Global Investigations Review

The Guide to Monitorships

Editors
Anthony S Barkow, Neil M Barofsky and Thomas J Perrelli

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GIR

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Publisher's Note

The Guide to Monitorships is published by Global Investigations Review – the online home for all those who specialise in investigating and resolving suspected corporate wrongdoing.

It aims to fill a gap in the literature – the need for an in-depth guide to every aspect of the institution known as the 'monitorship', an arrangement that can be challenging for all concerned: company, monitor and appointing government agency. This guide covers all the issues commonly raised, from all the key perspectives.

As such, it is a companion to GIR's larger reference work – *The Practitioner's Guide to Global Investigations* (now in its third edition), which walks readers through the issues raised, and the risks to consider, at every stage in the life cycle of a corporate investigation, from discovery to resolution.

We suggest that both books be part of your library: *The Practitioner's Guide* for the whole picture and *The Guide to Monitorships* as the close-up.

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The Publisher would like to thank the editors of this guide for their energy and vision. We collectively welcome any comments or suggestions on how to improve it. Please write to us at insight@globalinvestigationsreview.com.

Preface

Corporate monitorships are an increasingly important tool in the arsenal of law enforcement authorities, and, given their widespread use, they appear to have staying power. This guide will help both the experienced and the uninitiated to understand this increasingly important area of legal practice. It is organised into five parts, each of which contains chapters on a particular theme, category or issue.

Part I offers an overview of monitorships. First, Neil M Barofsky – former Assistant US Attorney and Special Inspector General for the Troubled Asset Relief Program, who has served as an independent monitor and runs the monitorship practice at Jenner & Block LLP – and his co-authors Matthew D Cipolla and Erin R Schrantz of Jenner & Block LLP explain how a monitor can approach and remedy a broken corporate culture. They consider several critical questions, such as how can a monitor discover a broken culture? How can a monitor apply 'carrot and stick' and other approaches to address a culture of non-compliance? And what sorts of internal partnership and external pressures can be brought to bear? Next, former Associate Attorney General Tom Perrelli, independent monitor for Citigroup Inc and the Education Management Corporation, walks through the life cycle of a monitorship, including the process of formulating a monitorship agreement and engagement letter, developing a work plan, building a monitorship team, and creating and publishing interim and final reports.

Nicholas Goldin and Mark Stein of Simpson Thacher & Bartlett – both former prosecutors with extensive experience in conducting investigations across the globe – examine the unique challenges of monitorships arising under the Foreign Corrupt Practices Act (FCPA). FCPA monitorships, by their nature, involve US laws regulating conduct carried out abroad, and so Goldin and Stein examine the difficulties that may arise from this situation, including potential cultural differences that may affect the relationship between the monitor and the company. Additionally, Alex Lipman, a former federal prosecutor and branch chief in the Enforcement Division of the Securities and Exchange Commission (SEC), and Ashley Baynham, fellow partner at Brown Rudnick LLP, explore how monitorships are used in resolutions with the SEC. Further, Bart M Schwartz of Guidepost Solutions LLC – former Chief of the

Criminal Division in the Southern District of New York, who later served as independent monitor for General Motors – explores how enforcement agencies decide whether to appoint a monitor and how that monitor is selected. Schwartz provides an overview of different types of monitorships, the various agencies that have appointed monitors in the past, and the various considerations that go into the decisions to use and select a monitor.

Part II contains three chapters that offer experts' perspectives on monitorships: that of an academic, an in-house attorney and forensic accountants at Forensic Risk Alliance. Professor Mihailis E Diamantis of the University of Iowa provides an academic perspective, describing the unique criminal justice advantages and vulnerabilities of monitorships, as well as the implications that the appointment of a monitor could have for other types of criminal sanctions. Jeffrey A Taylor, a former US Attorney for the District of Columbia and chief compliance officer of General Motors, who is now executive vice president and chief litigation counsel of Fox Corporation, provides an in-house perspective, examining what issues a company must confront when faced with a monitor and suggesting strategies that corporations can follow to navigate a monitorship. Finally, Frances McLeod and her co-authors at Forensic Risk Alliance explore the role of forensic firms in monitorships, examining how these firms can use data analytics and transaction testing to identify relevant issues and risk in a monitored financial institution.

Part III includes four chapters that examine the issues that arise in the context of cross-border monitorships and the unique characteristics of monitorships in different areas of the world. First, litigator Shaun Wu, who served as a monitor to a large Chinese state-owed enterprise, and his co-authors at Kobre & Kim examine the treatment of monitorships in the East Asia region. Switzerland-based investigators Daniel Bühr and Simone Nadelhofer of Lalive SA explore the Swiss financial regulatory body's use of monitors. Judith Seddon, an experienced white-collar solicitor in the United Kingdom, and her co-authors at Ropes & Gray International LLP explore how UK monitorships differ from those in the United States. And Gil Soffer, former Associate Deputy Attorney General, former federal prosecutor and a principal drafter of the Morford Memo, and his co-authors at Katten Muchin Rosenman LLP consider the myriad issues that arise when a US regulator imposes a cross-border monitorship, examining issues of conflicting privacy and banking laws, the potential for culture clashes, and various other diplomatic and policy issues that corporations and monitors must face in an international context.

Part IV includes five chapters that provide subject-matter and sector-specific analyses of different kinds of monitorships. For example, with their co-authors at Wilmer Cutler Pickering Hale and Dorr LLP, former Deputy Attorney General David Ogden and former US Attorney for the District of Columbia Ron Machen, co-monitors in a DOJ-led healthcare fraud monitorship, explore the appointment of monitors in cases alleging violations of healthcare law. Günter Degitz and Richard Kando of AlixPartners, both former monitors in the financial services industry, examine the use of monitorships in that field. Along with his co-authors at Kirkland & Ellis LLP, former US District Court Judge, Deputy Attorney General and Acting Attorney General Mark Filip, who returned to private practice and represented BP in the aftermath of the Deepwater Horizon explosion and the company's subsequent monitorship, explores issues unique to environmental and energy monitorships. Glen McGorty, a former federal prosecutor who now serves as the monitor of the New York City District Council of Carpenters and related Taft-Hartley benefit funds, and Joanne Oleksyk of Crowell & Moring

LLP lend their perspectives to an examination of union monitorships. Michael J Bresnick of Venable LLP, who served as independent monitor of the residential mortgage-backed securities consumer relief settlement with Deutsche Bank AG, examines consumer-relief fund monitorships.

Finally, Part V contains two chapters discussing key issues that arise in connection with monitorships. McKool Smith's Daniel W Levy, a former federal prosecutor who has been appointed to monitor an international financial institution, and Doreen Klein, a former New York County District Attorney, consider the complex issues of privilege and confidentiality surrounding monitorships. Among other things, Levy and Klein examine case law that balances the recognised interests in monitorship confidentiality against other considerations, such as the First Amendment. And former US District Court Judge John Gleeson, now of Debevoise & Plimpton LLP, provides incisive commentary on judicial scrutiny of DPAs and monitorships. Gleeson surveys the law surrounding DPAs and monitorships, including the role and authority of judges with respect to them, as well as separation-of-powers issues.

Acknowledgements

The editors gratefully acknowledge Jenner & Block LLP for its support of this publication, as well as Jessica Ring Amunson, co-chair of Jenner's appellate and Supreme Court practice, and Jenner associates Jessica Martinez, Ravi Ramanathan and Tessa JG Roberts for their important assistance.

Anthony S Barkow, Neil M Barofsky and Thomas J Perrelli
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Contents

Introduction

Anthony S Barkow and Michael W Ross[1]

What should government authorities do when companies get into trouble? That question has become increasingly important among legal practitioners, regulators and commentators – and has led to dialogue about the role of individual responsibility in the corporate setting,[2] the appropriateness of fines and penalties on corporations,[3] and the consequences to a public company of pleading guilty to a crime.[4] As prevailing practices continue to develop, one sanction that has become more common in the corporate setting is the appointment of an independent monitor. In recent years, household names like Apple, Avon and Western Union have all seen government investigations end with the appointment of a monitor to oversee aspects of the company's operations. And, although frequently a tool used by the US Department of Justice (DOJ), numerous other regulators have appointed monitors following an inquiry, including the US Securities and Exchange Commission (SEC), the New

1 Anthony S Barkow and Michael W Ross are partners at Jenner & Block. Special thanks to Jenner & Block associates Ravi Ramanathan and Tessa JG Roberts, who were instrumental in preparing this introduction.

2 See, e.g., Rod J Rosenstein, 'Keynote Address on Corporate Enforcement Policy, Program on Comp. Compliance and Enforcement', N.Y.U. Law, 6 October 2017, https://wp.nyu.edu/compliance_enforcement/2017/10/06/nyu-program-on-corporate-compliance-enforcement-keynote-address-october-6-2017; Sally Quillian Yates, 'Individual Accountability for Corporate Wrongdoing', DOJ, 9 September 2015, https://www.justice.gov/archives/dag/file/769036/download; 'DOJ Announces Important Changes to Yates Memo', Sidley Austin, 30 November 2018, https://www.sidley.com/en/insights/newsupdates/2018/11/doj-announces-important-changes-to-yates-memo.

3 See, e.g., 'DOJ Announces New Policy to Avoid "Piling On" of Duplicative Corporate Penalties,' Jenner & Block LLP, 5 May 2018, https://jenner.com/library/publications/18003.

4 Yaron Nili, 'The Credit Suisse Guilty Plea: Implications for Companies in the Cross Hairs', *Harv. L. Sch. Forum on Corp. Governance & Fin. Reg.*, 9 June 2014, https://corpgov.law.harvard.edu/2014/06/09/the-credit-suisse-guilty-plea-implications-for-companies-in-the-crosshairs; Shah Gilani, 'Banks Being Forced to Plead Guilty to Criminal Charges: Will They Survive?', *Forbes*, 5 May 2014, https://www.forbes.com/sites/shahgilani/2014/05/05/banks-being-forced-to-plead-guilty-to-criminal-charges-will-they-survive.

York State Department of Financial Services (DFS) and the United Kingdom's Serious Fraud Office (SFO).

This guide takes an in-depth look at the corporate monitor – defined broadly by both the DOJ and SEC as 'an independent third party who assesses and monitors a company's adherence to the compliance requirement of an agreement that was designed to reduce the risk of recurrence of the company's misconduct'.[5] The authors bring extensive experience with corporate monitorships, and each chapter addresses a topic relevant to understanding this important area of practice. The guide first delves into topics common to almost any monitorship – such as the monitor selection process, the task of developing and carrying out a monitorship work plan, and the legal issues that every monitor must face. Next, it provides first-hand perspectives on monitorships from a number of viewpoints (government, in-house and academic), and then addresses a variety of issues that arise during specific types of monitorships, including cross-border and international monitorships, and monitorships within specific industries.

In an era where monitorships have become a regular tool of law enforcement, this guide provides critical insights for any private practitioner, government lawyer, senior executive or general counsel, or board member interested in delving deeply into how monitorships work in practice.

The historical roots of the corporate monitor

The concept of delegating court or government remedial powers to a private actor has historical precedent dating back to English common law.[6] Beginning in the sixteenth century, special masters served as court-appointed assistants with the power to sell property and settle judgments, hold evidentiary hearings, calculate damages and audit financial accounts. These special masters were traditionally private attorneys, law professors or retired judges who were given these powers over a particular case.[7] Appointing such an individual enabled a court to leverage outside resources to achieve its remedial objectives.[8]

More recently, the corporate monitorship has its roots in government efforts to enforce the Racketeer Influenced and Corrupt Organizations Act (RICO) against organised crime. About 35 years ago, the DOJ began a practice of selecting a third-party 'trustee' in RICO cases to implement institutional reforms among labour unions that had come under the influence of organised crime.[9] Between 1982 and 2004, the DOJ filed at least 20 civil cases against unions asserting RICO violations,[10] and in almost all of them, the DOJ successfully secured court appointment of a third party to oversee the implementation of institutional

5 US Dep't of Just. and US Sec. and Exch. Comm'n, 'A Resource Guide to the U.S. Foreign Corrupt Practices Act' 71 (16 January 2015), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf.

6 Vikramaditya Khanna and Timothy L Dickinson, 'The Corporate Monitor: The New Corporate Czar', 105 *Mich. L. Rev.* 1713, 1715 (2007).

7 James S Degraw, Rule 53, 'Inherent Powers, and Institutional Reforms: The Lack of Limits on Special Masters', 66 *N.Y.U. L. Rev.* 800, 800-01 (1991).

8 Khanna and Dickinson, *supra* note 6, at 1716.

9 Lauren Giudice, 'Regulating Corruption: Analyzing Uncertainty in Current Foreign Corrupt Practices Act Enforcement', 91 *B.U. L. Rev.* 347, 369 (2011); James B Jacobs et al., 'The Rico Trusteeships after Twenty Years: A Progress Report', 19 *Lab. Law.* 419, 452 (2004).

10 id.

reforms.[11] For the most part, these proto-monitors served as an ongoing fact-finding tool for the court: although some of them had broader powers, the most common function of these trustees was to gather information about and periodically report to the court on factual information relevant to remedying the wrongdoing.[12] These RICO cases provide an early instance of third-party monitoring, building on the historical practice of selecting a private party to enhance a court's ability to exercise its remedial power.

In the early 1990s, external monitors began to be appointed to address corporate wrongdoing. In 1994, a federal court approved what some have described as the first deferred prosecution agreement (DPA), following the DOJ's investigation of Prudential Securities Inc (Prudential) for fraudulently marketing an oil and gas fund to thousands of investors.[13] Prudential had misstated the returns (and tax status) of the fund, used the inflated returns to sell more shares and then paid out returns from new investments (rather than from actual returns).[14] Among the sanctions extracted by the DOJ was the appointment of an 'independent ombudsman' for a three-year term who would sit on Prudential's board of directors and who would be required to submit quarterly reports to the DOJ on any instances of criminal conduct or other 'material improprieties' at the company. To accomplish that, the DPA required Prudential to report such criminal misconduct to the ombudsman and established a hotline through which employees could anonymously make 'complaints about ethics and compliance'.[15] Thus, the ombudsman served as the watchful 'eyes and ears' of the DOJ, providing a mechanism by which the government could monitor the company for additional instances of wrongdoing, for years beyond the case's resolution.

The use of third-party overseers as part of resolving criminal charges coincided with the DOJ's increased reliance on internal investigations by law firms as part of the investigation process itself. In the 2000s, the DOJ and other regulators began to incentivise companies to hire outside counsel to conduct investigations and provide the results of those investigations to the DOJ, both so that the DOJ could outsource the work and also as a lever to make companies demonstrate acceptance of responsibility.[16] This reliance on law firm probes has only increased since in both domestic and international investigations.[17]

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11 id.

12 Cristie Ford and David Hess, 'Can Corporate Monitorships Improve Corporate Compliance?', 34 *J. Corp. L.* 679, 683-84 (2009).

13 Wulf A Kaal and Timothy A Lacine, 'The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2013', 70 *Bus. Law* 61, 72 (Winter 2014/2015); Kurt Eichenwald, Brokerage Firm Admits Crimes in Energy Deal, *NY Times*, 28 October 1994, https://www.nytimes.com/1994/10/28/us/brokerage-firm-admits-crimes-in-energy-deals.html.

14 id.

15 Deferred Prosecution Agreement, *United States v. Prudential Sec., Inc*, No. 94-2189 (SDNY 1994), at 3 (Prudential DPA).

16 See Charles D Weisselberg and Su Li, 'Big Law's Sixth Amendment: The Rise of Corporate White-Collar Practices in Large U.S. Law Firms', 53 *Ariz. L. Rev.* 1221, 1243-45 (2011); see generally Jesse Eisinger, 'The Chickenshit Club: Why the justice Department Fails to Prosecute Executives' (criticising government reliance on law firms for investigations).

17 David S Hilzenrath, Justice Department, 'SEC Investigations Often Rely on Companies' Internal Probes', *Washington Post*, 22 May 2011, https://www.washingtonpost.com/business/economy/justice-departmen t-sec-investigations-often-rely-on-companies-internal-probes/2011/04/26/AFO2HP9G_story.html; see generally Eisinger, *supra* note 16.

By the early 2000s, the role of the monitor expanded beyond simply reporting on facts, and began to include the responsibility for making affirmative recommendations about how to address ills at an embattled company. The most well-known example occurred in the wake of one of the most significant accounting fraud scandals in American history, *WorldCom, Inc* WorldCom had overstated its income by $11 billion and its balance sheet by $75 billion by fraudulently booking expenses as investments;[18] and, as part of the flurry of criminal and regulatory activity that followed, the SEC called for the appointment of a monitor. At first, the SEC asked the court for a relatively limited mandate: to ensure that documents were preserved and that no improper payments were made to executives or WorldCom's affiliates.[19] With that mandate in mind, WorldCom and the SEC agreed to appoint former SEC Chairman Richard C Breeden as monitor.[20] But, soon after his appointment, Breeden's role expanded significantly – with consent of the SEC and the company, the court empowered Breeden to review WorldCom's corporate governance structure and to issue broad-ranging recommendations concerning them.[21]

In the end, former SEC Chair Breeden made 78 recommendations designed to address corporate governance weaknesses that caused WorldCom's collapse, all of which were unanimously approved by WorldCom's board of directors in 2003.[22] Among other changes, Breeden recommended that the board adopt provisions that barred directors from serving more than 10 years and a mandate that at least one member depart each year. Other recommendations included switching outside auditors every 10 years and creating a website where investors could bring concerns to the attention of the board and shareholders.[23] Whatever the merits of any particular recommendation, WorldCom as a company benefited. In his final judgment, the district judge praised Breeden 'not only as a financial watchdog (in which capacity he has saved the company tens of millions of dollars) but also as an overseer who has initiated vast improvements in the company's internal controls and corporate governance'.[24] Armed with these changes, together with its successful reorganisation, the company would continue under a new name, MCI Inc, and eventually sell itself to Verizon Communications in 2005 for $6.6 billion.[25]

18 *SEC v. WorldCom, Inc*, 273 F. Supp. 2d 431, 431 (SDNY 2003).

19 Litigation Release No. 17588, Sec. and Exch. Comm'n, 'SEC Charges WorldCom with $3.8 Billion Fraud Commission Action Seeks Injunction, Money Penalties, Prohibitions on Destroying Documents and Making Extraordinary Payments to WorldCom Affiliates, and the Appointment of a Corporate Monitor' (27 June 2002), http://www.sec.gov/litigation/litre-leases/lr17588.htm.

20 *WorldCom, Inc*, 273 F. Supp. 2d at 432.

21 id.

22 Barnaby J Feder, 'WorldCom Report Recommends Sweeping Changes for Its Board', *NY Times*, 26 August 2003, https://www.nytimes.com/2003/08/26/business/worldcom-report-recommends-sweeping-changes-for-its-board.html.

23 id.

24 *WorldCom, Inc*, 273 F. Supp. 2d at 432 (SDNY 2003).

25 Timothy L O'Brien, 'WorldCom to Exit Bankruptcy and Change Name to MCI', *NY Times*, 24 April 2003, https://www.nytimes.com/2003/04/14/business/worldcom-to-exit-bankruptcy-and-change-name-to-mci.html; Matt Richtel and Andrew Ross Sorkin, 'Verizon Agrees to Acquire MCI for $6.6 Billion, Beating Qwest', *NY Times*, 14 February 2005, https://www.nytimes.com/2005/02/14/technology/verizon-agrees-to-acquire-mci-for-66-billion-beating-qwest.html.

The contemporary monitor

Since *WorldCom*, the DOJ and others have come to regularly use the appointment of a monitor as a key tool in resolving investigations into corporate wrongdoing.[26] According to the University of Virginia's corporate prosecution registry, there were 30 independent monitors appointed in DOJ corporate criminal cases between 2001 and 2007 under federal DPAs or non-prosecution agreements (NPAs) – a rate of approximately five per year.[27] Between January 2008 and January 2017, the DOJ matched that pace, appointing at least 51 independent corporate monitorships after NPAs and DPAs.[28] This monitorship activity became so extensive that in November 2015, the DOJ appointed a full-time compliance expert or 'monitor czar' to oversee the monitorship process and to consult with and train prosecutors on compliance issues.[29] Other agencies have also increasingly appointed corporate monitors, including the SEC, state regulators and even foreign regulatory agencies.[30]

These appointments have covered various areas of law and a wide array of industries. Monitors have been appointed following investigations into conduct covered by, for example, bribes in violation of the Foreign and Corrupt Practices Act (FCPA), anticompetitive business practices under antitrust law, improper foreclosures of mortgages and tax evasion, to name just a few.[31] Further, monitorship appointments have touched nearly every industry in which companies do business in the United States: from financial services and healthcare to food services and hospitality.[32]

The powers given to these monitors have also been varied, reflecting in part that monitors are often appointed by agreement between an enforcement agency and a corporation following extensive negotiations. That said, most monitors include a mandate, hearkening back to the role of the ombudsman in *Prudential*, of providing a fact-finding and reporting function to a court or government agency.[33] Many others include a broader mandate, akin to the *WorldCom* monitorship, of making recommendations to the company about how to improve its corporate compliance programme or culture.[34] And an array of other functions have also been implemented, such as auditing the organisation's compliance with its DPA or NPA, or investigating the root causes of the compliance failure that resulted in a legal or regulatory violation.[35] The varied functions, agencies and areas of laws encompassed by

26 Khanna and Dickinson, *supra* note 6 at 1718.

27 Corporate Prosecution Registry, University of Virginia (18 January 2019), http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/index.html (exported data).

28 id.; Robert Anello, 'Rethinking Corporate Monitors: DOJ Tells Companies to Mind Their Own Business', *Forbes*, 15 October 2018.

29 id.

30 See *infra* Parts IV and V; see also, e.g., Press Release, 'Chemical and Mining Company in Chile Paying $30 Million to Resolve FCPA Cases', Sec. Exchange Comm., 13 January 2017, https://www.sec.gov/news/pressrelease/2017-13.html; Press Release, 'Biomet Charged With Repeating FCPA Violations', Sec. Exchange Comm., 12 January 2017, https://www.sec.gov/news/pressrelease/2017-8.html.

31 Victoria Root, Modern-Day Monitorships, 33 *Yale J. L. & Reg.* 109, 109 (2016).

32 See *infra* Part IV.

33 See, e.g., Prudential DPA, at 3; see also Root, *supra* note 31, at 124–27 (providing examples).

34 See, e.g., Consent Order, *In the Matter of Credit Suisse AG, NY Dep't Fin. Servs.*, 18 May 2014, at 5–6; see also Root, *supra* note 31, at 124–37 (providing examples).

35 Am. Bar Ass'n, Monitor Standards, 16 June 2016, https://www.americanbar.org/groups/criminal_justice/standards/MonitorsStandards.

modern-day monitors reflect the flexibility of the independent monitorship as a tool to remedy corporate malfeasance.

But that flexibility has also seen some tightening around the edges, at least when it comes to the DOJ. With the more frequent use of monitors, the DOJ has come to focus on how and under what circumstances to employ them. Much of that scrutiny came in the mid 2000s, in response to certain controversial decisions of then-US Attorney for the District of New Jersey Christopher J Christie.[36] Christie negotiated DPAs in seven cases during his tenure as US Attorney, of which several included the appointment of a monitor to oversee the corporation's adherence to the agreement.[37] In one instance, Christie negotiated a DPA that appointed a monitor and, as part of the DPA, also required the company to endow an ethics chair at Christie's alma mater, Seton Hall University School of Law.[38] In another, Christie appointed John Ashcroft – his former DOJ boss – as the monitor in a matter that ultimately resulted in a one-page bill, with no hours tracked, for $52 million in fees for 18 months of work.[39]

In the wake of outcry about these incidents, the DOJ began to establish guidelines to ensure more transparent procedures around the appointment of monitors. In March 2008, the DOJ issued the 'Morford Memo', its first policy memorandum addressing the selection and use of corporate monitors.[40] To eliminate unilateral selection of a monitorship candidate, the Morford Memo required the government office handling a given case to establish an ad hoc committee to consider monitor candidates and obtain approval of the appointment from the Office of the Attorney General.[41] Providing further guidance around the appointment decision, in October 2018, the DOJ issued a memorandum by Assistant Attorney General for DOJ's Criminal Division Brian A Benczkowski (the Benczkowski Memo), requiring an express analysis of whether a monitor is justified before appointing one in a particular case.[42] The focal point of the Benczkowski Memo is its requirement that the DOJ undertake a cost–benefit analysis, stating that 'the Criminal Division should favor the imposition of a monitor only where there is a demonstrated need for, and clear benefit to be derived from, a

36 Chaka Patterson and Erica Jaffe, 'Corporate Monitors: Looking Back and Looking Forward', *Am. Bar Ass'n* (2016), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/wccn2016_patterson.pdf.

37 Anthony S Barkow and Rachel E Barkow, 'Introduction', in *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct* 4 (Anthony S Barkow and Rachel E Barkow 2011) (*Prosecutors in the Boardroom*).

38 id.

39 id.; see also Press Release, 'House Judiciary Committee, Conyers and Sánchez Demand Ashcroft Testimony about $52 Million No-Bid Contract' (30 January 2008); Nina Totenberg, 'House Panel Questions Ashcroft on No-Bid Contract, NPR', 12 March 2008, https://www.npr.org/templates/story/story.php?storyId=88132206.

40 Memorandum from Craig S Morford, Deputy Attorney General, US Dep't of Justice, to Heads of Department Components and United States Attorneys, Selection and Use of Monitors in Deferred Prosecution Agreement and Non-Prosecution Agreements with Corporations, 7 March 2008, https://www.justice.gov/sites/default/files/dag/legacy/2008/03/20/morford-useofmonitorsmemo-03072008.pdf (Morford Memo).

41 Lauren Giudice, 'Regulating Corruption: Analyzing Uncertainty in Current Foreign Corrupt Practices Act Enforcement', 91 *B.U. L. Rev.* 347, 371 (2011); Morford Memo at 3.

42 Assistant Attorney General Brian A Benczkowski Delivers Remarks at NYU School of Law Program on Corporate Compliance and Enforcement Conference on Achieving Effective Compliance, Dep't of Justice, 12 October 2018; Memorandum from Brian A Benczkowski, Assistant Attorney General, U.S. Dep't of Justice, to All Criminal Division Personnel, Selection of Monitors in Criminal Division Matters, 11 October 2018, https://www.justice.gov/opa/speech/file/1100531/download (Benczkowski Memo).

monitorship relative to the projected costs and burdens.'[43] Several commentators have viewed this new guidance as an attempt by the DOJ to scale back on corporate monitorships, based on the costs that monitorships may impose on companies.[44] But Benczkowski has since disagreed with that view, stating that the memorandum was not designed to 'kill all the monitors', but rather was 'meant to provide greater clarity' to both companies and prosecutors to ensure that 'when they do recommend the appointment of a monitor that they are doing so for the right reasons and with the right scope'.[45]

In addition to requirements on when to appoint a monitor, DOJ guidance has also placed restrictions around the functions that should be assigned to a monitor once appointed. The Morford Memo sets out that a monitor's mandate should be focused on reducing the risk that the misconduct at issue in the investigation might recur – as opposed to a broader mandate that might address the risk of other potential wrongdoing at the company.[46] Thus, even when appointed, a DOJ-appointed monitor is supposed to be circumscribed to the specific wrongdoing at issue.

The DOJ's more recent focus on defining when and how a monitor is appropriate raises the important question of how a monitorship fits within the traditional goals of punishment for wrongdoing. Academic commentary to some extent raises the same question.[47] But, as regulators continue to hone the parameters around the appointment and acceptable mandate of monitors, public commentary indicates that current norms fall comfortably within several well-recognised goals of punishment: deterrence (using punishment to deter wrongdoing by others), incapacitation (preventing wrongdoing by taking away the offender's ability to commit crimes) and rehabilitation (seeking to change the offender's disposition towards criminality).[48]

As commentators have noted, the cost and burdens of a monitorship to a company can serve as an effective deterrent against future corporate misconduct.[49] Those costs come in the form of fees to the monitor but also in that the company must devote time, attention and other resources to interfacing with the monitor and responding to and implementing recommendations or other forms of oversight. Indeed, commentators have noted that some companies fear the appointment of a monitor for just this reason: the disruption they could cause to business operations.[50]

43 Benczkowski Memo at 2 (emphasis added).

44 Anello, *supra* note 28; Ronald C Machen et al., 'The DOJ's New Corporate Monitor Policy', *Harvard Law Sch. Forum on Corp. Governance & Fin. Reg.*, 5 November 2018, https://corpgov.law.harvard.edu/2018/11 /05/the-dojs-new-corporate-monitor-policy; John M Hillebrecht et al., 'To Monitor or Not to Monitor?', DLA Piper, 17 October 2018, https://www.dlapiper.com/en/us/insights/publications/2018/10/to-monitor-or-not-to-monitor.

45 Adam Dobrik, 'Criminal Division Chief Plays Down Talk of Monitorship Demise', *Global Investigations Review*, 8 March 2019, https://globalinvestigationsreview.com/article/jac/1181316/criminal-division-chief-plays-down-talk-of-monitorship-demise.

46 Morford Memo at 5.

47 Root, *supra* note 31, at 109.

48 *Black's Law Dictionary* (10th ed. 2014).

49 Khanna and Dickinson, *supra* note 6, at 1715.

50 Ford and Hess, *supra* note 12, at 703.

Relatedly, the imposition of a monitor can have important incapacitating effects on a company by rendering the company less likely or willing to engage in misconduct. With a corporate monitor peering into decisions and activities of the company, it may make it harder for a company to undertake a course of action that violates the law, or to make decisions to postpone addressing reported instances of wrongdoing in its midst.

Last, the monitorship can also be seen in the context of rehabilitation. In the context of corporations, rehabilitation can take the form of improving the company's culture and internal procedures to reduce the likelihood of future misconduct. For example, the Morford Memo describes a chief purpose of a monitorship as providing a means to 'address and reduce the risk of recurrence of the corporation's misconduct'.[51] Consistent with that purpose, in an October 2018 speech at the New York University School of Law, Geoffrey Berman, the US Attorney for the Southern District of New York, argued that 'a monitor's role is remedial, not punitive'.[52] If carried out effectively, certainly a monitorship can revitalise a company's compliance systems and culture. As described above, the *WorldCom* case demonstrated those rehabilitative benefits, as do other monitorships.

Although the precise details of each monitorship may vary, many will likely share these important features that put them squarely within the long-standing goals of punishment for wrongdoing. This guide – which assembles chapters from leading lawyers and practitioners in the field – provides insight into these and other monitorship issues, and is a crucial resource for anyone interested understanding or practising in this important area.

51 Morford Memo at 5.

52 Geoffrey S Berman, US Attorney Geoffrey Berman Keynote Speech on Monitorships, N.Y.U. Law Program on Corp. Compliance & Enf't, 12 October 2018, https://wp.nyu.edu/compliance_enforcement/2018/10/12/u-s-attorney-geoffrey-berman-keynote-speech-on-monitorships.

