal Ecosystem is the term used for the markets, applications and processes as well as sending and receiving customers, partners and vendors that have traditionally involved the Postal Service in some way.

2) Global Envelope Manufacturers, 2008 Economic Job Study Final Report, June 2008, http://www.emafoundation.org/file_depot/0-10000000/0-10000/2518/conman/IPS+2008+Jobs+Study+Final_Report1.pdf

3) Christensen, C. “The Innovator’s Dilemma,” Harvard Business Press. 1997.

4) Jarvis, J. What Would Google Do?, Collins Business. 2009.

By 2020, 40 percent of the U.S. population will be digital natives⁵ born into new technologies. Digital natives’ behaviors are ingrained in electronic alternatives with little or no desire to deal with hard copies. This group chooses online banking over checks; e-vites over invitation letters; text messages or Twitter over email; and e-books over physical books. As younger digital natives begin to enter the workforce, their behaviors will have an even more fundamental impact on how businesses leverage technology.

While there is no indicator of how much of our communications and commerce will go digital, the migration is nonetheless creating a lengthening tail of digital refugees, which will only increase as the digital revolution progresses.

The statistics cited above provide only a glimpse of the impact of the digital revolution. A number of other key trends indicate how digital technology is affecting both communications and commerce:

1. There has been a progressive shift in communications moving from the physical to the digital. With every new technology, the speed and scope of communications have increased.
2. Businesses and governments are looking to move not only communications, but also transactions, to the digital world.
3. The digitization of bill presentment and payments (to varying degrees of adoption) is becoming mainstream as more households, including seniors and people of varying income levels, are adopting the trend.
4. Control is shifting from the sender to the receiver, giving the latter greater choice in what, when and how they receive communications.

5) Booz and Company, “The Rise of Generation C – Implications for the World of 2020,” January 2010.

5. The Internet has evolved from mass broadcast media to personalized conversations, hastened by the growth of social media sites.
6. Traditional players in print media (magazines and newspapers) have not disappeared, but are rapidly shifting their focus to online content.
7. Although traditional media still receives a majority of advertising expenditures, online and mobile advertising continue to grab the market share.
8. Explosive growth of mobile devices increase consumption of content “on the go” and provides marketers the ability to get their content directly into the hands of individuals wherever they are.
9. New marketing tools, combining data of online activities with other demographic information and offline activities, allow advertisers to offer a more targeted, personalized marketing communications to potential customers with an easy way for them to respond.
10. E-commerce is growing rapidly, but has not reached its full potential. Participants are still working to improve trust and enhance associated logistics, return services, payment and security.
11. Mobile commerce is positioned to grow significantly in the U.S. market as a tool for marketing, retail, finance and payments.
12. Digital technologies have facilitated global commerce, allowing businesses to market and, together with parcel delivery services, fulfill orders across borders.

KEY POSTAL IMPACTS

The Postal Service has maintained its position in physical communications due to its reach and monopoly access; however, new competitors are bypassing this advantage, changing the “postal ecosystem.” No longer do hard copy providers solely drive this ecosystem. Disruptive digital companies like Google are suddenly everywhere, changing business models for advertising (Google adwords), communications (Gmail priority) and publications (Google books). With the enhanced targeting capabilities of digital technologies, marketers are shifting towards behavioral and location-based advertising that enables a more direct linkage between awareness and response. Some of the main types of service providers in the digital

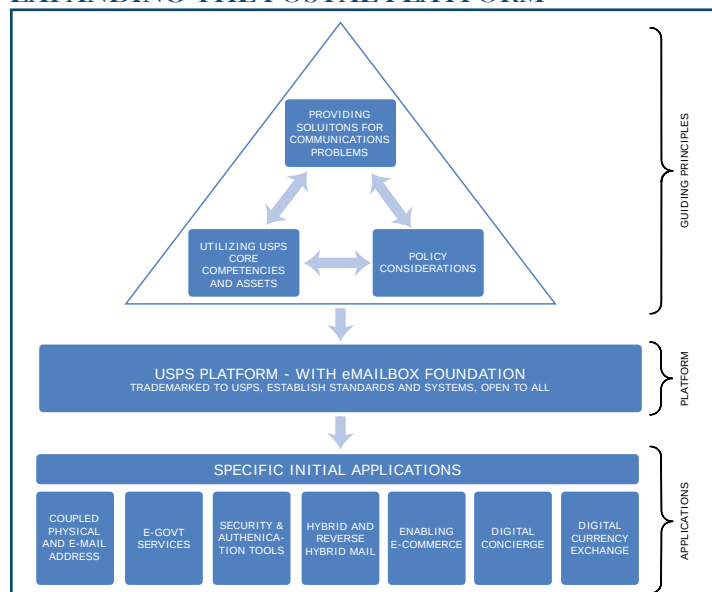
economy today – platforms, Internet intermediaries, search networks, digital data providers, application providers such as social media and mobile technology providers – look to maintain or grow their position as the digital economy evolves.

Nevertheless, the Postal Service can continue to play a significant role. Over the past 236 years, the Postal Service has provided the secure, universally accessible platform for physical commerce and communications. The Postal Service can extend its trusted role as an intermediary to the digital realm. It could establish an enabling platform to bridge the digital divide and allow citizens to traverse from the physical to the digital, if they choose or are required to, in this new digital economy.

This role may take on many different forms, but by working with leading Web service providers, the Postal Service has the opportunity to shape and enforce industry standards that fill identified gaps in the digital marketplace. Given the rapid cycles taking place in the digital economy, the window of time for action is limited. The Postal Service must establish a pivotal role for itself in this new emerging world to ensure its future relevance.

The transition to a new digital landscape is already under way, but the path forward is undefined. The Postal Service should consider new products and services that reflect the evolving mandate to “bind the nation together” in a new world where people are increasingly communicating digitally.

EXPANDING THE POSTAL PLATFORM



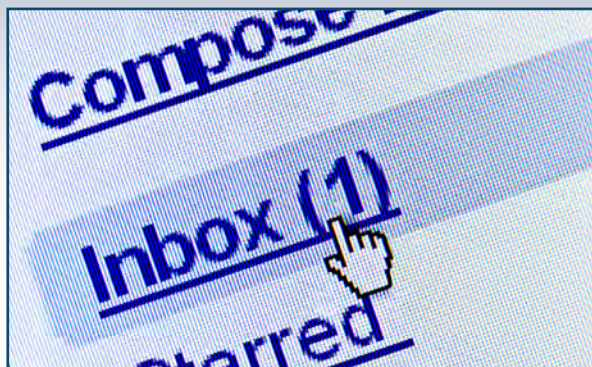
THE GUIDING PRINCIPLES

The conceptual framework depicted in the diagram on page 27 constructs a strategic positioning for the Postal Service to consider. The framework is developed in response to three guiding principles.

The first principle encourages an exploration of applications that provide solutions to communication problems of the digital age. Today's Internet-focused world and all of its functionality are not readily available to all citizens, some of whom lack skills or bandwidth access, to reap its full benefits. Additionally, many of these same citizens lack sufficient availability to affordable digital currency services. The U.S. global digital infrastructure also remains fragile, susceptible to viruses and interruptions in service, and is provided by companies that could fail or quickly face obsolescence. Just as critical, there remain inadequate levels of privacy, confidentiality, dependability and security in digital communications and financial transactions as desired by citizens, as well as a risk of involuntary profiling.

As the frequency and intensity of electronic communications and applications continue to increase, consumers are experiencing an information overload as well as a lack of tools to manage it. Companies and governments are limiting the choice of delivery as physical delivery is eliminated in favor of digital-only communications and transactions. Finally, there is a potential threat to equal and fair access to the Internet.

The second guiding principle promotes the utilization of the Postal Service's core competencies and assets in the development of a greater digital role. These include a long history of acting as a trusted intermediary as well as a position of legal standing for postal communications in the courts and government, ensuring that their content remains private. The Postal Service's multichannel infrastructure of points of sales and services (retail, collection and delivery) distinguished by comprehensive national coverage and its experience in developing and running a national address management and change of address databases would also prove valuable. Further, no other organization has the combination of a critical mass of business and consumer customers with the skill of facilitating communications in the first mile (collecting from the sender) and last mile (delivering to the recipient). Lastly, the Postal Service has an effective tradition of serving as a neutral arbiter



providing an array of products and services, including currency transactions, at the lowest combined cost.

The final guiding principle requires the Postal Service to evaluate applications that are considered proper for the Postal Service. Any development of digital services strategy must first ask the following, Is the opportunity in the public interest, linking a wide array of business sectors to the American public? Is the opportunity appropriate for the Postal Service? Is the opportunity needed to assure the Universal Service Obligation? Finally, would a change in policy be required?

THE POSTAL SERVICE ENTERS THE DIGITAL SPACE

First, the Postal Service should develop a foundation of a permanent one-to-one linkage between a physical address and an electronic address available to every citizen and business. The Postal Service would also establish this "eMailbox" to serve as a digital counterpart to the physical mailbox.

Second, the Postal Service can develop and maintain a secure digital postal platform, accessible to all citizens through a website. Private industry would be invited to provide commercial solutions and work with the Postal Service on developing effective postal and governmental applications on the platform to serve all. The Postal Service can fill its established role of providing a trusted communications infrastructure. This represents a modern manifestation and a natural extension of its traditional mandate in the physical space to meet the new requirements of the digital age.

Apple's strategy of encouraging independent development of applications or "apps" for its iPhone® and iPad® platforms would serve as a relevant model for independent development of digital products on the postal platform. Apple invites all developers to bring their applications to its online App Store, as

long as they meet the required technical and content standards. The Postal Service identifies the standards to allow innovation and allow market forces to determine success and failure.

Third, the Postal Service could develop on that platform seven initial applications that adhere to the guiding principles mentioned previously. In addition to the eMailbox with the physical-digital address linkage, the others include:

- An eGovernment application that promotes the further expansion of government services through the postal platform and utilizes the eMailbox to send and receive secure and official communication with federal agencies. This could be paired with physical kiosks (connected to government department call centers) at Post Offices where needed.
- Tools for identity validation, privacy protection and transaction security that allow users to verify the individuals and businesses with whom they are communicating and ensure the safety of their personal information and security of their purchases and financial transactions.
- Hybrid and reverse hybrid mail that allow senders and receivers to convert digital documents to physical documents and physical documents to digital documents. This hybrid solution could foster a healthy symbiotic relationship between printed and digital communications and help elevate the value of both media.
- Enhancing services for the shipping and delivery of secure online purchases through flexible pick-up and delivery options, expanded payment choices and a cost calculation that includes all charges and fees for purchases (even international) at the time of sale.
- Digital concierge services that utilize the eMailbox to integrate an individual's physical and digital communications in a single place



to manage the “information overflow,” as well as serving as a curator offering a type of secure “lock box” for important communications and other personal documents (such as medical records and wills) that can be accessed quickly when needed.

- Develop a network to buy and redeem cash and digital currency both at Post Office™ locations and online. A good example is the leveraging of the vast geographic coverage of the Postal Service to allow unbanked citizens the ability to redeem cash for digital currency in the form of prepaid cards. Such a network could also facilitate payments between government agencies and citizens, such as Social Security payments and tax refunds.

INITIAL APPLICATIONS TO EXPLORE

The Postal Service could develop the eMailbox foundation as well as eGovernment applications as a natural first step. The Postal Service would be expanding on its traditional role in providing secure, authenticated, two-way communication between government agencies at every level and citizens. It provides the postal platform with almost instant access to a critical mass of users and makes it attractive to developers looking to reach consumers. Additionally, the application is timely as government cutbacks force agencies to explore new and less costly channels for their services.

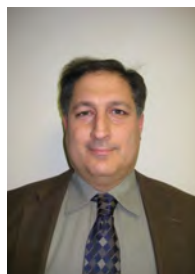
Developing eGovernment services encounters fewer barriers than other applications. Current law allows the Postal Service to offer nonpostal products and services to other government entities. While a number of agencies developed tools for online transactions and communications, no one party has unified the applications on a single platform or linked it with a secure electronic identity for individuals.

Ancillary products, within existing legislation, appear to be an area that has not been fully explored by the Postal Service. This may provide some added flexibility for these applications without the immediate need for legislative action. Other applications will arise as innovation and market conditions dictate, though the underlying platform will remain constant. The paper also suggests a limited role in a much larger ecosystem and among many other players. This requires mechanisms and processes for inviting and developing business

relationships and strategic alliances with the private, public and academic sectors.

IMPLEMENTATION

A key element of a digital strategy lies in the creation or designation of a Postal Service functional area to own and coordinate the resources for the effort. There are undoubtedly a myriad of issues (technical, political and institutional) pertinent to the implementation of a digital strategy. The adoption of such a strategy would not only provide a range of new and needed



David Asher

David Asher is currently an economist specialist at the Risk Analysis Research Center in the Postal Service Office of Inspector General. During his two-year tenure at the RARC, he has worked primarily on digital issues, and led the work on two major white

papers on the Postal Service and the digital world, *The Postal Service Role in the Digital Age: Facts and Trends* and *The Postal Service Role in the Digital Age Part: Expanding the Postal Platform*.

Prior to joining the Postal Service OIG, Mr. Asher spent 12 years as the senior manager of strategic analysis at the Newspaper Association of America where he published a number of papers on advertising, marketing and new media issues. David also worked in politics serving as the deputy press secretary of the Democratic Senatorial Campaign Committee and in the press office of the Democratic National Committee.

David received his A.B. in economics from the University of Michigan as well as an M.B.A. in finance and international business from New York University Stern School of Business, where he was a Stern scholar. David is also a veteran of the MBA Enterprise Corps program, where he served in Poland as an in-house consultant for a national retail chain.

products and services to all Americans, but would help to reinforce the United States' standing as a leader in technology and digital infrastructure. It should be noted that this platform is not a financial panacea for the Postal Service; it should have a utilitarian focus to help all citizens and businesses. ☞

For comments or questions, please contact Bruce Marsh at bmarsh@uspsoig.gov or David Asher at dasher@uspsoig.gov.