Part I

An Overview of Monitorships

1

Changing Corporate Culture

Neil M Barofsky, Matthew D Cipolla and Erin R Schrantz[1]

Misconduct by employees on a scale that leads to the imposition of a monitorship will often find its roots in a flawed or dysfunctional corporate culture. The best gauge of a monitor's success will therefore often be its ability to help the company successfully reform its culture and by doing so avoid the perils of recidivism. This is a particularly difficult challenge, which requires an in-depth understanding of the company's formal articulation of its approach to compliance as well as how it executes those ideals. In other words, while management and compliance programmes set official policies regarding what should happen at a company, '[c]orporate culture determines what actually happens, and which rules are obeyed, bent, or ignored'.[2] Further, because the failure of a corporate culture to embrace compliance may be what leads to the imposition of a monitor, the yardstick for successful remediation is often the degree to which the culture of the monitored entity has improved since the original misconduct. The role that a monitor can play in effecting that type of cultural change is, in many ways, the unifying theme of this guide.

To be sure, sometimes, when a corporation engages in unlawful behaviour and finds itself on the receiving end of a monitorship, the misconduct was only committed by a few bad apples. But in other cases, the tree – or the whole orchard – may be rotten, in which case a few revised policies and revamped compliance processes will not be enough, and planting the seeds of cultural change becomes necessary. Although cultural change is a daunting task, with a monitor's help and guidance, not only can prosecutors and regulators be assured that

1 Neil M Barofsky, Matthew D Cipolla and Erin R Schrantz are partners at Jenner & Block LLP. The authors would like to thank partner Jessica Ring Amunson for her important contributions to this chapter, and associate Jessica A Martinez, who was instrumental in its research and drafting.

2 Richard M Steinberg, Governance, Risk Management and Compliance (2011), at 6 (quoting Committee of Sponsoring Organizations of the Treadway Commission, Enterprise Risk Management – Integrated Framework (2004)).

the company is meeting its compliance responsibilities, the company itself can experience transformational change that leads to sustained, profitable and compliant growth.

Of course, fixing a broken culture is no easy task. A litany of business school case studies, scholarly articles, consultant engagements and criminal enforcement actions attest to the challenge. Edgar H Schein, who pioneered the concept of organisational culture, argued that culture is the most difficult aspect of organisational life to alter because 'it points us to phenomena that are below the surface, that are powerful in their impact but invisible, and to a considerable degree unconscious'.[3] Despite these challenges, a monitor using the techniques described in this chapter is uniquely well suited to guide organisations through large-scale cultural change. Assuming a willingness on the part of senior management to address the cultural issues that led to the appointment of the monitor, a monitor can partner with an organisation to address cultural change while still maintaining the ability to independently hold the organisation to account. This is because a monitor brings an external perspective to the table, one that is not invested in how things were done in the past, and is able to see the full picture and illuminate problems that need fixing.

As noted in several of the following chapters, regardless of whether the government enforcement authority views the imposition of a monitor as a form of deterrence to other organisations that may be contemplating similar types of misconduct, the underlying goal of the monitor should never be to effect additional punishment for the company's wrongdoing, but rather to guide the organisation along the path to sustainable change, and to help it avoid repeating its previous mistakes long after the monitor is gone. As a result, a successful monitorship cannot be fully determined on the eve of its termination; rather, we must look at where the organisation is five or 10 years down the road. To ensure that the organisation is on the road of compliance rather than recidivism, a monitor should take a proactive role in partnering with management to improve or transform the organisation's culture of compliance.

Not every instance of corporate wrongdoing leads to a monitorship that will require efforts to reform the company's culture. In some instances, the underlying causes of the misconduct that led to the imposition of the monitorship are not systemic, and in others, the cultural infirmities that led to the misconduct have been addressed by pre-settlement remediation efforts. In these instances, a monitor enters a situation in which the few bad actors have already been tossed out, and while the organisation's policies and procedures may need to be further enhanced, its overall culture is relatively healthy. Thus, at the outset of the monitorship, it is vital to assess the current state of the company's culture. The monitor should examine the tone that is set not just at the top, but also in the middle of the organisation. The monitor must also look at the existing compliance framework and the organisation's proposed strategies to remediate any misconduct. The monitor should also evaluate the employees – not just who caused the misconduct but also who tried to rein it in. In addition to determining whether cultural change is necessary, this assessment helps to pinpoint which aspects of the company's culture potentially need to be addressed.

With that assessment complete, a monitor can then go about the difficult task of counselling the organisation through cultural change. In doing so, a successful monitor must develop a deep understanding of the company's business and financial objectives. Obviously,

3 Alison Taylor, 'The Five Levels of Ethical Culture' (working paper, BSR, San Francisco, 2017), at 7 (quoting Edgar H Schein, *Organizational Culture and Leadership* (2004), at 8).

an organisation will not embrace cultural change if that means abandoning all hope of profits and growth. To the extent that some in the organisation complain that remediating the issues identified by the monitor will bankrupt the business, a monitor who understands the company's business will be best equipped to parry these charges, or help the company find suitable alternatives. A successful monitor can then obtain internal buy-in on the goals and means of cultural change, particularly from the leadership of the business itself. This includes leveraging and building upon pre-existing structures that can be used to foster compliance, as well as reinforcing consistent (and repeated) communication about compliance. These tactics will help management ingrain a new compliance-focused culture in a company by encouraging employees to become more personally invested in the process – a recipe for lasting change. A successful monitor knows that cultural reforms will have a short shelf life if they are imposed on an organisation against its will, hamstring the company's financial goals or never gain traction with the employees who remain at the company long after the monitor has moved on to the next engagement.

Is cultural reform necessary?

Every organisation experiences compliance breaches where responsibility legitimately rests on a few bad actors rather than a cultural failing. At times, rogue employees can circumvent even the best compliance programmes, but those incidents should be rare in a healthy corporate culture. When they arise, a robust compliance programme must detect the misconduct and then take swift and deliberate action to punish the wrongdoers, no matter their seniority. A healthy compliance culture learns the hard lessons from each compliance breach, and then uses those lessons to fortify the organisation's control framework going forward.

The monitor's first task is to assess whether an organisation's misconduct can be fairly attributed to isolated bad actors limited to a particular business unit or division, or whether the misconduct reflects deeper systemic failures across the organisation that can be traced to corporate culture.[4] This assessment should be multifaceted, considering the tone set by management at the top and how that translates to tone in the middle; the company's compliance framework, including how it measures and incentivises compliance; the company's proposed remediation to violations of compliance policies and the law; and the company's existing personnel, particularly whether anyone involved in the misconduct remains at the company. Armed with this assessment, the monitor will know whether and to what extent cultural change is necessary and possible, and then begin the careful process of reporting those results to senior management, the board and the relevant governmental authority. It is absolutely essential to carefully educate the organisation's leadership of the monitor's findings rather than simply to impose them; if the monitor claims there is a culture problem, but has not marshalled the facts to demonstrate and convince leadership of the scope and severity of the problem, senior management will rightly criticise the monitor for overreach and make meaningful change all but impossible.

4 e.g., US Dep't of Justice Criminal Division, Fraud Section, Evaluation of Corporate Compliance Programs (2017), https://www.justice.gov/criminal-fraud/page/file/937501/download; US Dep't of Justice Criminal Division and US Securities and Exchange Commission Enforcement Division, A Resources Guide to the US Foreign Corrupt Practices Act (2015), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf.

Assessing the tone from the top and the middle

Tone from the top, according to the Ethics & Compliance Initiative (ECI), a leading non-profit organisation focused on developing best practices for compliance programmes, is often considered to be the 'elusive but necessary condition for success' in creating a culture of compliance.[5] No less important is whether and how middle management reinforces the tone set by senior management. Indeed, tone in the middle is particularly critical to assess given that middle managers typically have more extensive interactions with employees who will ultimately either embrace a culture of compliance or will not. As an initial part of the assessment, it is important to evaluate the reaction of both senior and middle management to the findings of the government's investigation (as well as any internal investigation), and to look at how management has communicated that reaction throughout the organisation, both formally (through town halls, email communications, etc.) and informally (such as in meetings and conversations between senior managers and their direct reports). Do senior and mid-level managers accept the facts made known to them through the investigative process and express a willingness to address them appropriately? Or do they seek to minimise the misconduct and claim they are the victims of overzealousness? In messaging employees, does management describe the settlement that created the monitorship as a wake-up call and catalyst for necessary change to the organisation? Or do they portray the monitorship as a burden and unfair punishment for the isolated misconduct of a few bad apples?

Consider these hypotheticals: in the first instance, on the heels of a large government sanction, the organisation's chief executive officer (CEO) sends an email throughout the organisation announcing his or her commitment to compliance and compliant growth as the company tries to turn the page on its troubled past; in the second instance, the CEO does not communicate to the bulk of employees at all, but complains to his or her direct reports that the government investigation was an overreaching 'witch hunt' that was conducted purely for political purposes in which the company was targeted for the same conduct undertaken by its peers, a message that those direct reports then funnel down through the organisation. Obviously, these very different approaches can have very different impacts on the organisation's cultural approach to compliance. Communications like these create a lasting impression, either positive or negative, that middle management echoes down to their teams. Where senior managers put their heads in the sand and refuse to acknowledge or understand the extent of the problems that led to the government sanction – and then communicate that resistance to the need for change down the chain – long-lasting cultural change will be very difficult to achieve. In contrast, senior managers who accept responsibility and recognise that change is necessary have likely already embarked on the path of change, making it far easier for the monitor to shepherd the company to broader and longer-lasting reform.

In making the assessment of tone at the top and in the middle, the monitor should examine a variety of media and communications. Email and written communications are the easiest to review, but the monitor should also attend key town hall meetings or gatherings where senior management communicates with a large number of managers and employees. Similarly, committee meetings of managers on areas that relate to the monitorship may also

5 Ethics & Compliance Initiative (formerly Ethics and Compliance Officer Association Foundation), *The Ethics and Compliance Handbook: A Practical Guide from Leading Organizations* (2008), at 39 (ECOA/ECI Handbook).

be fruitful in determining whether and how compliance-related communications have translated into running the business. The monitor can also learn a lot from initial and follow-up interviews with senior management, and selected interviews with managers further down the line.

Finally, the monitor should assess management's tone around compliance through management's day-to-day interactions with the monitor. To be clear, no snap judgements should be made in the initial days of the monitorship as management adjusts to the presence of a very foreign and unique presence within the organisation, but over time, the following questions may arise:

- Does management approach the monitor as a partner in improving the organisation, or more as it would treat an adversary in a hotly contested litigation?
- Is management transparent in communicating with the monitor, or does the monitor have to go to great lengths to obtain relevant information?
- Does management point out perceived compliance weaknesses to the monitor, or stay silent and hope that the monitor does not discover those weaknesses on its own?

The more cooperative and transparent management is with the monitor, the more likely that cultural reform has occurred, is under way or is unnecessary. Obstructive behaviour, however, should be regarded as a harbinger of trouble.

Assessing the compliance framework

The current state (and historical development) of a company's compliance framework also speaks volumes about its culture. A company's compliance framework shows how much the company values the importance of the compliance function to identifying and mitigating existential risks. A wealth of resources exist to help a monitor evaluate compliance programmes, including, to name a few, the Federal Sentencing Guidelines,[6] the Justice Manual,[7] the 'Evaluation of Corporate Compliance Programs' guidance from the Department of Justice's Fraud Section for the United States;[8] and, globally, the Organisation for Economic Co-operation and Development (OECD)'s 'Good Practice Guidance on Internal Controls, Ethics, and Compliance'[9] and its 'Anti-Corruption Ethics and Compliance Handbook for Business',[10] or the International Organization of Standards (ISO) 19600 Compliance Management Systems guidelines.[11] There is also no shortage of guidance to be found beyond these resources,[12] and familiarising oneself with the basics of good compliance programmes is essential to ensure that a monitor can capably identify any gaps in the company's

6 US Sentencing Guidelines Manual Section 8B2.1 (US Sentencing Comm'n 2016).

7 US Dep't of Justice, Justice Manual Section 9-28.800 (2018).

8 US Dep't of Justice Criminal Division, Fraud Section, 'Evaluation of Corporate Compliance Programs', 2017, https://www.justice.gov/criminal-fraud/page/file/937501/download.

9 OECD, 'Good Practice Guidance on Internal Controls, Ethics, and Compliance', 18 February 2010, https://www.oecd.org/daf/anti-bribery/44884389.pdf.

10 OECD, 'Anti-Corruption Ethics and Compliance Handbook for Business', 2013, http://www.oecd.org/corruption/Anti-CorruptionEthicsComplianceHandbook.pdf.

11 International Organization of Standards (ISO), 19600 Compliance Management Systems guidelines, https://www.iso.org/obp/ui/#iso:std:iso:19600:ed-1:v1:en:edB1:v1.

12 e.g., ECOA/ECI Handbook.

existing compliance structures, while also getting the necessary grasp on where the company is culturally.

As every corporate culture and monitorship is different, the compliance standards set forth in the literature cited above will only get a monitor so far, but there are certain common themes to examine.

First, the assessment needs to have the necessary scope and depth to avoid the common error of validating a programme that looks great on paper, but is not implemented effectively, and does not actually identify and mitigate risky behaviour.[13] For example, consider an organisation with a strict global anti-corruption policy that forbids giving anything of value to a government official over $25 without advance written approval; conducts web-based anti-corruption training in 10 languages; has a third-party due diligence protocol; and requires internal audit to conduct periodic audits of corruption risk. On paper, this has all the hallmarks of a robust and effective compliance programme, and a monitor who relies on a handful of presentations and interviews may come away with the sense that there is little more to be done.

Although senior management may be relieved to receive a monitor's report to this effect, the monitor has done the entity no favour. A more diligent monitor would do a more careful assessment, which could include testing employees' understanding of the training, as well as auditors' understanding of relevant risks. Such a monitor would also assess whether the due diligence protocol and audit fieldwork are covering all relevant aspects of the business's day-to-day activities, and whether the compliance group is effectively monitoring conduct to make sure that it comports accordingly with the policy. In so doing, the monitor may discover that, although the company has a sound policy, its effectiveness is limited because:

- the policy is not effectively communicated or policed, and employees do not seek advance written approval;
- employees take the online training but report that it does not address the realities they see on the ground and is hard to follow;
- the third-party due diligence protocol leaves out critical swathes of high-risk third parties; and
- the periodic anti-corruption audits all come back 'clean' in part because the auditors who conduct them are not trained on how to identify corruption risks.

Such a programme might be a cultural red flag of putting form over substance when it comes to important compliance issues. A monitor can assess whether the programme is leading both internal and external stakeholders to believe that the organisation is doing the right thing, when the reality may be very much different.

In testing for 'paper' programmes, a monitor should consider what efforts the company is making to monitor compliance with its policies, to seek continuous improvements to those policies, and to investigate and discipline employees if policy breaches are detected. Among other things, the monitor can evaluate the effectiveness of compliance training by

13 Hui Chen and Eugene Soltes, 'Why Compliance Programs Fail – and How to Fix Them,' *Harvard Business Review* (March–April 2018); Geoffrey Miller, 'The Compliance Function: An Overview' (2014); David Hess, 'Corporate Culture and Corporate Compliance Programs: Towards an Understanding of an Organizational Ethical Infrastructure' (2015).

conducting or reviewing employee surveys or interviews to identify what information is (or is not) being internalised.[14] The monitor should also examine whether employees follow policies in their day-to-day practices through consistent, risk-based testing. Testing can include manual reviews of high-risk transactions, such as customer due diligence for money laundering risk or third-party invoices for corruption risks, or automated testing that looks for known, high-risk patterns. The monitor should examine how the entity performs its own tests for compliance with its policies and whether the tests are ultimately effective in surfacing questionable behaviour.[15] It is also important to evaluate the metrics used to assess the programme's effectiveness. For example, many companies count the number of people who have completed training as a measure of an education programme's success. Counting heads in an online training 'room' is a necessary component of ensuring that personnel are educated about risk, but it is hardly sufficient. In particular, it does not assess whether employees fully understand and follow the guidance provided by the trainings.[16] Better metrics include whether the incidence of high-risk behaviour decreases after employees receive training, whether reporting on issues flagged in the training increases, and whether personnel more frequently seek advice from control functions about grey areas that the training highlighted. It is also important to evaluate whether the training has easy-to-follow examples and tests the employees on their comprehension of the applicable policies and procedures.

The monitor's assessment should also consider whether the maturity and sophistication of the compliance function correlates to the risks that the business generates. Profit-driven organisations by their very nature look for innovative ways to generate revenue and grow their business, as they should. Yet, new products, services and markets can introduce compliance risks that a start-up compliance function may be ill-equipped to mitigate. For example, a manufacturing company that exclusively operates in the United States, but then quickly expands its business globally through a series of acquisitions, may not have proper controls around corruption and export controls – common risks for global businesses.

Firms that experience rapid growth without a corresponding maturation of their compliance function may foment a culture that prizes growth above all else and could leave

14 Nitish Singh and Thomas J Bussen, *Compliance Management: A How-to Guide for Executives, Lawyers, and Other Compliance Professionals* (2015), at 117.

15 Deloitte, 'Testing and monitoring: The fifth ingredient in a world-class ethics and compliance program', https://www2.deloitte.com/content/dam/Deloitte/us/Documents/risk/us-aers-testing-and-monitoring-the-fifth-ingredient.pdf; US Dep't of Justice Criminal Division and US Securities and Exchange Commission Enforcement Division, 'A Resources Guide to the U.S. Foreign Corrupt Practices Act' (2015), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf.

16 See Hui Chen and Eugene Soltes, 'Why Compliance Programs Fail – and How to Fix Them,' *Harvard Business Review* (March–April 2018). In a classic (and often-cited) example of how incorrect or incomplete metrics can hide a paper programme, when the DOJ brought criminal charges against a Morgan Stanley employee in 2012 for his role in a conspiracy to evade internal accounting controls required by the Foreign Corrupt Practices Act, prosecutors noted that Morgan Stanley frequently trained employees on internal policies, the FCPA, and other anti-corruptions law, and the indicted employee himself had been trained on the FCPA seven times and received at least 35 reminders to comply with the FCPA. See US Dep't of Justice, 'Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA', 25 April 2012, https://www.justice.gov/opa/pr/former-morgan-stanley-managing-director-pleads-guilty-role-evading-internal-controls-required; Singh and Bussen, *supra*, at 6-7.

themselves vulnerable to employee misconduct.[17] In some cases, particularly early on in an organisation's existence, legal personnel may be more attuned to accommodating growth of the business and may not be equipped to, or used to, serving as a check on how that business attains that growth. Thus, a monitor must assess what the legal and compliance functions look like, not just in their structure, but also in their stature. Is the compliance programme respected by other parts of the company as an independent and empowered function that is a partner in helping the business grow in a compliant manner, or is it viewed as an unnecessary hindrance (or, even worse, as an accomplice to help navigate around existing policies or laws)? Do the company's legal and compliance components have sufficient resources to identify and mitigate legal, compliance, reputational and other risks? Do compliance personnel have a spot at the decision-making table such that, even if the compliance chief does not report directly to the CEO or sit within executive management, his or her voice is nevertheless heard and respected at the highest levels of the organisation? A monitor can pull on different threads to reveal whether a compliance function commands respect, such as observing cross-functional meetings with compliance and business personnel, gathering an assessment from internal audit about compliance leadership, and reviewing how the CEO and his or her direct reports respond to compliance presentations.

Assessing the proposed remediation

A monitorship begins months, or even years, after the company first became aware of problems with its employees, compliance programme or corporate culture. Consequently, the company almost certainly will have already undertaken steps to remediate the previously identified issues. The monitor must consider and respect these initial remediation efforts and the organisation's proposals for addressing the misconduct going forward. Even when the monitor views such proposals as flawed and incomplete, the monitor must resist the temptation to reject them out of hand and impose on the monitored company its own perception of the 'best in class' compliance programme for the company. As long as the existing remediation plan provides a path to being effective, it is almost always better to work within that framework. A wholesale rejection of the company's efforts to date risks demoralising and undermining the stature of the existing compliance personnel, and setting an adversarial tone for the monitorship rather than one of partnership. Moreover, the hard work of convincing management to invest in the preexisting remedial plan has presumably already been accomplished, and it will be far easier to convince management of the utility of improving a preexisting programme than to make a resource-intensive exercise of starting from scratch.

Further, a snap judgement about the company's past remedial efforts also runs the risk of being wrong. What may have worked at another company in another monitorship might not fit this particular company's business and culture. Instead, it is important to understand why the company chose the remedial path it did, and leverage that work to improve the compliance programme so as to effect cultural change.

To assess remediation efforts in a meaningful way, a monitor should look both at what was accepted and implemented in response to the government's findings of misconduct, as

17 Alison Taylor, 'What Do Corrupt Firms Have in Common?', Center for the Advancement of Public Integrity, Issue Brief, April 2016.

well as at what was considered but rejected. This provides insight into management's thinking, and gives the monitor a starting point for remedial solutions that are likely to fit within the organisation. Are there ideas that were thrown out before the monitorship began that could actually be effective with some revision? Were they rejected because the business misperceived the extent of remediation necessary? Did business managers push back on proposed remedial measures, and if so, what was their rationale? The historical interplay between business management and compliance personnel over different avenues of remediation can provide significant insights into what motivates the business, and what kinds of compliance reforms will meet resistance or engender business support in the future.

Assessing the personnel

One of the most important and challenging aspects of the monitor's initial assessment of the company's culture is its evaluation of the people in the organisation – at a multitude of levels.

The monitor can play an important role in helping the company make sure all the direct participants in the misconduct are gone. Under the Federal Sentencing Guidelines, for example, companies must take reasonable efforts to remove personnel that the organisation knew (or should have known) were engaged in misconduct from positions of substantial authority.[18] Identifying the principal wrongdoers is often straightforward and will typically have largely been completed by the government or internal investigation, but it is also just as important to understand and identify those who may have knowingly supported or enabled them. In a monitorship with a backward-looking assessment, the monitorship offers the associated benefit of alerting management to personnel whose historical behaviour may warrant further scrutiny. Management may decide those personnel need further training, better compliance incentives, or should be transferred within – or even out of – the organisation. Even in a monitorship focused only on the current control environment, the monitor, through interviews of key personnel, can help management identify personnel that do not buy in to cultural reform, minimise misconduct, erect roadblocks to change or are obstructive. In the first instance, the monitor should attempt to work with those individuals and their supervisors to develop support for reforms. But if those efforts prove unsuccessful, it is the monitor's obligation to share its concerns with more senior management, the CEO, the board of directors or even the appointing governmental authority if the monitor believes that the individual will be an impediment to the reforms necessary for the company to avoid recidivism.

The monitor also can serve an important role in helping a company identify and potentially empower 'change agents' that already exist within the company's ranks. Change agents are those within the organisation who have a demonstrated track record of fostering compliance (or at least pushing for reform) and the commitment to help lead the organisation in its cultural transformation.[19] Change agents – who may be located within the business, legal, compliance or elsewhere – can be key to facilitating a broader transformation, because their visibility in the organisation conveys a persuasive message that sustainable change emanates from within the organisation, rather than from external forces. The monitor can help facilitate that process, identifying voices that may not have previously been heard, searching for

18 US Sentencing Guidelines Manual Section 8B2.1 (US Sentencing Comm'n 2016).

19 John P Kotter, 'Leading Change: Why Transformation Efforts Fail', *Harvard Business Review* (2007).

obstacles that may have held them back and helping clear the way for change agents to lead the organisation down a more compliant path.

Implementation – fixing corporate culture

At the end of this initial assessment, if the monitor concludes that the culture in all or part of the organisation contributed to the misconduct, and that existing efforts to address it are unlikely to be sufficient, the monitor is then faced with the difficult task of working with management, the board of directors and potentially the appointing governmental body to change that culture.

In setting out to change a corporation's culture, it is important to avoid common pitfalls. Change management thought leader and Harvard Professor John Kotter, for example, has argued that most large-scale corporate culture transitions founder because they fail to generate a sense of urgency, to establish a powerful guiding coalition, to develop and communicate a vision, or to fully embed changes into the corporate culture.[20] And Harvard Business School Dean Nitin Nohria and Professor Michael Beer contend that about 70 per cent of corporate change initiatives fail because, in their rush to change their organisations, managers immerse themselves in 'an alphabet soup of initiatives' – failing to recognise the real human toll of change efforts and, ironically, focusing on too many conflicting ideas about how to change a company rather than a single coherent strategy.[21] In other words, efforts to change everything can often lead to a failure to change anything.

The existing scholarly literature, though helpful, will only get a company so far. An effective monitor will need to use all the tools in his or her toolkit to fix a broken culture. The most relevant are discussed below, including getting internal buy-in, leveraging and building upon pre-existing structures, and reinforcing consistent, repeated messaging.

Obtaining internal (and business) buy-in

A monitor is most effective in shepherding large-scale change when it has the buy-in of the key components of the organisation itself, particularly, as discussed below, from those running the business. To be sustained, cultural change must be driven or adopted from within, rather than imposed against the company's will by an outsider. When imposed from the outside, change tends to dissipate quickly after the monitorship has ended. Of course, internally driven change demands willing partners. This strategy works best where senior leadership – as demonstrated through the work done in the monitor's initial assessment or otherwise – is invested in effectuating change.

Perhaps the most important constituency to bring on board for cultural change are the personnel in the organisation's business units. Regardless of how good an organisation's legal and compliance functions are, the business is where the culture is shaped and lived in day-to-day decisions. As the ECI puts it, an effective compliance programme sets a compliance strategy that is central to the company's business strategy.[22] A more compliant culture requires

20 ibid.

21 Michael Beer and Nitin Nohria, 'Cracking the Code of Change,' *Harvard Business Review* (May 2000).

22 Thomas R Fox, 'Measuring the Impact of Ethics and Compliance Programs,' *FCPA Compliance Report*, 27 July 2018, http://fcpacompliancereport.com/2018/07/measuring-the-impact-of-

an organisation, in the first instance, to commit to ethical and compliant behaviour rooted in policies, laws and ethical principles. Achieving this culture demands a commitment to specific reforms. Business personnel need to embrace the overall goal of compliant growth and sign on to the specific reforms that will aid the organisation in reaching that objective, with the understanding that, in the long run, the company will be more successful in the marketplace if it is regarded by its customers, regulators and governmental investigators as a compliant company that conducts itself in an ethical manner. In other words, revenues will increase as the company regains the trust it may have lost with its customers as a result of the misconduct that led to the monitorship. And the bottom line will improve as costs related to investigating misconduct, responding to regulators and settling with the government drop precipitously, as well as through increased efficiencies that often accompany the alignment of incentives between employees and management brought about by a more compliant culture. Getting buy-in from managers and employees throughout the chain of command within the business helps to make sure that the message that compliance is important gets internalised, and will inspire employees to invest in the company's efforts to change.

Although a monitor may have the mandate to impose reforms on business units, the goal of sustained cultural change is better served if the monitor instead can persuade the business of its benefits. Ideally, this would occur through direct interactions with senior management resulting in buy-in for the monitor's recommendations. The monitor must be an advocate and build its case to business management that a problem exists, and if left unaddressed, the problem will cost more in the end than the proposed reform, through additional investigations and fines, increased reputational costs, inefficiencies or distraction of management. But if management refuses and unreasonably digs in its heels, the monitor should leverage the power of the company's board of directors or the governmental authority that appointed the monitor to get management to see the light. The monitor can inform the board or the governmental authority of management's intransigence, either informally or formally through the monitor's reports. If these efforts are unsuccessful, the monitor can issue its recommendations, use its remaining time to report on implementation, and then rely on the continued vigilance of the board of directors and the appointing authority to give the reforms time to fully take root and hopefully improve the company's culture alongside them. But this result should be a worst-case scenario, as it has the least chance of effecting cultural change that will best prevent recidivism.

As discussed above, a successful monitor will also have (or develop) a keen understanding of the entity's business to understand what drives its profitability and growth, and use that understanding to convince the business that a more compliant business is not incompatible with a growing and more profitable business. To be effective, this is where a monitor must demonstrate its ability to add significant value – as an outsider with independent authority and freedom from the organisational hierarchy who can marry the twin goals of compliance and growth. Demonstrating a keen interest in the business and a desire to find a path to compliant growth also will allow the monitor to gain the necessary credibility with the business so that it respects the monitor's recommendations as necessary and practical. The alternative, dictating reforms without regard to the underlying business imperatives, will inevitably

ethics-and-compliance-programs (discussing Ethics & Compliance Initiative, 'Measuring the Impact of Ethics and Compliance Programs' (2018)).

frustrate the process and diminish the monitor's credibility, and therefore its ability to help achieve sustainable reform.[23] A monitor also should be prepared for the possibility that certain business practices are simply not compatible with compliance policies and the law. For example, business personnel often decry restrictions on what they can give to government officials, claiming that such practices are the only way to do business in certain countries. In those moments, the monitor needs to stand firm. Although the first imperative is to draw on its own experiences with other monitored entities or clients to help the company find a compliant path forward, if the business genuinely cannot survive in a certain market without breaking the law, the company has to be prepared to exit that market.

Getting business unit buy-in may also require marshalling historical facts to provide the needed wake-up call to business management. Where a monitorship includes a historical component, the monitor's investigation can expose the facts and scope of misconduct to business management who may have previously lacked awareness or turned a blind eye. Where managers do not know the full facts of what occurred previously, they may be less inclined to make the decisions necessary to achieve cultural change. Although a company may initially view the requirement of a backwards-looking investigation as a costly, punitive measure, if harnessed effectively by a monitor, it can be a critical tool for motivating cultural change. Specifically, it may demonstrate the extent to which the misconduct was driven by historical cultural issues that may still be present despite the post-investigation remedial conduct engaged in by the company. Put simply, if the company did not understand the extent of the problem, it cannot be expected to take all the necessary steps to fix it. Where a monitorship has no historical component, a monitor should look to the results of internal investigations, regulatory investigations, and its initial assessments, and use those facts to frame the need for change as necessary.

Another key way to achieve internal buy-in is to encourage (and even require) the company, and in particular its business components, to play a role in finding the solutions to problems identified by the monitor or the company itself. A company is much more likely to buy in to a reform, particularly one that is potentially transformative, that comes from within as opposed to one that is forced upon it by an outside party. In addition to the benefit of the business 'owning' the solution, it can apply its superior knowledge and expertise to craft sustainable reforms that are consistent with its business objectives. Soliciting ideas from the business also will help the company view the monitor not as an enemy, but as a partner to help it follow a better path – which is in line with the goal of a monitorship as remedial, rather than punitive.[24]

23 See Bart M Schwartz, 'Getting Started as a Monitor', 18 *Prac. Litig.* 15, 18 (2007).

24 A view recently expressed by Southern District of New York US Attorney Geoffrey Berman in his keynote speech on monitorships at a 2018 NYU Program on Corporate Compliance and Enforcement conference. See US Att'y Geoffrey Berman, Keynote Speech on Monitorships - NYU Program on Corporate Compliance and Enforcement, 12 October 2018, https://wp.nyu.edu/compliance_enforcement/2018/10/12/u-s-attorney-geoffrey-berman-keynote-speech-on-monitorships/.

Leverage and build upon pre-existing structures

As discussed above, one of the greatest impacts a monitor can have is empowering voices already within the organisation and removing obstacles that stand in their way. This applies not only to people, but also to ideas.

A company rarely needs to start entirely from scratch. There are typically existing processes or procedures already in place that could be more effectively utilised to enhance compliance or communicate new compliance values. The monitor plays the critical part of identifying the processes or procedures worth keeping, and helping the company augment and deploy them to improve compliance. And the best ideas often originate from company personnel, who are embedded in the business and have a keen sense for what processes are most likely to succeed. Consider the following example: business managers at a company were falling short on compliance and were not meeting senior management's expectations that they would identify and address certain compliance risks among their subordinates. After discussing its finding with senior management, the monitor declined the invitation to propose its own solution and instead encouraged the company to develop its own path forward. With the guidance of the monitor, business managers devised an innovative solution that went well beyond the monitor's mandate, and therefore beyond any solution the monitor could have recommended. As a result, the company created a whole new system of executive accountability that grew organically from its own business leadership, and was embraced by their teams as a positive change.