Bruce Marsh

Bruce Marsh is currently a manager at the Risk Analysis Research Center in the Postal Service Office of Inspector General. In this position, he manages a team of economists and public policy analysts working on various white papers and projects impacting the

postal sector, including an ongoing series of work on the role of the Postal Service in the digital age.

Previously, he worked for seven years in the Global Business Group at the Postal Service serving most recently as a program manager in international affairs focused on multilateral and bilateral agreements, international letter-post rates, and quality of service. Bruce also has extensive congressional experience, having worked in various positions for Maryland Congressman and current Minority Whip, Steny Hoyer, from 1997 to 2001.

Mr. Marsh received a B.A. in political science from Wake Forest University and an M.A. in economics and American foreign policy from the Johns Hopkins School of Advanced International Studies. He is an alumnus of the U.S. Congress – German Bundestag Exchange Program for Young Professionals, a past board member of Young Government Leaders, and a co-founder of Emerging Postal Leaders, a group at the Postal Service headquarters dedicated to networking and professional development.



Suspension and Debarment Program

A Powerful Tool to Promote Contractor Accountability in Contingency Environments

By Acting Inspector General Steven Trent and Brian Persico

Procurement fraud and lack of contract oversight have been identified as major threats to the U.S. reconstruction effort in Afghanistan. The stakes are high and carry national security implications. Failure of systems, shoddy performance and diversion of resources meant for reconstruction can create advantages for the insurgency, while putting U.S. troops, contractors and their employees at risk.

The best-known remedies for fraud or significant misconduct are criminal prosecution or civil litigation. However, there is a third, lesser-known option – suspension and debarment – and it can be a powerful tool in a contingency environment such as Afghanistan. The Office of Special Inspector General for Afghanistan Reconstruction recognizes the potential of this tool, and is making suspension and debarment actions a major core activity.

SIGAR's action is aligned with the view of the Council of Inspectors General on Integrity and Efficiency that suspension and debarment can help detect contractor fraud in its early stages. In addition, it is responsive to the concerns of many members of Congress, who are calling for strong accountability measures that can be implemented in a timely manner to aggressively tackle contractor oversight.

OVERVIEW

The stated purpose of including suspension and debarment in the Federal Acquisition Regulation is to ensure that government contracts are awarded only to responsible contractors. Use of these remedies is a discretionary function intended for the government's protection and is not considered punishment.¹ Debarment of a contractor may occur on a finding of a "preponderance of the evidence" that a contractor has engaged in misconduct in connection with a public contract or subcontract, violated antitrust statutes relating to the submission of offers, violated one or more terms of a government contract, or

engaged in conduct so serious or compelling that it adversely affects the present responsibility of the contractor or subcontractor.² The secretary of each executive branch department and agency has delegated to a suspension and debarment official, the authority to take action to suspend and debar non-responsible contractors.³ A "preponderance of evidence" is evidence that, as a whole, shows that the fact sought to be proven is more likely true than not.⁴ Debarment is more serious than suspension. The period of debarment, under the FAR, should generally not exceed three years. However, three years is not a limit and periods of debarment may be extended or reduced. Suspension is a temporary measure designed to exclude contractors from contracting with the government during ongoing legal proceedings or in instances where exigent circumstances require the exclusion of a contractor immediately. To facilitate contractor suspensions in such circumstances, the agency need only show "adequate evidence" of wrongdoing to support an exclusion from government contracting.⁵

The primary issue that the SDO considers in imposing debarment is whether the contractor is "presently responsible."⁶ Present responsibility requires, among other things, that a contractor have the ability to perform contracts in accordance with their requirements, have "a satisfactory record of business integrity and ethics," and possess or be able to obtain the accounting and operational controls necessary to perform government contracts.⁷ It is the contractor's burden to demonstrate present responsibility.⁸ Debarred contractors are excluded from receiving government contracts unless the agency head, or his or her designee, determines that a compelling reason exists to do so. In addition, offers may not be solicited

2) See 48 C.F.R. § 9.406-2(b).

3) See 48 C.F.R. § 9.403.

4) See Caiola at 399; Robinson v. Cheney, 876 F.2d 152, 154, 277 U.S.App.D.C. 393, 396 (D.C. Cir., 1989) (discussing the preponderance of evidence standard).

5) See 48 C.F.R. § 9.407-1(b).

6) 48 C.F.R. 9.402(a); See Caiola at 398-99.

7) See 48 C.F.R. § 9.401-1; Frequency Electronics at 2.

8) See 48 C.F.R. § 9.103(c); OSG Product Tankers LLC v. United States, 82 Fed.Cl. 570, 576 (2008).

1) See 48 C.F.R. § 9.402(b); See Caiola v. Carroll, 851 F.2d 395, 398-399 Vol. 271, U.S.App.D.C. 140, 143-144 (D.C. Cir. 1988).

from debarred contractors, who are also banned from being awarded subcontracts exceeding \$30,000. It is important to note, however, that current contracts are not affected because suspension and debarment is a forward-looking remedy. It can prevent an organization from being considered for future contracts, but does not terminate a current contract. The U.S. government may place an order with debarred contractors for the guaranteed minimum quantity under indefinite-quantity, indefinite-delivery contracts. However, options may not be exercised or other steps taken, to extend the duration of a current contract.⁹

DEVELOPMENT OF THE PROGRAM

Until recently, the suspension and debarment remedy of Section 9.4 of the FAR,¹⁰ or the government-wide debarment and suspension regulations utilized for non-procurement transactions,¹¹ has been used to address individuals, organizations and companies operating in traditional support and development roles. In particular, the remedy was used to address criminal activity or performance issues associated with systems acquisition, facilities support contracts, academic grants and similar functions performed on behalf of the government as part of predictable programs and agency requirements.

Since 9/11, however, “contingency” government contracting – to support deployed U.S. forces, the governments of Iraq and Afghanistan and the reconstruction of both countries – has grown steadily, both in absolute dollar value and as a share of overall government contracting spending. According to the final report of the Commission on Wartime Contracting in Iraq and Afghanistan, a total of \$192.5 billion has been obligated for contracts and grants in Southwest Asia from fiscal year 2002 through 2011. Of that total, \$187.2 billion went to contracts awarded for reconstruction projects, operational support needs and other requirements that were met by contractors in theater.¹²

While numerous specialized organizations and contracting funding sources have been developed to address these contracting needs, only limited changes have been made to the FAR and other regulations that provide contracting direction and guidance. Consequently, these organizations and sources of funding are guided by regulations developed for use

in non-contingency environments. But the contingency environment brings with it rapidly-evolving operational needs, while many of the traditional organizations specializing in contracting lack the investigative and audit capabilities found in the offices of inspectors general or law enforcement agencies.

In contingency contracting cases, there are multiple layers of contacts between the agent or auditor developing information on a contractor, and the agency attorney responsible for assembling the case for review by the SDO. The end result is misunderstandings among the various stakeholders at the agency attorney, investigator and auditor levels and about how, when and why suspension and debarment may be applied in the contingency contracting environment.

In response to these challenges, SIGAR launched its Suspension and Debarment Program in June 2011 to operate in the Afghanistan contingency contracting environment. The program integrates SIGAR’s audit and investigative functions with the administrative remedies of suspension and debarment. The result is a dramatic increase in the number of suspension and debarment referrals in SIGAR’s cases: 47 individuals and seven companies referred for action to the Army and U.S. Agency for International Development since October 2010, with 24 referred since the inception of the SIGAR SDP. SIGAR developed its program after a review of the quality and quantity of referrals made to agency SDOs based on reconstruction-related fraud cases. We determined that a significant number of cases were not being acted upon due to a focus on criminal convictions and civil recoveries. As a result, cases that failed to be accepted for criminal or civil action were being closed without referrals to SDOs, or were referred without the documentary evidence needed to meet the evidentiary standards for a successful suspension or debarment. This problem was especially acute for SIGAR because many cases that were opened and investigated involved local Afghan nationals or third-country nationals, or did not result in a direct loss to the government, resulting in lack of jurisdiction or a basis for sustaining a criminal or civil case in U.S. District Court. We also identified the need to have experienced legal counsel examine cases as they developed, to ensure that referrals for suspensions and debarments took place in a timely manner and not – as had often been the case – as afterthoughts to criminal and civil remedies. Furthermore, we found

9) See 48 C.F.R. §§ 9.405, 9.405-1 and 9.405-2.

10) See 48 C.F.R. § 9.400.

11) 68 F.R. 66534, 26 Nov 03.

12) Transforming Wartime Contracting: Controlling Costs, Reducing Risks, Commission on Wartime Contracting in Iraq and Afghanistan, 31 Aug 11, page 22.

that while SIGAR's audit functions could detect and report contractor failure to perform, available remedies were limited to criminal action or civil cases brought under the Civil False Claims Act. These actions had the same limitations found in criminal investigations – with the added complication that they are primarily directed toward determining efficiency and project completion, not individual or corporate wrongdoing.

At approximately the same time SIGAR made the determination that suspension and debarment should be institutionalized as a core competency; the International Security and Assistance Force and U.S. Forces-Afghanistan were identifying and emphasizing contractor responsibility as a primary concern. As contracting in Afghanistan often involves multiple tiers of subcontractors to perform the requirements of a contract, there has been an upswing in reports of shoddy or incomplete performance by subcontractors who have not been vetted by the contracting officer, largely due to the lack of a direct legal relationship with the government. This gap in the contractor vetting process has also allowed criminal networks and insurgents to divert contract funds from their intended purpose, frustrating the intent of many projects designed to improve the Afghan economy and the rule of law. In response to these concerns, Task Force 2010, an anti-corruption task force within ISAF, was established to oversee contractor vetting processes and contractor oversight functions. ISAF and USFOR-A also highlighted the need to suspend or debar contractors who engage in illicit activities – including smuggling and links to criminal networks – as the continued use of these contractors undermines efforts to support and promote the rule of law. This emphasis on contractor vetting provided the SIGAR Suspension and Debarment Program with guidance on how to meet the operational needs of ISAF and USFOR-A.

PROGRAM ELEMENTS

The SIGAR SDP is based on four main components, which include training, coordination, integration and deliverables. Each of these is discussed in detail within the SIGAR SDP instruction, which is a document based on best practices found in the suspension and debarment, investigative, audit and intelligence communities. Our goal is to implement a program that rapidly addresses operational and contracting

needs found in the contingency contracting environment.

Training: All SIGAR investigative and audit staff, at headquarters and forward deployed locations, are receiving comprehensive training on suspension and debarment. This training will take the form of in-person training by SIGAR attorneys responsible for the implementation of the SDP, and reference materials that can be used on a day-to-day basis during the course of investigations and audits. Specific information about the materials to be gathered to support the suspension and debarment of individuals, organizations and contractors is provided, along with instruction on how suspension and debarment works. This training is institutionalizing these remedies in SIGAR's processes. It also is raising awareness of the important role that suspension and debarment can play in reconstruction oversight, especially in holding contractors accountable.

Coordination: Throughout the development of suspension and debarment cases, it is critical to coordinate with the Department of Defense, Department of State, USAID, ISAF, USFOR-A and other organizations responsible for the award of contracts, task orders, purchase orders, grants and loans in Afghanistan. Suspension and debarment actions do not happen in a vacuum. The impact of excluding an individual, organization or company from contracting has wide-ranging direct and indirect consequences. Steps are taken at all stages, prior to the referral of any suspension or debarment of a contractor to the appropriate SDO, to evaluate the impact of exclusion. In addition, coordination with partner organizations helps to develop information regarding contractors. This information can be used to collaterally address contractor wrongdoing by recommending the exclusion of individuals or subsidiaries, as opposed to an entire organization or company, if appropriate. To this end, SIGAR regularly coordinates its actions with Task Force 2010, the U.S. Central Command Joint Theater Support Contracting Command, the Department of Justice and the International Contract Corruption Task Force. Coordination also takes place between SIGAR and the agency counsel responsible for reviewing suspension and debarment referrals, after a determination is made designating the lead agency for each suspension and debarment action. This process of coordination helps to ensure that the SIGAR Suspension and Debarment Program is responsive to the operational needs

of the contracting community in Afghanistan. It also provides inputs that assist in the further development of the SIGAR's Suspension and Debarment Program.

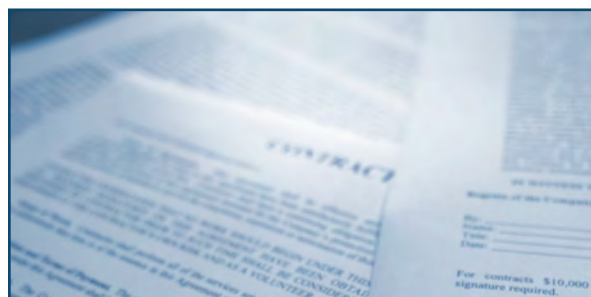
Integration: As part of our Suspension and Debarment Program, SIGAR created the position of senior counsel for investigations to provide centralized oversight and control over how suspension and debarment actions are developed. This position, within the SIGAR Investigations Directorate, gives the SDP the ability to observe the development of cases and provide direction on the use of these remedies as part of our investigative and audit strategies. This integration into SIGAR's operations gives the senior counsel for investigations the ability to find, fix, track, target and engage individuals, organizations and companies accused of criminal activity or poor performance at an early stage, resulting in timely referrals to SDOs. The findings of investigators and auditors are supplemented by the ability of the senior counsel for investigations to call upon specialized analyst assistance available to the investigations directorate. Moreover, in cases where force protection is an issue, the senior counsel for investigations receives information from the intelligence community using SIGAR's capabilities to access classified materials. This integration also allows SIGAR to assess whether follow-up actions, using suspension and debarment remedies, is needed when additional affiliate individuals, companies and organizations that have had conduct imputed to them or other targets are identified during an investigation or audit. All criminal investigative cases that SIGAR participates in are referred to the senior counsel for investigations at the time of opening and closing. This ensures that suspension and debarment remedies are adequately addressed as part of the investigative process.