Of course, sometimes it will be up to the monitor to introduce its own solutions to problems when the company is unable to forge its own path forward. But even in this situation, the monitor should bring the company into the process of shaping the proposed reform, by sharing draft recommendations, soliciting internal input on how to improve them, and then working with management to find the best ways to implement the recommendations.

Reinforce consistent (and repeated) messaging

To be successful, cultural change requires a vision that employees can rally behind and that management can point to as the rationale for decisions being made that impact employees (sometimes negatively). Inculcating a compliant culture requires reinforcing this vision through regular messaging because, as compliance experts Nitish Singh and Thomas J Bussen note in their practitioners' guide for compliance management, employees are more likely to behave more honestly and responsibly if senior managers express their vision of an ethical corporate culture 'loudly and consistently'.[25]

Repetition

An effective monitor should encourage and help a company use every vehicle possible to communicate the company's vision for a compliant culture and its plan to achieve it. A company that is serious about change, and instilling and maintaining a culture of compliance, should:

- repeat the core messages behind the organisation's cultural shift and new vision at town halls, management presentations and public discussions;

25 Singh & Bussen, *supra*, at 79.

- make compliance a core part of the company's code of conduct, which plays a key role in setting the appropriate tone and is one of the most visible manifestations of the values and culture of an organisation, both to employees and the outside world;[26]
- ensure messaging is consistent, with no deviation from the message that compliance is important and a part of the core culture; any deviations should be immediately addressed. If necessary, managers who refuse to support the message, or who undermine it, should be considered for disciplinary measures or even termination. For example, a company should pay careful attention to managers who undermine compliance personnel in team meetings, downplay the importance of (or ignore) compliance risks in town halls, or excuse compliance breaches of their top-performing revenue generators; and
- teach new behaviour by example, set the tone from the top, and reinforce that tone down the management ranks.

As the ECI's *Ethics & Compliance Handbook* notes, '[s]etting an appropriate tone for ongoing discussions about ethics and compliance is one of the most important roles an organization's board and senior managers can play.'[27] That means senior managers, as well as lower-level managers, must not only talk the talk, they must walk the walk.[28] A manager who walks the walk will often confront tough decisions, like terminating a top-performing salesperson who regularly circumvents the rules, even if that decision causes a short-term hit to the manager's own financial performance.

Set the right tone from the middle

Middle management serves as both the emissaries of top management, and the supervisors of those who are most responsible for carrying out and adhering to the company's policies. Their involvement is critical to the success of any effort to change the corporate culture. Most employees, especially at larger organisations, have little direct contact with senior management, and so will take their strongest cues from those managers who supervise and interact with them regularly.

An effective monitor can help reinforce a compliance-driven culture in middle management. It can push for and provide guidance on rewriting a company's code of conduct, identify through monitoring and testing where messaging has deviated from the expectation of compliance, push senior managers to walk the walk themselves by consistently messaging the importance of compliance and offering incentives that reward it, and use its reporting authority to credit middle managers who are setting the right tone for their teams. The monitor also plays a crucial role in helping an organisation devise strategies to conduct its own monitoring and testing of how it is measuring up against its improved compliance framework. With a robust testing programme in place, an organisation can better detect those employees who need additional training or guidance, as well as those who simply do not want to change their way of doing business.

26 ECOA/ECI Handbook at 55; Singh & Bussen, *supra*, at 63-64.

27 ECOA/ECI Handbook at 43.

28 Singh & Bussen, *supra*, at 78.

Evaluation and incentives

A monitor should also look for ways to make sure employees are being evaluated, measured, and compensated in a way that promotes compliance. Employees will look to the criteria against which they are measured, and the ways those criteria impact their compensation and promotion, as key signals regarding how much attention they should pay to compliance.

Recent enforcement actions underscore the cost of getting incentives and compensation wrong. For example, when federal regulators fined Wells Fargo $185 million in 2016 after finding that employees had secretly created millions of unauthorised bank and credit card accounts without customers' knowledge, the Consumer Financial Protection Bureau pointed to Wells Fargo's sales goals and incentives, including an incentive-based compensation programme, as influencing employees to engage in improper sales practices.[29] Employees described a toxic sales culture with impossibly high targets, where employees who did not meet daily sales goals were chastised and demeaned in front of peers,[30] or threatened with termination.[31] Although, fortunately, situations this extreme are uncommon, a monitor must be sensitised to a culture that incentivises misconduct and must work with the company to realign such an incentive system.

Importantly, when it comes to determining business employees' and their managers' compensation, the monitor should look to see whether it is based only on financial performance, or if it also incorporates compliance metrics.[32] For example, if business personnel shoulder responsibility for conducting due diligence on third-party agents, are they also evaluated on the quality of the due diligence they perform? Does the company specifically measure how well business personnel execute that compliance responsibility and does that measurement factor into compensation decisions? Or are these personnel only measured on how much business they generate? To be sure, there is no one perfect metric to capture compliance-related performance, and any such determination is likely to be conducted on a company-by-company basis. But a monitor can help a company identify compliance metrics that are appropriate to its business, capture both positive and negative performance, and then feed into compensation decisions in a meaningful way.

Ultimately, employee incentives should be aligned to promote compliance (and deter non-compliance). A successful change effort will use both 'carrots' (in the form of positive incentives, including financial incentives) and 'sticks' (in the form of disciplinary measures) to instil and repeat the message of a compliant culture. A company's compensation system should be structured to avoid incentivising employees to misbehave and instead both penalise bad behaviour and reward good behaviour. The rewards and penalties built into the system should be aligned with the message from management about the new culture of compliance.

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29 Consumer Financial Protection Bureau, *In the Matter of Wells Fargo Bank, N.A.*, Consent Order (8 September 2016), https://files.consumerfinance.gov/f/documents/092016_cfpb_WFBconsentorder.pdf.

30 E Scott Reckard, 'Wells Fargo's pressure cooker sales culture comes at a cost,' *Los Angeles Times*, 21 December 2013, https://www.latimes.com/business/la-fi-wells-fargo-sale-pressure-20131222-story.html

31 Matt Levine, 'Wells Fargo Opened a Couple Million Fake Accounts,' *Bloomberg*, 9 September 2016, https://www.bloomberg.com/opinion/articles/2016-09-09/wells-fargo-opened-a-couple-million-fake-accounts; *People of the State of California v. Wells Fargo & Company, et al.*, No. BC580778, Compl. (4 May 2015), available at https://assets.bwbx.io/documents/users/iqjWHBFdfxIU/rPxi_pVaKx2Y/v0.

32 Singh & Bussen, *supra*, at 79.

The question of whether to reward ethical conduct – or simply to expect it as the norm – is one that has generated controversy as of late. Publicising when an employee makes choices in line with the organisation's compliance goals and rewarding those who are exceeding the performance of their peers sends a powerful signal of how to be successful at that company, not to mention providing real-world guidance on operationalising the company's stated values.[33] As one example, at a monitor's suggestion, a business division that sought to improve its culture of compliance devised metrics to evaluate personnel on compliance-related topics, and then used those metrics to award increased bonuses to employees who demonstrated top compliance performance. Within one year, the division experienced what its leadership described as a 'sea change' in attitudes about compliance.

A final tool to effect cultural change is through negative incentives and, in particular, to ensure that the company's disciplinary process is in line with the intended message of the importance of compliance. The monitor should ensure that employees who engage in misconduct that is in any way similar to the misconduct that led to the imposition of the monitorship are treated with the appropriate level of severity. Nothing will undermine management's stated goal for change more than seeing recidivist employees receiving a slap on the wrist for the same type of conduct that was the impetus for reform. Further, employees should be consistently disciplined for misconduct. If rainmakers or star business generators receive a 'pass' or are disciplined inconsistently (or not at all) because they are valuable to the business, this can undermine all other efforts to improve the company's culture. Such a practice can breed resentment and resistance, and obscure the message that compliance is important for all in the company. As the ECI observed, '[e]mployees are careful observers of how their employers impose discipline.'[34] Where the monitor sees inconsistency in the disciplinary process, this should be highlighted for the company and a revamp of the way discipline is handled can be recommended. In addition to sending the right cultural message, the consistent imposition of discipline and rewards is an important way to demonstrate that a compliance programme is more than just a 'paper' one.[35]

Conclusion

Many of the assessments, processes and tools described in this chapter are hallmarks of any effort to revamp a corporation's culture. A monitor, however, occupies a unique middle-ground space – not an insider, but also not the government – that allows it to press on different levers and apply external pressure to an organisation that might not otherwise undergo necessary cultural change.

One of the monitor's most prized tools in helping to effect cultural change is the power of reporting. A monitor often enjoys a high level of credibility with a company's board of directors and the government authority that appointed the monitor, and as a result, a monitor's words are amplified. For management, a report criticising its efforts to reform its culture as lacking can lead to highly negative consequences, including to compensation or continued employment. Similarly, a report that gives credit where credit is due can bolster certain

33 ECOA/ECI Handbook at 112.

34 ECOA/ECI Handbook at 114.

35 ECOA/ECI Handbook at 108.

managers in the eyes of the board of directors and the company's regulators. The monitor must use its credibility and its power of reporting to incentivise change and give management every chance to earn a positive report, while never wavering from its duty to truthfully and accurately provide information on the company's challenges and failures.

Another important characteristic of monitorships in achieving cultural change is the monitor's experience and credibility as an outside expert. A monitor is not invested in how the company has always done things, and is not a part of the existing hierarchy. As an independent third party, a monitor can marshal historical evidence to shine light on the problems that led to imposition of the monitorship in the first place, and create the requisite sense of urgency and a wake-up call for change. Because of this, an effective monitor can also empower individuals and ideas that have been ignored in the organisation before. A monitor is also able to facilitate change at all levels, by virtue of communication and interaction with everyone from senior management to rank-and-file employees. This broad perspective allows a monitor to see the full picture, putting it in a uniquely strong position to help a company chart a path with full awareness of unintended consequences.

Ultimately, the task before a monitor in effecting cultural change is to help the company develop the tools of a compliant culture, and then teach the company how to use them so that the company itself steps into the monitor's shoes after the monitorship ends. Ideally, by the conclusion of the monitorship, the change agents within management should be empowered and acting on the monitor's invitation to proactively identify compliance risks, and proposing and implementing solutions to address them. By the time the monitor leaves, the company should have recognised that a compliant culture is also good for the bottom line and have an unwavering commitment to continuing along the path it set down with the monitor, so that cultural change will endure long after the monitorship has concluded.

2

The Life Cycle of a Monitorship

Thomas J Perrelli[1]

This chapter addresses commencing a monitorship, previews issues that may arise during a monitorship and discusses reporting. Many issues that could arise in a monitorship are addressed by a few key documents finalised at or near the commencement of a monitorship, which provide a window on the entire life cycle of a monitorship: the agreement,[2] the engagement letter and the work plan.

The agreement

In many respects, the agreement, which sets forth the monitorship, is its beginning and end, defining the terms and powers of the monitor, including critical issues such as access to information and the monitor's role in disputes.

Understanding the scope

Every monitorship begins with a close reading of the agreement; in circumstances where the monitor is selected before the agreement is final, the monitor may even have an input on key provisions.

Understanding the monitor's job is not as straightforward as it may seem. In the throes of negotiation, the parties may leave provisions vague, concluding they obtained 'enough' to argue about meaning later. That tendency in negostiations can result in the most significant areas of dispute in a monitorship. When the agreement says 'the monitor must ensure that policies and procedures comply with X law', does that require a paper review of policies and procedures or a review of how these policies and procedures are implemented? These are

1 Thomas J Perrelli is a partner at Jenner & Block LLP..

2 In this chapter, the 'agreement' refers to the document that establishes a monitorship and defines its scope – be it a settlement agreement, a consent judgment, a deferred prosecution agreement (DPA), a non-prosecution agreement (NPA) or the conditions of probation.

vastly different enterprises. If the agreement authorises a monitor to interview employees, does the agreement permit the company[3] to have a representative present for such interviews? These and other issues are best resolved at the outset of the monitorship.

Understanding the parties' view of scope

A first step following review of the agreement is a meeting with each party. Although joint kick-off meetings have some value, separate meetings are far more desirable because the monitor needs to hear from both sides in a candid manner. At such meetings, the monitor can explain his or her approach, but these meetings serve primarily for the monitor to obtain information from the parties.

From the government, the monitor needs to understand the underlying facts – not because the monitor will be doing a backwards-looking investigation, but because the monitor needs to know the background for specific provisions in the agreement. In addition, the monitor can ask the government about areas of the investigation that may never have been completed, but nonetheless are addressed, in some fashion, in the agreement.

From the party undergoing monitorship, the monitor needs extensive briefings about the company itself (its structure, personnel, relevant policies and procedures, and IT systems). In addition to this, the monitor should learn about the company's view of the facts that led to the agreement and any steps that have already been taken to address the underlying conduct. In most cases, the company will have made significant changes during the pendency of the investigation, both as a means to avoid further violations of law and to mitigate potential punishment. These efforts, of course, require testing, but monitored parties often make significant progress before the agreement is signed.

In many cases, the company and the government will have clearly different perspectives. The government may view the company as unchanged – with the same problems that resulted in the agreement. That can lead to a mismatch between the agreement and the goals of the monitorship (e.g., the agreement may demand that the monitor expend significant resources overseeing an activity that the company has already stopped). In addition, monitored parties will often plead that the government misunderstood the underlying facts (e.g., 'the government always thought we did X, but we never did'). These long-standing disputes can be a source of ongoing tension throughout the monitorship.

Finally, the separate meetings allow the monitor to explore areas that may be vague in the agreement. At the end of these separate meetings, the monitor will often have a short list of issues where the parties do not appear to have a meeting of the minds. These issues can be addressed in the context of the work plan (discussed below) or may be discussed separately. Some areas of dispute may be sufficiently minor that the monitor prefers to wait to address them in the context of a concrete dispute later in the monitorship. But in most circumstances, a monitor should seek to get agreement on key issues at the outset.

If such agreement is not possible, the parties may look to the monitor to be the tiebreaker. That is not an ideal or recommended approach for disputes over the meaning of the agreement. The agreement is, after all, that of the parties, not the monitor. Parties, however, are

3 In this chapter, the 'company' or 'the monitored party' will refer to the company or entity that is the subject of the monitorship.

loathe to renegotiate or to seek court intervention (if available) to resolve issues. Thus, the monitor is often drawn into being the arbiter.

In this situation, the monitor has a couple of choices. The monitor can pursue a 'third way', developing a compromise that advances the goals of the agreement, but does not treat the disputed issue as binary, with a winner and loser. Such a compromise will generally need buy-in from the parties. Or if the monitor must interpret the agreement, the role is like that of a judge, making the most reasonable interpretation possible, in the context of the overall agreement.

The engagement letter

An entire chapter could be written about monitor engagement letters. This chapter will address a few important issues, primarily of relevance to the monitor.

Payments or budget

For the monitored party, cost is an enormous issue. In practice, however, it is very difficult for a monitored party to complain about a monitor's expenditures.[4] While there have been cost caps in some monitorships,[5] they are rare and, for the monitor and the government, they are poor ideas. Caps create the incentive for the monitored party to drive up the cost to the monitor, including by delaying or resisting production of documents.

The company, in some cases, can find an ally on cost issues in the government. Increasingly, government lawyers have pressured monitor candidates to keep costs down, primarily in the name of avoiding public or judicial criticism. With monitor-selection processes becoming more routinised, budgeting and cost estimates have become a significant part of the competition to become a monitor.[6]

For a monitor candidate, it is incredibly difficult to propose a legitimate budget before commencing work. Even if the scope of the agreement is relatively fixed, the variables (the seriousness of the issues, remediation performed prior to the agreement, the company's approach to producing information, etc.) overwhelm what is known. While the government and the monitored party may be attracted to a low-cost proposal, in many circumstances they may actually be choosing the least candid monitor candidate.

Because pre-monitorship estimates are fraught with uncertainty, budgeting is an important component of the early part of the monitorship. In the engagement letter or the work plan, the parties should discuss budgets and costs. In many respects, this approach mirrors what a lawyer should provide any client in a substantial matter – a real effort to budget (likely after the work plan), a heads-up when costs will significantly exceed what had been anticipated, and a discussion about steps the monitor and the company can take to keep costs down.

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4 Consent Judgment, *State of Iowa v. Education Management Corp.*, Equity No. EQCE079220, (D.Ct. Polk 16 November 2015) (*EDMC* Consent Judgment), Paragraph 36 (authorising court review of disputes about the settlement administrator's fees).

5 *EDMC* Consent Judgment Paragraph 39 (capping the settlement administrator's fees).

6 In 2016, the FTC published materials showing how various monitor candidates for the *Herbalife* monitorship approached budget (and other) issues. Those materials were quickly removed from the internet, but did provide a window on the competition for monitorships.

Single point of contact

Although a monitor may want a free hand to contact company personnel (see below), most monitorships function best if the monitored party has a primary contact person responsible for interacting with the monitor and making sure that the company is responsive. This individual needs to be given sufficient authority to get the attention of company personnel.

Messaging concerning the monitor's role and the agreement

Some agreements specifically define what the company must tell employees about the monitor's role and cooperation.[7] Even if not set forth in the agreement, there is value in agreeing what will be communicated to employees. If employees are made to believe that the monitor is an enemy or a spy, rather than someone committed to a key aspect of the company's long-term health (compliance), the company will not be successful in completing its obligations.

Confidentiality

Although confidentiality may seem obvious, it can be tricky in the context of a monitorship. A monitor, in most cases, should have a wide range of access to company materials, including materials protected by various state and federal laws.[8] Thus, monitors are generally bound by strong confidentiality provisions.

But a monitor's role entails making reports – often for the public or to a court that may make them public, or to a government agency subject to public-records laws. Expectations should be clear at the outset as to what will happen with the monitor's reports – are they intended or likely to be made public? Are they admissible in the event of a dispute? Whether through the engagement letter or the work plan, the parties should agree on a process for reviewing information that may become public for confidentiality, allowing for redactions or other appropriate protections.[9]

Access to information

Other chapters will cover the many challenges of accessing data and information in foreign countries. Owing to local law restrictions, document review, interviews and even report-writing may need to occur in-person, in-country, with strict limitations.

But even domestic monitorships require thoughtful consideration of how information should be handled. Every company has significant confidential information (e.g., financial institutions, consumer companies, healthcare companies, and educational institutions), especially personally identifiable information (PII). Absent proper procedures, the monitor can become the weak link in the protection of such information. If the information is provided

7 Deferred Prosecution Agreement, *United States v. $900,000,000 in United States Currency*, Case No. 1:15-cv-07342 (*GM* DPA) Paragraph 15(f)(3) (SDNY 16 September 2015) (requiring company to notify employees of the monitor's role and authorising employees to speak anonymously with the monitor).

8 *GM* DPA, Paragraph 15(c) (authorising the monitor to share information with specific government agencies, but prohibiting other disclosures).

9 Some agreements envision the creation of a public version of the monitor report or an executive summary, which will allow for public release. *EDMC* Consent Judgment Paragraph 53.

to the monitor and then lodged on a law firm or consulting firm's computer system, it may lack the types of protection ordinarily accorded by the monitored party. In many cases, it will make sense for the monitor team to have secure laptops or other computers with direct access to the certain of the monitored party's systems, but not connected to a law firm or consulting firm system. These arrangements ensure that the monitor's access is no less secure than that of a senior employee of the monitored party.

Testimony by the monitor or indemnities

In many cases, the agreement itself will define whether the monitor can be required to testify and, if so, under what circumstances. The parties may want the monitor available to testify in the event of a dispute; even if the parties do not envision such testimony, the court, if one is involved, may want to hear from the monitor.[10]

There is almost no situation in which a monitor will want to testify in a dispute. The parties – whether through the court that entered a consent judgment or through a new case filed to enforce the agreement – usually have ample ability to obtain and present evidence. Although the monitor's work may have been important in defining the issue or uncovering evidence (and the monitor likely will provide such evidence to the government), the monitor's opinion or view of the dispute is rarely dispositive or even admissible evidence.

Even more problematic is the possibility of the monitor being called to testify in wholly separate disputes. For example, consumers filing a class action lawsuit against a company may seek the testimony of the monitor – or production of the monitor's work papers – to obtain evidence of the company's alleged wrongdoing (whether prior to the monitorship or during the pendency of the monitorship). Similarly, members of Congress may seek information about the monitorship, whether out of an interest in the monitored party, the monitor or the conduct of the government in imposing a monitorship.

None of these scenarios is attractive for the monitor. For that reason, where not otherwise covered by the agreement, a monitor's engagement letter should make exceptionally clear that the monitor will not be called to testimony in any proceeding and shall be prohibited from producing documents absent a court order. Moreover, as part of the broad indemnity that should be given to the monitor, if that testimony (including production of documents) is compelled, the monitored party must pay the defence costs. Although none of the above will defeat a court order, they should provide some measure of protection for the independence of the monitor and some disincentive for the parties to embroil the monitor in collateral disputes.

Building a team

Although monitors are often individuals, monitorships are all about the team. The process of defining the monitor's tasks – in the agreement, as refined in the work plan – goes hand-in-hand with building a team to complete those tasks.

10 In court-imposed or supervised monitorships, the court may want to hear directly from the monitor, either *ex parte* or with the parties in attendance. To the extent that the monitor is simply being required to discuss his or her findings to inform the judge, such 'testimony' may simply be an extension of the monitor's reporting function. Where, however, the 'testimony' veers into a dispute between the government and the monitored party, all the same concerns arise.

Increasingly, monitors put together a team of lawyers, auditors, consultants and subject-matter experts as part of the monitor-selection process. Even where tentative decisions are made before selection, a critical early component of a monitorship is determining whether additional expertise is needed. On this point, the initial phases of the monitorship – understanding the agreement, meeting with the parties about their expectations, and developing a detailed work plan – can reveal gaps in the monitor's team. For example, the parties may believe that the key areas for testing in an FCPA monitorship are financial controls, rather than legal issues or training. The former may be better addressed by an auditor, the latter by a lawyer.

The foundation of a great monitor team is no different from any high-functioning team – and similar to the ingredients of a successful compliance team in a company. The monitor needs to set the tone at the top. He or she will generally appoint a day-to-day lieutenant – or multiple lieutenants, if the monitorship is large in scope – to manage the team's work. There needs to be a clear understanding of what each member of the team is doing – both to ensure that the requisite tasks are performed and to avoid a team member feeling redundant in his or her role (a common problem when lawyers and non-lawyer professionals work together).

An often forgotten and critical component of the monitor 'team' can be compliance personnel at the monitored party. Although they must be viewed carefully given the monitor's role, the company's compliance team can be strong allies for the monitor (and vice versa).[11] Moreover, collaborating with in-house personnel can enhance and strengthen the in-house group; after all, when the monitor leaves, the in-house team will remain and may be the most important ingredient to sustained compliance by the company.

The work plan

Other than the monitor's reports, the most significant written document is the work plan, which sets out a road map for the monitorship. Some agreements specifically require a work plan;[12] it should be among the monitor's first tasks, even if not explicitly required by the agreement.[13] In general, all parties should agree on the work plan, although, in the event of disagreement, the monitor or the government usually resolves disputes.

The topics to be covered by an initial work plan will vary, but essential components almost certainly include:

- the monitor's tasks; and the methodologies or approaches that the monitor will use to evaluate compliance;
- access to information, including witness interviews;
- the monitor's approach to communicating issues or information; and
- addressing non-compliance and alleged misconduct.

The work plan will, however, evolve significantly over the course of the monitorship.

11 Some agreements specifically require the monitor to leverage, where possible, the work of the in-house compliance team (to reduce duplication and cost).

12 *EDMC* Consent Judgment Paragraph 35 (requiring EDMC, the state attorneys general and the settlement administrator to agree on a work plan within 60 days).

13 Increasingly, monitor applicants are asked to preview a work plan as part of the selection process.

Tasks and testing methodologies

Work plans can come in many forms, but most will include both a rough calendar for planned tasks, as well as a task-by-task discussion of how the monitor will approach testing compliance. For example, when will the monitor seek to complete specific testing? Will the monitor prioritise specific areas, delaying testing on others until later? How far in advance of a report must the monitor receive data or testing to include it in a report?

Most work plans will, whether in chart form or otherwise, break down specific tasks, explain the intended means for examining compliance with the relevant provisions, highlight information that may be required and identify open issues for discussion. The work plan should address the following kinds of questions:

- What kinds of documents will be requested?
- What systems will need to be accessed?
- Is this a policy or procedure review, or one that is focused on outcomes?
- Will sampling be used – and if so, what are the broad outlines of the sampling protocol?[14]
- Are interviews contemplated and, if so, what purpose will they serve?
- Are there thresholds for materiality with respect to potential non-compliance?

Once a work plan is adopted, there will be a strong presumption that the monitor will employ those methodologies in evaluating compliance. But a monitor cannot accept a work plan that limits his or her ability to adjust if circumstances change. For example, a monitor who intends to use sampling to evaluate specific types of compliance must retain the discretion in appropriate circumstances – following disclosure and discussion – to expand the sample or abandon a sampling approach if the underlying assumptions of the sampling approach come into question.[15]

Access to information and interviews

Documents and information

In almost every circumstance, a monitor is entitled to non-privileged information possessed by the monitored party.[16] While there may be specific types of documents that the government and the monitored party might define as outside scope (e.g., the monitorship does not extend to activities in X country, and thus document requests related to those activities would

14 For monitorships that require detailed review of specific transactions, such as the *National Mortgage Settlement* and the *RMBS* monitorships imposing consumer relief obligations, individual and detailed testing plans may be required for each specific type of relief (i.e., what information is required – and how shall it be evidenced – to earn credit for a specific type of consumer relief).

15 See Citi Monitorship Ninth Report at 7-16 (November 2018).

16 One common issue is whether the monitor has access to privileged material. Arguably, because the monitor has been engaged by the monitored party, disclosure to the monitor (with a limit on further disclosure) would not waive privilege. But, because compelling a party to disclose privilege is so disfavoured, most monitors take the view that they do not have access to privileged material unless that was clearly anticipated by the government and the monitored party when the agreement was signed. Compare Deferred Prosecution Agreement, *United States v. Panasonics Aviation Corp.*, Case No. 1:18-cr-00118-RBW, Att. D Paragraphs 5–6 (DDC 30 April 2018) (allowing company to assert privilege, but referring disputes to the Department of Justice) (*Panasonics Aviation* DPA) with *EDMC* Consent Judgment, Paragraph 40 (prohibiting the settlement administrator from obtaining privileged material).

be inappropriate), absent such agreement, the work plan must contemplate that the monitor gets any documents that he or she needs to complete the work.

Monitored parties will often complain that a monitor's demands are unduly burdensome. On this point, the monitored party may have limited recourse. It is better practice for a monitor, however, to approach testing compliance not like a civil litigant demanding massive amounts of email with metadata. Rather, the monitor should focus on what is required to reasonably ensure compliance. In some cases, that may be a substantial email review, but in most cases it will not.

The rationale for focusing the monitor's resources is directly related to the outcomes the monitor is seeking to achieve. The goal of any monitorship is to have the company be better able to comply at the end of the monitorship. No company can, on an ongoing basis, deploy a 'boil the ocean' approach to compliance; it will have to implement controls, make reasonable choices, invest sufficiently (but not without limit), and foster a culture of compliance. To help a company implement a sustained commitment to compliance, the monitor needs to demonstrate that it can be performed with reasonable investments that can be made on an ongoing basis.

Recordings

Call recording systems are a critical tool for compliance teams at companies that communicate with numerous consumers by phone. Although there have been few monitorships that directly touch on consumer interactions, those that have – principally the state attorney general consent judgments with for-profit education institutions[17] – have required call recordings of interactions between company personnel and consumers as the centrepiece of the agreement.[18]

A combination of random listening and targeting listening based on key-word searches will almost always be the best approach. The latter requires implementation of transcription or other search capabilities that will increase costs for the monitored party. For companies that do significant business with consumers by phone and have had an agreement imposed on them because of allegations of misrepresentation, this sort of transcription or search capability is absolutely essential. Without it, given the volume of calls, it is impossible for the compliance team or the monitor to identify patterns of misleading statements. Defining search terms is a challenging and evolving process over the life of a monitorship.[19]

17 See, e.g., *EDMC* Consent Judgment Paragraph 40(b).

18 Another aspect of the compliance toolbox is mystery shopping – whether via phone, in person or electronically. Mystery shopping involves an individual posing as a consumer and testing whether appropriate and accurate information is being provided by company personnel. Many companies already employ mystery shopping as part of their compliance approach. Owing to cost, mystery shopping will rarely provide a statistically significant sample for evaluating compliance, but it can identify issues for further review or additional training.

19 A company that only uses targeted listening will fail to identify new or unexpected issues for which planned search terms are inadequate. The experience of random call listening can inform future search terms and sharpen the monitor's focus.

Interviews

Interviews can be a source of contention in a monitorship. Some agreements specify clearly the monitor's access to all personnel.[20] But even those agreements may not specify whether the monitor may compel any employee to be interviewed without company counsel present. From the company's perspective, the monitor, although independent, is viewed as an arm of the government; compelled interviews without counsel smacks of government overreach, particularly if potential consequences are severe (i.e., revocation of the DPA or imposition of criminal penalties). From the monitor's perspective, however, having company counsel present may be perceived as a means of obstruction.

In most cases, both sides work in good faith to set ground rules at the outset; a discussion about monitor access to employees will be far more heated if the first time it arises is in the context of specific allegations of non-compliance. There is no single approach that has been adopted by all monitors. Some have insisted on the absolute right to interview without company counsel present, even if, in most circumstances, the monitor does not exercise that right. Other monitors have agreed that company counsel can participate in interviews of current company employees. Another approach could give the monitor some latitude to talk to employees without counsel present in settings where compulsion is not apparent – tours of facilities, focus groups, voluntary interactions of different kinds – but permit company counsel's participation where an interview is compelled or when senior officials are the subject of the interview.

Whistleblowers, former employees and customers present special cases. A monitor must preserve the ability to speak with whistleblowers (broadly construed to include any employee who voluntarily seeks out the monitor) without notice to or the presence of company counsel. The same is often true about former employees; the parties may agree in the work plan to a required disclosure so that former employees understand the terms of their interaction with the monitor team (e.g., voluntary, encouraged or requested by the company, subject to the former employee's separation agreement, or required by the agreement).

Customers of the monitored party present a much more complex problem. Unless they have affirmatively reached out to the monitor, it feels invasive for a monitor to use personal information obtained from the company's files to approach a customer. Although it may be appropriate in some circumstances – for example, if the customer is a large company represented by counsel – it will rarely be appropriate when the customer is an individual consumer.

That is not to say that monitors cannot find some means to get relevant information from customers. Monitors and the monitored party may be able to obtain feedback from consumers – for example, by requesting volunteers in a communication from the company to consumers or using voluntary focus groups to which the monitor has access.

Communication of issues, including disputes

The cadence of every monitorship is different, but a work plan will usually establish regular communication between the monitor's team and the monitored party (as well as the

20 See, e.g., *EDMC* Consent Judgment Paragraph 40(s) (requiring 'reasonable access' for the settlement administrator to current and former employees).

government). A regular weekly status call is a common approach. These calls or meetings will be more or less frequent at different phases of the monitorship.