Deliverables: The primary mission of the SIGAR SDP is to provide comprehensive, documented and timely referrals of individuals, organizations and companies to SDOs. These referrals include information regarding the background of a contractor, the basis for the allegations supporting the suspension or debarment referral, and the documentation necessary to establish an administrative record for use by the SDO. They are to be made at the earliest opportunity, taking into account the need to ensure that available criminal and civil remedies are addressed prior to undertaking any suspension or debarment action. To this end, the assistant inspector general for investigations reviews all referrals for suspension

and/or debarment to ensure that such referrals do not impede or restrict the government's ability to pursue criminal or civil remedies against a contractor. In cases where a declination of criminal and/or civil remedies takes place, referrals are made following a determination by the senior counsel for investigations that the evidentiary standards for suspension or debarment have been met. During the course of an investigation or audit, the senior counsel for investigations also provides regular written input for the case file to document the need for materials to support a suspension or debarment. This ensures that – should these remedies become available – they can be utilized in a timely manner. Once a referral is made to the lead agency's SDO, additional supporting materials are provided to agency counsel upon request. In all cases, prior to the closing of an investigative file, the senior counsel for investigations provides a copy of any referral to a SDO or provides a written rationale outlining why a referral of a contractor for suspension or debarment was not made by SIGAR.

CONCLUSION

Contract fraud has a corrosive impact wherever it occurs, but it is especially damaging in a contingency environment. Not only does it divert taxpayer dollars from their intended uses, but also it has the potential to divert U.S. resources to the insurgency and create additional hazards for our service members, contractors and their workforce.



Suspension and debarment is a powerful tool that can complement the better-known legal remedies of criminal prosecution and civil litigation. The robust use of suspension and debarment is endorsed by CIGIE and supported by leading members of Congress. SIGAR embraces this view, and believes that suspension and debarment has an important role to play in protecting the integrity of the acquisition process and safeguarding the U.S. taxpayers' investment in Afghanistan reconstruction from waste, fraud and abuse. 

SIGAR SUSPENSION AND DEBARMENT PROGRAM CASE STUDY

Proposed Debarment of Noor Ahmad Yousufzai Construction Company and Mr. Noor Ahmad

On August 24, 2011, the SIGAR SDP prepared a recommendation for the proposed debarment of Noor Ahmad Yousufzai Construction Company and its owner, Mr. Noor Ahmad. Mr. Ahmad was arrested on June 13, 2011, by Afghan National Police officers at Kandahar Airfield following an investigation by the International Contract Corruption Task Force that determined he had offered a \$400,000 cash payment to a U.S. Army Corps of Engineers contracting officer.

As an Afghan national, Mr. Ahmad is subject to the jurisdiction of the Government of the Islamic Republic of Afghanistan, despite the fact his actions were intended to influence the award of a U.S. government contract. Absent a referral for debarment by SIGAR to the Army, no record of Mr. Ahmad's attempted bribery would be readily available to the contracting community.

Instead, the allegations against him would have been addressed by the local criminal courts, leaving him-- and his company-- potentially free to continue to pursue government contracts. By making its referral, the SIGAR SDP acted to ensure that Mr. Ahmad and his company are excluded from receiving these awards. This will prevent further attempts to improperly influence contracting personnel, and will safeguard taxpayer dollars. Mr. Ahmad and his company were listed on the General Service Administration's Excluded Parties List System on August 31, 2011.



Steven Trent

Steven Trent was designated acting special inspector general for Afghanistan reconstruction by President Obama on September 3, 2011. Prior to being named acting IG, he served as acting deputy inspector general and assistant inspector general for investigations, overseeing SIGAR's criminal investigations and suspension and debarment program.

During his 29-year career in federal law enforcement, Mr. Trent developed special expertise in fighting financial crimes, international money laundering and narcotics trafficking, as well as combating commercial fraud and human trafficking. He has held senior executive positions at the U.S. Customs Service and the Department of Homeland Security. Before joining SIGAR, he was special agent in charge of investigations in Baghdad for the Special Inspector General for Iraq Reconstruction. Mr. Trent holds a bachelor's and master's degree from American University and is a graduate of the Senior Executive Fellows Program at the John F. Kennedy School of Government at Harvard University.



Brian Persico

Brian A. Persico joined SIGAR in June 2011 and is responsible for development and operation of its suspension and debarment program. Prior to that, he was an Air Force Judge Advocate and a civilian attorney with the Army Legal Services Agency. Since 2005, Mr.

Persico has prepared approximately 800 suspensions, proposals for debarment, debarments and related actions to address fraud, poor performance and other misconduct by contractors. The majority of these cases addressed contracts supporting contingency operations in Southwest Asia.

Mr. Persico holds a bachelor's degree from the University of Scranton and a law degree from The Catholic University of America. He is a member of the bars of the Supreme Court of the State of New Jersey, the D.C. Court of Appeals, the U.S. Court of Federal Claims, the Air Force Court of Criminal Appeals and the U.S. Court of Appeals for the Armed Forces. He is a major in the Air Force Reserve.



Suspension and Debarment

Debunking Myths and Suggesting Practices for Offices of Inspectors General

By Inspectors General Allison Lerner and Steve Linick

Whether through its role as a consumer in the marketplace or through the provision of financial assistance, the federal government uses a substantial amount of taxpayer dollars to fund its various programs and activities.¹ Protecting these public funds from potential misuse is of utmost importance, even in the best of economic times. When non-responsible contractors and other awardees violate the public trust through poor performance, noncompliance or misconduct, or other actions affecting present responsibility, administrative suspension and debarment remedies exist to prevent those entities or individuals from receiving any new federal business for a specified time period.² However, as congressional hearings in the past few years have shown, many poor performing contractors continue to receive public funding, and deficiencies exist in agency suspension and debarment processes.³

Given continuing congressional interest and the importance of ensuring that scarce federal funds are spent responsibly,⁴ the Investigations Committee of the Council of Inspectors General on Integrity and Efficiency formed a working group to raise the profile of suspension and debarment as tools already in the government's "toolbox." Building on a survey it conducted of suspension and debarment use and practices among Offices of Inspectors General, the working group recently issued a report debunking common myths about these remedies and offering suggested practices for OIGs to increase their use of

these vital tools.⁵ This article summarizes the working group's report.

DEBUNKING MYTHS

According to the working group's report, the survey respondents indicated that suspension and debarment "could be used more frequently and more effectively."⁶ Misconceptions about the impact of suspension and debarment on contemporaneous proceedings, as well as the appropriate bases for suspension and debarment, have likely affected people's perceptions of the utility of these tools.

These myths, which are discussed below, are readily debunked through a better understanding of a few fundamental concepts. In addition, some practical steps can be taken by OIGs and others to move past these roadblocks toward greater suspension and debarment use.

MYTH #1: CONTEMPORANEOUS CRIMINAL OR CIVIL PROCEEDINGS WILL BE COMPROMISED

The first myth discussed in the working group's report is a belief that pursuing suspension or debarment will necessarily jeopardize contemporaneous criminal or civil proceedings by disclosing sensitive investigative information or case theories to the subject. However, procedural safeguards and careful planning can help protect contemporaneous proceedings while suspension and debarment actions are being pursued.

Notices of proposed debarment or suspension, for instance, do not require disclosure of all of the government's evidence; they must simply inform the subject of the grounds for taking action.⁷ Courts have further expounded that the suspension notice

1) In Fiscal Year 2010, the federal government spent \$535 Billion on contracts and \$555 Billion on grants, as well as substantial amounts on other forms of assistance. See <http://www.usaspending.gov/explore?carryfilters=on>.

2) While federal statutes sometimes contain language governing the exclusion of federal awardees in certain circumstances, such as for Clean Air Act violations, this article focuses on discretionary suspension and debarment actions, which, in the procurement context, are governed by the Federal Acquisition Regulation (FAR), see 48 C.F.R. Part 9.4; and, in the realm of non-procurement transactions (grants, loans, or benefits), by Office of Management and Budget Guidelines to Agencies on Government wide Debarment and Suspensions (NPR), see 2 C.F.R. Part 180.

3) See, e.g., Rewarding Bad Actors: Why Do Poor Performing Contractors Continue to Get Government Business? Hearing before the Committee on Oversight and Government Reform, U.S. House of Representatives One Hundred Eleventh Congress, Second Session, March 18, 2010 Serial No. 111-78. (statements of Calvin L. Scovel III, Inspector Gen., U.S. Dep't of Transp.; Richard L. Skinner, Inspector Gen., U.S. Dep't of Homeland Sec.).

4) See generally American Recovery and Reinvestment Act, P.L. 111-5, 123 Stat. 115 (2009) (requiring unprecedented levels of oversight, transparency, and accountability).

5) Don't Let the Toolbox Rust: Observations on Suspension and Debarment, Debunking Myths, and Suggested Practices for Offices of Inspectors General (Sept. 20, 2011) [hereinafter Working Group Report]. The report can be found at: <http://www.ignet.gov/randp/sandwgrpt092011.pdf>.

6) *Id.* at 1.

7) See FAR 9-406-3(c)(2); 9.407-3(c)(1); 2 C.F.R. §§180.715(b) and (c), 180.805(b).

need only contain enough information regarding the time, place and nature of the alleged misconduct to facilitate a meaningful contest.⁸ Requests for documentation supporting the suspension may be denied if disclosure could harm the pending proceedings.⁹ Additionally, while the rules governing suspension and debarment allow fact-finding hearings when material facts are in dispute, there are some boundaries. In the case of suspensions, such hearings must be denied based on Department of Justice advice that contemporaneous proceedings would be prejudiced.¹⁰ Further, it is worth mentioning that fact-finding is not at all permissible in either suspension or debarment actions based on a conviction, judgment, or indictment.¹¹

Practically speaking, OIGs can prevent the disclosure of sensitive information through careful planning during the referral process. OIG referrals need only provide enough information sufficient to satisfy the applicable evidentiary standards – “preponderance of the evidence” (or 51 percent) in the case of debarments and the lower “adequate evidence” standard with respect to suspensions. Some OIGs, for example, have provided the agency suspension and debarment official with simply a copy of the search warrant affidavit that had previously been disclosed to the subject.¹² Managing disclosure concerns can be aided by active communication among the relevant communities (OIGs, DoJ, SDOs and others). Through frank and open dialogue, disputes can be avoided or minimized.

MYTH #2: SUSPENSION AND DEBARMENT MUST BE BASED ON JUDICIAL FINDINGS

Most commonly, suspension and debarment actions are based solely on the results of court proceedings – namely, a conviction, civil judgment or indictment for an integrity-related offense.¹³ However, another less-traveled path exists to exclude a non-responsible individual or entity from doing further business with the government. Fact-based actions, which rest solely

on the strength of facts discovered through investigations, audits, or inspections, without an associated conviction, judgment, or indictment, may also be viable – but often overlooked¹⁴ – options in many circumstances.

The Federal Acquisition Regulation and National Public Radio both explicitly provide for fact-based actions by explaining that debarments can be supported by a preponderance of the evidence¹⁵ sufficient to establish, among other things:

- A particularly serious violation of the terms of a government contract, subcontract, or transaction; or
- Any other cause of such a compelling and serious nature that it affects present responsibility.¹⁶

The latter cause is especially sweeping and empowers the SDO to debar an individual or entity for an array of conduct indicating, for example, a lack of integrity or competency to handle federal funds.

Similarly, suspensions may – but do not always have to – rest upon court findings. While an indictment alone can support a suspension,¹⁷ such action can also be anchored in other “adequate evidence” (a low standard akin to probable cause) establishing a cause for debarment, such as any cause so serious that it implicates present responsibility. Suspensions further require a need for immediate action to protect the government’s interest.¹⁸ In deciding whether to impose a suspension, the SDO will evaluate the supporting facts to assess their “adequacy” and should consider such factors as the amount of evidence available, its credibility, corroboration and reasonable inferences.¹⁹

Apart from a general misconception that suspension and debarment actions are only possible with the existence of a supporting conviction, judgment or indictment, other factors also affect the use of fact-based exclusions. As the working group report notes, agencies may have concerns over the potential difficulties associated with conducting a fact-finding hearing, such as the time and resources that may be involved.²⁰ In addition, misunderstandings over the level of evidence required to impose a fact-based ac-

8) See *ATL, Inc. v. United States*, 736 F.2d 677, 686 (Fed. Cir. 1984); *Transco Security, Inc. v. Freeman*, 639 F.2d 318 (6th Cir. 1981), cert. denied, 454 U.S. 820 (1981).

9) See NPR Preamble, 68 Fed. Reg. 66543 (2003) (“[t]he suspending official may have to review [sensitive] evidence [pertaining to an investigation] in camera and be unable to disclose the evidence to a suspended respondent”). Cf. 5 U.S.C. § 552(b)(7)(A) (Freedom of Information Act exemption protecting records, which, if disclosed, could reasonably be expected to interfere with a law enforcement proceeding). The concept of an in camera review, in which evidence is not disclosed to the respondent, is supported by the ATL and Transco cases, above.

10) See FAR 9.407-3(b)(2); 2 C.F.R. § 180.735(a).

11) See FAR 9.406-3(b)(1), 9.407-3(b)(1); 2 C.F.R. §§ 180.830(a)(1), 180.735(a)(1).

12) Working Group Report at 6.

13) Such offenses include commission of any offense indicating a lack of business integrity or business honesty that seriously and directly affects present responsibility. See FAR 9.406-2(a); 9.407-2(a) and (b); 2 C.F.R. §§ 180.705(b); 180.800(a).

14) Only 27% of OIGs responding to the working group’s survey reported that they had made fact-based suspension referrals in Fiscal Year 2010; only 24% of the respondents had made fact-based debarment referrals. Working Group Report at 7.

15) A “preponderance of the evidence” means proof leading to the conclusion that a fact in issue is more probable than not. See FAR 2.101; 2 C.F.R. § 180.990.