A work plan should also set forth expectations for how the parties will handle issues of non-compliance and disputes. Except in unusual circumstances, a monitor should identify issues of material non-compliance to the monitored party prior to publishing a report of such non-compliance. The monitored party should have the opportunity to address the issue, so that, in a report, the non-compliance is addressed with its solution or, at a minimum, a plan to address it. While not always possible, such an approach is most consistent with the goals of a monitorship – sustained compliance.

Some agreements have explicit provisions for how material non-compliance will be addressed – identification, validation, formation of a corrective action plan, evaluation of completion of such plan.[21] Even where not specifically addressed, that approach will often be the best way to deal with such issues. In any event, however, unless specifically limited by the agreement, the government will generally have the option of looking at reported non-compliance – even if subsequently addressed through a corrective action plan or other means – and determining whether it triggers consequences under the agreement.

Findings and new obligations

Although the agreement defines the monitored party's obligations, over the course of a monitorship, new obligations may be imposed – as a result of a negotiation between the parties, clarification of the agreement, or non-compliance, requiring a corrective action.[22] The work plan should set forth – at least in general terms – how the parties deal with these eventualities.

New obligations that were not part of the original agreement may be difficult to enforce. For that reason, it is critical for the parties to specify, in writing, any new or different obligations that go beyond or alter the terms of the agreement. The corrective action plan requirement in some agreements attempts to fulfil this goal. Where, however, the parties have not agreed in writing such obligations additional to the agreement, there is a significant risk of dispute about actions the monitored party is required to take.

Other types of misconduct

A monitor's job is limited by the scope of the agreement. Given the nature of the monitor's role, it is not uncommon for the monitor to become aware of misconduct, including violations of law that are not the subject of the agreement. Many agreements specify the monitor's obligations for addressing violations of the agreement itself,[23] but they frequently do not address misconduct that is outside the monitor's scope.

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21 *EDMC* Consent Judgment Paragraph 116(a) (requiring negotiation of a corrective action plan in the event of a pattern or practice of non-compliance); id., Paragraph 116(b) (directing settlement administrator to report to state Attorneys General on corrective action plan).

22 In some circumstances, the agreement itself will require the monitor to make recommendations, which must be implemented by the monitored party. *Panasonics Aviation* DPA Att. D Paragraph 14. Such agreements will also set forth how compliance with these recommendations is to be evaluated.

23 Agreements such as DPAs or NPAs generally define the monitor's role in reporting information directly to the government. *GM* DPA Paragraph 15(f)(4) ('If potentially illegal or unethical conduct is reported to the Monitor, the Monitor may, at his or her option, conduct an investigation, and/or refer the matter to the

In most circumstances, the monitor should not undertake a new investigation of information outside the scope of the monitorship. In the case of a whistleblower, the best course may be to facilitate communication by the whistleblower to the relevant government agency. In other circumstances (such as information uncovered from documents or interviews), the monitor will need to evaluate what course to take. One approach is to provide the relevant information to the monitored party to allow the monitored party to investigate and address where necessary. This approach can be coupled with an implicit or explicit threat that, if the monitored party does not disclose to the government, the monitor will do so. Alternatively, the monitor can identify the potentially unlawful conduct to both the government and the monitored party, which may result either in an internal investigation by the company, an investigation by the appropriate government agency, or expanded scope (by agreement) for the monitor to investigate and address the allegations of misconduct. Although these approaches, which give the company an opportunity to address alleged misconduct, are common, the monitor always must retain the discretion – whether required by the agreement or not – to report apparent violations of law immediately to the government.

Reporting

As the product of most monitorships, reports are the primary way in which the government evaluates whether the monitor was effective, the monitored party assesses whether the monitor has been fair and the public understands what the monitorship has accomplished.

Report-writing is an incredibly resource-intensive aspect of a monitorship. Many monitors have a separate team solely dedicated to reports. As a number of monitors have noted, if the government and the monitored party understood how much effort went into reports, they would likely request fewer. For the company, more reports adds significantly more cost.

This section focuses primarily on the first and last report; many of the interim and ongoing reports will follow a template set with the first report and can be more formulaic.

First report

The first report differs from those that follow because it will often not focus on ongoing compliance. Rather, the first report will discuss the state of the company at the commencement of the monitorship (its structure, steps taken before the monitorship, etc.) and the methodologies the monitor will undertake to review compliance. In many cases, the first report is a less detailed version of the work plan.

The first report will often provide a schedule for the monitor's ongoing work. For example, if the monitor intends to focus on specific issues in the first year, but transition to other issues in subsequent years, that can be explained to set expectations. In some cases, the first report will provide a high-level overview of the monitor's initial impressions, but monitors should be wary about drawing or suggesting any early conclusions. It will often be six months to a year (or even longer) before a monitor can make reasonable judgements about the monitored party's approach to compliance – and even those assessments are provisional.

[government]. The Monitor should, at his or her option, refer any potentially illegal or unethical conduct to GM's compliance office.')

Final report and conclusion of the monitorship

A number of dynamics come into play in the last year of a monitorship. Company responsiveness can decline; monitored parties have been known to try to 'wait out' the monitor. In that final year, the monitor must ensure that backsliding is not occurring.

The final report provides an opportunity to look both backwards and forwards – how far the company has come over the course of the monitorship, the challenges that remain, long-term issues the company will need to address and additional steps the company should take on the road to sustained compliance. The final report is also an opportunity to look at the agreement itself and note what worked. Although an argument can be made that such commentary is outside the scope of the monitorship, it is valuable to the government, the courts and the public to learn from the experiences of individual monitorships. Reports are the best way for these lessons to be passed on.

3

The Foreign Corrupt Practices Act

Nicholas S Goldin and Mark J Stein[1]

When resolving alleged violations of the Foreign Corrupt Practices Act (FCPA), US authorities have a range of options available to them. In addition to the standard consequences for violation of US laws, including penalties, disgorgement and imprisonment of individuals, US authorities also may require a company to appoint an independent FCPA compliance monitor. The monitor, who may not have any material connection to the company, its executives or its directors, is charged with objectively evaluating the company's compliance with the FCPA and its measures in place to mitigate corruption risk. An effective monitor also will indirectly assist companies with developing and implementing effective compliance programmes by providing an outsider's assessment of the programme and making actionable recommendations for improvements.

US authorities have required the appointment of monitors as part of the resolution of FCPA investigations involving a range of alleged forms of foreign bribery. The frequency of FCPA monitorships, however, has changed over time, and the number of FCPA settlements that have included a monitor has dropped significantly in recent years. Based on recent developments, including growing debate about the value proposition of monitorships and new US government policies, some practitioners expect the number of FCPA monitors to continue dropping, at least under today's US enforcement regime.

This chapter focuses on the role of an independent compliance monitor appointed as part of an FCPA settlement. Set forth below is a brief overview of trends in FCPA enforcement actions; a discussion of the distinguishing features of FCPA monitorships, including most notably their inherently broad, cross-border nature; and approaches for conducting efficient and successful monitorships, particularly in light of these unique aspects. Finally, this chapter

1 Nicholas S Goldin and Mark J Stein, both former US federal prosecutors, are partners in the New York office of Simpson Thacher & Bartlett. The authors would like to thank Kristina Green of Simpson Thacher for providing invaluable assistance in the preparation of this chapter based on her work on FCPA monitorships.

discusses the future of FCPA monitorships in light of current enforcement trends and recent FCPA guidance issued by the US Department of Justice (DOJ).

Overview of the FCPA

The US Congress enacted the FCPA[2] in 1977 to address concerns about widespread bribery of foreign officials by US companies.[3] The DOJ is commissioned with investigating and prosecuting criminal violations of the anti-bribery and accounting provisions of the FCPA, and the SEC is commissioned with civil enforcement of these provisions. After relatively modest enforcement levels for many years, enforcement activity increased steadily through the 2000s and peaked in 2016.[4]

The FCPA has extraterritorial reach, and US authorities may pursue violations against non-US entities based on alleged corruption that has only a limited nexus to the United States. In terms of the actual composition of defendants in FCPA cases, US-based entities and individuals have been involved in the majority of FCPA charges brought by the DOJ and the SEC. Nonetheless, in recent years, US enforcement agencies increasingly have pursued non-US companies for FCPA violations.

Distinguishing features of FCPA monitorships

While all US-style monitorships bear some similarities, FCPA monitorships are unique in a number of important respects, including the scope of the issues to be reviewed; the geographic reach of the review; and the challenges that routinely confront both the company and the monitor in markets where common business practices may create risk under either the FCPA or US regulatory expectations more generally, or where ethical norms are more lenient than under the prevailing US governance and compliance standards.

Breadth of issues

Because corrupt payments may be processed, paid and concealed through a wide variety of mechanisms, FCPA monitorships generally require an assessment of a broad range of a company's policies, procedures and internal controls. In addition to evaluating the company's policies specifically addressing anti-corruption, the monitor should evaluate ancillary policies that mitigate the risk that corrupt payments will be made. These policies and procedures generally govern:

- charitable donations and sponsorships;
- gifts and free merchandise;
- use of cash;
- travel and entertainment reimbursement;
- licensing and other regulatory payments;

2 15 U.S.C. Sections 78m and 78dd-1 et seq.

3 US Dep't of Justice, Criminal Div. and US Securities and Exchange Commission, Enforcement Div., 'A Resource Guide to the U.S. Foreign Corrupt Practices Act' (14 November 2012), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf, at 2; S. Rep. No. 95-114, at 3-4 (1977), https://www.justice.gov/sites/def ault/files/criminal-fraud/legacy/2010/04/11/senaterpt-95-114.pdf.

4 Foreign Corrupt Practices Act Clearinghouse: 'DOJ and SEC FCPA Enforcement Actions Per Year', *Stan. L. Sch.*, http://fcpa.stanford.edu/statistics-analytics.html.

- payments to vendors and third parties;
- commissions or other service fees; and
- discounts and rebates.

In addition, an FCPA monitorship is multidimensional. Assessing the sufficiency of these policies at face value is an important first step. The FCPA monitor, however, will need to dig beneath the 'paper' dimension of the company's anti-corruption compliance programme to assess whether the programme is not only well designed but also effectively implemented. The monitor should evaluate whether employees, from the most senior executives to the lowest rank-and-file employees, understand and comply with the policies, procedures and controls. One of the most effective ways to make this assessment is through interviews in person with employees at various levels of seniority.

Another dimension of an anti-corruption compliance monitorship is assessing the company's overall compliance culture and commitment to ethical business conduct (see Chapter 1). While this is an unavoidably amorphous concept, and no two companies are the same, a company's commitment to lawful business practices may be measured indirectly through several criteria, including:

- the 'tone at the top' – or efforts by senior management to promote compliance, including compliance-related messaging;
- distribution and accessibility of compliance-related policies and procedures;
- the scope and effectiveness of training, including attendance rates and the substantive content;
- the availability and use by employees of ethics 'hotlines' and other channels for reporting suspected misconduct, and the company's efforts to publicise these channels to employees;
- the willingness of employees to report misconduct over a fear of retaliation;
- the company's willingness and capacity to investigate alleged wrongdoing, discipline wrongdoers, and remediate deficiencies; and
- the company's ongoing internal efforts to monitor anti-corruption compliance, such as internal audits.

Finally, in light of the accounting provisions of the FCPA, depending on the scope of the monitorship as agreed with US authorities, the monitor also may need to evaluate the accuracy of the company's books and records, and related internal accounting controls.

Geographic scope

FCPA monitorships are almost always cross-border in nature, even when the charges that led to the monitorship only involve deficiencies in internal controls. Therefore, in addition to evaluating the company's enterprise-wide compliance measures, a monitor should assess compliance measures in markets outside the United States. While there are different ways to approach this more granular review, it is often not practical to conduct testing procedures in every one of the markets around the world where a company conducts business.

As a result, the selection of markets for review is a critically important step in the monitorship process. If FCPA violations are known to have occurred in a particular location, then the monitor should usually include that market in the scope of its review. At the same time, a robust review will typically need to extend beyond the markets that were the subject of the

settlement with the US authorities. Perhaps unsurprisingly, this selection of markets for close inspection can present a challenge to a monitor striving to balance the breadth of the review with the need to complete the work both within a prescribed period of time, and with minimal disruption and cost to the company.

In deciding which markets to inspect, the FCPA monitor typically considers a range of factors, including where corruption-related misconduct is known to have occurred; the perceived corruption risk (based on public reports such as Transparency International's Corruption Perceptions Index, and the company's own internal risk assessments that are based on historical compliance violations and audit findings); where the nature and scope of the company's business creates heightened corruption risk; and, if possible, a diversity of markets in terms of revenue generation and location.

Once a group of markets has been selected, the monitor will conduct an in-depth review in those locations. Based on what the monitor learns during these in-country assessments, it will be positioned to make informed decisions about any additional markets worth visiting, and also may be able to draw broader conclusions about the overall effectiveness of the compliance programme. In addition, the monitor should be able to formulate practical recommendations for enhancements to the programme informed by patterns and trends that emerge across markets, as well as by deficiencies identified in one particular market that reflect a broader, enterprise-wide weakness.

Effective practices for conducting FCPA monitorships

FCPA monitorships are generally guided by the specific requirements of the agreement between the company and the US government agency imposing the monitorship, including the subject-matter scope; and general guidance issued by the US government concerning effective anti-corruption compliance programmes.

In the course of its preliminary work, including through an introductory overview provided by the company (discussed below), the monitor should identify the company's key risk areas, including its touchpoints with non-US government officials, the frequency of those touchpoints and the employees engaged in those interactions, and the maturity of the compliance programme. The monitor then should develop a written work plan that details the monitor's plans for evaluating whether the company's compliance programme is both adequately designed on paper to identify, mitigate and respond to corruption risk, and effectively understood by employees and implemented in practice.

Procedures commonly incorporated into monitorships

Document review

The monitor should review the company's prior risk assessments, policies, procedures, training materials, organisational charts, compliance committee materials, relevant investigative, audit and monitoring reports, reports of wrongdoing, and relevant compliance-related communications.

Interviews

The monitor should conduct interviews with employees from relevant functional groups, various regions, and different levels of seniority within the company. Attention should be

paid to the order of these interviews, as it often makes sense to begin with corporate-level executives who can provide high-level perspectives on how the compliance programme operates and its key challenges, followed by interviews of relevant lower-level personnel in the markets. Before arriving in-country for field work, the monitor should consider speaking with relevant senior personnel from that country to obtain a preliminary understanding of how business is conducted in the market. This approach will help improve the efficiency of sometimes limited time on-site by ensuring that the work is appropriately focused on the relevant issues and employees.

Forensic transaction testing

An important tool for evaluating whether policies and procedures have been effectively implemented is forensic transaction testing, which typically requires the services of an experienced, independent forensic accountant. By selecting a sample of transactions based on indicia of potential red flags (such as unusual payments to third-parties or to government agencies), and then reviewing whether the selected transactions were executed in compliance with the company's applicable policies and controls, the monitor is able to identify policies that might warrant clarification or revision, either because they are not sufficiently understood by employees or otherwise are not effective in achieving their objective.

Hotline testing

The monitor must ensure that the available channels of reporting – such as ethics hotlines that operate independently of personnel in local markets – are functioning properly. To do this, in addition to reviewing the record of the company's handling of prior reports, the monitor should consider testing of the hotline in real time by submitting (with advance notice to a limited number of personnel at the company) mock reports in various languages and involving a range of alleged misconduct, and then tracking the company's response.

Aspects of the company's compliance programme a monitor should evaluate

Policies, procedures and controls

The monitor should evaluate the substantive sufficiency of policies, procedures and controls designed to mitigate corruption. These typically include the company's general anti-corruption policy as well as any policies and procedures governing the company's interactions with non-US government officials; the onboarding and use of third parties; entertaining, hosting and reimbursement of related expenses; use of cash; gifts; sponsorships and charitable contributions; marketing; and promotional products. In addition, the monitor should consider whether the policies are sufficiently clear, understood by employees and practical.

Tone at the top

While a company's 'tone at the top' is an amorphous concept, and different companies have different ways of approaching this issue, the monitor should review the extent and substance of any compliance messaging by the board and leadership at the corporate and market levels. In addition, interviews with employees at various levels of the company may provide insight into whether the company's commitment to compliance has cascaded down to the rank and file.

Resources and autonomy

The monitor should assess whether the company has sufficient resources allocated to anti-corruption compliance, including budget, headcount and subject-matter expertise; whether these resources are appropriately assigned based on the risk profile of the regions where the company operates; whether the compliance function has sufficient independence from senior leadership; and how the compliance function reports to the company's board of directors.

Training

The monitor should review compliance-related training materials; evaluate the frequency, format and substantive scope of the training; speak with employees about the effectiveness of the training; determine whether the company tracks employees' attendance at training sessions; and consider attending a training session.

Use of third parties

Because vendors, sales agents and other third parties used by companies often present heightened corruption risk, the monitor should evaluate the design and implementation of any policies, procedures, and controls governing the onboarding and use of third parties, including the process for selecting third parties, conducting due diligence, the representations and rights included in contractual agreements with third parties (such as anti-corruption representations and audit rights), and the controls for payments to and from third parties. In this regard, it can be valuable to conduct forensic testing on a sample of third parties to assess whether they have been properly onboarded and documented in compliance with the company's applicable policies and controls, and whether payments complied with company policy.

Reporting, investigations and discipline

The monitor should evaluate the adequacy of the company's reporting channels and investigative processes. This assessment should include a review of available reporting channels (including the availability of anonymous reporting); the company's efforts to encourage employees to 'speak-up' about suspected misconduct; and whether employees are not only aware of the reporting channels but are both comfortable reporting and believe that the company will take appropriate action in response to reports. The monitor also should inquire about the company's efforts to prohibit retaliation against employees who report suspected misconduct. Relatedly, it should explore whether the company's resources and processes for investigating complaints and disciplining employees for substantiated misconduct are sufficiently robust. Finally, the monitor may examine whether the company's employee performance review process and related compensation decisions assign appropriate weight to an employee's compliance with anti-corruption policies and procedures.

Self-monitoring

The monitor should evaluate the company's internal audits and compliance monitoring programmes to determine whether the company has appropriate standing measures in place to self-identify and mitigate corruption risks and incidents of non-compliance.

Mergers and acquisitions

The monitor should evaluate the company's policies concerning transactional due diligence on potential acquisition targets and joint venture partners, and whether this diligence includes an anti-corruption risk assessment.

Noteworthy considerations in FCPA monitorships

While there is an inherent tension given the nature of the oversight work that the monitor is charged with conducting, it is incumbent on both the monitor and the company to develop a collaborative, respectful working relationship from the outset. Some noteworthy aspects of FCPA monitorships that bear on this dynamic are described below.

Noteworthy considerations for the company

FCPA settlements often arise from conduct in regions of the world where business practices, ethical norms and government oversight are more lenient, or where anti-corruption compliance generally is viewed as less of a priority than in the United States. This raises several issues. In these markets, compliance with anti-corruption regulations of a foreign sovereign may not be fully incorporated into local corporate practices and culture. Employees and third parties that act on the company's behalf may not appreciate the scope of the FCPA and how its requirements impact what may be routine but problematic business practices. And, in any event, personnel might struggle to conform their conduct to US regulatory requirements and expectations in the face of the practical commercial realities of doing business in regions where standards of business conduct are less restrictive than in the United States. Non-US personnel also may be inherently suspicious of an independent monitor reporting to US authorities. Finally, personnel may be reluctant to report suspected violations to their companies owing to a fear of retaliation or a more generalised but not uncommon social stigma associated with whistleblowing. These cultural circumstances are often more acute in remote markets that have fewer compliance resources, confront language barriers, and generally fall outside the field of vision of the company's corporate compliance centre.

While the company's headquarters may understand, or at least accept, the appointment of a monitor and perhaps may even embrace the monitor with a collaborative spirit, company leadership must work to ensure that support of the monitor cascades to employees abroad. In this regard, the company should educate and sensitise employees to the concept of the monitorship, including, for example, through information sessions for employees who will interact with the monitor.

Another challenge confronting monitored companies is time and resource management. The inherently international nature and substantive scope of FCPA monitorships make them especially vulnerable to significant costs, in terms of both the monitor's professional fees and management distraction. It is, therefore, important for companies early in the negotiating process with the US authorities to explore ways to limit the scope of the monitor's mandate to issues that correlate closely to the underlying alleged misconduct. For example, for a settlement based on bribes paid by third-party vendors, the company might seek to limit the monitorship to a targeted review of policies, procedures and controls relating to the use of third parties.

In terms of managing the monitorship efficiently, one effective approach is for the company, at the outset, to present the monitor with a description of the conduct underlying its FCPA settlement as well as an overview of its business operations, key components of its compliance programme, its primary risk areas, and relevant findings from internal investigations and internal audits. With the benefit of this background, the monitor should be better equipped to immediately focus on the core issues and avoid fact-gathering on foundational issues. During the course of the monitorship, the company should strive for an open dialogue with the monitor with respect to the monitor's work plan, highlighting proposed areas for review that are inconsequential, present limited risk or exceed the monitor's mandate. The company also should work with the monitor to avoid scheduling responses to information and document requests, interviews and in-country reviews at times of year that conflict with essential business functions, such as financial close periods.

Finally, the company should ask to review drafts of the monitor's reports to address factual inaccuracies and to discuss the feasibility and sustainability of the monitor's recommendations for remedial measures, particularly given the diverse markets in which the company might operate. With guidance from the company, the monitor might recast proposed remedial measures in a less burdensome and more practical fashion while still addressing the perceived deficiencies and without sacrificing its objectivity and independence.

Noteworthy considerations for the monitor

As discussed above, when assessing the design and implementation of an anti-corruption programme, monitors need to understand the specific corruption risks facing the company and how the compliance programme mitigates these risks.[5] At the same time, just as a compliance programme always could include more policies, more controls and more resources, a monitor always could take more steps and perform more testing. A monitor that dives into an assessment without fully understanding the unique risk profile and business needs of the company, therefore, is more likely to become sidetracked at the outset with issues that, while in theory might seem important to a compliance programme, are less important given the profile and history of the monitored company. A company's risk profile may be evaluated based on its industry and commercial sector; its use of agents and other third parties; its interactions with non-US government agencies and officials; its compliance history; and the perceived corruption risk of the markets in which it operates.

While the monitor must maintain objectivity and independence, the monitor should leverage the company's experience and existing risk assessment mechanisms to ensure an efficient, streamlined evaluation. Perhaps unsurprisingly, the company's senior leadership is often the best and most accessible source of information on the company's business practices and risk profile – or at least the best starting point for understanding these issues.

In addition, the monitor should be mindful of how it interacts with non-US employees, including the tone and body language of the monitor's team. Other steps for maximising the success and efficiency of the monitor's work include:

5 It is beyond the scope of this chapter, but a wealth of available literature addresses designing a risk-based compliance programme to meet the unique risk profile of a company.

- developing open communication channels with the company for sharing updates and information;
- seeking the company's input on draft work plans (including witness interview lists and countries proposed for in-market scrutiny), accuracy of factual findings and proposed recommendations for remedial measures;
- adjusting work schedules to accommodate the company's ongoing business, including avoiding deadlines around periods when relevant personnel are likely to be distracted; and
- maintaining sensitivity to the feasibility and sustainability of remedial measures, and being receptive to constructive, valid criticism from the company.

Finally, in the most practical terms, a monitor is granted broad discretion to decide how to carry out its mandate, and given the broad scope of issues involved in FCPA monitorships, it is the monitor's responsibility to continuously revisit its work plan and ensure that its procedures and scope are appropriate for the risk profile of the company. The monitor should guard against 'scope creep' by evaluating whether it is pursuing issues or undertaking procedures that, on balance, have limited value or fall outside its mandate. This is not necessarily straightforward or easy, as deciding, for example, how many countries to include for field work or to how many employees to interview often comes down the exercise of good judgement. As a result, rigorous self-regulation by the monitor is critical to ensuring an efficient, balanced and successful monitorship.

Looking ahead: the future of FCPA monitorships

In the wake of debate about the sometimes exorbitant costs of monitorships, there has been increasing dialogue in the United States about the cost–benefit ratio of independent monitors. In addition to the obvious out-of-pocket expenses, critics have pointed to the disruptive impact of monitorships on ongoing business activities, monitorships that have seemingly expanded beyond their original scope into broad investigatory exercises, and the relative long-term benefits to the company.

Perhaps in recognition of these concerns, FCPA settlements have include independent monitorships with decreasing frequency. In 2018, the number of companies resolving FCPA charges that were assigned a monitor had dropped significantly from just a few years earlier. While it may be too soon to conclude that this trend reflects a long-term shift, in October 2018, DOJ issued new, more rigorous standards for determining whether to include a monitorship as part of a corporate criminal resolution. As demonstrated by the following passage from this guidance, DOJ appears to have signalled a move away from monitorships:

> *In general, the Criminal Division should favor the imposition of a monitor only where there is a demonstrated need for, and clear benefit to be derived from, a monitorship relative to the projected costs and burdens. Where a corporation's compliance program and controls are demonstrated to be effective and appropriately resourced at the time of resolution, a monitor will likely not be necessary.*[6]

6 Memorandum from Brian Benczkowski on Selection of Monitors in Criminal Division Matters to All Criminal Division Personnel of the U.S. Dep't of Justice, Criminal Div. (October 11 2018), https://www.justice.gov/opa/speech/file/1100531/download, at 2.

In terms of when to impose a monitor, this guidance states that the DOJ will weigh the benefit of a monitorship against the potential costs, including the impact on the company's operations. The guidance articulates the following specific factors that will bear on this assessment:

- whether the misconduct occurred under different corporate leadership or in a different compliance environment;
- whether the underlying misconduct involved the manipulation of corporate books and records or the exploitation of an inadequate compliance programme or internal controls;
- whether the misconduct at issue was pervasive across the company or approved or facilitated by senior management;
- the adequacy of remedial measures or corrective actions implemented by the company to prevent or detect similar misconduct;
- whether the company has made significant improvements to its compliance programme and internal controls;
- the unique risks and compliance challenges faced by the company; and
- the projected expense of a monitor.[7]

In addition, this guidance states that, when DOJ does require a monitor, the 'scope of any monitorship should be appropriately tailored to address the specific issues and concerns that created the need for the monitor'.[8] Importantly, this guidance does not apply to the SEC (see Chapter 4), which has independent authority to impose monitors as a condition of civil FCPA settlements.

7 id.

8 id.

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The Securities and Exchange Commission

Alex Lipman and Ashley Baynham[1]

In enforcement matters, the US Securities and Exchange Commission (SEC) routinely requires companies, broker dealers, investment advisers and others to engage a monitor where there is a concern that a defendant organisation does not have effective internal compliance programmes or internal control systems to prevent the recurrence of the misconduct identified in the government investigation. A compliance monitor is, therefore, appointed as 'an independent third party who assesses and monitors a company's adherence to the compliance requirements of an agreement that was designed to reduce the risk of recurrence of the company's misconduct'.[2]

Most of the information about how the SEC uses monitors and when it thinks a monitor may be appropriate can be gleaned from the various settlements of its enforcement actions involving corporate entities.[3] In addition, the SEC and the US Department of Justice's (DOJ) joint guidance on enforcement of the Foreign Corrupt Practices Act (FCPA) provides the most explicit general guidance on the SEC's use of monitors and, in particular, which factors favour the imposition of monitorship.[4] Because, from the SEC's perspective, the FCPA is a books-and-records violation and – relatedly, to the extent that hidden bribes distort reported results and affect a company's reported prospects and risks – a predicate of anti-fraud violations, the Resource Guide has wide application to most of the SEC's enforcement cases.[5]

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1 Alex Lipman and Ashley Baynham are partners at Brown Rudnick LLP. The authors would like to thank Elliot Weingarten, an associate at Brown Rudnick, for his assistance in researching and drafting this chapter.

2 DOJ Criminal Division and SEC Enforcement Division, A Resource Guide to the U.S. Foreign Corrupt Practices Act 71 (2012), www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf (Resource Guide).

3 Most often monitors are imposed as part of a settlement agreement. In fact, the majority of SEC enforcement actions not involving delinquent filing settle before litigation is ever filed by the SEC. See, e.g., David Rosenfeld, 'Admissions in SEC Enforcement Cases: The Revolution That Wasn't', 103 *Iowa L. Rev.* 113, 137 (2017).

4 Resource Guide, *supra* note 1.

5 See 15 U.S.C. Section 78m(b).

Generally, the SEC, like the DOJ, will seek to tailor the scope and duration of a monitorship to the nature of the violation, the quality and reliability of management, the resources of the defendant, and any other factors bearing on the likelihood of recurrence.[6] Although monitorships can be very expensive and intrusive, they offer several benefits, including, when they can be narrowly tailored, allowing a company to reduce the severity of penalties and collateral effects of an enforcement action. They can also provide the impetus, where necessary, for reforming a recalcitrant bureaucracy, and they can foster a culture and record of compliance that could help address any future violations of law should compliance programmes fail again.[7]

This chapter will focus on the SEC's use of monitors, focusing on the statutory authority for monitorships, historical use and analysis of prior monitors, and specific guidance issued by the DOJ regarding monitorships.

Statutory authority for monitors

The SEC has sought the imposition of corporate monitors or 'review persons' since at least 1980 in civil enforcement cases in federal courts by invoking the federal courts' power to order 'ancillary relief' attendant to statutory authorisation for courts to enjoin defendants from violating the federal securities laws in the future.[8] At the time, there was no explicit authorisation for federal courts to order any such ancillary relief, but courts fairly uniformly had held that because Congress granted them the power to impose injunctions, they could rely on their general equitable powers to impose other remedies, such as monitorships, to ensure compliance with their injunction orders.[9]

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6 See Resource Guide, *supra* note 1, at 71–72 (outlining the factors that the DOJ and SEC consider in determining whether a monitor is appropriate).

7 e.g., id.; Acting Deputy Attorney General of the United States, Memorandum re Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (7 March 2008), https://www.justice.gov/sites/default/files/dag/legacy/2008/03/20/morford-useofmonitorsmemo-03072008.pdf (the Morford Memorandum); Assistant Attorney General of the United States, Memorandum re Selection of Monitors in Criminal Division Matters (11 October 2018), https://www.justice.gov/opa/speech/file/1100531/download (the Benczkowski Memorandum).

8 See Securities Exchange Act, 15 U.S.C. Section 78u(d)(1) ('Whenever it shall appear to the Commission that a person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter . . . it may in its discretion bring an action . . . to enjoin such acts or practices'); Securities Act, 15 U.S.C. Section 77t(b) (similar); Investment Advisers Act, 15 U.S.C. Section 80b-9(d) (similar); Investment Company Act, 15 U.S.C. Section 80a-41(d) (similar); see also George W Dent, Ancillary Relief in Federal Securities Law: A Study in Federal Remedies, 67 *Minn. L. Rev.* 865, 869–72 (1983) ('The most persuasive argument for ancillary relief in federal securities law is that the Supreme Court and many lower courts have approved such relief and that almost no judicial precedent has questioned it.'); see *SEC v. Page Airways, Inc*, 1980 WL 1390 (WDNY April 8 1980); SEC News Digest, Issue 80-71 at 3 (10 April 1980), https://www.sec.gov/news/digest/1980/dig041080.pdf (noting that in *SEC v. Page Airways, Inc*, the defendant agreed to 'undertake[] to internally investigate matters alleged in the Commission's complaint and retain a Review Person to evaluate the methods and procedures followed in this investigation').