16) FAR 9.406-2(b)(1)(i), (c); 2 C.F.R. §§ 180.800(b),(d). A comprehensive list of the causes for debarment that may be established factually (i.e., without a predicate judicial finding) can be found at FAR 9.406-2(b), (c); and 2 C.F.R. § 180.800(b), (c), (d).

17) FAR 9.407-2(b), 2 C.F.R. § 180.700(a).

18) FAR 9.407-1(b), 2 C.F.R. § 180.700(c).

19) FAR 9.407-1(b)(1), 2 C.F.R. § 180.705(a).

20) Working Group Report at 7.

tion and concerns about contemporaneous proceedings may also play a role. More simply, however, many agencies and OIGs mistakenly believe that suspension and debarment actions must be tied to a judicial proceeding.²¹ Undoubtedly, some of these obstacles can be identified and overcome through strong relationships and dialogue between all parties involved in the suspension and debarment process, including OIGs, SDOs, other agency officials and staff, and DoJ. The bottom line is that an increased awareness of the fact-based option, amplified by outreach and communication, may pave the way for increased suspension and debarment use in instances where no judicial finding has been made.

MYTH #3: SUSPENSIONS AND DEBARMENTS MAY BE BASED ONLY UPON INVESTIGATIVE FINDINGS.

The final myth discussed in the working group's report is a belief that suspensions and debarments may be imposed only based on investigative findings. OIGs, for example, rarely make "non-investigative" suspension or debarment referrals. According to the working group's survey, in fiscal year 2010, only 1.5 percent of the respondents' suspension and debarment referrals arose from non-investigative activities.²² As discussed above, however, the FAR and NPR each contain very broad "catch all" provisions that permit suspension or debarment for any "serious or compelling" cause affecting "present responsibility,"²³ including the types of matters that may be discussed in OIG audit reports of grantees and contractors.

For example, audits often uncover significant or recurring internal control deficiencies that place federal funds in danger of misuse or misallocation; these findings might establish a cause for suspension or debarment. Auditors who perform work under Office of Management and Budget Circular A-133, given the wide lens through which they conduct their reviews,²⁴ are uniquely situated to see trends and persistent problems across government with particular awardees. Evidence of this nature might bear on present responsibility and make a strong case for suspension or debarment.

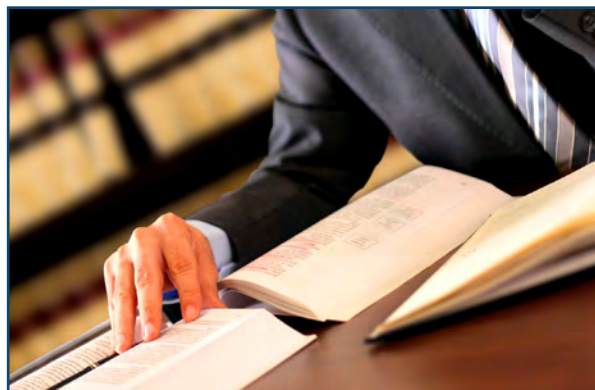
21) *Id.* at 7.

22) *Id.* at 8. The report notes that the low rate of non-investigative referrals could be due, in part, to the internal focus of many audits and inspections. Also, some OIGs may require audit and investigation units to refer fraudulent or improper activity discovered during the course of their work to the office of investigation.

23) FAR 9.406-2(c), 9-407-2(c); 2 C.F.R. §§180.800(d), 180.700(b).

24) Under OMB Circular A-133, which implements the Single Audit Act of 1984, each federal grant recipient that expends \$500,000 or more a year in federal assistance is required to have a single audit.

Merely recognizing that suspension and debarment may be obtained from non-investigative activities may not be enough to spur referrals based on audits or inspections. Many auditors and inspectors have little familiarity with these remedies and will need further education about their fundamentals before they are fully equipped to make referrals. Focused "in-house" training and/or wider participation in government-wide courses offered by the Federal Law Enforcement Training Center or by CIGIE would significantly raise the knowledge base. Other steps to stimulate non-investigative referrals may include developing checklists and referral templates tailored to audit and inspection activities. Finally, as with the other myths discussed, greater communication between OIGs, SDOs and other agency officials should take place to avoid confusion and surprises. This is especially important because many SDOs and other agency officials may be less familiar with referrals of this nature than with those stemming from investigations.



SUGGESTED PRACTICES

Debunking the myths surrounding the use of suspension and debarment is just one-step to increasing the use of these remedies. Although recognizing that there is no "one size fits all" approach, the working group's report also identified several suspension and debarment-related practices that, if implemented, could help foster referrals. The report encourages offices to consider adopting these practices, which are summarized below, to the extent their circumstances warrant.²⁵

- **Assigning Dedicated Personnel:** While no single staffing approach can be applied consistently across the entire OIG community, some OIGs have experienced success with the dedication of

25) See Working Group Report at 10-16, for a more full discussion of each suggested practice.

personnel specific to the suspension and debarment function. Such arrangements – where a specific OIG employee serves as the main point of contact with the SDO’s office – can build internal expertise and strengthen relationships with agency suspension and debarment staff.

- **Identifying and Recommending Improvements to Agency Programs:** Through their regular internal audit and evaluation functions, many OIGs have conducted audits or reviews of their agency’s suspension and debarment system, and therefore may be able to identify deficient processes and recommend positive changes.
- **Using OIG Reports to Identify Suspension and Debarment Candidates:** Several survey respondents assign staff to periodically review all OIG reports for information such as indictments, convictions, pleas and other information that may be indicative of a lack of present responsibility, all of which might support a suspension or debarment.
- **Enhancing OIG Referral Practices:** Referral practices can be enhanced in two ways. First, many OIG survey respondents explained that they use measures, such as statistics, designed to encourage employees to make suspension and debarment referrals when appropriate. Second, creating a system for preparing and tracking OIG suspension and debarment referrals, such as templates and checklists, can facilitate their preparation and use.
- **Developing Strong OIG Suspension and Debarment Policies:** 59 percent of survey respondents have written policies for addressing suspension and debarment referrals to the agency. These policies lend structure and organization to the process as a whole.
- **Increasing Outreach Among Relevant Communities:** Regular outreach and communication can go far to alleviate concerns or misconceptions that may affect suspension and debarment use. The working group suggests that all parties engaged in the process (OIGs, SDOs and DoJ) engage in regular dialogue to “work through areas of mutual concern and to correct misunderstandings.”²⁶
- **Additional Training:** Formal training can increase awareness of suspension and debarment as viable tools and dispel the myths that sur-

round them. For their part, OIGs can encourage their staff to attend existing suspension and debarment training, such as the course offered by FLETC. They might also consider preparing and presenting training within their offices and agencies, providing “basic information to facilitate those remedies’ use under appropriate circumstances.”²⁷

- **Leveraging Semiannual Reports:** Some survey respondents include specific statistics and discussions of suspension and debarment referrals in their Semiannual Reports. Such reporting can serve multiple purposes by: 1) providing a means to educate the Congress and other interested parties about suspension and debarment activities; 2) illuminating an office’s commitment to pursuing these remedies; and 3) illustrating the extent to which OIG referrals have been translated into actions.

CONCLUSION

Fiscal responsibility and proper stewardship over public funds demand that the government transact business only with responsible parties. Suspensions and debarments are important tools in the fight against fraud, waste and abuse of public funds. Unfortunately, some basic misunderstandings can restrain their use. The working group report has addressed a few myths surrounding suspension and debarment by discussing safeguards for contemporaneous proceedings and highlighting the availability of fact-based actions, including those stemming from OIG audits and inspections. However, overcoming the effects of these myths will require further steps, including additional training, outreach and active communication among all parties involved in the process. ❧

ACKNOWLEDGMENT

Thanks to Kristen Cutforth, NSF OIG, for her assistance in preparing this article; and Ken Chason, NSF OIG and Brian Baker, FHFA OIG, for their review and comments. Special thanks is also extended to the CIGIE Suspension and Debarment Working Group members for their hard work on the report entitled *Don’t Let the Toolbox Rust: Observations on Suspension and Debarment, Debunking Myths and Suggested Practices for Offices of Inspectors General*, which this article summarizes.

26) Working Group Report at 14.

27) Working Group Report at 15-16.



Allison Lerner

Allison C. Lerner assumed the duties as inspector general of the National Science Foundation in April 2009, reporting to the National Science Board and the Congress. As head of the Office of Inspector General, she recommends policies for promoting economy, efficiency and effectiveness of NSF programs and operations. She leads efforts to prevent and detect fraud, waste and abuse; improve the integrity of NSF programs and operations; and investigate allegations of misconduct in science.

Ms. Lerner was appointed in November 2005 as counsel to the inspector general at the Department of Commerce, a position through which she acted as the IG's principal legal advisor and managed the office's staff attorneys and legal services.

Ms. Lerner began her federal career in 1991, joining the Office of Inspector General at Commerce as assistant counsel, and has been a member of the senior executive service since 2005. During her tenure, she served as special assistant to the IG, deputy assistant inspector general for auditing, and acting assistant inspector general for auditing. Prior to joining the federal government, she was an associate at a law firm in San Antonio, Texas.

In June of 2011, Ms. Lerner was designated by the president as a member of the Government Accountability and Transparency Board. She currently chairs the Counsel of the Inspectors General on Integrity and Efficiency working groups on suspension and debarment and research misconduct.

Ms. Lerner has been honored by the President's Council on Integrity and Efficiency with three awards for excellence: in 2001, for her work reviewing the Department of Commerce's management of 5,000 intra-agency and special agreements worth over \$1 billion; in 2002, for her assistance in a complex investigation of false claims submitted under a financial award from the National Institute of Standards and Technology; and in 2005, for her review of a controversial Booz-Allen Hamilton study that recommended significant structural changes to the National Oceanic and Atmospheric Administration's Office of Finance and Administrative Services.

Ms. Lerner received her law degree from the University of Texas School of Law and a B.A. in liberal arts from the University of Texas. She is admitted to the bar in both Texas and the District of Columbia.



Steve Linick

On September 29, 2010, the United States Senate confirmed Steve Linick as the first inspector general of the Federal Housing Finance Agency. Mr. Linick was sworn into office on October 12, 2010. Prior to his appointment as inspector general, Mr. Linick served in several leadership positions in the United States Department of Justice. Between 2006 and September 2010, Mr. Linick served in dual roles as executive director of DoJ's National Procurement Fraud Task Force and deputy chief of the fraud section, criminal division, DoJ. As deputy chief, Mr. Linick managed and supervised the investigation and prosecution of white-collar criminal cases involving procurement fraud public corruption, investment fraud, telemarketing fraud, mortgage fraud, corporate fraud and money laundering, among others. In addition, Mr. Linick was the primary intake official at DoJ for contract fraud cases relating to the wars and reconstruction efforts in Iraq and Afghanistan. In October 2008, Mr. Linick received the Attorney General's Distinguished Service Award for his efforts in leading the department's procurement fraud initiative. Previously, Mr. Linick was an assistant U.S. attorney, first in the central district of California (1994-1999), and subsequently in the eastern district of Virginia (1999-2006).



Electronic Access Discovery and Information Security

By Colin Carriere

The new world of electronic information and data presents both challenges and opportunities for the inspector general community. Although it affects the entire IG community in carrying out their responsibilities under the Inspector General Act and other applicable laws, it is of particular significance to IG legal counsel and investigative units. As described more fully below, the challenges and opportunities are plentiful, often interconnected and thus far unbounded. In the course of IG investigations, agents and investigators are not only likely to need massive amounts of “paper” records, but also photos and electronically created documents, including emails and digital records from copy machines. In the same vein, IG legal counsel have faced, or are likely to confront, issues regarding the application of these principles in connection with respondent challenges to OIG subpoena requests, as well as counsel responding to requests for IG electronic data, which the entity has maintained or created in cases where OIGs have referred matters for civil or criminal prosecution.

Because IG offices investigate both civil and criminal fraud, it is necessary to discuss the application of electronically stored information principles in the context of investigations, securing sensitive IG and investigative data, as well as the application of civil and criminal procedure, as appropriate. Although the law in the civil litigation context has been developing rapidly, along with the emergence of specialized Internet blogs and treatises, the application of ESI principles in the arena of criminal procedure and investigations has been developing slower. Nevertheless, what is clear is that the IG community, similar to the majority of the legal and investigative communities, will not escape this dilemma of obtaining and protecting electronic data.

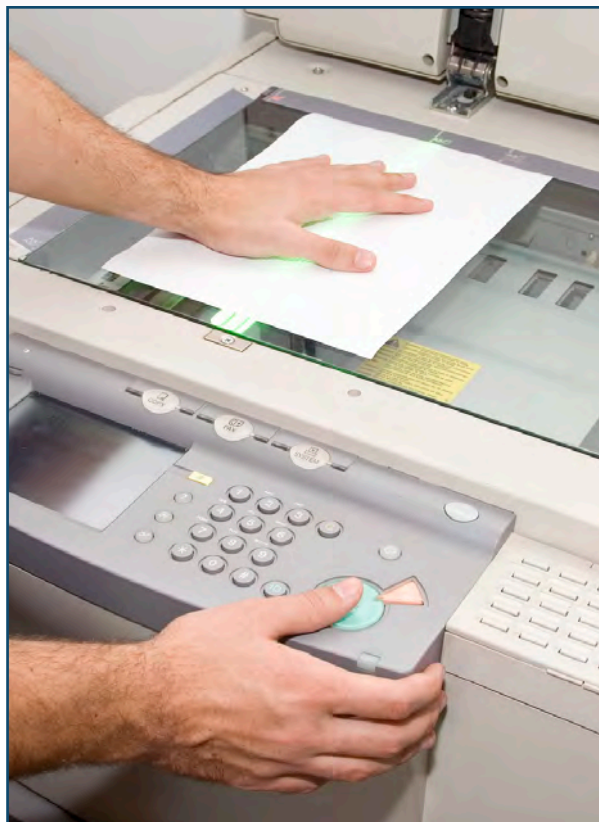
WHOSE DATA - METADATA ?