9 e.g., *SEC v. G.C. George Securities, Inc*, 637 F.2d 685 n.2 (9th Cir. 1981) (quoting *SEC v. Wencke*, 622 F.2d 1363, 1368 (9th Cir. 1980) ('The federal courts have inherent equitable authority to issue a variety of 'ancillary relief' measures in actions brought by the SEC to enforce the federal securities laws'); see also Aulana L Peters, SEC Commissioner, Address to American Bar Association Annual Meeting, 'Ancillary Relief and Remedies: Does the SEC Need More Clout?' (13 August 1986), https://www.sec.gov/news/speech/1986/081386peters.

In 2002, Congress authorised the SEC to seek 'equitable relief' for the 'benefit of investors', ostensibly removing any need to rely on the court's inherent equitable powers to order monitorships.[10] Arguably, explicit Congressional authorisation to order equitable relief for the benefit of investors supplants and narrows courts' ability to use their equitable powers in aid of injunctions.[11] Equitable relief in the Supreme Court's jurisprudence has specific, narrowly defined contours: it must be the type of relief that was available to courts of equity at the time of the divided bench.[12] An equitable remedy may not, therefore, and most importantly for present purposes, be punitive.[13] A monitorship, it follows, must be narrowly tailored to facilitate injunctive relief and nothing more. Of course, as noted, most SEC monitorships are imposed by consent.[14] However, understanding the limits of equity jurisdiction may be helpful to counsel to negotiate the narrowest possible monitorship scope on the theory that a broader scope may be ruled to be punitive and unenforceable by a court.

Similarly in administrative proceedings, the SEC is empowered to order a respondent to cease and desist from violating the securities laws.[15] A cease-and-desist order may 'require future compliance or steps to effect future compliance, either permanently or for such period of time as the Commission may specify'.[16] The SEC interprets this provision as authorising imposition of monitors in administrative proceedings.[17] This provision may be read as giving the SEC the ability to impose broader-scope monitorships than those district courts may impose. Of course, these monitorships are also usually imposed by consent, but, here too, counsel may be able to argue that, as a matter of statutory authorisation, the scope and

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pdf (discussing various forms of ancillary relief, and noting that '[t]he Commission has also required the appointment of a special consultant to investigate a registrant's internal procedures and report his findings to it and the court.')

10 Sarbanes Oxley Act of 2002, 15 U.S.C. Section 78u(d)(5) ('In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.')

11 e.g., *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (finding that where Congress 'has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency', a federal court cannot order more stringent remedies).

12 See *Grupo Mexicano de Desarolla SA v. Alliance Bond Fund, Inc*, 527 U.S. 308, 318-19 (1999) ('[T]he equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789 (1 Stat. 73).' (quoting A Dobie, Handbook of Federal Jurisdiction and Procedure 660 (1928)); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993) (holding that the phrase 'other appropriate equitable relief' in 29 U.S.C. Section 1132(a)(3) refers to 'those categories of relief that were *typically* available in equity') (emphasis in original).

13 See *Tull v. United States*, 481 U.S. 412, 422 (1987) ('Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity.'); id. at 422 n.7 (explaining that a remedy that 'exacts punishment' is 'a kind of remedy available only in courts of law'.)

14 See generally, note 2, *supra*.

15 See 15 U.S.C. Section 77h-1(a); id. at Section 78u-3(a); id. at Section 80b-3(k)(1).

16 id. at Section 77h-1(a); see also id. at Section 78u-3(a) (same); id. at Section 80b-3(k)(1) (same).

17 Steven Peikin, Co-Director, SEC Division of Enforcement, Remedies and Relief in SEC Enforcement Action (3 October 2018) ('In practice, two of the most effective forms or equitable relief [available to the SEC in enforcement actions and administrative proceedings] are undertakings . . . and conduct based injunctions . . . With respect to undertakings, many require the settling party to retain a compliance consultant or monitor'), https://www.sec.gov/news/speech/speech-peikin-100318.

duration of the monitorship must be narrowly tailored to effect future compliance with the SEC's order and nothing more.

The SEC's use of monitors

Case study: the expansive power of the monitor in *WorldCom*

The current use of SEC monitors stems in part from the spectacular corporate failures of Enron and WorldCom. In fact, WorldCom's experience with monitorship – largely viewed as the first 'modern era' monitorship – influenced the nature of the monitorships that followed. As discussed below, the *WorldCom* monitor began with a limited role. However, it was expanded incrementally until he, ultimately, revamped the company's entire corporate governance structure.[18] That expansive role in *WorldCom* and in other matters has been the target of much criticism: observers have wondered to what extent a monitor, who is an agent of the court (or the SEC) rather than the shareholders, should be able to effectuate changes in corporate governance or dictate management decisions.[19] An overview of the *WorldCom* monitorship is thus instructive as background to more recent trends regarding when a monitor will be imposed and the scope of that monitor's review.

The SEC brought a civil enforcement action against WorldCom in 2002 alleging that WorldCom's managers fraudulently misstated the company's income by over $9 billion.[20] Among other remedies, the SEC requested that the court enter an order prohibiting document destruction and extraordinary payments to any present or former affiliate, or officer, director or employee of WorldCom.[21] The SEC then asked for the appointment of 'a corporate monitor to ensure compliance' with those two prohibitions.[22]

Shortly after the complaint was filed, the SEC and WorldCom entered into a stipulation agreeing to the appointment of a monitor with 'oversight responsibility with respect to all compensation paid by WorldCom'.[23] Judge Jed S Rakoff of the Southern District of New York granted the requested relief and the parties jointly selected Richard Breeden, a former SEC chairman, as the corporate monitor.[24] Despite the seemingly narrow scope of

18 Compare *SEC v. WorldCom, Inc*, Litigation Release No. 17594 (28 June 2002) (stipulating a monitor for 'oversight responsibility with respect to all compensation paid by WorldCom') with Opinion and Order, *SEC v. WorldCom, Inc*, No. 02-CV-4963 (SDNY 7 July 2003) ('Under the Corporate Monitor's watchful eye, the company has replaced its entire board of directors, hired a new and dynamic chief executive officer and begun recruiting other senior managers from without [sic], fired or accepted the resignation of every employee accused by either the board's own Special Investigation Committee or the Bankruptcy Examiner or having participated in the fraud, and terminated even those employees who, while not accused of personal misconduct, are alleged to have been insufficiently attentive in preventing the fraud.')

19 Jennifer O'Hare, 'The Use of the Corporate Monitor in SEC Enforcement Actions', 1 *Brooklyn J. Corp., Fin. & Com. L.* 89, 93(2006) ('Commentators have argued that the corporate governance reforms required by the SEC in its consent decrees can interfere with the effective management of a company.') See also id. at 102–108 (outlining 'potential dangers presented by the use of a corporate monitor' including 'de facto expansion of corporate monitor's power' and 'potential interference with management').

20 *SEC v. WorldCom, Inc*, Complaint, No. 02-CV-4963 (SDNY 26 June 2002).

21 See id. at 'Prayer for Relief'.

22 id.

23 See *SEC v. WorldCom, Inc*, Litigation Release No. 17594 (28 June 2002).

24 See Stipulation and Order, *SEC v. WorldCom, Inc*, No. 02-CV-4963 (SDNY 18 July 2002) ("The Corporate Monitor, Richard C. Breeden, is an agent of this Court with such oversight responsibilities as set forth in the

Mr Breeden's original appointment, his authority at the company quickly expanded. The potential for an expansion of his authority, in fact, was explicitly recognised by the court as necessary when Mr Breeden was first appointed.[25] Among other things, the court interpreted Mr Breeden's role to monitor 'compensation' as not only including payments to executives, but also including any payments to advisers and consultants, such as investment bankers and attorneys.[26] Then, after WorldCom filed for bankruptcy, Mr Breeden's access to information about WorldCom broadened. As a result of the bankruptcy, for example, the court explicitly allowed Mr Breeden to receive 'complete information about every aspect of the business he deems relevant to his assessments'.[27] Mr Breeden was then permitted by the court to attend all board meetings, to attend board committee meetings and to receive information about essentially anything he personally deemed necessary to his appointment.[28]

The SEC eventually entered into a consent decree or partial settlement with WorldCom in November 2002.[29] That decree further expanded Mr Breeden's role. The decree required him to review WorldCom's future corporate governance.[30] As one indication of his powers over the company, in the settlement, WorldCom stipulated that it would adopt Mr Breeden's recommendations before his report was even issued.[31]

Mr Breeden eventually prepared a full report based on his investigation, making 78 recommendations for WorldCom to implement.[32] Most of the proposals sought to increase shareholder participation and control of the company, while also limiting executive power and compensation.[33] Among other corporate governance changes, he recommended a new legal and ethics compliance programme to ensure an improved corporate culture.[34]

Court's Order dated June 28, 2002.')

25 *SEC v. WorldCom, Inc*, Memorandum Order, No. 02-CV-4963 (SDNY 1 August 2002) ('[T]he original Stipulation and Order of June 28, 2002 creating a monitorship provided that the Corporate Monitor, among other powers, was to exercise complete "oversight and responsibility with respect to all compensation . . ." The order broadly defined "compensation," and provided the Corporate Monitor with total "discretion to determine the type of compensation to review and either approve or disapprove".')

26 id. ('The Court's further order of July 15, 2002 was intended to make clear, if there were any doubt, that such oversight included, inter alia, approval or disapproval of any future payment or promise of payment to any outside professional or adviser such as an investment banker, a restructuring specialist, and the like . . .')

27 id.

28 id. ('The Corporate Monitor can hardly determine what is 'necessary to the operation of the business' if he is not provided with complete information about every aspect of the business he deems relevant to his assessments . . . the Corporate Monitor must be informed of, and invited to, any meetings or discussions between any Covered Party and the company or any of its outside advisers.')

29 See *SEC v. WorldCom, Inc*, Judgment of Permanent Injunction Against Defendant WorldCom, Inc, No. 02-CV-4963 (SDNY 26 November 2002); see also O'Hare, *supra* note 19, at 98–99.

30 id.

31 Memorandum Order, *SEC v. WorldCom, Inc*, No. 02-CV-4963 (SDNY 7 July 2003) ("The company has also consented to a permanent injunction authorizing the Corporate Monitor to undertake a complete overhaul of the company's corporate governance . . . [and] the company has committed in advance to adopt and adhere to all corporate governance and internal control recommendations made by the Corporate Monitor and the independent consultants').

32 Richard C Breeden, Restoring Trust: Report To The Hon. Jed S. Rakoff United States District Court For The Southern District Of New York On Corporate Governance For The Future Of MCI (August 2003).

33 id.

34 id.

In sum, Mr Breeden's activities at WorldCom were all-encompassing: they extended well beyond his initial charge to monitor 'compensation'. He was making high-level decisions about WorldCom's business.[35]

Guidance post-*WorldCom* has restrained and defined corporate monitors

While *WorldCom* acts as an initial case study into the modern era of corporate monitors, the recent trend and guidance, as discussed below, has been to more narrowly conscribe the role of monitors.

Since *WorldCom*, the SEC has sought the appointment of monitors in a broad spectrum of civil and administrative enforcement proceedings across various aspects of the securities laws. For example, monitors have been imposed to:

- review and correct an organisation's 'policies, procedures, and practices relating to issuance and transfer of securities' under the Securities Act;[36]
- monitor various due diligence and compliance requirements under the Investment Advisers Act;[37]
- review and recommend changes to an organisation's policies related to underwriting of municipal securities under the Securities Act;[38]
- review customer identification and anti-money laundering programmes under the Exchange Act;[39]
- assess the effectiveness of an organisation's policies and procedures to prevent FCPA violations;[40]
- review investment adviser fee disclosures under the Investment Advisers Act;[41] and
- correct procedures to prevent failures to supervise insider trading under the Investment Advisers Act.[42]

As noted, outside of the joint SEC/DOJ FCPA Resource Guide published in 2012, the SEC has not published any express general guidance setting forth when, as a general matter, it would seek to impose a monitor and what form such a monitorship would take. Nonetheless, as explained above the Resource Guide is instructive for most, if not all, SEC matters.

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35 *SEC v. WorldCom, Inc*, Memorandum Order, No. 02-CV-4963 (SDNY 7 July 2003).

36 e.g., *In re American Registrar & Transfer Company*, Exchange Act Release No. 77,922 (25 May 2016), https://www.sec.gov/litigation/admin/2016/33-10082.pdf.

37 e.g., *In re Apex Funds Services (US), Inc*, Advisers Act Release No. 4429 (6 June 2016), https://www.sec.gov/litigation/admin/2016/ia-4429.pdf.

38 e.g., *In re Barclays Capital Inc*, Exchange Act Release No. 77,018 (2 February 2016), https://www.sec.gov/litigation/admin/2016/33-10016.pdf.

39 e.g., *In re E.S. Financial Services, Inc*, Exchange Act Release No. 77,056 (4 February 2016), https://www.sec.gov/litigation/admin/2016/34-77056.pdf.

40 e.g., *In the Matter of Stryker Corp.*, Rel. No. 84308, File No. 3-18853 (28 September 2018), https://www.sec.gov/litigation/admin/2013/34-70751.pdf; In re LAN Airlines S.A., Exchange Act Release No. 78,402 (25 July 2016), https://www.sec.gov/litigation/admin/2016/34-78402.pdf.

41 e.g., *In re Everhart Financial Group, Inc*, Exchange Act Release No. 76,897 (14 January 2016), https://www.sec.gov/litigation/admin/2016/34-76897.pdf.

42 e.g., *In re Steven A. Cohen*, Advisers Act Release No. 4307 (8 January 2016), https://www.sec.gov/litigation/admin/2016/ia-4307.pdf.

The Resource Guide explains:

> *In civil cases, a company may . . . be required to retain an independent compliance consultant*[43] *or monitor to provide an independent third-party review of the company's internal controls. The consultant recommends improvements, to the extent necessary, which the company must adopt.*[44]

In the Resource Guide, the SEC and DOJ enumerated the following factors that they consider in determining whether a monitor is appropriate:

- the 'seriousness of the offense';
- the 'duration of the misconduct';
- the 'pervasiveness of the misconduct, including whether the conduct cuts across geographic and product lines';
- the 'nature and size of the company';
- the 'quality of the company's compliance program at the time of the misconduct'; and
- the 'subsequent remediation measures'.[45]

These factors demonstrate, as the SEC and DOJ concede, that the 'appointment of a monitor is not appropriate in all circumstances, but it may be appropriate, for example, where a company does not already have an effective internal compliance program or needs to establish necessary internal controls'.[46] Put differently, these factors demonstrate that the SEC's decision regarding whether to impose a monitor will depend on its assessment that the organisation has an effective compliance programme and has otherwise demonstrated a commitment to compliance in its controls, remediation measures, and corporate culture.

The Resource Guide is the only SEC guidance setting forth the factors that the SEC considers when deciding to impose a monitor. From our review of the consent decrees and administrative orders implementing monitors, those documents do not elaborate on the SEC's criteria or analysis regarding when a monitor is appropriate. Rather, from these case-specific documents, one can glean general guidance as to the general terms and scope of monitorships.

It is helpful, therefore, to review briefly the DOJ's guidance on monitorships from the time that the joint Resource Guide was issued. Because the Resource Guide did not supplant the guidance was in place at the time, the then-current DOJ guidance aids one's understanding of the 2012 Resource Guide. In addition, more current DOJ guidance informs how the SEC would analyse monitorships because the SEC and DOJ often work in parallel and impose a single monitor to assure compliance with both the federal securities laws and the criminal code.[47]

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43 More recently, the SEC has referred to a monitor as an 'ICC'.

44 Resource Guide, *supra* note 1, at 72.

45 id., at 71.

46 id.

47 id., at 72 ('When both DOJ and SEC require a company to retain a monitor, the two agencies have been able to coordinate their requirements so that the company retain one monitor to fulfill both sets of requirements.')

Morford Memorandum[48]

In March 2008, then-Acting Deputy Attorney General Craig S Morford issued the DOJ's first memorandum relating to the scope and appointment of monitors (the Morford Memorandum). This memorandum governed the selection and use of monitors in DPAs and NPAs with corporations. It established nine 'principles' – guidelines and decision-making procedures – for monitorship programmes, including selection of monitors, scope of the monitor's duties, reporting requirements, and duration. In all these areas, the DOJ stressed that the monitor's responsibilities and his or her selection should be tailored to the limited scope of addressing the reoccurrence of the misconduct and nothing further:

> *A monitor's primary responsibility is to assess and monitor a corporation's compliance with the terms of the agreement specifically designed to address and reduce the risk of recurrence of the corporation's misconduct, and not to further punitive goals.*[49]

Along those lines, prosecutors were cautioned to be mindful not just of the 'potential benefits' of a monitor, but 'the cost' as well.[50] The Morford Memorandum's treatment of each of these principles is analysed below.

Selection

Under the terms of the Morford Memorandum, the monitor must be selected 'based on the merits'; however, the government can choose to play a greater or lesser role in the selection depending on the fact and circumstances of the matter.[51] As a result, in some circumstances, the corporation may select a monitor candidate, with the government vetoing the proposed choice if the monitor is 'unacceptable' to the government; in others, the government may create a committee to consider candidates, with the Office of the Attorney General approving the monitor and the organisation having little input.[52]

Scope

The Morford Memorandum recommended the scope of a monitor's duties be limited to the misconduct at issue, stating that the monitor's 'primary responsibility' is to assess and monitor

48 Morford Memorandum, *supra* note 6. Note that in June 2009, then-Assistant Attorney General Lanny A Breuer expanded on the Morford Memorandum, outlining the terms required in all monitorship agreements and refining the selection process for monitors. Assistant Attorney General of the United States, Memorandum re Selection of Monitors in Criminal Division Matters (24 June 2009), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/response3-supp-appx-3.pdf. The Breuer Memorandum, however, was superseded in 2018 by the Benczkowski Memorandum, discussed below. And in May 2010, Gary Grindler, then-Acting Deputy Attorney General, issued a memorandum clarifying the DOJ's role in resolving disputes between the monitor and corporation. Acting Deputy Attorney General of the United States, Memorandum re Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (25 May 2010), https://www.justice.gov/jm/criminal-resource-manual-166-additional-guidance-use-monitors-dpas-and-npas.

49 Morford Memorandum, *supra* note 6, at 2 (emphasis added).

50 id.

51 id., at 3.

52 id.

a corporation's compliance with those terms of the agreement 'specifically designed to address and reduce the risk of recurrence of the corporation's misconduct'.[53] The government, in fact, acknowledged that because the 'monitor is not responsible to the corporation's shareholders', the 'responsibility for designing an ethics and compliance program . . . should remain with the corporation, subject to the monitor's input, evaluation and recommendations'.[54]

Reporting requirements

The Morford Memorandum encouraged communications between the government, the corporation and the monitor, including as to the monitor's recommendations.[55] Organisations are not required to accept all the monitor recommendations, however. Instead, the DOJ guidance gave the corporation power to decide whether to implement the monitor recommendations, because the corporation and its officers 'are ultimately responsible for the ethical and legal operations of the corporation'.[56] If the corporation declines to adopt a recommendation by the monitor, the government considers both the monitor's recommendation and the corporation's reasons in determining whether the corporation fulfilled its obligations under the agreement.[57]

Duration

Finally, the Morford Memorandum recommended that the duration of the monitorship agreement be tailored based on the following criteria:

- the seriousness of the offence;
- duration of the misconduct;
- pervasiveness across geographic and product lines;
- nature and size of the organisation;
- quality of the compliance programme at the time of the misconduct; and
- adequacy of the remediation and corrective measures.[58]

Benczkowski Memorandum[59]

More recently, on 12 October 2018, Assistant Attorney General Brian A Benczkowski issued a memorandum significantly expanding the DOJ's guidance regarding application, need, selection and scope of monitorships. First, although the Morford Memorandum applied only to DPAs and NPAs and specifically excluded plea agreements, the Benczkowski Memorandum clarified that the Criminal Division should apply the same principles to plea agreements that impose a monitor as long as the presiding court approves the agreement.[60]

53 id., at 5.
54 id.
55 id., at 6.
56 id.
57 id.
58 id., at 7–8.
59 Benczkowski Memorandum, *supra* note 6.
60 id., at 1 n.3.

Second, and more importantly, the Benczkowski Memorandum stressed, more so than the earlier guidance, that monitors were only appropriate in certain cases:

> *In general, the Criminal Division should favor the imposition of a monitor only where there is a demonstrated need for, and clear benefit to be derived from, a monitorship relative to the projected costs and burdens. Where a corporation's compliance program and controls are demonstrated to be effective and appropriately resourced at the time of resolution, a monitor will likely not be necessary.*[61]

The Benczkowski Memorandum further set forth that:

> *In evaluating the 'potential benefits' of a monitor, Criminal Division attorneys should consider, among other factors: (a) whether the underlying misconduct involve the manipulation of corporate books and records or the exploitation of an inadequate compliance program or internal control systems; (b) whether the misconduct at issue was pervasive across the business organization or approved or facilitated by senior management; (c) whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal controls systems; and (d) whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future.*[62]

And, when weighing the potential costs, the Benczkowski Memorandum requires the Criminal Division attorney to 'consider not only the projected monetary costs to the business organization, but also whether the proposed scope of a monitor's role is appropriately tailored to avoid unnecessary burdens to the business's operations'.[63]

Third, the Benczkowski Memorandum further expands the prior guidance by clearly outlining a step-by-step process for monitor selection. It requires the following steps for approval of an independent monitor candidate:

- nomination of monitor candidates by counsel for the company;
- initial review of monitor candidates by the Criminal Division attorneys handling the matter;
- preparation of a monitor selection memorandum by the Criminal Division attorneys handling the matter;
- review of a monitor candidate by a standing committee of prosecutors;
- review by the Assistant Attorney General; and
- approval by the Office of the Deputy Attorney General.[64]

Notably, the Benczkowski Memorandum now allows companies to designate their first-choice candidate to serve as the monitor.

61 id., at 2.
62 id.
63 id.
64 id., at 4–8.

Recent case studies

While the Benczkowski Memorandum was issued by the DOJ and not the SEC, these changes will impact monitorships where both the SEC and DOJ are involved. It likely will also predict how the SEC may approach future monitorships in which it acts alone. For example, the chair of the SEC's foreign bribery unit, Charles Cain, has already indicated that the SEC is supportive of the DOJ's newest approach. In November 2018, after the publication of the Benczkowski Memorandum, Mr Cain said that the era of 'cookie-cutter' monitorships is over, and that authorities now tend to tailor the monitor's appointment narrowly.[65] Indeed, while early monitors such as Mr Breeden enjoyed unfettered access to all areas of WorldCom's business, more recent administrative orders tie a monitor's appointment to each specific area of misconduct identified in the order.

This trend is exemplified by the cases discussed below.

In the Matter of Stryker Corp

One example of the more tailored approach to the scope of monitors' responsibilities is illustrated in the September 2018 settlement reached between the SEC and Stryker Corporation (Stryker) for violations of the FCPA's internal accounting controls and books and records provision.[66] The SEC's investigation found that Stryker's internal accounting controls failed to (and were insufficient to) detect improper payments related to sales of Stryker's products in India, China and Kuwait.[67] The sales were made through Stryker's wholly owned subsidiaries, as well as through third-party deals and distributors.[68] The order also found that Stryker's Indian subsidiary maintained deficient books and records.[69] This case followed a 2013 consent settlement between Stryker and the SEC in which Stryker had also paid a $3.5 million penalty and more than $7.5 million in disgorgement to resolve related FCPA concerns.[70]

Issued just a couple of weeks prior to the Benczkowski Memorandum, the settlement between SEC and Stryker included a tailored monitorship limited to reviewing Stryker's internal controls, policies, and procedures relating to the use of and transactions by third parties. This narrow scope directly tied the monitor's responsibility with the underlying charges against Stryker, which involved improper payments made by third parties.[71] The factors enumerated in the Benczkowski Memorandum appear to be fully incorporated into the SEC's order. For example, the 'manipulation of corporate books and reports' and an 'inadequate compliance program' (specific indicators of the need for a monitor mentioned in the Benczkowski Memorandum) are explicitly referenced in Stryker as deficiencies that led to the monitor implementation. Further, as Stryker was under a prior settlement with the SEC in 2013 for similar conduct, its lack of 'significant investment[] in, and improvements

65 Clara Hudson, 'SEC Official: No More 'Cookie-Cutter' Monitorships', *Global Investigations Review* (1 November 2018), https://globalinvestigationsreview.com/article/jac/1176432/sec-official-no-more-%E2%80%9Ccookie-cutter%E2%80%9D-monitorships.

66 *In the Matter of Stryker Corp*, Rel. No. 84308, File No. 3-18853 (28 September 2018), https://www.sec.gov/litigation/admin/2018/34-84308.pdf.

67 id.

68 id.

69 id.

70 *In the Matter of Stryker Corp.* Rel. No. 70751, File No. 3-15587 (24 October 2013), https://www.sec.gov/litigation/admin/2013/34-70751.pdf.

71 *Stryker*, *supra* note 65.

to, its corporate compliance program and internal controls systems' were clearly a factor in determining whether a monitor was necessary.[72] Finally, consistent with the Benczkowski Memorandum and despite Stryker being a repeat offender, the SEC's imposition of the monitor was still narrowly tailored to the specific conduct at issue in the investigation.

In re EFP Rotenberg

EFP Rotenberg LLP (EFP Rotenberg), a registered public accounting firm, reached a settlement agreement with the SEC in July 2016 for violating Section 10A(a) of the Exchange Act.[73] In connection with EFP Rotenberg's audit of ContinuityX Solutions, Inc (ContinuityX), EFP Rotenberg failed to implement proper procedures to 'obtain appropriate audit evidence that ContinuityX's revenue was legitimate', despite being aware of significant risk with ContinuityX's reported revenues.[74] EFP Rotenberg further failed to perform procedures, as required by Section 10A(a), identify related party transactions, obtain appropriate evidence to support its audit opinion, and resolve inconsistencies in document findings.[75] The administrative order also noted that EFP Rotenberg improperly relied on management representations, failed to exercise due professional care, and that its policies and procedures were deficient.[76] As a result of this misconduct, ContinuityX's Form 10-K contained several material misstatements and omissions of material fact.[77]

In addition to censure, cease and desist, and a $100,000 fine, the SEC required EFP Rotenberg to retain 'an independent consultant' to review and evaluate EFP Rotenberg's audit and interim review policies and procedures for a variety of conduct.[78] Unlike the initial appointment in *WorldCom*, however, the SEC tailored the scope of the monitor's appointment to specific conduct relevant to the investigation, including:

- 'the exercise of due professional care' in audits;
- 'obtaining sufficient appropriate audit evidence';
- checking third-party confirmations;
- 'detecting and reporting misstatements resulting from illegal acts';
- identifying and considering 'the adequacy of the disclosures of related parties and related party transactions';
- evaluating and relying upon management representations;
- supervising 'individuals working on audits'; and
- having 'adequate audit documentation'.[79]

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72 Benczkowski Memorandum, *supra* note 6 at 2.

73 *In re EFP Rotenberg, LLP*, Exchange Act Release No. 78393 (22 July 2016). Section 10A(a) of the Exchange Act requires registered public accounting firms to comply with generally accepted auditing standards, including '(1) procedures designed to provide reasonable assurance of detecting illegal acts that would have a direct and material effect on the determination of financial statement accounts; (2) procedures designed to identify related party transactions that are material to the financial statement or otherwise require disclosure therein; and (3) an evaluation of whether this is substantial doubt about the ability of the issuer to continue as a going concern during the ensuing fiscal year.'

74 *In re EFP Rotenberg, LLP*, Exchange Act Release No. 78393 at 5 (22 July 2016).

75 id., at 6–8.

76 id., at 8–10.

77 id., at 4.

78 id., at 14.

79 id.

Notably, and consistent with current guidance from the DOJ memoranda, each of the items the monitor was to inspect was tied to a relevant deficiency in EFP Rotenberg's controls that was referenced in the SEC's order. The SEC also prevented EFP Rotenberg from retaining any new clients until the independent consultant certified compliance with the recommended changes.[80]

In the Matter of Voya Financial Advisors, Inc

Most recently, the SEC has turned its attention toward enforcement actions involving cybersecurity issues. These actions have used monitors as a remedy where the companies that are the subject of security breaches do not have adequate data security policies.

For example, in September 2018, the SEC concluded one such enforcement action in a matter involving Voya Financial Advisors (VFA). The conduct at issue invoked the Identity Theft Red Flags Rule (Rule 201 of Regulation S-ID).[81] This rule requires investment firms to create and maintain a policy that safeguards customer information from identity theft, and pay attention to 'red flag' warning signs that hackers may be attempting to steal information.[82] In 2016, hackers infiltrated VFA and gained access to personal information for 5,600 VFA customers by calling a support hotline and requesting password resets.[83] Key to the SEC's allegations was that VFA's security policy was not updated for 10 years, and it was not administered by the company's senior management, as required by the rule.[84] In settling the SEC's charges, VFA agreed to pay a $1 million penalty and was required to undertake a list of remedial actions and engaging a monitor.[85]

The monitor, termed a 'compliance consultant' in the settlement, was tasked with conducting a comprehensive review of VFA's data security policies and procedures, specific to the violation. This case demonstrates how the SEC is continuing to find new ways to use monitors to remedy alleged misconduct, while still tailoring the monitorship to the specific misconduct at issue and consistently with guidance.

SEC monitors: common elements

Examining administrative and civil federal court enforcement orders appointing monitors reveals certain common themes. While the scope of a monitor's appointment will be tailored to the relevant misconduct that the SEC seeks to prevent, the terms of monitorships remain fairly consistent. Indeed, almost all monitor appointments will include the following elements:

- Retention of an independent monitor by the organisation that is acceptable to the SEC. To ensure independence, the SEC often requires that the monitor has not provided any

80 id., at 16.

81 *Voya Financial Advisors, Inc*, Exchange Act Release No. 84,288 (26 September 2018), https://www.sec.gov/litigation/admin/2018/34-84288.pdf; see also Press Release, SEC, SEC Charges Firm with Deficient Cybersecurity Procedures (26 September 2018), https://www.sec.gov/news/press-release/2018-213 (explaining that '[t]his was the first enforcement action' involving the violation of this rule).

82 id., at 7.

83 id., at 8.

84 id.

85 id., at 10–13.

professional services to the organisation within a specified time period (including services provided as a former employee or board member).[86]

- A prohibition against terminating the monitor without approval from SEC staff, and an express waiver against any claim that an attorney–client relationship exists between the company and the compliance monitor.[87] This requirement prevents the company from withholding information on the basis that it communicated with the monitor on a privileged basis.
- A requirement that the company bear all costs and expenses associated with the monitor.[88]
- A description of the business areas that the monitor is to review and evaluate.[89]
- A requirement that the monitor have reasonable access to company records, employees, and information as required to properly evaluate and assess the specified areas.[90]
- A requirement that the monitor issue an initial report and provide a copy to the SEC within a specified time period. Such a report will summarise the review, evaluate the business areas identified, and make appropriate recommendations to mitigate risks in the specified areas.[91]
- In many cases, an organisation is also required to adopt the recommendations contained within the initial report within a specific time period.[92] If the company believes that any recommendations are 'unnecessary, unduly burdensome, or impractical', it may submit a written alternative proposal to the monitor and the SEC.[93] The monitor and the organisation can then negotiate an alternative proposal within a specified time period. If no agreement can be reached, the organisation must either abide by the original proposal or submit its objections to the SEC for consideration.[94] In some instances, the organisation may be able to obtain a third party mediator to resolve the issue.[95]
- Following the recommendations, the organisation must eventually certify, within a specified period time, that it has complied with the recommendations and implemented all required changes.[96]
- Finally, after the organisation certifies implementation, the monitor is required to re-examine the organisation at a later date to ensure it remains in compliance with the

86 e.g., *In re Barclays Capital, Inc*, Exchange Act Release No. 77018, at 5 (2 February 2016), https://www.sec.gov/litigation/admin/2016/33-10016.pdf.