As the New Orleans Saints rolled to the Superbowl in 2010, their fans bellowed a rallying chant of “who-dat, whodat,” referencing earlier years in the franchise and leaner winning periods when fans chanted “whodat going to beat them Saints.” As discussed more fully below, one of the flourishing mantras in the IG world, as well as in most of litigation and investigations, now may be about metadata.¹ Because metadata offers the opportunity for obtaining additional data as well as the challenge of protecting IG privileged data that may be entrapped in metadata, to mimic the success of the Saints, the IG community must be prepared to play both defense and offense related to this issue.

Prior to the advent of the popular use of computers and advance of digital data, lawyers and investigators in the IG community generally tilted in the arena of hard copy paper documents. Although issues arose concerning the authenticity of records and forgeries or fraudulent entries, their resolution usually did not stir the need for the development of new procedural rules or policies. It had also been recognized by most that even when documents were believed to be erased on computers, often through application of computer forensics, much of the erased data could be recovered. Thus “delete” does not really mean delete. Presently, there is another layer of electronic fingerprints that may exist. This is because nearly all “records” are “drafted,” maintained and retained in electronic format, and the unceasing advances in technology make it easier to access, store, transfer and use electronic and digital records. Thus the resolution of issues as-

1) Metadata is loosely defined as “data about data.” Metadata means information describing the history, tracking, or management of an electronic document, which may include changes that were made to a document and other document properties. Indeed, there are various forms of metadata, including systems metadata which a computer automatically generates; substantive metadata, which identifies substantive changes made to the text; embedded metadata, which is that data automatically generated and not typically visible to the user and includes linked files, field codes and database information. See Sedona Principles-Second Edition: Best practices Recommendations and Principles for Addressing Electronic Document Production Cmt. 12a (Sedona Conference Working Group Series 2007)); *Aguilar v. ICE*, 255 F.R.D. 350, 353-355 (S.D.N.Y. 2008).

sociated with discovery of electronic data has become complicated, yet indispensable.² Given the pervasiveness of ESI, it is inescapable that some form of ESI is at issue in most investigations and nearly all prolonged litigation, but the more crystallized issue of metadata and native format is multifaceted and its



import more selective and complicated.³ This complexity is highlighted by a recent CBS Evening News report, which described and depicted the type of digital information and data that may be contained on the hard drive of many digital copiers. In the CBS report, the news entity purchased several used copy machines. Surprisingly the hard drives of the copy machines contained a vast array of copied, scanned and emailed documents, including those containing social security numbers, birth certificates, bank records, blood test results, health care

records and income tax forms. This was because the machines contained a software device, which stored a copy of the document being printed or imaged onto the machine's hard drive in order to complete the requested tasks that the multifaceted copy machines now perform. The investigative report established that, in many cases, these files were stored on the copy machine the same way files would exist on the hard drive of a computer.⁴

Although in these circumstances, absent counter or scrubbing computer software, every page may not be able to be recovered from the copy machines, it is obvious that these hard drives exemplify the opportunities and challenges in the IG community. They present OIGs with a treasure of electronic data that should not be overlooked in investigations by downloading where necessary and appropriate, while at the same time requiring OIGs to be vigilant to protect the machines they utilize or employ software to prevent the copying of IG data to the hard drives unknowingly.

A more poignant example from an investigative perspective is illustrated in the investigation of the serial killer in Wichita, Kansas, known as the BTK killer (Dennis Rader). In one of his communications with police, Rader asked them if it was possible to trace information from floppy disks. Once the Wichita police department replied that they could not trace the originating computer based upon the information on a disk, he sent his message and floppy to the police department. The police checked the metadata of the document and found that a person named "Dennis" created the document. In addition, the disk showed a link to the Lutheran Church, of which he was a member. The police then searched the Internet for 'Lutheran Church Wichita Dennis,' where they found his family name and were able to identify him as a suspect.

On the other hand, risks are heightened by the potential inadvertent disclosure of classified or secret information containing metadata. For example, in 2005, the United Nations released a report containing metadata, which described Syria's suspected involvement in the assassination of Lebanon's former prime minister. The metadata contained the names of persons suspected to be involved in the assassination, which had been deleted from the final draft of the report.

2) See *Thompson v. HUD*, 219 F.R.D. 93, 96 (D. Md. 2003) (citing *In re Bristol-Myers Squibb Securities Litigation*, 205 F.R.D. 437, 440 n.2 (D.N.J. 2002) (estimating that more than 90 percent of all records created are done electronically)).

3) Native file/format refers to electronic documents which are created on your computer and contain hidden and embedded data referred to as metadata. It is produced in the format created by the authoring application (e.g. Microsoft Word, Excel) and represents the "default format of a file." These documents are considered a subset of ESI and usually retain metadata and are text searchable. Generally, in order to view a native file, the recipient must have the software installed on his system or which was used to create them. For example, in order to view a Word Perfect document, you must have the Word Perfect software. See, United States District Court for the District of Maryland, Suggested Protocol for Discovery of Electronically Stored Information, <http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf> (hereinafter Maryland Protocol) (description of system, substantive and embedded metadata).

4) Armen Keteyian, "Digital Photocopiers Loaded with Secrets, Your Office Copy Machine Might Store Thousands of Documents that Get Passed at Resale," www.cbsnews.com/stories/2010/04/19/eveningnews/main6412439.shtml.

As described below, OIG lawyers and investigators should conceptualize the benefits (offense) and repercussions (defense) on this issue. Proper execution, however, generally requires a third unit to assist the investigators and lawyers – information technology experts (special teams).⁵

BENEFITS AND OPPORTUNITIES

ESI, including metadata and documents reposed in their native format, can be found far and wide. Not only are they found in the expected places such as computer hard drives, diskettes and thumb drives, but also may be found in some digital copy machines, cameras and a few printers. Consequently, investigators and special agents have another piece of the information puzzle to configure, since in contrast to violent crime, the resolution of OIG investigations often is in the information and many times contained or embedded in “documents.”



Metadata and native format production can be of value to investigations in several manners, including the authentication of data, establishing the chain of

custody for certain ESI, providing data which investigators did not have basis to even believe existed, establishing backdating of records and developing information about the relevant “players” and their roles in connection with inappropriate actions. Email metadata may also be critical in determining forged electronic communications, who was blind copied, and who opened and viewed a message. Moreover, in certain instances, metadata may provide an additional tool to search and analyze ESI.

In the event that investigators decide that substantial electronic data is necessary, be prepared to argue why you need native format or metadata, have a rollout protocol and search terms, know what format you want the records produced and recognize that the court may appoint an independent neutral expert to make recommendations if the parties cannot resolve the issues or if there is sufficient complexity. Openly requesting or accessing ESI and metadata is less controversial than circumstances where metadata is produced inadvertently or obtained surreptitiously.

Although some may contend you ask for everything, including metadata and electronic information, in every case or investigation, there appears to be some basic investigative and practical considerations, which OIGs should ponder. Several that I consider crucial are:

1. Do you need metadata or documents to be produced in their native format in order to advance your investigation?
2. What type of metadata do you need to advance your investigation?
3. Who will be responsible for the costs and are you prepared to establish why the respondent should bear the costs of production in native format?
4. Do you need all of the data in native format or only some of the data?
5. Are you ready or in a position to identify adequate and reasonable search conditions, e.g., time periods, terms and what databases are to be searched?
6. Have you responded in a timely manner in requesting metadata, or the lack of metadata, or when objecting to the request for such information from you?
7. Are you familiar with the proportionality analyses, which some courts apply?
8. Are you willing to have the respondent sample the sources, to learn more about what burdens

5) See also, David Sarno, iPhone and iPad Can Track a User's History, L.A. Times (April 21, 2011) (as title depicts, “[s]ecurity researchers said they found a file hidden in the operating software of Apple's devices that can contain tens of thousands of records of a user's precise geographical location, each marked with a timestamp...Those records create a highly detailed history of a user's whereabouts over months or even years.”).

and costs are involved in accessing the information?

9. Are you prepared to address whether ESI has been removed from any storage media?
10. In connection with a search warrant, are you prepared, if necessary, to provide the magistrate with protocols regarding how you will handle ESI in the search and seizure?

In considering access issues, the legal standards for ESI, which represents the broader span of records, is developing under procedural rules and case authority, and has thus far evolved into a basic expectation in civil litigation, complicated by some thorny balancing issues discussed in various court decisions. Dissimilarly, there is neither a sense of entitlement nor a consistent legal approach for the narrower category of metadata, leading to a divergence of opinions.



SEDONA AND THE FEDERAL RULES OF CIVIL PROCEDURE

Most of the present law surrounding ESI evolved from the noteworthy case of *Zubulake v. UBS Warburg LLC*,⁶ as well as the Sedona Principles and the

amended Federal Rules of Civil Procedure, discussed below.

Predicting the alteration of discovery and document principles in litigation, the Sedona Conference, a policy and education organization comprised of lawyers, judges and electronic discovery experts, began meeting in 2003 to pronounce recommended solutions to electronic document production issues. The conference produced various standards concerning ESI, which have commonly been referenced as the Sedona Principles. After some debate, the principles accorded greater relevancy to metadata and focused upon accessibility and functionality.

“...protecting metadata or other digital data, and meeting the various ethics standards should be of concern to the OIG legal community”

Recognizing that the federal rules were ill equipped to deal with the advance of technology, in 2006, the Supreme Court amended the Federal Rules of Civil Procedure, particularly rules 16, 26, 33 and 34, to address the challenge of ESI preservation and disclosure issues.⁷ Under the 2006 amendments to Fed.R.Civ.P. 26(b) (2) (B), the party from whom discovery is sought must show that the ESI is not reasonably accessible because of undue burden or cost. The court may order discovery if the requesting party shows good cause and can specify conditions for the discovery, considering the limitations of Rule 26(b) (2)(C). This rule, often referred to as a proportionality test or analysis, consequently strikes a balance between reasonable accessibility and cost-effectiveness.

CHALLENGES AND REPERCUSSIONS

The challenges and risks associated with metadata and preserving electronic data are equally compelling. The challenges are enfolded in a ball of ethics, privileges, discovery prohibitions against data dumps and the duty to preserve records. Thus, protecting metadata or other digital data, and meeting the various ethics standards should be of concern to the OIG legal community.

⁶ The judge in *Zubulake* issued several decisions during the period 2003 through 2004: most critically 217 F.R.D. 309 (S.D.N.Y.2003); 216 F.R.D. 280 (S.D.N.Y.2003); 220 F.R.D. 212 (S.D.N.Y. 2003).

⁷ Rule 16 is the general discovery provision for defendants in criminal cases, along with *Maryland v. Brady*, 373 U.S. 83 (1963); *Giglio v. U.S.*, 405 U.S. 150 (1972), *Jencks v. United States*, 353 U. S. 657 (1957), all interpreting constitutional provisions or basic fairness to require some level of disclosure.

Is your metadata showing?⁸ This catchy title by one legal commentator to the issues of ESI captures the challenge of one of the principal responsibilities of OIG legal counsel – the protection of privileged data that IGs maintain. Importantly, the failure or sloppiness in preserving records can result in disciplinary actions for lawyers, depending on the level of willfulness or bad conduct. As the ABA cautions, “[w]hen a lawyer sends, receives, or stores client information in electronic form, the lawyer’s duty to protect that information from disclosure to unauthorized individuals is the same as it is for information communicated or kept in any other form.”⁹

On the other hand, there are also serious ethical implications associated with handling metadata. Lawyers and those working on their behalf must be concerned about running afoul of ethical violations related to accessing electronic data. The American Bar Association and various state bar associations have weighed in on the issue of the propriety of lawyers viewing metadata, which has been inadvertently produced in ESI. In 2006, the ABA opined that the applicable rule obligates a recipient of inadvertently sent confidential information – including metadata – to notify an adversary of the inadvertent transmission. However, it further determined that if that requirement is met, there is no additional ethical duty to abstain from searching metadata.¹⁰

To keep pace with the rapid growth of electronic data, there has been a concomitant expansion of the duties of parties or potential parties to preserve electronic records. For example, in *Zubulake*, the court observed that the duty to preserve evidence is triggered “when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.”¹¹

In the event that litigation ensues, there are various remedies that courts utilize to ensure the revelation of full information ranging from adverse inferences to spoliation charges and to dismissal. Of critical significance is whether destruction occurred as a result of bad faith.

Similar to the practical considerations noted above with respect to opportunities, there are considerations that OIG and government counsel should

employ in ensuring against negative consequences in protecting and producing ESI:

- Once a “litigation hold” is in place, OIG counsel must ensure that all sources of potentially relevant information are identified and placed “on hold.”
- Maintain a system for managing case information or data about investigations, including ESI.
- Familiarize yourself and others with the attorney general’s guidelines regarding discovery and ESI.
- Consider promulgation of policies regarding “dos and don’ts around the preservation of ESI data and using electronic communications.
- In choosing an electronic system and software, consider factors such as its search functionality and capabilities (e.g., taxonomies) and testing mechanisms.
- Review and appropriately revise your document retention policies.
- Become conversant and knowledgeable about the ESI systems that the OIG maintains, including its limitations and back-up systems.
- Ensure that information technology specialists are part of the problem-solving teams.
- Establish a protocol for gathering, reviewing and producing ESI.

ESI IN CRIMINAL CASES

ESI issues and e-discovery have also become more prevalent in the current-day criminal justice system. Just as legitimate activities are conducted using computers and other electronic and digital devices, so are illegitimate activities. Securities fraud, drug dealing, pornography distribution, illicit firearms sales – a panoply of bad acts – are conducted using computers and computer-mediated communications. Prosecutors and investigators now frequently request, and use for evidentiary purposes, electronic information regarding a suspect or witness, including text messages, phone records, photographs, e-mails and computerized records. In contrast to street crime, ESI is critical in fraud cases because they are more likely to entail significant numbers of records. On the other hand, with increasing frequency, defendants have injected ESI and metadata into many criminal cases, including the application of Federal Criminal Procedural Rules 16 and 26, and the Jencks Act, Brady rule and Giglio principles.¹²

8) L. Allison McKeel, *Your Metadata’s Showing: Do You Know What Opposing Counsel Sees?* St. Louis Lawyer, vol. XLIII, no.3, p. 12A (April 6, 2005).

9) ABA/BNA Lawyers’ Manual on Professional Conduct 55:401 (2008).

10) ABA Formal Opinion 06-442 (Aug. 2006).

11) 220 F.R.D. at 216.

12) See, e.g., *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1171–72 (9th Cir. 2010) (en banc) (per curiam); Cf. *United States v. Briggs*, 2011 U.S. Dist. LEXIS 101415 (W.D.N.Y. Sept. 8, 2011) (court discusses lack of federal criminal rule and

There is less certainty in the criminal law and justice arena on these issues. This is because the Federal Rules of Criminal Procedure have not caught up to the Federal Rules of Civil Procedure on ESI and e-discovery jurisprudence. Simplified, criminal matters can be bifurcated into pre-indictment issues or post-indictment e-discovery.



Pre-indictment places most of the burden on defendants and third parties in connection with responding to government demands for information, e.g., grand jury subpoenas, search warrants and other matters where investigators seek investigative data. This could include the parties negotiating issues regarding the scope of search warrants and grand jury subpoenas and resolving privilege and Fourth and Fourteenth Amendment issues about searches and seizures of equipment, data and other media. Courts have generally allowed broad grand jury subpoenas

Government ordered to produce ESI in a PDF or native format) with *United States v. Hazelwood*, No.1:10cr150, 2011 U.S. Dist. LEXIS 68481, at 61-62 (N.D. Ohio, June 27, 2011) (government is not required to segregate and locate Brady material within its discovery production).

and search warrants as applied to requests for digital records, albeit with some legal commentators suggesting greater restrictions.¹³

Post-indictment matters relate principally to the government responding to defendant's requests for criminal discovery. There are emerging examples, such as *United States v. O'Keefe*,¹⁴ *United States v. Skilling*,¹⁵ and *United States v. Stevens*,¹⁶ which demonstrate how the federal judiciary has addressed the developing influence the Federal Rules of Civil Procedure's e-discovery standards have had on criminal litigation.

In the end, however, criminal courts have not fully and consistently adopted the civil procedure standards and in some instances have rejected those considerations.¹⁷ As one prosecutor appropriately observed recently, for now: "Unlike civil litigation, which requires broad discovery on the basis of relevance, the prosecution's disclosure obligations are limited in scope, extending only as far as the requirements of Brady, Giglio, Jencks and Rule 16; that is, to material exculpatory and impeachment information; witness statements; a defendant's statements and prior record; certain documents, objects and scientific reports; and expert witness summaries. Indeed, courts have rejected broad, civil style discovery of government materials. ... If criminal discovery is incorporating principles from civil litigation, consistent and persuasive authority has yet to appear."¹⁸

APPLICATION OF ESI PRINCIPLES

Finally, how does all of this impact IG offices and their respective requests for ESI and, where appropriate, defending the disclosure of certain ESI? It already has with a few cases addressing these issues and, as OIGs continue to analyze these issues, they should be cognizant that IGs present some unique concerns.

OIG requests for ESI must be considered in the face of the rather long standing body of jurisprudence related to investigative and inspector general subpoena-

13) See, e.g., *United States v. Hatfield*, 2010 WL 1423103 (E.D.N.Y. April 7, 2010); *United States v. Hager*, 2011 WL 3862072 (D.N.D. 2011); *United States Department of Justice, Computer Crime & Intellectual Property Section, Searching and Seizing Computers and Obtaining Electronic Evidence Manual*, Ch. 2 (3d ed. Sept. 2009); Paul Ohm, *Massive Hard drives, General Warrants, & the Power of Magistrate Judges*, 97 Va. L.Rev. 1 (2011).

14) 537 F. Supp. 2d 14 (D.D.C. 2008).

15) 554 F.3d 529, 576 (5th Cir. 2009), vacated in part on other grounds, 130 S.Ct. 2896 (2010).

16) *United States v. Stevens*, No. 08-231, at 14 (D.D.C. December 19, 2008), 543 F. Supp. 2d 177 (Jan. 16, 2009), *cacated by*, substituted opinion at *U.S. v. Stevens*, 715 F. Supp. 2d (Jan. 21, 2009).

17) See note 13 above.

18) Andrew Goldsmith, *Trends – Or Lack Thereof – In Criminal E-Discovery: A Pragmatic Survey of Recent Case Law*, 59 U.S. Attorneys Bulletin No. 3 (May 2011) at 4.

nas that have established limited standards of judicial review in connection with IGs and government investigative bodies' requests for data, particularly subpoenas. IG subpoenas are deemed analogous to grand jury subpoenas with respect to their breadth; IGs powers as a necessary adjunct to the governmental power of investigation and inquisition; application of a presumption of validity for IG subpoenas; and courts repeatedly holding in this context that the subpoenaed party bears the costs of production, absent a clear showing of oppression or unreasonable financial burden. These principles are grounded in considerations of a greater public interest and the costs of a democratic government.

For OIGs, three broad principles emerge from the rules and cases including access, preservation and production of ESI. On balance, the ESI rules described herein should not seriously affect, and may strengthen, those significant legal principles and presumptions regarding OIGs obtaining ESI. However, there is undoubtedly some notable affect upon the level of preservation and maintenance that IGs employ for the data that they gather and analyze during an investigation, and possibly an audit. There is less clarity regarding the IGs' production obligations. Of course, there are ambiguities, unresolved critical issues and imbalances. ❧



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Mr. Carriere has previously worked as a trial attorney for the U.S. Department of Justice, environmental enforcement section; senior trial counsel for the U.S. Department of Energy, Office of Special Counsel; trial attorney for the District of Columbia attorney general's office, major civil litigation section; and attorney for a field office of the Legal Services Corporation in Philadelphia, Pa. He is a member of the Louisiana, Pennsylvania, District of Columbia and Nebraska bar associations. He is also a member of various federal courts, including the United States Supreme Court. He has taught legal courses at the college level and lectured at the Federal Law Enforcement Training Center and other federal training courses.

Mr. Carriere was born in New Orleans, La. He obtained his undergraduate degree in accounting from LeMoyne College in Syracuse, N.Y. in 1974 and his JD degree from Creighton University at Omaha, Neb., in 1977.



Railroad Medicare Fraud Detection Contracts: Lessons Learned

By Inspector General Martin Dickman

After touring the Recovery Accountability and Transparency Board's Operations Center and observing its fraud detection and prevention methods, we decided to explore fraud detection and prevention possibilities in the form of two limited scope Railroad Medicare fraud detection contracts.

Both contracts provided a valuable learning experience. This paper describes these contracts and the lessons learned.

MEDICARE: HIGH-RISK AREA

Since 1990, the U.S. Government Accountability Office has designated Medicare as a high-risk area due to its size and complexity, as well as its susceptibility to mismanagement and improper payments.¹ GAO's February 2011 high-risk update reiterates that "[t]he Medicare program remains on a path that is fiscally unsustainable over the long term. This fiscal pressure heightens the need for the Centers for Medicare and Medicaid Services to improve Medicare's payment methods to achieve efficiency and savings, and its management, program integrity and oversight of patient care and safety."²

GAO further stated that "[i]n 2010, Medicare covered 47 million elderly and disabled beneficiaries and had estimated outlays of \$509 billion. Medicare had estimated improper payments of almost \$48 billion in fiscal year 2010.

However, this improper payment estimate did not include all of the program's risk, since it did not include improper payments in its prescription drug benefit, for which the agency has not yet estimated a total amount."³ Improper payments of this magnitude are unacceptable and innovative prevention and detection tools must be used to reduce their occurrence.

RAILROAD RETIREMENT BOARD AND THE RAILROAD MEDICARE PROGRAM

The Railroad Retirement Board is an independent agency in the executive branch of the federal government. The RRB administers comprehensive disability, retirement-survivor and unemployment-sickness insurance benefit programs for the nation's railroad workers and their families.

The RRB also has administrative responsibilities for certain benefit payments under the Social Security Act, including the administration of Medicare benefits for qualifying railroad workers and dependents. Pursuant to statutory authority, the RRB, in consultation with CMS, selects and monitors the single nationwide Medicare Part B Carrier contract. During fiscal year 2010, the Railroad Medicare contractor processed more than 10 million Railroad Medicare Part B claims worth over \$869 million in paid medical insurance benefits on behalf of more than 468,000 Railroad Medicare beneficiaries.

MEDICARE FRAUD DETECTION

The "pay and chase" methodology of fighting Medicare fraud is antiquated and ineffective. To be more successful in the fight against Medicare fraud, waste and abuse, we must incorporate innovative oversight and proactive predictive modeling methods successfully utilized in other settings.⁴

For instance, the Recovery Accountability and Transparency Board offers an excellent example of innovative oversight. Their "operations center uses sophisticated screening and analysis of high-risk recipients to develop risk-based resource tools for the oversight community. The analytical tools have been designed to intercept fraud closer to the front end of the fraud continuum."⁵

1) See GAO, High-Risk Series: An Update, GAO-11-278 (Washington, D.C.: 2011).

2) Id.

3) Id.

4) Medicare claims are subject to pre-payment edits; however, given the current volume of improper payments more must be done.

5) See Recovery Accountability and Transparency Board, 2010 Annual Report (Washington, D.C. 2010).

Additionally, the credit card industry has been highly successful at utilizing real-time analysis to prevent and detect fraud. *Visa Inc. Corporate Overview* reports that “VisaNet is an information processing network, facilitating the transfer of value and information among our financial institution clients, consumers, merchants, businesses and governments.... Today, VisaNet’s centralized, integrated architecture enables Visa to provide our clients with secure, reliable, scalable processing (authorization, clearing and settlement)....” They further state that “[m]ore than 100 billion transactions (authorization, clearing and settlement transactions) were processed through VisaNet in calendar year 2009...[and they] estimate that VisaNet is capable of processing more than 20,000 transaction messages per second....[b]ecause of VisaNet’s centralized architecture, Visa is able to ‘see’ every Visa transaction that flows through the network. This enables Visa to risk-score transactions in real time with services such as advanced authorizations, potentially stopping fraud at the most important point – before it happens.”⁶ These examples illustrate the type of innovative fraud detection and prevention tools needed to successfully fight Medicare fraud, waste and abuse.

We understand that there are plans to implement “a number of measures that will shift [CMS] enforcement and administrative actions from a ‘pay and chase’ mode to the prevention of fraudulent and other improper payments.”⁷ Additionally, they are presented “with a valuable opportunity to partner with the private sector and collaborate on fraud detection efforts based on tools and methods that are already succeeding in other sectors.”⁸ We fully support these efforts and hope that Railroad Medicare is included in their plans.

RAILROAD MEDICARE FRAUD DETECTION CONTRACTS

The successes enjoyed by the Recovery Accountability and Transparency Board coupled with our concerns regarding improper payments in the Railroad Medicare program, led us into two limited scope contracts for Railroad Medicare Part B⁹ claims data analysis. Since we do not have access to live claims

data, we were limited to post-payment review. The parameters for both contracts were also narrowed by funding limitations.

Both contractors were quickly able to import and model data, including large volumes of Railroad Medicare claims information. Based on our limited experience, we believe that these types of data platforms are useful for conducting searches, testing fraud hypotheses and providing audit or investigative leads. We believe that they may be beneficial for pre payment analysis and predictive modeling to help stop improper payments before they go out the door. A brief description of each contract and the lessons learned from this experience are described below.

THOMSON REUTERS

To identify potentially fraudulent Railroad Medicare claims, we entered into a competitively bid, limited scope contract with Thomson Reuters to review and analyze three years worth of Railroad Medicare Part B claims. We selected four algorithms to analyze the more than 66 million records contained in Railroad Medicare Part B claims data from calendar years 2007, 2008, and 2009. The following briefly describes the four algorithms along with preliminary results.¹⁰

1. **Objective:** To determine whether any Railroad Medicare providers fraudulently billed for services not provided.

Algorithm: Identify Railroad Medicare claims for services incurred 60 or more days after the beneficiaries’ recorded dates of death as reported on the Social Security Administration’s Death Master File.

Preliminary results: There were 41 beneficiaries identified with Railroad Medicare Part B services incurred 60 or more days after their dates of death (as identified by the DMF).

2. **Objective:** To determine whether any Railroad Medicare providers fraudulently billed for emergency transportation to routine dialysis or physical therapy appointments.

Algorithm: Identify instances of emergency transportation when the patients received non-emergency dialysis-related services or physical therapy on the same day of the transport.

Preliminary Results: There were 939 unique patients who had either dialysis-related services

6) Visa Inc. Corporate Overview may be located at http://corporate.visa.com/_media/visa-corporate-overview.pdf (accessed March 28, 2011).

7) Fighting Fraud and Waste in Medicare and Medicaid: Hearing before the Subcommittee on Labor, Health and Human Services, Education and Related Agencies of the U.S. Senate Committee on Appropriations, 112th Cong. (2011) (Testimony of Peter Budetti, M.D., J.D.).

8) Id.

9) We did not include Durable Medical Equipment, prosthetics, orthotics, or supply claims because they are not processed by the Railroad Medicare Part B contractor.

10) All results are considered preliminary because they require additional investigation, including medical review, to validate the results.

or physical therapy on the same day as an emergency transportation trip.

3. **Objective:** To identify potential up-coding by Railroad Medicare providers.

Algorithm: Analysis of the 100 oldest Railroad Medicare beneficiaries with claims.

Preliminary Results: There were 4,028 claim lines associated with the 100 oldest beneficiaries with paid claims. On average, these patients had 13.67 claims for medical care during the three-year period.

4. **Objective:** To identify improper payments.

Algorithm: Identify providers who have submitted claims for services after they were officially sanctioned/excluded from government programs per the Office of Inspector General for the Department of Health and Human Services' List of Excluded Individuals/Entities.