87 e.g., *In re American Registrar & Transfer Company*, Exchange Act Release No. 77922, at 9 (25 May 2016), https://www.sec.gov/litigation/admin/2016/33-10082.pdf.

88 e.g., id at 8.

89 e.g., *In re EFP Rotenberg, LLP*, Exchange Act Release No. 78393, at 14 (22 July 2016), https://www.sec.gov/litigation/admin/2016/34-78393.pdf.

90 e.g., *In re American Registrar & Transfer Company*, Exchange Act Release No. 77922, at 9 (25 May 2016), https://www.sec.gov/litigation/admin/2016/33-10082.pdf.

91 e.g., *In re Apex Fund Services, Inc*, Investment Adviser's Act Release No. 4429, at 7 (16 June 2016), https://www.sec.gov/litigation/admin/2016/ia-4429.pdf.

92 id.

93 id.

94 id.

95 e.g., *In re EFP Rotenberg, LLP*, Exchange Act Release No. 78393, at 15 (22 July 2016), https://www.sec.gov/litigation/admin/2016/34-78393.pdf.

96 e.g., *In re American Registrar & Transfer Company*, Exchange Act Release No. 77922, at 9 (25 May 2016), https://www.sec.gov/litigation/admin/2016/33-10082.pdf.

recommendations.[97] The monitor will then issue a final report to the SEC and certify compliance.[98]

While no two cases are identical, recent SEC orders requiring monitors generally include some form of the terms referenced here, with modifications based on the scope of the review, the length of the monitor appointment, and the severity of the conduct.

Costs and benefits of SEC monitors

Generally, a corporate monitor imposed by the SEC can be beneficial for both the organisation and the SEC. The monitor can recommend, as well as help implement and guide, necessary changes to an organisation's internal system controls to prevent future investigations, penalties, and fines by the SEC and other regulators. Further, agreeing to a monitor as part of a settlement could end any litigation or investigation sooner than it would otherwise, and could reduce penalties and ameliorate collateral consequences.

However, monitorships are expensive and often intrusive. That cost can be quite high, especially where the monitor has been empowered to oversee significant or large parts of the organisation's operations and where the monitor's tenure is several years. An alternative, therefore, to an independent monitor that may be suggested in a settlement negotiation is the imposition of a 'self-monitoring' arrangement that requires the entity to charge an independent committee of the board of directors to appoint an individual to make periodic reports on progress with undertakings and agree to report any reasonable suspicions of violations of the federal securities laws.[99]

Conclusion

As SEC-imposed monitors have taken their modern form in the wake of *WorldCom*, the SEC's use of monitors has become widespread across a variety of industries for a broad range of conduct. While the use of monitors has expanded, recent trends and DOJ guidance demonstrate that the SEC has shifted from seeking all-encompassing roles for monitors to roles that are more tailored to remediating the problematic behaviour outlined in the charging or settlement papers. Even with this narrower scope, an organisation should still carefully evaluate the benefits and costs of accepting a monitor appointment as part of the resolution of an SEC investigation. Monitor appointments are unlikely to wane anytime in the near future, and, if anything, will likely be used more frequently to aid the SEC's regulatory function in a variety of contexts to protect the public from perceived recidivist corporate misconduct.

97 e.g., *In re E.S. Financial Services, Inc*, Exchange Act Release No. 77056, at 6 (4 February 2016), https://www.sec.gov/litigation/admin/2016/34-77056.pdf.

98 id., at 6–7.

99 See Final Judgment, *SEC v. Int'l Bus. Machs. Corp.*, No. 11-cv-00563 (DDC 25 July 2013); Final Judgment, *SEC v. Tyco Int'l LTD*, No. 12-cv-01583-RJL (DDC 17 June 2013); Final Judgment, *SEC v. Armor Holdings, Inc*, No. 11-cv-01271-RJL (DDC 23 July 2012).

5

When to Appoint a Monitor

Bart M Schwartz[1]

Understandably, there exists a fair amount of confusion among regulators, practitioners and the general public about monitors and their roles. For years, federal and state governments, regulatory agencies and quasi-governmental organisations have utilised independent, private individuals to assist in the monitoring of remediation efforts at entities (e.g., corporations, labour unions and non-profit organisations) found to have engaged in some form of misconduct. Broadly, these individuals may be referred to as monitors, although they are sometimes designated as independent consultants, compliance consultants, independent experts, independent reviewers or independent auditors. Regardless of the designation, the individual selected will be required to provide the regulator with an impartial evaluation of the monitored entity's remediation efforts. The extent to which the monitor is obliged to report on or make recommendations regarding aspects of the entity's activities and processes, organisational structure, or culture will depend upon the type of monitorship and its scope; not all monitorships are created equal.

Mechanisms for imposing monitors

Monitorships are generally the result of a legal settlement agreement reached between a government agency and an individual or organisation that is facing a criminal, civil, or administrative investigation or prosecution. These agreements most often take the form of a non-prosecution agreement (NPA), a deferred prosecution agreement (DPA), or a consent order or decree. An NPA is an agreement between a government agency and an entity or individual facing a criminal or civil investigation, whereby the government agency foregoes commencing or filing a case against that person or company. With a DPA, the government agency will have already commenced a case against the defendant, but simultaneously asks a

1 Bart M Schwartz is chairman of Guidepost Solutions LLC. Mr Schwartz greatly appreciates the work of Mary Stutzman, senior managing director at Guidepost Solutions LLC, in the preparation of this chapter.

court to postpone the prosecution. A consent decree is an agreement or settlement in either a criminal or civil matter that resolves a dispute between parties often without admission of guilt or assumption of liability. In other types of legal agreements there may be no allegations of illegal conduct but rather a perceived need by the regulators for the independent monitoring of some aspect of the agreement and the conduct under review. For example, a proposed corporate merger that requires approval by both the Antitrust Division of the US Department of Justice (DOJ) and ultimately a US federal court, may have requirements that necessitate the appointment of a monitor for independent confirmation.[2]

The US DOJ entered into 24 NPA and DPA agreements in 2018, slightly more than the 22 in 2017, but substantially lower than numbers reported over the past seven years.[3] In 2018, for the second year in a row, the Securities and Exchange Commission (SEC) did not enter into any NPAs or DPAs. Nevertheless, it has been observed that the DOJ 'continues to embrace corporate NPAs and DPAs as effective tools in resolving investigations into corporate criminal misconduct'.[4]

Types of monitorships

Just as there are different terms to describe a monitor, there are different types of monitorships. Depending on the nature of the actual or alleged misconduct, or the perceived issues (e.g., how serious the behaviour, how widespread within the organisation, how long the duration, and the remediation desired by the authorising agency), monitorships tend to focus either on enforcement or corporate compliance[5] and, occasionally, a combination of the two. Some monitorships require reporting to the court; others do not. The DOJ does not have a standard template that dictates the core terms required for every NPA or DPA; therefore, these may vary, and the role and responsibilities of a monitor, if one is required in the agreement, also vary.

Monitorships focused on enforcement

Government agencies, like the SEC, the Drug Enforcement Agency (DEA), the Environmental Protection Agency (EPA), the Federal Highway Safety Administration (FHSA) and the Food and Drug Administration (FDA), to name a few, routinely use monitors as an enforcement tool or remedy. In the early years, the federal government used monitors in labour unions, such as the teamsters' and carpenters' unions, to deal with corruption. In these instances, the monitored organisation may have violated a law or industry regulation and its agreement with the government requires remediation of that specific violative behaviour. The government appoints a monitor, typically referred to as an independent consultant or expert, to ensure

2 e.g., Justice Department Requires CVS and Aetna to Divest Aetna's Medicare Individual Part D Prescription Drug Plan Business to Proceed with Merger, https://www.justice.gov/opa/pr/justice-department-requires-cvs-and-aetna-divest-aetna-s-medicare-individual-part-d (last visited 7 January 2019).

3 Gibson Dunn & Crutcher, LLP, '2018 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements,' 10 January 2019, https://www.gibsondunn.com/2018-year-end-npa-dpa-update/. See text accompanying footnote 16, *infra*.

4 ibid., p. 1.

5 For an excellent discussion of types of monitorships see, Veronica Root, 'Modern-Day Monitorships', *Yale Journal on Regulation*, Volume 33, 2016, pp. 110–164.

compliance. These monitorships tend to be prescriptive, with the government detailing what is to be assessed to report to the government on the status of remediation. They are limited in scope and, generally, shorter in duration than a corporate compliance monitorship. They may be thought of as 'pass/fail exercises'. For example, Chapter 6 of the FDA Regulatory Procedural Manual discusses judicial actions. Exhibits 6–18[6] show how the FDA has created requirements for engaging 'independent experts' depending on the subject of the violation that has resulted in the consent decree.[7] While these independent experts act like monitors in that they review, report and sometimes recommend, their roles are very circumscribed.

At the SEC, enforcement type monitorships use 'independent compliance consultants' to review, evaluate, remediate and oversee the specific controls in place to prevent a reoccurrence of the subject misconduct. The SEC also appoints 'independent compliance monitors', generally as part of parallel civil and criminal proceedings. Their role tends to be more expansive and may go 'beyond assessment of the company's remediation and extends more generally to compliance with applicable laws'. These monitorships, more like the corporate compliance variety, require the monitor to make recommendations for improvements to the design and efficiency of the organisation's compliance programme.[8]

Corporate compliance monitorships

In a corporate compliance monitorship, the monitor does not focus exclusively on the predetermined remediation of an internal control or other compliance failure. Instead, as a result of an agreement between the corporation and the government, an independent individual is selected to review the corporation's compliance structure, its policies and procedures, internal controls and compliance culture to understand what happened to create the compliance failure, why it happened, and what can be done to prevent it from happening again. This is widely referred to among compliance professionals as 'root cause analysis' and it is key to the success of the monitorship.

The role of a corporate compliance monitor is also quite different from a monitor in a strictly enforcement scenario. In the latter, the monitor serves in a way as an agent of the government, in place to assess and confirm that required remediation has occurred. A corporate compliance monitor must be neither the agent of the government nor the monitored company. The fact that an agreement has been reached that allows for a monitor indicates that the government has sufficient trust in the corporation's commitment to an independent assessment of its compliance programme and any remediations effected to date, and that it will cooperate fully with the monitor and implement appropriate recommendations. The monitor must not be viewed or behave in a manner that is perceived as a punishment for wrongdoing, nor should the monitorship be thought of as just 'another investigation', following on the internal and external investigations the company has already undergone. The

6 US Food and Drug Administration, Regulatory Procedures Manual, Chapter Six Judicial Actions, Exhibits 6–18, October 2018. (https://www.fda.gov/ICECI/ComplianceManuals/RegulatoryProceduresManual/default.htm#_top).

7 https://www.fda.gov/ICECI/ComplianceManuals/RegulatoryProceduresManual/default.htm#_top.

8 Frank, Jonny. 'SEC-Imposed Monitors.' *SEC Compliance and Enforcement Answer Book* (2017 Edition) by David M Stuart, available at http://stoneturn.com/wp-content/uploads/2017/07/2017-SEC-Compliance-and-Enforcement-Answer-Book_SEC-Imposed-Monitors.pdf.

monitor must be impartial and independent of all parties. The process of selecting a monitor for a corporate compliance monitorship is paramount; see 'The selection of a monitor' for issues surrounding monitor selection.

To an even greater degree than for monitorships focused on enforcement, corporate compliance monitorships are not 'gotchas'. While it is essential to understand past bad behaviour to determine the root cause, the corporate compliance monitor must be forward-looking. To arrive at a successful conclusion of the monitorship, one that includes both remediation and sustainability, the monitor needs to understand and, if appropriate, use internal corporate resources, such as the company's internal audit staff, while retaining his or her independence. The monitor's recommendations must be rational and consistent with corporate culture to ensure their longevity. To be successful, the monitor must also strive to achieve changes in the corporate culture so that when the monitor departs, the changes remain. This requires corporate buy-in from the top down and the bottom up. Depending on the specifics of the agreement governing each particular monitorship, the process for review, acceptance and implementation of the monitor's recommendations will vary. In some instances, the government agency imposing the monitorship will have ultimate approval of the recommendations, while in other agreements the government essentially defers to the monitor's assessment regarding the nature and implementation of required remediation.

Which agencies impose monitors?

Since monitorships have been found to be useful in providing independent oversight and confirmation to government agencies, it is not surprising to find that they 'have become a common judicial, regulatory and conflict-resolution tool'.[9] In the United States, this is true not only at the federal level by various divisions and departments of the DOJ, EPA and FDA, to name a few, but also at the state, and in some instances, local levels. And, as will be discussed in detail elsewhere in this guide, by governments in the United Kingdom, France, etc.

The New York State Department of Financial Services (DFS) has been particularly vigorous in appointing independent consultants to monitor settlements reached with large, multinational financial institutions. Its 2014 agreement with BNP Paribas SA,[10] which was an extension of a 2013 memorandum of understanding, and in its 2012 agreement that DFS reached with Standard Chartered Bank over sanctions violations and inadequacies in its anti-money laundering compliance programme that was extended multiple times before expiring on 31 December 2018,[11] are notable examples.

The Port Authority of New York and New Jersey (PANYNJ) and the New York Metropolitan Transportation Authority (MTA), two public-benefit corporations engaged in the construction and maintenance of transportation facilities, infrastructure and buildings, routinely use monitorship agreements. These frequently occur when a contractor, subcontractor, supplier, etc., has been involved in a city or state criminal investigation, or the subject of a DPA, consent order or a debarment proceeding, but would like to bid on and work on PANJNY or MTA projects. The agencies will appoint a monitor to verify any required remediations, assess

9 American Bar Association, Monitors Standards, 5 December 2018, p. 1, https://www.americanbar.org/groups/criminal_justice/standards/MonitorsStandards/.

10 New York State Department of Financial Services, *In the Matter of BNP Paribas SA New York Branch*, Consent Order, 30 June 2014 (available at https://www.dfs.ny.gov/about/ea/ea140630.pdf).

11 https://www.sc.com/en/media/press-release/expiration-of-dfs-monitorship/.

internal controls and review and report on the compliance programme. The company's ability to work on agency projects is contingent upon a successful monitorship.

Over the past several years, agencies like PANYNJ and the MTA, the New Jersey Department of the Treasury, as well as large financial institutions like the World Bank, public private partnerships or large financial institutions that develop major infrastructure projects or are rendering disaster relief are appointing individuals called integrity monitors. These integrity monitors, who serve as independent eyes and ears on a project, are named to a project proactively to deter fraud, waste and abuse, rather than in response to discovered ethical, legal or regulatory non-compliance.

The decision to use a monitor

The decision to require a monitor as part of the resolution of most regulatory enforcement agreements is a fairly routine one. The subject company needs to remediate and the agency needs to verify remediation. The agency may not have the resources or technical expertise in house to do this so it turns to third parties for assistance. For example, the Federal Trade Commission's Bureau of Competition often uses monitors to enforce compliance with a merger remedy like those involving transfer of assets or intellectual property.[12] However, the decision to require a compliance monitorship as a condition of resolving a corporate investigation or prosecution, usually as part of an NDA or DPA, is generally a more protracted process that has evolved over time.

Guidance concerning when to appoint a monitor and how to select one has been periodically published by the DOJ in the form of memoranda. An early example is the memorandum issued on 7 March 2008 by then Acting Attorney General Craig S Morford, 'Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations' (the Morford Memo),[13] which outlined principals to consider when using and selecting a corporate monitor. Subsequent DOJ memoranda have dealt with such topics as the resolution of disputes that may arise between the monitor and the monitored corporation, the Grindler Memo,[14] and individual accountability in corporate wrongdoing, the Yates Memo,[15] most recently substantially revised by Deputy Attorney General Rod Rosenstein in November 2018.[16]

12 Huber, Susan. 'Monitors: Expert eyes and ears in Commission orders.' Bureau of Competition (14 July 2015), (https://www.ftc.gov/news-events/blogs/competition-matters/2015/07/monitors-expert-eyes-ears-commission-orders).

13 Memorandum from Craig S Morford, Acting Deputy Attorney General, 'Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations' (7 March 2008) http://www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf.

14 Memorandum from Deputy Attorney General Gary G Grindler, 'Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations' (25 May 2010), available at https://www.justice.gov/sites/default/files/dag/legacy/2010/06/01/dag-memo-guidance-monitors.pdf.

15 Memorandum from Deputy Attorney General Sally Quillian Yates, Individual Accountability for Corporate Wrongdoing (9 September 2015), https://www.justice.gov/archives/dag/file/769036/download.

16 The Yates Memo required corporations seeking to obtain cooperation credit in corporate investigations (civil and criminal) to identify all individuals involved or responsible for the misconduct at issue whereas the changes announced by Mr Rosenstein allow corporations to earn full cooperation credit if they identify individuals substantially involved in the potential misconduct. See Rosenstein address at https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0.

The most recent guidance from the DOJ specifically regarding monitorships is the October 2018 memorandum issued by Assistant Attorney General Brian Benczkowski, the 'Selection of Monitors in Criminal Division Matters' (the Benczkowski Memo).[17] After observing that corporate monitors 'can be a helpful resource and beneficial means of assessing a business organisation's compliance with the terms of a corporate criminal resolution,' Mr Benczkowski notes that '[d]espite these benefits, the imposition of a monitor will not be necessary in many criminal resolutions'.[18] He reiterates two of the Morford Memo's considerations that should guide prosecutors when deciding whether a monitor is appropriate '(1) the potential benefits that employing a monitor may have for the corporation and the public, and (2) the cost of a monitor and its impact on the operations of a corporation'.[19] He then elaborates on those considerations and adds the following factors:

> *(a) whether the underlying misconduct involved the manipulation of corporate books and records or the exploitation of an inadequate compliance program or internal control systems; (b) whether the misconduct at issue was pervasive across the business organization or approved or facilitated by senior management; (c) whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal control systems; and (d) whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future.*[20]

The Benczkowski Memo also addresses the selection process for corporate monitors, outlining a four-tiered process that begins with the names of three candidates who are proposed by the monitored company. These candidates are then reviewed by the DOJ attorneys handling the matter and one name is chosen and forwarded to a DOJ standing committee for review. If found acceptable, the name is sent to the Office of the Attorney General for final review and approval. All Criminal Division employees involved in any way in the process must comply with conflict-of-interest guidelines and provide written certification of same. In remarks Mr Benczkowski made at the NYU School of Law Program on Corporate Compliance and Enforcement Conference on Achieving Effective Compliance, which was held on the day following the distribution of his memo, he referenced the selection process and stated that:

> *the goal is to ensure that the process is fair, ensures the selection of the best candidate, and avoids even the perception of any conflicts of interest. For this reason, the Division's monitor selection committee will continue to include an ethics official from the Criminal Division. We want to ensure that businesses and the public are confident in the selection process,*

17 Memorandum from Brian A Benczkowski, Assistant Attorney General, to All Criminal Division Personnel (11 October 2018), https://www.justice.gov/opa/speech/file/1100531/download.

18 ibid., pp. 1–2.

19 Footnote 11, p. 2.

20 Footnote 15, p. 2.

> *avoiding any suggestion that monitors are chosen for inappropriate reasons, including personal relationships or past employment in the Department.*[21]

The Benczkowski Memo also states that any agreement that requires a monitor should specify the terms of retention, including the monitor's qualifications, the selection process, the process for removing a monitor if necessary, the timeline for monitor selection, an explanation of the monitor's responsibilities and the scope and length of the monitorship.[22] In short, over the years, partly in response to concerns about the cost of monitorships and imprecision in describing the monitor's scope and responsibilities, the DOJ has continued to refine its use of monitors and its guidance. While the Benczkowski Memo comes out of the Criminal Division and the breadth of its application elsewhere remains to be seen, its impact on the use of corporate monitorships may be significant if, as Mr Benczkowski said in his remarks at NYU, the imposition of a corporate monitor should be 'the exception, not the rule'.[23]

In addition to these DOJ memoranda, the Fraud Section of the DOJ produced a guidance document intended to assist individuals appointed as corporate monitors in evaluating the adequacy of a corporate compliance programme.[24] The evaluation guidance was significant because in addition to assisting the monitor, it provides a benchmark for companies to use in assessing their own internal compliance programmes and opens a window into the type of review the Fraud Section would undertake when negotiating a plea or other agreements.

The selection of a monitor

In DOJ memoranda issued over the years, and various regulatory agency manuals and guidance documents, the factors to be considered when selecting a monitor are generally clearly articulated. All regulators appear to be in agreement on the essentials: the monitor must be a highly qualified and respected person, should not present any conflict of interest or appearance thereof, and should instil public confidence.

Under both the Beneczkowski Memo concerning criminal matters and a 13 April 2016 memorandum from the Acting Attorney General Stuart F Delerey, 'Statement of Principles for Selection of Corporate Monitors in Civil Settlements and Resolutions' (the Delerey Memo),[25] the selection process begins with the opposing party identifying three candidates for the position and providing detailed information on each candidate. This information is then reviewed by a screening or standing committee and the candidates undergo a conflict-of-interest clearance process. Both the Criminal Division and Civil Division of the DOJ interview their prospective candidates and make a recommendation, which is then reviewed and approved by senior DOJ personnel.

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21 Remarks by Assistant Attorney General Brian A Benczkowski at NYU School of Law Program on Corporate Compliance and Enforcement Conference on Achieving Effective Compliance (12 October 2018), p. 5 available at https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-nyu-school-law-program.

22 ibid., p. 3.

23 ibid., p. 4.

24 US Department of Justice, Criminal Division, Fraud Section, Evaluation of Corporate Compliance Programs, https://www.justice.gov/criminal-fraud/page/file/937501/download.

25 Memorandum from Stuart F Delery, Acting Attorney General, Statement of Principles for Selection of Corporate Monitors in Civil Settlements and Resolutions.

On occasion, individual US attorneys' offices, in connection with their criminal and civil enforcement efforts, may select, or participate in the selection of monitors, receivers, special masters, claims administrators, and similar appointments. In some instances, depending on the circumstances and exigencies of the case, the attorney's office will solicit applications for these positions.[26]

Regulatory agencies, the bulk of whose monitorships are of the enforcement variety and usually require specific or technical expertise, may issue request for proposals (RFPs) to solicit qualified candidates. The RFP will request information similar to that required by the DOJ (e.g., credentials, experience, references and fee structure). The agency will then review submissions, winnow the field, interview the finalists and make a selection.

In some instances, individual agencies, for example the PANYNJ or the MTA, may establish a pre-qualified pool of candidates whose capabilities and reputation have been determined to be appropriate for the type of monitorship under consideration. While subject entities may be offered an opportunity to object to the selection of a particular monitor, unlike with corporate compliance monitorships, regulatory agencies do not typically solicit the names of candidates from the monitored entity.

26 https://www.justice.gov/usao-sdny/monitors-receivers-claims-administrators.

Part II

Experts' Perspectives

6

An Academic Perspective

Mihailis E Diamantis[1]

Monitorships are a common part of the suite of sanctions for corporate misconduct. Prosecutors show an increasing interest in actively reforming corporate criminals[2] and seem to favour using monitors for the job.[3] Judges, too, can[4] and do[5] impose sentences that involve monitor-directed reform. The role of the corporate monitor, in light of its new-found prominence, has come under increasing scrutiny by academics. The general tenor of the resulting discourse has been one of concern, namely that monitors do too much or too little, the wrong thing or the right thing in the wrong way.[6] Corporate lawyers and academics generally incline towards the efficiencies of private ordering, which is reflected in their preference for relatively hands-off sanctions, such as fines. Monitor-directed corporate reform is anything but hands-off.

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1 Mihailis E Diamantis is an associate professor at the University of Iowa, College of Law.

2 Lisa Kern Griffin, 'Inside-Out Enforcement', in *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct* 110, 119 (Anthony S Barkow and Rachel E Barkow, eds., 2011) ('Most DPAs mandate remedial measures, including prosecutor-designed compliance programs and, in some cases, personnel changes and structural reforms.')

3 id., at 119 ('About half of all DPAs also include monitoring provisions that effectively install government representatives within corporations to review and evaluate internal controls.')

4 US Sentencing Guidelines 8D1.1(a)(6) (providing judges with broad discretion to design terms of corporate probation 'to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct'.)

5 Vikramaditya Khanna, 'Reforming the Corporate Monitor?', in *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct* 226, 230 (Anthony S Barkow and Rachel E Barkow eds., 2011) ('[C]ourts have relied on a variety of supervisors, including trustees in bankruptcy, corporate probation officers and special masters.')

6 See generally *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct* (Anthony S Barkow and Rachel E Barkow, eds., 2011); Vikramaditya Khanna and Timothy L Dickinson, 'The Corporate Monitor: The New Corporate Czar?', 105 *Mich. L. Rev.* 1713 (2007).

This chapter, however, sounds a relatively rare note of enthusiasm for the criminal justice potential of the corporate monitor. When private ordering becomes corrupted by familiar pathologies of the organisational setting – agency costs, collective action barriers or ineffective information channels – a more hands-on approach may be the most effective remedy. As instruments of criminal justice, monitors and the promise of reform they bring should be evaluated in light of the goals of corporate criminal law. As argued below, monitors may be uniquely situated as the most promising agents for achieving the goals of corporate criminal law (see 'Criminal justice advantages of monitors and reform'). In fact, when corporate monitors are effectively used, they may obviate the need for any other form of criminal sanction (see 'Implications of monitorships for other sanctions'). To achieve these goals, prosecutors, judges and monitors must bear in mind some of the unique weaknesses of monitorships as a criminal justice solution (see 'Addressing the unique criminal justice challenges of monitorships').

Criminal justice advantages of monitors and reform

Criminal law finds itself in the embarrassing position of having punished corporations for over a century[7] without a defensible theory of what corporate punishment is supposed to accomplish. Consequently, corporate sanctions often involve a range of terms grasping ineffectively at cross purposes. A more effective approach would adopt a single coherent theory of corporate justice. The main alternatives academics have embraced are retribution and deterrence. As explained below, neither is suitable to the corporate context. While corporate rehabilitation is rarely discussed as a stand-alone goal of corporate punishment, it alone offers a coherent purpose for corporate criminal law. With rehabilitation comes the crucial role of the corporate monitor.

According to retributive theories of punishment, criminals should suffer their just deserts.[8] Retributivist themes are prominent in the public and political discourse about corporate wrongdoing.[9] Retributivism is socially salient owing to a feature of human psychology that disposes people to see corporations as (what cognitive scientists call) 'entitative' groups.[10] Once viewed as entities rather than mere collections of people, such groups occupy a similar place in human cognition as other moral agents. This means that people are disposed to blame and wish harm upon corporations that behave in ways people perceive to be wrong.

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7 See John Hasnas, 'The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability', 46 *Am. Crim. L. Rev.* 1329 (2009).

8 See Immanuel Kant, *Metaphysical Elements of Justice* 138 (John Ladd trans., 1999); Stanley I Benn, 'Punishment', in 7 *The Encyclopedia of Philosophy* 29, 30 (Paul Edwards ed., 1967) (noting that retributivists maintain that 'the punishment of crime is right in itself, that it is fitting that the guilty should suffer, and that justice, or the moral order, requires the institution of punishment'); Andrew Weissmann & David Newman, 'Rethinking Criminal Corporate Liability', 82 *Ind. L.J.* 411, 429 (2007) ('The corporation that transgresses that boundary can be as subject to retribution as an individual.')

9 See Miriam H Baer, 'Choosing Punishment', 92 *B.U. L. Rev.* 577, 612 (2012) ('The public has increasingly registered greater moral outrage in response to corporate governance scandals. Moral outrage, in turn, fuels retributive motivations and therefore supports those institutions best poised to take advantage of such motivations.').

10 Mihailis E Diamantis, 'Corporate Criminal Minds', 91 *Notre Dame L. Rev.* 2049, 2077–80 (2016).

The trouble for retributivism as a framework for corporate punishment is that corporations cannot experience suffering.[11] Since corporations have 'no body to be kicked',[12] the punishment the law imposes typically takes the form of monetary fines.[13] But fines flow through the corporate fiction to harm shareholders and employees, who, more often than not, will be innocent of their corporation's misconduct.[14] Shareholders and employees, as natural people, do suffer. So the unresolved paradox of retributive corporate punishment is that the bulk of the suffering corporate punishment inflicts goes to those who do not deserve it.

Deterrence as a framework for corporate punishment has a similarly fundamental shortcoming. Corporate sanctions, according to deterrence theorists, are supposed to alter corporate incentives so that criminal conduct becomes unappealingly costly.[15] Corporations may seem to be particularly appropriate targets for deterrence because they excel at the sort of cost–benefit analysis that deterrence theory relies on.[16] However, just as corporations do not suffer, they do not have the psychological structures capable of supporting independent incentives.[17] People sometimes say that corporations 'want' profit, but this is just shorthand for pointing out that the individuals who own and operate corporations want profit. Since corporations do not have their own incentives, there is no direct mechanism for corporate sanctions to have a deterrent effect.

It might be possible to deter corporations indirectly by targeting the individuals who act on their behalf.[18] These individuals have their own incentives. Yet corporate punishment is a poor tool for getting at them. Each shareholder and employee suffers, at most, a fractional share of any corporate-level sanction. These diluted sanctions cannot hope to outweigh

11 See *Dynamic Image Techs, Inc v. United States*, 221 F.3d 34, 37 n.2 (1st Cir. 2000) ('[C]orporations, unlike natural persons, have no emotions.')

12 John C Coffee Jr, 'No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment', 79 *Mich. L. Rev.* 386, 386 (1980) (footnote omitted) (attributing the quote to Lord Chancellor Baron Thurlow).

13 See *Texas Trading & Mill. Corp v. Fed. Republic of Nigeria*, 647 F.2d 300, 312 (2d Cir. 1981), overruled by *Frontera Res. Azerbaijan Corp v. State Oil Co of Azerbaijan Republic*, 582 F.3d 393 (2d Cir. 2009) ('Unlike a natural person, a corporate entity is intangible; it cannot be burned or crushed. It can only suffer financial loss.')

14 See Albert W Alschuler, 'Two Ways To Think About the Punishment of Corporations', 46 *Am. Crim. L. Rev.* 1359, 1366-67 (2009) ('This punishment is inflicted instead on human beings whose guilt remains unproven. Innocent shareholders pay the fines, and innocent employees, creditors, customers, and communities sometimes feel the pinch too.')

15 See Darryl K Brown, 'Street Crime, Corporate Crime, and the Contingency of Criminal Liability', 149 *U. Pa. L. Rev.* 1295, 1325 (2001) ('Corporate criminal law . . . operates firmly in a deterrence mode.'); Cindy R Alexander and Mark A Cohen, 'The Causes of Corporate Crime: An Economic Perspective', in *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct* 11, 14-15 (Anthony S Barkow and Rachel E Barkow eds., 2011) ('Within [deterrence theory's] rational-choice "deterrence" framework, individuals weigh the costs and benefits of crime-related activity against the expected sanction to maximize their private utility under the constraints of the organization in which they find themselves (or select into).'); Jennifer Arlen, 'The Potentially Perverse Effects of Corporate Criminal Liability', 23 *J. Legal Stud.* 833 (1994).