Preliminary Results: This algorithm identified 29 Unique Provider Identification Numbers from the LEIE that had Railroad Medicare professional claims after their sanctioned date.



PALANTIR TECHNOLOGIES

We had the opportunity to visit the Recovery Accountability and Transparency Board's Operations Center and observe the functionality of Palantir Technologies' data analysis platform. In order to gain a better understanding of how this analytical tool may be utilized for fraud detection in the Railroad Medicare program, we entered into a two-month data analysis pilot project.

Since we do not have access to live claims data, Palantir analyzed the more than 66 million records contained in Railroad Medicare Part B claims data

from calendar years 2007, 2008, and 2009. Their platform utilized data fusion to quickly integrate a variety of information sources including coding patterns that OIG had identified in previous fraud cases. Palantir was able to fuse this information to identify non-obvious relationships and patterns in the claims data. They were also able to present a graphic display of the Railroad Medicare claims data, illustrating provider billing patterns, timelines reflecting questionable treatment frequencies, and improbable geospatial connections between providers and beneficiaries.

LESSONS LEARNED

Data analysis results are only as reliable as the original data sources utilized.

Our recent Railroad Medicare fraud detection experience highlighted the fact that results are only as reliable as the original data sources utilized. During the course of these contracts, we used a variety of Railroad Medicare and RRB data files, the publically available DMF and the publically available LEIE. Unfortunately, we became aware of data integrity issues, such as inaccurate or incomplete data, with each of these sources. Inaccurate or incomplete data increases the likelihood of false positives in both predictive modeling and data analytics, thereby requiring extensive investigation before funds may be recouped.

The compartmentalization of Medicare claims processing by geographic region or by class of beneficiary, as is unique to the Railroad Medicare program, makes it difficult, if not impossible, to see the "big picture" and has a negative impact on efforts to identify erroneous or fraudulent claims.

The results of our recent contracts illustrated that it is extremely difficult to detect national fraud trends or significant aberrances based solely on Railroad Medicare data. Medicare fraud is a national problem and the compartmentalization of claims data across geographic zones or class of beneficiary makes it difficult to fully analyze fraud trends. Our experience highlights the necessity for the Integrated Data Repository. The IDR, which is required by the Patient Protection and Affordable Care Act as amended by the Health Care and Education Reconciliation Act of 2010,¹¹ is designed to support an integrated data warehouse containing health care-related data across all benefit categories. In particular, the IDR will in-

11) Pub. L. No. 111-148, 124 Stat. 119 (2010) and Pub. L. No. 111-152, 124 Stat. 1029. (2010).

clude national claims and payment information from Medicare parts A, B, C and D; Medicaid; the Children's Health Insurance Program; and health-related programs by the Department of Veterans Affairs, the Department of Defense, the Social Security Administration and the Indian Health Service. To adequately address health care fraud in the Railroad Medicare program, it is imperative that Railroad Medicare part B claims data is included in both the IDR and any predictive modeling or proactive fraud detection activities using IDR data.

In addition to the IDR, Medicare claims processing should be consolidated into one national processor. Currently, Medicare claims processing is divided into zones; however, Medicare fraud does not stop at a geographic zone. Under the current system, sophisticated criminals may simply relocate to another zone once their billings fall under increased scrutiny. A single Medicare processor offers a "centralized architecture" that would be ideal for predictive modeling fraud prevention and detection. This technology would bring greater transparency to the Medicare program and would be a vast improvement on the current system of "pay and chase."

Data analysis reveals aberrances, which may be used as audit or investigative leads; however, any leads developed will require substantial amounts of audit or investigative work to confirm that the claim(s) should not have been paid.

Data analysis and the application of algorithms have the capacity to produce false positives and must be thoroughly investigated before any funds may be recovered. Additionally, the cost of the investigation,

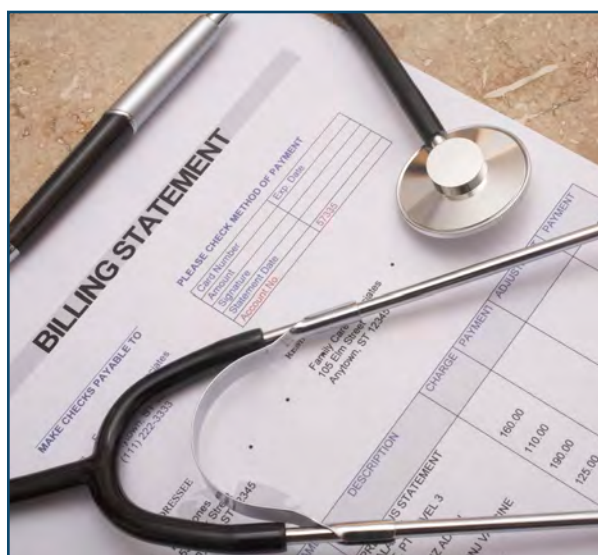
including any medical reviews, must be weighed against the potential recoupment value.

Our recent experience illustrated that cost analysis is especially poignant in the Railroad Medicare program. Since Railroad Medicare beneficiaries are spread across the United States, the aberrances represented small dollar amounts and, without complete Medicare claims data, it is difficult to determine whether the Railroad Medicare aberrance is a minor instance or part of a larger fraud scheme. This combined with the potential for inaccurate data makes recoupment impossible without a thorough investigation.

The "pay and chase" methodology of fighting Medicare fraud, even with the use of powerful software tools, is ineffective and work intensive. Medicare must institute better controls on the front-end to prevent the disbursement of improper payments.

As stated previously, the Recovery Accountability and Transparency Board offers an excellent example of innovative oversight. Their "operations center uses sophisticated screening and analysis of high-risk recipients to develop risk-based resource tools for the oversight community. The analytical tools have been designed to intercept fraud closer to the front end of the fraud continuum."¹²

It is imperative that resources are focused on preventing improper payments including the utilization of enhanced provider screening and technologically advanced Medicare cards. Paper Medicare cards have outlived their usefulness and are susceptible to identity theft. Technologically advanced Medicare cards, such as common access cards being used by the Department of Defense or chip technology utilized by Visa Inc., not only offer the opportunity to track Medicare spending at the place of service, aid in the prevention of improper Medicare payments and identity theft, but may also increase claims processing speed. In fact, Visa Inc. states that "[c]hip cards have a small, powerful, embedded microprocessor that can provide enhanced security and increased transaction speed."¹³ Since the vast majority of Medicare providers are required to submit electronic Medicare claim forms, a technologically advanced Medicare card may help to ensure accuracy by reducing the amount of data input required for claims submission.



12) See Recovery Accountability and Transparency Board, 2010 Annual Report (Washington, DC, 2010).

13) Visa Inc. Corporate Overview may be located at http://corporate.visa.com/_media/visa-corporate-overview.pdf (accessed March 28, 2011).

In addition, consideration should be given to utilizing a single national Medicare processor. A single Medicare processor would offer a “centralized architecture” and would be ideal for predictive modeling fraud prevention and detection technology. This new technology would bring greater transparency to the Medicare program and would be a vast improvement to the current system of “pay and chase.”

We must concentrate on preventing improper payments by continuing to explore enhanced provider screening and the possibilities of utilizing technologically advanced Medicare cards. This technological advancement will aid in both the prevention and detection of fraud, waste and abuse in the Medicare program. However, it must be noted that data integrity is the key to proper prevention and detection. Inaccurate or incomplete data increases the likelihood of false positives in both predictive modeling and data analytics, thereby requiring extensive investigation before funds may be recouped.

CONCLUSION

Medicare fraud is a pervasive, multifaceted problem that often involves elaborate schemes. In order to release the fiscal pressures on the Medicare program and to increase the likelihood of sustainability, we must incorporate innovative oversight techniques successfully utilized in other settings. Analyzing data in a segmented manner based upon either a particular geographic zone or type of Medicare claim may allow fraud to remain undetected. Our Railroad Medicare fraud detection project demonstrated that the optimum manner to analyze data is on a nationwide basis, including all Medicare carriers and types of Medicare claims. In addition, we must concentrate on stopping Medicare fraud before it happens, including utilizing technologically advanced Medicare cards, enhancing provider screening, and focusing on predictive modeling. While we recognize that numerous prepayment edits are already in place, a vast amount of fraud occurs despite these edits. An open dialogue regarding Medicare oversight is imperative to ensuring the integrity of the program. ❧



Martin Dickman

Martin J. Dickman was confirmed as inspector general for the U.S. Railroad Retirement Board in October 1994. Prior to his appointment, Mr. Dickman served as a prosecutor for the Cook County, Ill., State’s Attorney’s Financial and Governmental Crimes Task Force. His responsibilities included the investigation, indictment and prosecution of criminal cases involving governmental and white-collar crimes.

Additionally, Mr. Dickman was a member of the Board of Trade of the City of Chicago. At the Board of Trade, he served as the presiding judicial officer at exchange judicial hearings and as a director and member of the executive committee. Mr. Dickman has also presided over tax-related disputes as a hearings referee for the Illinois Department of Revenue; interpreted and drafted legislation as a legislative counsel for the minority leadership of the Illinois House of Representatives; and represented the city of Chicago in various aspects of civil litigation as an assistant corporation counsel.

A native of Chicago, Mr. Dickman is a graduate of the University of Illinois and DePaul University College of Law. Mr. Dickman is currently a guest lecturer at the John Jay College of Criminal Justice.



Doing More with Less

How Export Credit Agencies are Using Performance Metrics to Improve Customer Service

By Mark Thorum

Government agencies are under increasing pressure to improve public sector performance against a backdrop of budget cuts and a challenging economic environment. The new mantra of the decade has indeed become, “Do more with less.” Although there is no single blueprint to enhance the quality of public service, the use of performance metrics to improve operational efficiency and customer service levels can play an important role in this process. Moreover, soliciting customer feedback in a timely and systematic manner provides valuable insight as to customer priorities and informs future resource allocation.

At the heart of the issue lies the public’s rising expectations of customer service, fueled by technological advances and private sector best practices. The old paradigm that relates quality of service to costs incurred is no longer valid as public sector managers must learn to optimize costs, quality and customer service.

The importance of this paradigm shift is underscored by President Obama’s Executive Order 13571, entitled “Streamlining Service Delivery and Improving Customer Service.” Building upon earlier federal initiatives, the order requires federal agencies to develop customer service plans and standards required by the GPRA Modernization Act of 2010¹ and to learn and implement best practices from the private sector. In addition, agencies are to benchmark their performance against both internal standards and those of the private sector. Finally, the order requires agencies to establish a “signature” initiative for using technology to transform customer service.

GPRA established the framework for results-oriented planning, measurement, and reporting in federal government agencies. The act created a more defined performance framework by prescribing a governance structure and by better connecting plans, programs, and performance information. The new

1) P.L. 111-325, 124 Stat. 3866 (2011). GPRAMA amends the Government Performance and Results Act of 1993, P.L. 103-62.

law requires more frequent reporting and reviews (quarterly instead of annually) that are intended to increase the use of performance information in program decision-making.

This article briefly discusses how Export Credit agencies both in the United States, and abroad are using performance metrics to measure, benchmark, and improve the overall customer experience.² It also illustrates how the Office of Inspector General can add value by independently assessing best practices, benchmarking federal agency performance and providing guidance to improve operational efficiency. Observations are drawn from interviews and a recent survey administered by the Office of Inspector General of the U.S. Export-Import Bank of the United States.

GREATER FOCUS ON OPERATIONAL PERFORMANCE

Throughout the last decade, negotiations among G-7 ECAs have led to a convergence in program features, particularly with respect to sovereign transactions. The resulting Organization for Economic Co-Operation and Development Arrangements establish a common framework for core financing elements, risk ratings, and minimum pricing levels. The underlying objective is to provide a level playing field for exports and to encourage competition among exporters based on the quality and price of goods and services, rather than on the most advantageous government-sponsored financing terms. Non-sovereign transactions, however, exhibit a wider divergence in fees and structures in the international arena. This is due in part to different approaches to risk mitigation and risk-rating methodologies.

The convergence in programs has also engendered a greater focus on operational performance to

2) ECAs facilitate a country’s exports by issuing loans, guarantees and insurance products to foreign governments and private corporations to purchase services and products from the issuing countries.

enhance ECA competitiveness and improve customer service levels. From the standpoint of the ECAs, performance metrics for customer service often target the following four areas, with transaction response time cited as the single largest determinant of cus-



tomers satisfaction.

Variables used to measure ECA operational performance:

- Transaction response time – this includes the speed of application processing, decision making, and claims processing.
- Availability and knowledge level of staff to answer questions.
- Information requirements and supporting documentation for applications.
- Customer interface with IT platform – this includes the online application process, availability and quality of information, etc.

Performance metrics allow management to track progress toward its objectives in a transparent manner. In addition, they provide insightful data that can be utilized for a variety of purposes such as ensuring resource alignment, highlighting potential problems and taking corrective action, developing strategy and incentivizing performance.

How can agencies improve customer service while facing the pressure of declining budgets and limited resources? One approach adopted by several ECAs is to apply “lean production” techniques to their organization. Originally espoused by McKinsey (2002) for use in the private sector, these techniques challenge prior practices and refocus employees to deliver value from the customer’s perspective. Implementation involves several steps. First, management must align current resources including staff to improve the process flow and benefit the customer. Second, management invests judiciously in those areas that drive customer satisfaction. To do this, one must first

identify the components of operational performance that correlate with higher levels of customer satisfaction. These components can be identified through customer surveys and focus group discussions, and designated as potential “drivers” of customer satisfaction. Third, management should minimize wasteful spending by prioritizing these drivers in the budget allocation and performance review processes. The above results in a closer alignment among resources, customer priorities, and the budgeting process.

THE CASE OF THE EX-IM BANK

Ex-Im Bank is the official export-credit agency of the United States. Its mission is to support the financing of U.S. goods and services in international markets, thus promoting job creation in the United States. Ex-Im Bank accomplishes this task by assuming the credit and country risks that private sector financial institutions are unable or unwilling to accept. Concurrent with this mission, Ex-Im Bank must safeguard taxpayer resources by ensuring a reasonable assurance of repayment. Ex-Im Bank’s principal programs are loan guarantees, direct loans, export credit insurance and working capital guarantees. As a federal agency, Ex-Im Bank’s programs are backed by the full faith and credit of the U.S. government.

Over the last five years, Ex-Im Bank has witnessed a substantial increase in new business with total new authorizations amounting to \$32.7 billion for FY 2011.³ In addition, the level of employee efficiency – the average dollar amount of authorizations per employee – has more than doubled while the number of authorizations per employee increased from six to 10 during the same period. Concurrent with this growth, Ex-Im Bank has successfully implemented measures to enhance its transaction response time performance in the Small Business Group and short-term products.

Notwithstanding this progress, response time performance in the long-term structured portfolio has been mixed as Ex-Im Bank staff and the IT budget have not kept pace with the growth in new business. Indeed, the number of long-term guarantees and loans processed in FY 2011 rose almost 25 percent over 2010 levels without a corresponding increase in staff or IT budget. As a result, certain Ex-Im Bank stakeholders have complained about the approval times and process. For example, Donna Alexander,

3) Ex-Im Bank Authorizes \$3.4 Billion in Financing at Fiscal Year-End Supporting Over 20,000 U.S. Jobs, September 30, 2011, Ex-Im Bank Press Release, <http://www.exim.gov/pressrelease.cfm/5BFB12B0-CCF4-B6E4-0546FC19AA3BE72D/>

president of the Bankers' Association for Finance and Trade and the International Financial Services Association, recently testified in Congress that Ex-Im Bank "program processing inefficiencies are generally manifested by inordinately long processing times for transactions and ultimately can compromise some deals. This is particularly true of some small business transactions, where the costs related to lengthy processing periods can cause difficulties in completing transactions."⁴

On May 24, 2011, the Ex-Im Bank inspector general, the Honorable Osvaldo L. Gratacós, testified before the Senate Committee on Banking, Housing, and Urban Affairs; Subcommittee on Security and International Trade and Finance (U.S. Government, 2011). The subcommittee hearing focused on stakeholder perspectives on the reauthorization of the Ex-Im Bank. Mr. Gratacós's testimony confirmed BAFT-IFSA's concerns and highlighted several key areas to improve the level of customer service:

- The need to increase staffing levels to reflect the growth in authorizations.
- The inefficient and ineffective IT platform.
- The need to develop performance standards and metrics for programs and products.
- The need to reduce turn-around times for certain transactions.
- The absence of a systematic approach to measure customer satisfaction.

In FY 2010, Ex-Im Bank began implementing its strategic plan that reinforces Ex-Im Bank's ability to accomplish its mission, serve a prominent role in the National Export Initiative,⁵ and meet its Congressional mandates in future years. Ex-Im Bank's vision is to create and sustain U.S. jobs by substantially increasing the number of companies it serves and expanding their access to global markets. The strategic plan consists of three primary goals:

- Expand awareness of Ex-Im Bank services through focused business development and effective partnerships.
- Improve ease of doing business for customers.
- Create an environment that fosters high performance and innovation.

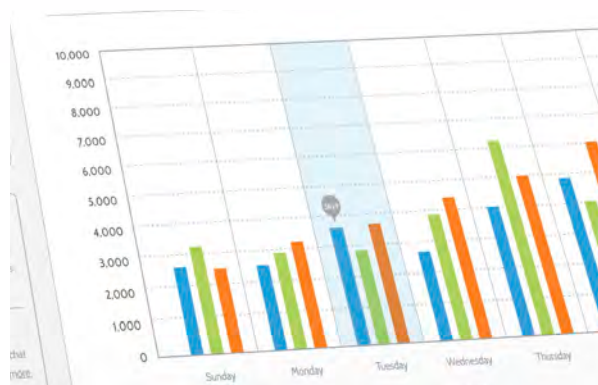
Through implementation of its strategic plan, Ex-Im Bank hopes to get more U.S. companies to export to more countries and more customers, thereby creating more jobs in the United States.

4) Ms. Alexander's testimony can be found at <http://financialservices.house.gov/uploadedfiles/052411alexander.pdf>.

5) President Obama announced the National Export Initiative in his 2010 State of the Union Address and set the goal of doubling U.S. exports by the end of 2014.

THE EVALUATION

As part of its broader mission to evaluate Ex-Im policies and procedures, Ex-Im OIG conducted an evaluation of Ex-Im's operational performance with a particular focus on transaction response time. Response time is an important metric as it contributes to the Bank's overall competitiveness and is a critical factor in Ex-Im's clients' ability to generate new export business. In fact, according to our ECA survey, transaction response time is the single largest determinant of customer satisfaction.



The impetus for conducting this evaluation was twofold. First, Ex-Im Bank's accelerated growth during the past four years resulted in the growing perception among certain stakeholders that transactions may be taking longer to process and approve. Second, given this observation, the Ex-Im Bank OIG was interested in benchmarking Ex-Im Bank's performance against ECA best practices related to operational efficiency and customer service.

The evaluation consists of two phases. Phase one entails a review of Ex-Im Bank's metrics for operational efficiency and a comparison of those metrics with other ECA practices based on an OIG survey of 12 ECAs. Phase two consists of an Ex-Im Bank customer satisfaction survey to be conducted by Ex-Im Bank OIG. The customer survey will provide valuable feedback on customer priorities and Ex-Im Bank's perceived performance.

Data for phase one of the evaluation are drawn from four principal sources including 1) a review of Ex-Im's internal reporting systems and related management reports; 2) interviews with Ex-Im Bank staff; 3) interviews with a select group of ECA peers; and 4) a broader survey of other ECAs on performance metrics for operational efficiency and best practices. The survey focused on ECA best practices, such as the selection and measurement of performance met-

rics for operational efficiency, recently introduced initiatives to improve customer service and how institutions balance competing agendas of timely customer response and the need to complete satisfactory transaction due diligence.

ECA survey respondents included a diverse group of European, Asian and North American agencies. In preparing the survey, Ex-Im OIG sought input from various internal product groups as well as other ECAs. The results of the survey are discussed herein.

When comparing Ex-Im Bank's operational efficiency metrics with those of other ECAs, we must be mindful that other countries have different ECA business models ranging from lenders of last resort to quasi-market players to industrial policy institutions. Moreover, the operational objectives, risk appetites, pricing and financial drivers associated with each of these models may differ. These differences, in turn, may impact institutional priorities and resource allocation (GAO, 2012). Nevertheless, benchmarking Ex-Im Bank with its peers provides insights on best practices in the competitive ECA sector.

Phase two of this initiative is to conduct a customer survey targeting a representative sample of approximately 400 exporting clients. The customer survey will be jointly conducted in 2012 by Ex-Im

OIG and Ex-Im's Strategic Policy Group. The survey seeks to validate several points:

- The relative importance of response time as a competitive factor for U.S. exporters.
- The perceived relevance of Ex-Im as a promoter of U.S. exports.
- The perceived performance of Ex-Im and suggested areas of improvement.
- The drivers of customer satisfaction.
- The likelihood that our customers will recommend Ex-Im to a colleague, our "Net Promoter Score."

OBSERVATIONS TO DATE: PHASE ONE

The importance of customer service resonates well with ECAs. Indeed, the survey results confirmed the relative importance of customer service to all respondents. Despite this consensus, there is a wide divergence in practices and behaviors among ECAs. Second, there does not appear to be a common approach as to the methodology or frequency to measure customer satisfaction with service levels. The following is a summary of the feedback according to key themes addressed in the ECA survey.



The importance of customer satisfaction in achieving organization's overall objectives.

Virtually all ECAs responded that customer satisfaction was either “very” or “extremely” important in achieving organizational objectives. That said, there may be occasions when internal policies conflict with customer requests. This can be mitigated by transparency and good communication throughout the transaction cycle. Several ECAs commented that they have created dedicated “customer care centers” to resolve potential issues.

How to measure customer satisfaction? How often?

Methodology used to measure customer satisfaction differs among the various ECAs. A majority of ECAs commented that they measure customer satisfaction at least once a year. However, several institutions employ an anecdotal approach and measure customer satisfaction infrequently.

Best practices dictate that ECAs should be proactive and survey their clients on a regular and systematic basis. However, collecting data can also pose challenges for many institutions. Differences in definition and data collection procedures within an organization may generate ambiguous results. Related questions include “what must be measured,” “how to measure it,” and “how frequently?” “Which clients should ECAs approach?” “How can ECAs obtain a representative sample and avoid selection bias?” Despite the challenges, customer feedback on operational performance provides valuable insight on the alignment of resources and customer needs.

ECA respondents cited several practical suggestions. First, imbed the solicitation for feedback in the overall customer experience, i.e., at the end of the transaction. This increases the response rate and may result in more accurate results. Second, use focus groups to inform survey design. Third, cross-validate the results of survey analysis with focus groups and select interviews. Finally, use annual surveys to determine the current and future needs of their clients – an important initiative given the challenging economic environment.

The use of customer satisfaction as an annual performance objective.

Although virtually all ECAs commented on the importance of customer service, a majority responded that it is not a metric used in the annual appraisal process. This may be due in part to the inherent diffi-

culty of measuring customer satisfaction objectively. Second, management may define success parameters largely in quantitative terms – touting the volume of exports financed, number of jobs supported, and revenues per employee. While these measures are important, they do not address the underlying issue of customer satisfaction.

Best practices suggest including customer satisfaction levels as a metric for performance appraisals and incentive compensation. For example, certain ECAs implement a balanced score card approach and incorporate customer satisfaction as an important metric for the appraisal process.



How do we determine performance metric targets? Do they address customer expectations?

Operational performance metrics may reflect a number of factors including historical precedent, peer performance, government regulation, transaction complexity or internal limitations. Nevertheless, to what degree do they reflect customer expectations? Is there a hierarchy among customer service levels? How do ECAs balance competing agendas of timely customer response and the need to complete satisfactory transaction due diligence, credit analysis and policy compliance?

Most ECA respondents confirmed that performance metric targets reflect internal policies and constraints, but also the needs of their customer base. Second, practically all ECAs commented that performance metric targets are included as management objectives. Some referenced different performance targets across product lines. Finally, several highlighted the importance of transparency and communica-

tion throughout the transaction as effective tools to manage customer expectations. As one respondent noted, “We maintain a close dialogue with clients to communicate policy guidelines and to understand their timing constraints.”

Measuring transaction response time.

ECAs view response time as an important factor in the ability of customers to win additional export business and to enhance ECA competitiveness. In addition, ECAs felt strongly that response time is an important driver of customer satisfaction and represents a shared responsibility with the client.

Approaches to measuring response time differ among ECAs and among products within the same organization. Some ECAs wait for a complete application before tracking response time; others start earlier but “stop the clock” while waiting for customers to respond to information requests. In addition, ECAs use different milestones including application to letter of interest, application to credit approval/authorization, application to final delivery, etc. Certain ECAs use multiple milestones with distinct service levels for each product.

From a best practice perspective, it is important to remember that the customer’s view may not be

point to point, but rather the “totality of the experience.”

In which areas have you been encouraged by your customers to provide better customer service? Responses include response time, information requirements, availability and knowledge level of staff, interface with IT platform.

In terms of customer feedback, practically all ECA participants have been encouraged to improve the response time of at least one of the following processes including application process, decision making, and claims processing. Additional areas of improvement often cited by clients include 1) information/ documentation requirements; and 2) availability and knowledge level of staff to assist clients.

CONCLUSION

Faced with increasing pressure to improve performance with limited resources, public sector managers must learn to optimize costs, quality and customer service. An important tool at their disposal is the use of performance metrics to measure and improve operational efficiency. Customer surveys on operational performance provide valuable insight on the alignment of resources and customer needs. They may also inform future resource allocation.



In this regard, the Office of Inspector General can add substantial value by conducting independent surveys to determine best practices; benchmarking federal agency performance, soliciting customer feedback; and providing guidance to improve operational efficiency.

Key points to bear in mind include the solicitation of customer feedback in a systematic and timely manner; the ability to identify key drivers of customer satisfaction; the selection and implementation of performance metrics for operational efficiency; and the use of performance metrics/drivers in the budgeting and performance appraisal processes.

Finally, to quote a familiar adage, “success breeds success.” Once management understands the drivers of customer satisfaction, it can develop these factors and leverage the “net promoters” of the organization.



Mark Thorum

Mark Thorum serves as acting assistant inspector general for inspections and evaluations at the Export-Import Bank Office of Inspector General. In this capacity, he is responsible for establishing, planning, directing and conducting inspection and evaluation functions within the OIG. These functions assess the efficiency and effectiveness of Ex-Im Bank programs, operations and transactions; review and evaluate policies and regulations; and develop recommendations for improving program performance.

Mr. Thorum has more than 20 years of experience with credit structuring, financial and capital markets, advisory experience with domestic and international banks. In his last position, he worked as a senior consultant with the financial markets advisory department of an international bank. He has successfully executed complex financial advisory assignments and debt financings in both the United States and Europe.

Mr. Thorum is ABD and Ph.D. candidate at the Virginia Polytechnic Institute and State University School of Public and International Affairs. He holds a M.A. from the John Hopkins University School of Advanced International Studies, a D.E.A. from the Institute of Political Studies in Paris, France; and a B.A. from Long Island University. Mr. Thorum is conversant in several languages including English, French, Spanish and Dutch.



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**Inspector General Act of 1978,
as amended
Title 5, U.S. Code, Appendix**

**2. Purpose and establishment of Offices of Inspector General;
departments and agencies involved**

In order to create independent and objective units--

(1) to conduct and supervise audits and investigations relating to the programs and operations of the establishments listed in section 11(2);

(2) to provide leadership and coordination and recommend policies for activities designed (A) to promote economy, efficiency, and effectiveness in the administration of, and (B) to prevent and detect fraud and abuse in, such programs and operations; and

(3) to provide a means for keeping the head of the establishment and the Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action;