16 Harvey M Silets and Susan W Brenner, 'The Demise of Rehabilitation: Sentencing Reform and the Sanctioning of Organizational Criminality', 13 *Am. J. Crim. L.* 329 (1986).

17 See Lynn Stout, 'The Problem of Corporate Purpose', 48 *Brookings Governance Stud.* 1, 5, 7 (2012).

18 See Alexander and Cohen, *supra* note 8, at 15 (examining causes of corporate crime 'through the lens of an economic model in which corporate crime is the outcome of decisions by rational utility-maximizing individuals who have the ability to incur criminal liability on behalf of the corporation').

whatever private gains – reputation, bonus, promotion – induce individual employees to commit crime. Deterrence theory and corporate fines cannot overcome the inescapable economic fact of agency costs.[19] Indeed, available empirical evidence shows that corporate fines are ineffective at reducing corporate misconduct.[20]

Retribution and deterrence both fail because they get lost in the fiction that corporations are people. These two theories forget that corporate 'suffering' and 'incentives' are just as illusory as the corporate 'people' who are said to have them.[21] Rehabilitation is different.[22] It offers a framework within which there is something corporate sanctions can actually achieve without assuming corporations have human psychological attributes – preventing corporate recidivism[23] and modelling good corporate citizenship.

Organisational theorists have long recognised that corporate-level features (culture, processes and procedures, compensation rubrics, etc.) influence how employees behave.[24] Corporate culture in particular has garnered the attention of policymakers[25] and academics in business[26] and law.[27] Some aspects of corporate culture are, as with culture generally, premised on shared understandings, practices and histories that bring some features of the environment to social salience.[28] Other factors that influence corporate culture include a corporation's hierarchy, goals and policies, treatment of prior offences, efforts to educate employees

19 See Cindy R Alexander and Mark A Cohen, 'Why Do Corporations Become Criminals? Ownership, Hidden Actions, and Crime as an Agency Cost', 5 *J. Corp. Fin.* 1 (1999).

20 Alexander & Cohen, *supra* note 15 at 24 ('There is little evidence that increasing the magnitude of monetary sanctions has a deterrent effect.')

21 See *Int'l Shoe Co v. Washington*, 326 U.S. 310, 316 (1945) ('[T]he corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact.')

22 See Mihailis E Diamantis, 'Clockwork Corporations: A Character Theory of Corporate Punishment', 103 *Iowa L. Rev.* 507 (2018).

23 I am not aware of statistics for corporate recidivism and they would likely be unreliable in light of the very small fraction of corporate crime that is ever caught. Recidivism rates for individual white collar criminals are very high. See Mihailis E Diamantis, 'White-Collar Showdown', 103 *Iowa L. Rev.* Online 320, 328–29 (2017).

24 e.g., Fiona Haines, 'Corporate Regulation' 25 (1997) ('Organizational culture forms the 'touchstone' by which individuals behave and act.'); Martin L Needleman and Carolyn Needleman, 'Organizational Crime: Two Models of Criminogenesis', 20 *Soc. Q.* 517 (1979) (introducing and exploring the concept of crime-facilitative corporate systems in which participants are not compelled to perform illegal acts, but rather face extremely tempting structural conditions that encourage or facilitate crime).

25 US Dep't of Justice, United States Attorneys' Manual 9-28.600 (2008), https://www.justice.gov/archives/usam/archives/usam-9-28000-principles-federal-prosecution-business-organizations ('A corporation, like a natural person, is expected to learn from its past mistakes. A history of similar misconduct may be probative of a corporate culture that encouraged, or at least condoned, such misdeeds, regardless of any compliance programs.')

26 JP Cornelissen et. al., 'Social Identity, Organizational Identity and Corporate Identity: Towards an Integrated Understanding of Processes, Patternings and Products', 18 *Brit. J. Mgmt.* S1, S7 (2007) ('Among the most important traits identified by scholars are those relating to strategy, structure, culture and company history.'); see TC Melewar & E Karaosmanoglu, 'Seven Dimensions of Corporate Identity: A Categorization from the Practitioner's Perspectives', 40 *Eur. J. Mktg.* 846 (2006).

27 Pamela H Bucy, 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability', 75 *Minn. L. Rev.* 1095, 1099–100 (1991); Brent Fisse, 'The Attribution of Criminal Liability to Corporations: A Statutory Model', 13 *Sydney L. Rev.* 277 (1991); Ann Foerschler, 'Comment, Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct', 78 *Cal. L. Rev.* 1287, 1300–02 (1990); Jennifer Moore, 'Corporate Culpability Under the Federal Sentencing Guidelines', 34 *Ariz. L. Rev.* 743, 759–60 (1992).

28 See Edwin H Sutherland, *White Collar Crime* (1949).

on compliance with the law, and compensation scheme.[29] Corporate culture affects how employees behave.[30] For example, a high-pressure environment oriented toward quotas and production goals with little emphasis on legal or ethical limits can foster malfeasance, even among individuals not otherwise disposed to it.[31]

Compliance programmes are another organisation-level feature that influences the occurrence (and recurrence) of crime within a corporation.[32] By definition, compliance programmes seek to prevent misconduct within corporations.[33] They involve formal operation procedures designed to prevent, detect and remedy criminal conduct. The sorts of techniques currently emphasised in compliance literature are mostly common sense: 'promulgation of codes of behavior, the institution of training programs, the identification of internal compliance personnel and the creation of procedures and controls to insure company-wide compliance with legal mandates'.[34] But they need not stop there. Some scholars are calling for a more progressive, data-driven and technically sophisticated approach to compliance.[35]

If criminal corporations have criminogenic traits – such as defective corporate culture or poorly structured compliance – these are distinctly corporate features that the criminal justice system can actually work on. For this reason, corporate rehabilitation is uniquely situated as a framework for corporate punishment. As argued in 'Implications of monitorships for other sanctions', such rehabilitation is a criminal-justice goal that everyone can endorse.

In the effort to rehabilitate corporations, monitors have a crucial role to play. The fact that misconduct has taken place within a corporation is itself likely evidence of some organisational deficiency. The pervasiveness of the misconduct, the corporation's history of such misconduct and any involvement of higher-ranking corporate officers are all factors that bear on the magnitude of the deficiency.[36] The question then concerns how it can be repaired. The

29 Bucy, *supra* note 27, at 1101.

30 Alexander & Cohen, *supra* note 15, at 18 ('[T]he corporation can influence the probability of internal detection and punishment.')

31 e.g., E Scott Reckard, 'Wells Fargo's Pressure-Cooker Sales Culture Comes at a Cost', *LA Times* (21 December 2013), http://www.latimes.com/business/la-fi-wells-fargo-sale-pressure-20131222-story.html (discussing how the high-pressure sales environment of Wells Fargo led to large-scale moral and ethical breaches).

32 Samuel W Buell, 'Potentially Perverse Effects of Corporate Civil Liability', in *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct* 87, 93 (Anthony S Barkow and Rachel E Barkow, eds., 2011). ('Criminal [deferred prosecution agreements] now routinely require firms to reorganize business operations, adopt compliance measures, submit to enhanced monitoring for legal violations, and create systems to encourage and protect whistle-blowers.')

33 Miriam Hechler Baer, 'Governing Corporate Compliance', 50 *B.C. L. Rev.* 949, 958 (2009) ('"Compliance" is a system of policies and controls that organizations adopt to deter violations of law.'); William S Laufer, 'Corporate Liability, Risk Shifting, and the Paradox of Compliance', 52 *Vand. L. Rev.* 1343, 1345 (1999) ('An elaborate cottage industry of ethics compliance and preventive law experts lay claim to dramatically reducing the likelihood of criminal liability by maintaining an organizational commitment to ethical standards.')

34 Tanina Rostain, 'General Counsel in the Age of Compliance: Preliminary Findings and New Research Questions', 21 *Geo. J. Legal Ethics* 466–67 (2008).

35 William S Laufer, 'The Missing Account of Progressive Corporate Criminal Law', 14 *N.Y.U. J.L. & Bus*. 71 (2017).

36 These are among the features that federal prosecutors consider in their corporate charging decisions. Memorandum from Larry D Thompson, Deputy Attorney General, US Dept. of Justice, to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organisations (12 December 2006).

corporation cannot be left to fix its own defects. It was already entrusted to obey the law upon incorporation, and yet the defects still somehow arose. The deficiency may have come about by design – perhaps some higher-ranking managers stood to benefit from the misconduct.[37] But defects may also arise inadvertently because of incompetence, lack of will, inattention or poor communication about where risk resides. Whatever the case, the corporate structure and those running it were insufficient to keep the corporate house in order. Such a situation calls for an outside party, with different expertise and incentives, and with the power to implement reform. And so, enter the monitor.[38]

Implications of monitorships for other sanctions

When judges and prosecutors impose a corporate monitorship, it is typically alongside other corporate sanctions. Ideally, the various sanctions should hang together as a coherent, mutually reinforcing punitive package. Getting to the question of coherence presupposes that there is some legitimate function the other sanction terms need to perform. So, it is worth asking, if monitors can effectively rehabilitate criminal corporations (see 'Addressing the unique criminal justice challenges of monitorships'), is there any criminal justice residue for other penalties to address?

The answer is likely no. As discussed in 'Criminal justice advantages of monitors and reform', it is far from certain that there are any legitimate corporate criminal justice goals aside from rehabilitation. To the extent that other goals such as modified versions of retribution and deterrence should still have some purchase in the criminal law, corporate rehabilitation may be the best way to achieve them too.

Consider deterrence. As argued above, corporate fines are ineffective at deterring corporate misconduct because they cannot single out the individual employees whose incentives matter. Coerced reform, however, is also something corporations seek to avoid, especially when authorities appoint monitors to oversee it.[39] Presumably this is because corporations are particularly averse to the intervention of outside parties. So the threat monitors pose to corporate autonomy has its own deterrent effect. What is more, unlike fines, intervention by a monitor strikes directly at the individual autonomy interests of the employees within a corporation who are in the best position to prevent corporate misconduct.[40] Monitors, then, can accomplish what corporate fines cannot – targeted deterrence.

Most deterrence theorists do not care about deterrence for its own sake but for the ultimate goal of reducing the incidence of corporate crime. Here, reform and monitorships can beat typical deterrent sanctions at their own game. Successful rehabilitation directly reduces

37 See Jennifer Arlen & Marcel Kahan, 'Corporate Governance Regulation Through Non-Prosecution', 84 *U. Chi. L. Rev.* 323 (2017).

38 Khanna, *supra* note 5, at 237 ('[T]he monitor's primary task should be to ensure compliance and reduce the chances of future wrong-doing.')

39 id., at 231 ('[R]elying on a monitor as sanction may prove desirable when the deterrent effects of cash fines are exhausted and we desire more deterrence.')

40 Brent Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions', 56 *S. Cal. L. Rev.* 1141, 1155 (1983). ('A recent discussion of the potential use of probation as a sanction against corporations pointed out that probationary orders requiring corporations to rectify defective standard operating procedures or to make other structural changes within the organization may have a significant deterrent as well as rehabilitative effect because such intervention detracts from managerial autonomy.')

the incidence of corporate crime by forcing corporations to restructure operations so as to minimise the risk of recidivism.[41] Deterrent sanctions hope to prevent crime indirectly by adjusting corporate incentives. Corporations whose goal is to avoid future sanctions have two options about how to proceed. They might choose to invest in reforming themselves and preventing future offences. This is the option deterrence theorists hope corporations will take. But corporations might also choose to invest in better concealing future offences.[42] Which option will be in any corporation's best interest – reform or conceal – will depend on contingent circumstances. When used effectively, monitors take the second option off the table – criminal corporations have no choice but to reform as their monitors direct.

Using monitors to implement reform may also vindicate the underlying value that retributivists care about in corporate criminal law. As discussed above, a straightforward translation of traditional retributivism to the corporate context is nonsensical. It would require, impossibly, that corporate criminals suffer for their crimes. A modified version of retributivism may be more appropriate, one that sees punishment as communicating society's condemnation[43] and helping to establish standards for appropriate behaviour.[44] On this expressive form of retributivism, corporate punishment is a way for society to repudiate corporations that unduly prioritise profit over individual or social interests.[45]

To the extent that authorities have a retributive goal with corporate punishment, it must be responsive to the public's politically powerful demand for condemnation.[46] If that is right, retributivists should want to assure that their approach to corporate punishment draws on whatever methods best align with and express this condemnatory impulse.[47] An impressive body of evidence suggests that the human psychology of blame responds to the

41 See Ramsey Clark, *Crime in America: Observations on Its Nature, Causes, Prevention and Control* 220 (1970) ('Rehabilitation is also the one clear way that criminal justice processes can significantly reduce crime.')

42 e.g., Miriam H Baer, 'Too Vast To Succeed', 114 *Mich. L. Rev.* 1109, 1119 (2016); Chris William Sanchirico, 'Detection Avoidance', 81 *N.Y.U. L. Rev.* 1331, 1361 (2006).

43 HLA Hart, *Punishment and Responsibility* 235 (1968) ('[Some] modern retributive theory has shifted the emphasis . . . to the value of the authoritative expression, in the form of punishment, of moral condemnation for the moral wickedness involved in the offense.')

44 Lawrence Friedman, 'In Defense of Corporate Criminal Liability', 23 *Harv. J.L. & Pub. Pol'y* 833, 843 (2000) ('Criminal liability in turn expresses the community's condemnation of the wrongdoer's conduct by emphasizing the standards for appropriate behavior – that is, the standards by which persons and goods properly should be valued.')

45 See Dan M Kahan, 'Social Meaning and the Economic Analysis of Law', 27 *J. Legal Stud.* 609, 618–19 (1998) ('Just as crimes by natural persons denigrate societal values, so do corporate crimes. Members of the public show that they feel this way, for example, when they complain that corporations put profits ahead of the interests of workers, consumers, or the environment. Punishing corporations, just like punishing natural persons, is also understood to be the right way for society to repudiate the false valuations that their crimes express. Criminal liability "sends the message" that people matter more than profits and reaffirms the value of those who were sacrificed to "corporate greed."').

46 See Baer, *supra* note 9, at 612.

47 As many think it should. See Emile Durkheim, *The Division of Labor in Society* 47 (1983) ('[Through criminal punishment] we are avenging . . . the outrage to morality.'); George Vuoso, 'Background, Responsibility, and Excuse', 96 *Yale. L. J.* 1661, 1663 (1987) ('Only a criminal law that incorporated to some extent the morality of the society it was supposed to serve, could hope to endure and effectively achieve general deterrence and the other societal benefits that are thought to justify criminal punishment.')

characterological traits of offenders that produce bad action rather than merely to bad action itself.[48] This would suggest that people care most – morally speaking – about the organisational defects that encourage, facilitate or permit employee misconduct. Coercively reforming these should be the best way to satisfy the need society has to blame corporate malfeasance. Fines are too easily dismissed as a cost of doing business. With better publicity about how monitorships work and what they accomplish, the public might come to see them as the most fitting vehicle for shared retributive sentiments.

Addressing the unique criminal justice challenges of monitorships

Monitorships and corporate reform introduce a unique set of criminal justice challenges. While calculating the right size of a fine for retributive or deterrent purposes may be difficult, imposing a fine should be relatively easy. The magnitude of the fine conveys the retributive message, and the deterrent effects (i.e., how to avoid another fine in the future) are left for the corporate target to sort out for itself. Recent data, though, suggests that federal authorities are actually not very good at ensuring fines against corporations are paid.[49] If the simple act of collecting a fine poses a challenge, what can we expect by way of follow-through on the much more complicated process of imposing reform through corporate monitorships? The fact that the DOJ has only once found a corporation out of compliance with a pretrial diversion agreement (through which prosecutors typically impose monitorships) is not encouraging.[50] All of the beneficial criminal justice effects of monitorships can materialise only if the monitorships are well designed and properly implemented.

The inept implementation of prosecution-imposed monitorships is illustrative of a broader problem. Prosecutors lack the expertise necessary to design effective monitorship terms and programmes of corporate reform.[51] This is reflected in the open-ended nature of the reforms prosecutors require in pretrial diversion agreements.[52] This is not due to any aversion prosecutors may have to detail. The terms of monitorships are quite specific when it comes to compensation, length of appointment, powers and reporting.[53] However, so far as substance is concerned, prosecutors tend to give carte blanche to monitors to design and

48 See Mark D Alicke, 'Culpable Control and the Psychology of Blame', 126 *Psychol. Bull.* 556, 569–71 (2000); Michael D Bayles, 'Character, Purpose, and Criminal Responsibility', 1 *Law & Phil.* 5, 7 (1982) (arguing that moral blame and punishment are ordinarily responsive to assessment of the character of a wrongdoer, not his acts); Janice Nadler & Mary-Hunter McDonnell, 'Moral Character, Motive, and the Psychology of Blame', 97 *Cornell L. Rev.* 255, 257 (2012) ('In ordinary social life, therefore, an actor's perceived character and reasons for acting are of primary importance to the process of administering blame for that actor's harmful action.')

49 See Gov't Accountability Office, 'Criminal Debt: Court-Ordered Restitution Amounts Far Exceed Likely Collections for the Crime Victims in Selected Financial Fraud Cases' 2005.

50 Brandon Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations*, 78 (2014) ('Only once have prosecutors declared a company in breach of a deferred prosecution agreement, resulting in a guilty plea.')

51 See Baer, *supra* note 33, at 953 ('Despite the fact that the DOJ has intoned an interest in generating a more ethical 'corporate culture,' its prosecutors have little expertise in bringing about this development . . .')

52 See Garrett, *supra* note 48, at 72 ('[C]ompliance programs [required in DPAs] are often described in fairly general terms. They refer to 'appropriate due diligence' and 'effective compliance' without defining it.')

53 Vikramaditya Khanna and Timothy L Dickinson, 'The Corporate Monitor: The New Corporate Czar?', 105 *Mich. L. Rev.* 1713, 1723-27 (2007).

implement reforms.[54] Though accountability should be assured through the regular reports monitors must send to prosecutors, the latter lack the experience necessary to evaluate them properly.[55] In any case, these progress reports effectively function as self-graded report cards, since the monitors are reporting on their own handiwork.

To a large extent, the lack of direction prosecutors provide to monitors is symptomatic of a broader problem with monitors and corporate rehabilitation – there is global ignorance about how to reform corporations and what effective compliance looks like. To be sure, the base of knowledge among organisational scientists and business scholars is expanding rapidly, but it is far from complete.[56] Efforts to advance the understanding of corporate compliance are stunted by the fact that monitors' reports are generally withheld from the public. As a result, the actual details and results of monitors' efforts at reform remain secrets between corporate criminals and prosecutors.[57] There is no evidence that prosecutors are keeping any kind of scorecard. Shockingly, after decades of relying on corporate monitors to help rehabilitate corporations, the Government Accountability Office concluded that the 'DOJ . . . has no measures to assess their effectiveness'.[58]

These vulnerabilities of monitorships suggest some general policy changes that could help monitors achieve their criminal justice objectives. It should go without saying that monitors should be compliance experts in the relevant industry. This seemingly obvious point calls into doubt the DOJ's habit of appointing former prosecutors as monitors.[59] Further, even with expert monitors, authorities should do more to direct monitors about the types of reforms that would best further criminal justice goals. Currently, the DOJ 'has no formal guidelines for corporate compliance programs'.[60] Overly detailed guidelines would probably be counterproductive given the idiosyncratic compliance needs of any particular corporate criminal. However, the half-baked format of present monitor provisions suggests the DOJ should draw more generously from the 'considerable experience [that regulatory agencies have] with compliance programs'.[61]

While present-day organisational science is far from complete, all legal authorities should be drawing on the most up-to-date insights. Present indications are that prosecutors and

54 See also Griffin, *supra* note 1, at 120 ('DPAs . . . fail to make clear the scope of the monitor's responsibilities.'); Garrett, *supra* note 48, at 72 (noting that pretrial diversion agreements often just gesture toward the goal of 'effective compliance').

55 See Baer, *supra* note 31, at 977 ('[P]rosecutors do not review compliance plans prior to their implementation, test compliance processes over time, pool information learned from disparate firms, consult on a regular basis with compliance officers on key issues or concerns, or address procedural shortcomings as they discover them.')

56 Laufer, *supra* note 35, at 71.

57 Kathleen M Boozang & Simone Handler-Hutchinson, '"Monitoring" Corporate Corruption: DOJ's Use of Deferred Prosecution Agreements in Health Care', 35 *Am. J. L. & Med.* 89 (2009).

58 US General Accountability Office, GAO 10-110, 'DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-Prosecution Agreements, but Should Evaluate Effectiveness' 20-24 (2009), available at http://www.gao.gov/assets/300/299781.pdf.

59 Griffin, *supra* note 2, at 120 ('When prosecutors direct sole-source contracts to former colleagues in the private sector, questions about conflicts of interest arise.')

60 Memorandum from Eric Holder, Deputy Attorney General, to All Component Heads and United States Attorneys, Bringing Criminal Charges Against Corporations (16 June 1999), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF.

61 id.

judges are largely ignorant of recent data and technologies.[62] By tying projects of reform to the best present-day understandings of what works, authorities can maximise the prospect that monitors will succeed in rehabilitating corporations.[63] A data-driven approach would also help secure more cooperation and confidence from the corporations who are undertaking the effort and expense of complying with monitors' instructions.

In addition to having more detailed and informed terms for monitorships, more effort should be made to make monitors' progress reports publicly available. Part of the rationale behind keeping reports secret is to protect corporate business secrets. These should be protected. However, to the extent not absolutely necessary for that goal, publicising monitor reports would have three distinct advantages. First, it would help advance organisational science. With more available data about what corporations have tried in various industries, scholars and authorities could get more insight into what works and what does not. Once these insights filter into the work monitors undertake, the prospect for successful reform would improve. Second, publicised reports would give the public more exposure to and a better understanding of what monitorships involve. With this, the public may come to see that monitorships adequately satisfy the expressive interests society has in corporate criminal justice. Third, publicised reports may help authorities keep tabs on monitors. Prosecutorial follow-through is an enduring weakness of corporate sanctions. Bringing the light of day to monitor's reports could effectively crowdsource the work by allowing the public and media to follow a corporate criminal's progress towards reform.

62 John Hasnas, 'A Context for Evaluating Department of Justice Policy on the Prosecution of Business Organizations: Is the Department of Justice Playing in the Right Ballpark?', 51 *Am. Crim. L. Rev.* 7 (2014).

63 See William S Laufer, 'A Very Special Regulatory Milestone', 20 *U. Penn. J. Bus. L.* 391, 409.

7

An In-House Perspective

Jeffrey A Taylor[1]

At the outset

The company will learn during its settlement discussions with the government whether it will be subject to an independent monitor. Assuming a monitorship cannot be avoided, the first important question will concern the identity of the monitor. While the government ultimately makes the selection, the company can often propose candidates and, through external counsel, may be able to help the government understand what experience, expertise and technical capability the monitor should have to maximise the odds the monitorship will achieve the government's aims and remediate the perceived problems of the company. Key also to the government will be the independence of the monitor candidates; lawyers, consultants, and former government officials who have previously interacted with the company will almost always lack the required independence.

For instance, if the company is a manufacturing concern, the monitor candidates would ideally have experience of some type in that industry. To be clear, this does not mean the monitor must previously have been the monitor for another company in the industry (though this would be helpful). Rather, it would be enough if, for example, the candidate had consulted in the industry, provided legal representation to a manufacturing company, or worked for a regulatory body that oversaw or interacted with the industry. It is critical that a monitor comes to the assignment with basic knowledge of the company's business, and a professional and prepared monitor team will have done enough advance study to be able to hit the ground running when the monitorship begins.

If the monitor candidate lacks knowledge of the industry, the monitor will often look to fill that gap by assembling a team to assist in performing the monitorship. If the monitor is from a law firm, the team will likely comprise other members from the law firm as well as experts retained to assist in technical areas beyond the ken of the lawyers. Increasingly

1 Jeffrey A Taylor is the executive vice president and chief litigation counsel for Fox Corporation.

monitors come from consulting firms that specialise in investigative services, compliance, project management and monitorships (see Chapter 8). These firms have in-house specialists but also access to external experts who can be hired on contract to serve as members of a monitorship team. The monitor candidates will often assemble a portion of their teams in preparing and submitting proposals to the government.

The engagement letter

For the company, there are two critical documents concerning the monitorship: the deferred prosecution agreement (DPA) or plea agreement, which will already have been finalised with the government, and the engagement letter, which will be negotiated and signed with the monitor. The latter will in many respects be informed and constrained by the former.

For instance, the scope or jurisdiction of the monitor's work will be set forth in the DPA and then mirrored in the engagement letter. Sometimes the language will clearly detail the monitor's mission, but more often the language used by the government will be more general and open to interpretation. And even in cases where the language is specific, the DPA will usually contain a catch-all provision that makes clear that the scope of the monitor's work is to be interpreted broadly. To cite just one example, the provision will state that '[p]rovisions regarding the Monitor's jurisdiction, powers, and oversight authority and duties [are] broadly construed'. Such language will make it difficult for the company to confine the monitor's work strictly to the precise terms of the jurisdictional provision, no matter how specific the language. The company should always keep in mind, too, that the government will be generally disposed to side with the monitor in disagreements concerning scope. After all, there is little incentive for the government to side with a company accused of – and having admitted to – wrongdoing.

Still, the engagement letter process gives the company an early opportunity to engage with the monitor on jurisdiction and scope, and in any event, the language in the engagement agreement should not be broader than that found in the DPA or plea agreement. If the monitor and the company simply cannot come to a meeting of the minds on this topic at this stage, it is better to resolve the issue (with the government's help, if necessary) early in the relationship so that the work can begin on a sound footing.

The engagement letter will also mirror other important terms of the DPA, for example, the term of the monitorship, the company's responsibility for fees and costs, the company's obligation to make available witnesses and documents, and how matters subject to legal privilege will be handled. The company has scant leverage on many of these terms, but there remains some. The company can ask the monitor to agree to use company-preferred (and less expensive) travel and lodging services; the company can suggest language that makes clear that monitor requests – particularly those relating to senior company officials – should be reasonable; and the company can expressly reiterate the language from the DPA that protects the company from having to disclose privileged material to the monitor.

The engagement letter should also contain language ensuring the confidentiality of the materials and information provided to the monitor, the monitor's reports, and any other materials created by the monitor concerning the company, and what will be done with those at the end of the monitorship. In addition, the agreement should make clear that the monitor will join with the company in fighting any effort by third parties to obtain such materials.

Finally, the company should pay close attention to the term of the monitorship set forth in the engagement agreement. The DPA, which has a specified term, may well commence several weeks before the monitor is named. The engagement letter may take a week or so to finalise, and as a result, the monitorship term may purport, pursuant to the engagement letter, extend beyond the expiration date of the DPA. This mistake should be remedied at the outset, with the dates aligned to the end date of the DPA.

Structuring the company's monitor team

Just as the monitor will need to build a team with the required expertise, judgement and ability for the mission, so too the company must have a qualified team ready to work daily with the monitor to satisfy the company's obligations. Ideally, the company should identify a single individual to lead that effort, and it should be someone who can devote most if not all his or her attention to the task. The ideal candidate will be a respected leader in the company who has the support of, and access to, senior leadership and, as appropriate, the board of directors; an experienced team leader with strong project management experience; and someone who understands the mindset of government regulatory and enforcement agencies. It is not essential that the candidate be a lawyer, but if not, it is critical that the team include a member of the in-house legal staff who can advise the team and help identify matters that implicate attorney–client privilege or work-product doctrine.

The internal monitor team leader should be empowered by the company to make significant decisions that bind the company under the monitorship. That leader must have enough experience, expertise and judgement to know when issues need to be elevated to the company's general counsel or business leadership. The internal team leader should build a close working relationship with the monitor. Significant issues should be elevated to this level and resolved, if possible, before elevating further, including to the government.

The team should also include subject-matter experts from within the company whose expertise dovetails with the subject matter of the monitor's scope of work. For example, if the monitorship is focused on the company's compliance programme, the internal company team should have members steeped in that programme. Similarly, if the monitor is focused on safety and engineering processes, the internal team should include members who are knowledgeable in these areas. In this way, the team members can help educate the monitor team, proactively identify issues and anticipate next steps, and quickly identify witnesses and information that will increase the efficiency of the monitor's work.

Just as the team leader should be a respected and talented employee, the team members should also be known top performers in the organisation. These individuals will interact regularly with the monitor team, and to the extent these interactions build trust and confidence, it will help the monitorship proceed smoothly and end successfully.

Setting the tone

From the outset of the monitorship, the company should establish and maintain a cooperative and constructive relationship with the monitor. The monitor will be there for some period, working with and inside the company at the direction of the government; it makes little sense for the company to assume an adversarial position unless necessary. During the term of the monitorship, the company should err on the side of accommodation to preserve a

good working relationship with the monitor. The company should always bear in mind that there is little or no incentive for the government to side with the company in a dispute with its monitor.

Critical to creating a productive, collaborative tone is establishing early on a relationship between the monitor and the senior leadership and board of directors of the company. This will give the monitor confidence at the outset that the company respects and supports the effort she is undertaking, and company leadership gains a better understanding of the plans the monitor has for the monitorship.

A good start is achieved by inviting the monitor to present to the board and the senior leadership during the first few weeks of the monitorship. The monitor team leader for the company should work with the senior leadership and board to prepare them for the meeting by reviewing the DPA, the engagement letter, and what the monitor has proposed as her initial work plan. It is important during this meeting that the chief executive officer (CEO) and board chair (lead director, if the CEO is the chair) convey their support for the monitor's work and pledge the support of the company. Put simply, the company message should be along the lines of: 'We have made mistakes, we are working hard and are committed to correcting those mistakes, we understand and appreciate that the monitor is here to help us make those corrections, and we will fully support the monitor's efforts.'

The team leader should also brief the monitor on the members of the senior leadership team and the board, and what they would hope to see in the meeting from the monitor. It is helpful if the monitor has studied his or her brief and can speak intelligently – even at that early stage – about the company and its business.

Following this meeting, additional efforts should be undertaken to flow down throughout the company the cooperative and respectful tone taken by company leadership. For example, a video message from the CEO to company employees expressing support for the monitor's work helps establish the proper company mindset for upcoming interactions with the monitor and her team.

Briefing the monitor and his or her team

Setting the scene

At the outset of the monitorship, the company will also be well served by conducting detailed briefings for the monitor team concerning the business of the company. The briefing should start with a comprehensive overview of the business, and then focus in detail on those parts of the business where problems arose that led to the DPA or plea agreement. Detailed briefing books should be prepared and delivered in advance so that the monitor team can prepare for the meetings and have prepared questions. It is also helpful at these briefings to have the company experts and managers present on the different topics. This approach shows again the cooperative posture of the company, and it instils confidence and trust in the monitor and his or her team. Also, by introducing many of the employees and materials relevant to the scope of the monitor's work, this approach can help focus the early work of the monitor team.

As part of its early education effort, the company should also schedule site visits, particularly when manufacturing or engineering issues are critical to the monitor's work. For example, in the automotive industry, one lacks an appreciation for the complexity and challenge of engineering and manufacturing vehicles until one visits an assembly plant. Witnessing the company's activities will help the monitor gain perspective about the company and its employees.

Preparing the company's employees

The company's employees must also be educated about the DPA or plea agreement, the monitor, and pitfalls to be avoided. This can best be accomplished through a programme that includes communications and training.

With the DPA or plea agreement, there will undoubtedly have been some communication from company leadership when the agreement was entered with the government. Even so, the company should continue with additional communications concerning the obligations the company is undertaking as a result, including the monitorship. The communication should also make clear to employees the cooperative and collaborative approach the company will take with monitor. Last, the communication should inform employees that they are required to take a training module on the DPA and the monitorship.

The training module should be prepared and available on day one of the monitorship. It should cover the requirements of the DPA, the details of the monitorship and the company's expectations of employees in their interactions with the monitor team. Importantly, the training should also identify the internal company monitor team, make clear that the internal team has responsibility for interacting with the monitor team, and provide contact information for each of its members. Employees should be encouraged to reach out those team members if they have questions or concerns, and an internal email or web address should set up to reach out to the internal team. Because many DPAs also require that the monitor establish its own hotline at the company during the monitorship term, the company communication and training should also reference that hotline.

The training must address another critical concern relating to the DPA or plea agreement. Those agreements will contain an agreed upon statement of facts between the company and the government. The DPA or plea agreement will also contain a provision prohibiting the company or its employees or agents (e.g., external counsel) from making public statements that contradict the statements of facts. While it is critical that company leaders, spokespersons and attorneys are aware of these restrictions, educating all employees on this restriction will help ensure that no inadvertent mistakes occur.

Living with the monitor

A collaborative, cooperative, transparent and trusting relationship is the key to a successful monitorship for the company. The confidence-building steps described above should put the relationship on a strong foundation. Going forward, the internal monitor team must make sure that relationship is sustained in daily interactions, including the setting of ground rules. The better the relationship, the more likely that ground rules can be established that are less intrusive.

Interviews

The DPA gives the monitor unfettered access to people throughout the company. And the monitor may well be within his or her rights to approach anyone in the company without prior notice to the internal monitor team. From the company's perspective, such an approach would be extremely disruptive, and in truth, it would not serve the monitor's broader purpose of bringing positive change to the company.

Instead, the company and monitor should agree that the internal monitor team will serve as 'clearing house' for interview requests from the monitor team. The internal team can assist the monitor in identifying the appropriate employees for interviews and making certain they are available at a time convenient for the monitor team. The internal team can also make sure that interviewees locate and provide requested documents, while ensuring that such documents do not include privileged materials. To preserve the independence of the monitor and the integrity of the monitorship, the internal team should agree at the outset of the monitorship that it will not 'prep' or coach the interviewees. One caveat is that the monitor should not object to the internal team reminding the employee before the interview that he or she should not answer questions that touch on legal advice or legal work product.

On the other hand, a monitor will not typically object if the internal monitor team debriefs the interviewee after a meeting, particularly if it is done not just to aid the company in understanding the direction of the monitor's inquiry, but also proactively to assist the monitor in identifying other employees and documents that may bear on the issue of interest. By engaging in these debriefs the internal team can keep a running log of all interviews and topics covered (which should be disclosed to the monitor). In addition to helping the company understand the scope and direction of the monitor's work, the debriefs help avoid redundant interviews and assist the internal team in checking the accuracy of the monitor's reports.

Documents

The DPA empowers the monitor to obtain documents from the company, except for those subject to attorney–client or work-product privilege. The monitor will want to keep these documents in its own database, which will be off-limits to the internal company team. Here, too, however, the company – with notice to the monitor – should keep a log of all documents that are produced to the monitor during the term of the monitorship. As is the case with the interview log, the document log helps the company understand the scope and direction of the monitor's work and anticipate next steps. As described below, tracking the documents will also help the company team review monitor reports for accuracy and completeness.

Monitor reports

The DPA will direct the monitor to file periodic reports with the government, and the frequency depends on the preference of the government regulator involved in the case. Some agreements require annual reports and some require them as often as every four months.[2] In any event, the company should attempt to persuade the monitor to give the company a role in reviewing the draft reports for factual accuracy before they are submitted to the government. Not every monitor will accede to this request, particularly if the relationship with the company is the least bit adversarial. But a compelling argument can be made to the monitor that he or she does not want to suffer the embarrassment of submitting a report that contains factual errors or inadvertent misrepresentations of employee interviews.

Assuming the monitor agrees to this request, the internal team can use the interview and document logs to assist in reviewing the draft report. Those logs will also help the team locate

2 Some are even three months (e.g., RMBS monitorships).

the appropriate company personnel to review factual assertions and recitations of employee interviews. By thus farming out relevant portions of the report for review, the internal team can quickly provide comments to the monitor that will make for a more accurate report.

Occasionally the monitor team and the internal team will end up at loggerheads over a factual assertion, an inference drawn or a quotation taken from an employee interview. In these cases, if a resolution cannot be reached by the monitor herself and the company's lead, the company could take the issue to the government through its outside counsel. But this should be done only in extraordinary cases as it risks undermining the relationship with the monitor, and the government will be loath to side against the monitor.

Monitor recommendations

Throughout the monitorship term, the monitor will make recommendations to the company to make changes that will fix problems that led to the DPA. From the company's perspective, these recommendations should proceed from a thorough understanding of the company's structure and operations. The internal team should make it a priority from the outset to assist the monitor team in developing that understanding. Ideally, the monitor will agree to hold off on making recommendations until his or her team has developed sufficient understanding and credibility with company employees so that the recommendations are well designed, substantive and effective at solving the identified problems. Recommendations for the sake of making recommendations should be discouraged by the internal team.

Ideally, the monitor will agree that recommendations will be finalised only after consultation with the company. While the monitor is certainly empowered to make recommendations even when strongly opposed by the company, a better result will be achieved if the monitor and company reach consensus on the proposed recommendation. An effective approach used by some monitors involves raising proposed recommendations as 'discussion items', engaging in dialogue with company experts on the feasibility and effectiveness of the proposal, and finalising the recommendation for submission to the government after consensus is reached.

The internal team should keep detailed records of the recommendations. A spreadsheet listing the recommendations, the date each was finalised by the monitor, the target date for completion and the internal owner of each recommendation are useful for tracking implementation progress. To ensure there is a plan for implementing the recommendation, the internal team should require an implementation plan created and maintained by the internal owner of each recommendation. From time to time, the monitor will ask to be updated on the company's progress with recommendations, and these records, kept current, can be used for this purpose.

Interactions with the board, the CEO and senior leaders

The relationship established at the outset between the monitor and those at the highest levels of the company should be maintained throughout the monitorship. This relationship helps the monitor appreciate the importance assigned to the monitorship by the company, and it affords the company leadership the opportunity to hear of any issues of concern directly from the monitor. An effective approach can be to have the monitor present to the board of directors periodically and participate in a regularly scheduled short meeting with the CEO and other senior leaders whose responsibilities intersect with the scope of the monitorship.

Some potential pitfalls

Reporting 'bad news' and avoiding surprises

The internal team must make sure that the monitor learns of new issues from the company, particularly where the problem relates to a matter within the jurisdiction of the monitorship. More problematic is the scenario involving a new issue, potentially criminal in nature, not within the monitor's bailiwick. The DPA will include a requirement requiring that such an issue be raised to the government, though not necessarily to the monitor. In these cases, the company should nonetheless provide the monitor a high-level, factual summary of the matter, being mindful of protecting privileged advice and information. The monitor should not hear about an issue for the first time from the new media. By being transparent and proactive, the company will instil confidence and trust in the monitor that the company is committed to doing the right thing.

Privilege and work product

The typical DPA allows the company to hold back materials but obliges the company to use best efforts to provide the requested information in a manner that does not jeopardise the asserted privilege. At the beginning of the monitorship, the internal team leader should obtain the monitor's agreement that the monitor team members will not seek information protected by privilege, and that the company team will be permitted to educate employees about privilege before they are interviewed by the monitor team.

Still, inevitably the monitor team will ask for information or materials that implicate attorney–client privilege or work-product doctrine. When this issue arises, it should be elevated to the monitor and the internal team leader, who should involve the company's legal department in negotiations over a solution. Generally, a compromise can be reached. If not, this is an area where the company may well need to go the government with its concerns. A company subject to a DPA is likely subject to related civil litigation, and the company should not have to risk waiver to remain in compliance with the DPA.

Ending the monitorship

At the end of the monitorship, amid well-deserved elation, the company must remain mindful of several important close-out matters. The company should put together a plan for bringing the monitorship and government supervision to a close, and then execute that plan. To develop that plan, the company should in parallel work towards closure with the monitor and, with the assistance of external counsel, begin a dialogue with the government about bringing the matter to a close.

Company counsel should work through outside counsel to make certain the government, too, understands and agrees that the monitorship is winding down successfully. The communications should begin several weeks – if not months – before the end date specified in the underlying document that establishes the monitorship. There should ordinarily be no surprises at this point; presumably any government concerns would have been communicated to the company through external counsel for the company of the monitor. Still, the waning days of a monitorship can be fraught, as employees, managers, and leaders at the company sometimes grow complacent and less diligent, figuring – wrongly – that the government may have lost interest in the matter. To the extent the company can get the government's agreement

that, assuming no late-breaking problems, the monitorship and pending charges (in the case of a DPA) will end on a certain date, the company can construct its plan accordingly.

The company should also communicate closely with the monitor during this time period. Ideally, the relationship between the monitor and the company is productive and strong at this point in the relationship, and the monitor can be the company's ally in going to the government about closure. Of course, the monitor cannot play that role if unaware of the company's efforts, and therefore the monitor should be generally aware about the company's conversations with the government. Indeed, it can be very helpful if the monitor, the company and the government engage in discussions about the end game, including the date on which the government will end its supervision of the company.

By this point in the monitorship, the company and the monitor should be aligned on the progress the company has made and the justification for ending the relationship. Typically, the monitor will have made its final set of recommendations several months prior, and the final few months are spent monitoring implementation and sustainment of those recommendations. To ensure alignment as the closing date approaches and conversations with the government begin, the company should take several proactive steps.

First, the company should proactively schedule reviews for the monitor, designed to show the progress made on recommendations and positive results therefrom. While often a company will not be able fully to implement all recommendations by the end of the monitorship (and generally this is not required), it is important to demonstrate continuing progress to the monitor – and the government, and to show the company's commitment energetically to complete the effort and its willingness to continue devoting necessary resources.

To underscore that commitment, the company should also make senior management and board members available to the monitor in the closing weeks of the monitorship. Inviting a final report by the monitor to the board of directors bookends the beginning of the monitor's relationship with the company and will provide evidence of the company's ongoing commitment to remediation as well as appreciation for the work the monitor has done, and there should be a wrap-up meeting with the CEO at which the monitor is given explicit assurance that the company will continue the corrective course set out by the monitor. It is also helpful at such meetings for the CEO or other senior leadership to sketch out how the company will continue to monitor implementation of the recommendations. Often, for instance, companies will commit to using their internal audit functions in such a role.

Finally, while respecting the monitor's need for independence, the company should work closely with the monitor team as it prepares its final report to the government. The company team should be quick to provide requested documents, witnesses and other materials necessary for that report, and the team should look for fitting examples of significant remediation successes that can be brought to the monitor's attention for inclusion in the final report. The goal of the company is for that report to conclude without reservation that the monitorship has accomplished its goal.

Despite all these best efforts, sometimes a last-minute brush fire will occur. Perhaps an employee engages in a fraud that is attributable to the company, or a compliance lapse takes place, or an important recommendation has simply been ignored. In such cases, the trust and mutual respect that has been established during the preceding few years is what should spare the company from further trouble (in the form of, say, an extension of the monitorship). The hard work and good corporate behaviour exhibited by the company should convince the

monitor (and in turn the government) that the late-breaking issue represent not backsliding, but truly aberrant behaviour that will be dealt with appropriately by the company.

Housekeeping items

In connection with the end of the monitorship, the company should consider whether and to what extent it desires publicity about the matter. Should there be a press release? Does the company want to have a hearing in open court at which the judge will dismiss the pending charges in a DPA? Does the company need to make a disclosure under securities laws? The answers will differ depending on the facts of each case, but the questions need to be studied by the appropriate company personnel in the run up to the date.

Finally, after the monitorship ends, the charges are dismissed and the government supervision ends, the company must attend to the voluminous records and files it undoubtedly will have amassed during the monitorship. Proper storage and retention protocols should be followed, and it is also important to hold the monitor to the engagement letter requirement that the monitor return all documents to the company or destroy them, and certify that such destruction has occurred.

8

Leveraging Forensic Accountants

Frances McLeod, Emma Hodges, Neil Goradia and Jenna Voss[1]

Over the past decade, monitorships have advanced considerably, being adopted by an increasing number of regulators and enforcement entities. Although still building momentum, jurisdictions further afield than the United States have moved beyond nurturing an interest in monitorships to formally legislating their application in settlement negotiations. It was once more common for monitorships to stem from investigations into alleged bribery and corruption; today, the monitorship model receives a far wider scope, imposed in response to a variety of organisational misconduct and across a breadth of industries. Monitors have been installed, for example, to oversee and assess conduct in:

- police departments (focusing on cultural change);
- vehicle manufacturers (assessing controls around research and development, and emissions testing);
- banking institutions (testing anti-money laundering and sanctions-related compliance programmes); and
- public accounting and auditing firms (overseeing quality control and cultural improvements).

Although each monitorship approach is invariably different, firms that offer forensic accounting and data analytics can play a fundamental role, particularly in such a changing landscape. Fulfilling a monitorship broadly requires a good understanding of the subject organisation, as well as acquiring and analysing its data, books and records, and its control environment – both historical and newly implemented. It is chiefly in connection with this that forensic firms have played such an important role over the past decade, but forensic firms can also provide a strategic role that should not be underestimated.

1 Frances McLeod is a founding partner, Emma Hodges and Neil Goradia are partners, and Jenna Voss is a director at Forensic Risk Alliance.

Frequently, there is a disconnect between an organisation's conduct and what regulators expect of it during monitorships, and this is often the case where an organisation has not recognised the need or learned how to transition from investigation mode to monitorship mode. Often, there is a divide concerning data analytics and compliance monitoring activities and capabilities. Forensic firms can play a crucial role in bridging this gap. That said, there is no one-size-fits-all approach: approaches vary depending on the industry of the organisation, which may be lightly regulated or heavily regulated, such as life sciences or banking. In a heavily regulated industry, the forensic firm should have the necessary experience to successfully meet the monitorship's objectives while maintaining the integrity and security of the organisation's data.

The role of forensic firms in monitorships

Forensic firms typically comprise closely integrated teams of forensic accountants, consultants and data analytics specialists. Teams will often include chartered accountants; certified fraud examiners; anti-money laundering specialists; data specialists and analysts; and industry-specific experts (e.g., banking experts). These teams ideally marry complementary expertise in the areas of, for example:

- anti-corruption, anti-money laundering, sanctions and counter-terrorism financing investigations;
- compliance programme design, review and testing;
- process review and internal controls testing;
- audit negligence assessments; and
- disgorgement and the ability to pay calculations.

Forensic firms with multi-jurisdictional experience, including in situations that require handling data-access challenges (e.g., data privacy, banking secrecy, confidentiality and state secrets), can be immensely helpful. Forensic firms should also bring experience conducting internal and regulatory investigations, performing and evaluating transactional and controls testing, and undertaking reviews of compliance programmes (e.g., corporate and social responsibility, human rights, product liability, sanctions, anti-bribery and corruption, anti-money laundering and counter-terrorism financing, and taxation).

In a more practical sense, forensic firms may also identify opportunities to improve the business by detecting both isolated and systemic issues, crafting specific and pragmatic recommendations, and later evaluating and testing the ensuing remediation efforts. All these tools are required throughout the life cycle of a monitorship.

Further, the forensic firm may take on the role of being a monitor, supporting a company that reports to a monitor, or providing independent advice and support directly to a monitor. These three roles are set out in more detail below.

The role of monitor

If subject-matter expertise is a prerequisite for a company's monitorship, it may be useful that either the forensic firm or an individual from within the forensic firm takes on the role of monitor. For example, Public Company Accounting Oversight Board monitorships require candidates for monitorships to possess substantial accounting and auditing experience and qualifications, and it is anticipated that the United Kingdom's Financial Reporting Council

and other regulators may adopt similar requirements in the future, which would render forensic firms best suited for handling these types of monitorships.

The role of 'company-support forensic firm'

Forensic advisers may support a company during its monitorship. A monitorship can be a significant burden on a company's time and resources, placing employees in an entirely unprecedented situation to the point of overwhelming the company. One way to alleviate these pressures is for the company to employ a monitor-response team, and forensic advisers may make excellent members of such a team. Undertaking the role of company-support, a forensic firm can help the company proactively understand and respond to key issues, including:

- helping the company navigate the nuances of monitorships and certification decisions;
- providing project management support to the company, such as facilitating its responses to monitor requests for data and documentation, preparing status reports, and coordinating meetings and interviews with the monitor;
- providing additional resources to fill new or vacant roles within the company, or to departments that require additional support;
- supporting the company in developing and executing plans to implement the remedial measures the monitor recommends, including in remote locations;
- identifying potential areas of concern through compliance testing and monitoring, allowing the company the opportunity to pre-empt these issues during the monitorship; and
- supporting the company's implementation of measures to mitigate identified risks, whether concerning policies and procedures, controls, technology, data management, or data analytics.

The role of 'monitor-support forensic firm'

Finally, the forensic firm may collaborate with the monitor and provide support. This role varies based on the nature of the engagement, the mandate of the regulator, and the level of sophistication or maturity of the company's compliance programme. Such support generally involves:

- understanding the historical misconduct and subsequent investigation, focused principally on the scope and methodology employed by the company;
- understanding the company's current situation, including what, if any, remediation efforts are already in place;
- determining what a company must do to meet the regulator's mandate;
- devising clear and pragmatic recommendations;
- testing the company's remediation efforts following implementation of the monitor's recommendations; and
- reporting to the monitor, the company and relevant regulators.

This chapter primarily focuses on the two supporting roles highlighted above, as other chapters of this guide provide information relevant to the role of monitor and are applicable to forensic firms undertaking this role.

Leveraging forensic accountants and data analytics

Company-support forensic firms

Guiding a company through a monitorship can be challenging, complicated and stressful, leading to damaging finger-pointing exercises and reorganisation, which may escalate tension and uncertainty. Investigations also place a strain on the company's resources that would otherwise be spent running the business. Further, it is not often the case that a company's employees will have previously held key leadership roles during a monitorship. A company-support forensic firm can provide the requisite experience and resources to alleviate these pressures.

Below, we highlight several areas where companies under monitorship may benefit from engaging a company-support forensic firm.

Navigating the nuances of monitorships and certification decisions

Under each monitorship there will come at least one critical moment where the monitor will need to determine whether the company has successfully mitigated the risks that originally led to his or her appointment. As part of this certification decision, the monitor may consider the company's plans for the future, whether it has a strong compliance 'tone at the top', whether its remediation measures are well designed, sustainable and effective, and how fully the company has addressed the monitor's concerns. A company-support forensic team helps the company's management better anticipate necessary changes and provide insight into the monitor's role.

Further, an experienced company-support forensic team can help the company understand which factors the monitor may consider in his or her decisions and ensure the company has adequate resources to focus on the key areas of business the monitor will focus on. For example, the monitor of a company under Foreign Corrupt Practices Act (FCPA) monitorship for past conduct relating to bribes facilitated via payments to vendors will likely place a high emphasis on ensuring the company has a robust, sustainable and well-controlled vendor due diligence programme in place, as well as a strong compliance department that exercises sufficient monitoring and oversight over this due diligence process.

Responding to requests

In many situations, the monitor will use a forensic firm to analyse the company's internal controls. A company-support forensic firm offers supplementary assistance, helping the company understand the monitor's requests for documents and data to fulfil his or her role. This can be effective as it eases the burden on employees.

A company-support forensic firm also helps prepare the company's approach to the monitorship. For example, if the monitor requests 'all documents' relating to a disbursement transaction, the forensic team can help the company prepare a checklist for the type of documentation the company would likely retain for such a transaction, including the contract with the vendor, vendor due diligence files, invoices, purchase orders, accounting system screenshots and relevant correspondence. Providing these documents upfront will minimise the burden on the company and facilitate a smoother working relationship with the monitor.

Preventing monitor 'scope creep'

A company should be mindful of the monitor's potential 'scope creep', where the monitor's requests for information and data relate to areas outside the purview of the monitorship. Scope creep can cost a company time and money, as well as increase its exposure, and a company-support forensic firm may be able to support the company in identifying and formulating responses to requests that are out of the monitor's purview.

Developing and executing remediation plans

Following the monitor's recommendations, the company may develop, execute, test and communicate its remediation plans, as well as provide training to its employees. A forensic firm may help interpret the monitor's recommendations and support the company's remediation plans. Further, monitor recommendations often require enhancements to – or even replacing – the company's systems. It is often the case with compliance issues that communication issues are to blame. A forensic firm with systems-related expertise can help evaluate the company's information technology, including determining whether systems are fit for purpose, and assist the company with any necessary implementations.

Remediating issues at local branches

Often, large organisations struggle to roll out new processes and controls to remote branch locations or subsidiaries. Challenges may arise owing to language barriers, time-zone constraints, a lack of resources, localised policies and procedures, and poor communication between employees. Again, a forensic firm may be able to provide the necessary support to a company by assisting communication and remediation, and providing resources.

Internal audit and investigations guidance

In certain types of monitorships, the monitor may consider the sufficiency of a company's internal audit and investigations teams, in which case forensic firms can employ professional with in-house or external experience in these areas. This may include providing internal audit teams with guidance on improving the level and type of documentation in their work papers, ensuring audit work programmes capture relevant regulatory risks, and delivering reporting that clearly articulates key observations. Similarly, an inexperienced internal investigations team could benefit from observing how the company-support forensic firm conducts an investigation into a hotline complaint regarding alleged misconduct (i.e., a shadow investigation).

Proactive testing and assessment of implementations

Engaging a forensic firm with sufficient monitorship experience can help a company understand how the monitor may carry out his or her assessment during the initial phases of the monitorship, for example, by testing controls related to the company's disbursements process. The same holds true for assessing the company's technical and systems landscape to ensure it is suitable. Remediation often takes companies significantly longer than they anticipate, and a forensic firm can address this early on by providing feedback addressing areas of focus or pre-empting the most complex remediation. A head start increases the company's chances of successfully ending the monitorship within the initially defined term by allowing more

time for remediation and spreading out the burden placed on employees over a longer period of time.

The forensic firm can also partner with the company's internal audit team to leverage testing that the audit team already performs to avoid duplication of efforts. Depending on the monitorship's established reporting cadence, a company may not receive feedback from the monitor outside of predefined intervals – sometimes even as infrequently as once per year. The forensic firm's proactive testing can be an important measure to mitigate any risk that the company does not receive critical feedback when it is too late to address potential shortcomings.

Supplementary resources

Frequently, companies undergoing a monitorship lack the necessary resources to adequately triage the company's controls landscape, perform baseline risk assessments, assess systems and monitoring capabilities, ensure processes are carried out in a timely and effective manner, and develop action plans to address critical issues. While hiring additional employees is often necessary, commencing a recruiting campaign and identifying the right candidates may not be feasible in the short term.

As well as providing supplementary resources to a company, guidance from a forensic firm may take the form of an advisory role, such as reviewing a draft policy, as well as support for implementation efforts. In a different capacity, the forensic firm may supply resources for analyst roles as a temporary measure for organisations with resource or knowledge constraints. For example, a financial institution with a backlog of 'know your customer' forms to complete as part of its new customer onboarding process owing to a shortage of resources may consider retaining the forensic firm for temporary support completing said reviews. Such resources can also alleviate the burden on the company's full-time employees, additional to the daily duties, to respond to monitor requests (e.g., for data, documents or interviews).

Project management support

Successfully navigating a monitorship requires a strong project management programme, and companies often lack the capacity for this, which can hinder their ability to sufficiently enhance their controls within the monitorship. There may also be situations where companies lack an organised process for gathering and delivering requested documents to the monitor, thereby delaying the monitor's ability to assess remediations. If a company cannot implement enhancements and the monitor cannot obtain evidence of the enhancements in a timely manner, a company could find itself in the costly position of a monitorship extension. Forensic consultants from reputable firms possess project management experience in sensitive, time-critical situations, and can take on many of the imminent project management requirements while the company is under monitorship.

Monitor-support forensic firms

Once selected, monitors have a difficult task ahead: sifting through large volumes of data and documents, understanding complex global organisations from top to bottom, and making critical evaluations of many components of an organisation's operational and technical infrastructure, often while navigating the additional nuances resulting from a cross-border

assignment. It is critical, therefore, that monitors carefully consider how to structure a team that has sufficient subject-matter expertise, industry knowledge, technical and analytical skills, and resources to meet the objectives the regulators established for the monitorship. A monitor-support forensic firm can help a monitor achieve this.

Meeting regulators' expectations

Regulators expect the monitor to have a well-rounded team that includes professionals with skills outside the monitor's primary expertise. In these situations, selecting a monitor-support forensic firm to complement the monitor's team is more than simply a best practice. In situations where the regulator does not explicitly require a monitor-support forensic firm, including a multifaceted team during the monitor-selection phase can bode well. The monitor-support forensic firm's reputation and experience can enhance the monitor's profile – especially if the monitor-support forensic firm has worked with the regulator previously.

In recent years, the Department of Justice (DOJ) has placed increasing emphasis on the use of data analytics through the establishment of its own Data Analytics Team. Hui Chen, former compliance consultant to the DOJ, stated that, '[t]he Fraud Section's data analytics capacity building is a recognition of the importance of data science in compliance and investigations, and the move places it well ahead of most corporate compliance programs in the ability to detect crimes.'[2] Often, companies not only perform ongoing monitoring and testing, but the monitor engages a forensic firm to. An emphasis on data analytics to underpin this work was apparent by Fraud Section requests to include data requests as part of pitches and the practice for monitors to identify and bring to pitches their forensic consultant of choice.

Structuring the monitor's assessment

During the initial planning phases, it is important to conduct a thorough risk assessment of the company, identifying the risks relevant to the monitorship (e.g., geographically, by customer type or by business unit). A forensic firm experienced in assessments related to the nature of the monitorship will be adept in identifying these risks through a combination of analytics, targeted review of documents and interviews.

The monitor-support forensic firm uses information gathered during the risk assessment to build a work plan for the assignment. A well-designed work plan is critical to ensuring the monitor understands the level and depth of analysis required in key areas of the business based on identified risks, and helps lay out the timing for completing assessments to ensure the monitor's objectives can be achieved within the time frame set forth in the applicable settlement agreement. For example, the monitor-support forensic firm may compile a detailed schedule that includes the timing of specific steps that the monitor-support team and the monitor's team need to perform to facilitate the monitor's assessment, including when sample selections would be communicated to the company, the company's deadlines for producing documents in response to the sample selection, and the anticipated dates for site visits to the company's global locations. This schedule may be shared with the company in advance.

2 https://www.bna.com/data-analytics-whitecollar-n57982088607/

A monitor will separately be concerned in some detail by the organisation's own risk assessment, which represents one dimension of its compliance risk management framework and control environment. Monitor-support forensic firms are adept in taking the evaluation one step further to assess whether the company's risk responses have been designed effectively so as to adequately mitigate certain key risks presented in the risk assessment.

Analysis, testing, reporting and certification

The monitor-support forensic firm can serve a critical role in supporting the monitor in understanding what went wrong historically, performing the baseline assessment of the company, determining what remedial actions the company needs to take, and assessing the company's progress in implementing these remedial actions through transaction review, data analytics and controls testing. Through this testing, the monitor-support forensic firm will be able to deliver examples of what is actually happening in practice within the company and to help pinpoint existing or remaining risk areas or weaknesses.

Data analysis, transaction testing and controls testing often follows a risk-based approach. Planning begins with the risk assessment (see above), understanding compliance risks inherent to the business (e.g., geographical, the nature of the product, routes to market or types of customers). This is supplemented by an understanding of relevant IT systems and data sources, along with the control environment and an evaluation of whether the company has an adequate understanding of relevant risks and adequate controls in place to mitigate relevant risks.

Transactions can be drawn from any number of data sources and for a variety of purposes depending on the risk focus. This is to determine, for example, whether a higher-risk transaction has been executed in line with the company's policies and procedures, or contracts, whether there is proper business rationale for the transaction, whether it has been recorded and documented appropriately, and whether controls have operated effectively. Transaction testing may identify individual or isolated issues, or may provide information about systemic issues. In either case, the monitor-support forensic firm, with knowledge of the specific issues, will be able to design practical recommendations. On the other hand, transaction testing may provide evidence that risks have been adequately addressed, which will also be important in presenting a balanced report.

Monitor-support forensic firms perform elements of control testing through the transaction testing outlined above. However, a monitorship will often require a more holistic evaluation of company's control environment. This would consider assessing whether controls are correctly designed, implemented fully, and working effectively, including whether the controls have the necessary impact once in place and whether the company has adequate resources to perform the control.

Testing is also used to assess the effectiveness of remediation efforts. For example, the monitor may have recommended that the company implements a system control to prevent payment to third parties that have not been successfully diligent. The monitor-support forensic firm may test a sample of payments to third-parties, post implementation of this system control, to determine whether the control has indeed been implemented and whether it has been operating effectively to prevent such payments. Monitor-support forensic firms will often also consider the sustainability of controls over the long term by weighing whether the proposed or newly added control comes as too high a cost (e.g., in time, resource, or

budgetary requirements) such that a risks exists that the organisation may abandon the control at a later point.

Further, as the monitorship progresses, the monitor will need to make important decisions regarding the company's readiness for certification. Monitor-support forensic firms understand the nuances required in contemplating certification, and can draw on experience in other matters to provide the monitor guidance in assessing which concerns within the company are the most critical for the company to remediate, given the historical concerns underlying the settlement agreement.

Navigating data access, privacy and secrecy considerations

Locale-specific statutes and regulations – such as the French Blocking Statute, Chinese Cybersecurity Law, Russian data localisation laws and other legal constraints – present monitors with significant challenges in collecting and analysing data, and monitors must frequently establish protocols to address regulations across jurisdictions. The May 2018 enactment of the EU General Data Protection Regulation (GDPR) has further compounded the challenges monitors face. Monitors often rely heavily on forensic firms to support the collection, management and analysis of data throughout the monitorship.

Sophisticated monitor-support forensic firms can be instrumental in devising nimble solutions and processes to overcome data challenges. It is not uncommon to face situations where data cannot move outside a certain jurisdiction, location or be accessed at all owing to data privacy and confidentiality requirements, including in situations with a complex systems landscape and in jurisdictions with stringent data privacy requirements. In these situations, a monitor-support forensic firm, understanding the underlying purpose and nuances of these regulations and restrictions, works with companies to develop a process to access the information needed to perform the analysis while ensuring confidentiality and data-privacy provisions are not breached. For example, to handle particularly sensitive data, a firm may establish mechanisms for transferring only sanitised versions of documents for review, with the confidential information visible only when accessing the information in a jurisdiction where such access is allowed. This solution requires a strong understanding of the local regulations, the ability to effectively communicate with the company and their counsel to reassure them that the solution will satisfy their concerns, and finally, the technological know-how to develop on-site solutions and ensure protocols cannot be broken.

Selecting a forensic firm

Since every monitorship is different, it is important to consider the nature, complexity and subject matter of the assignment at hand when evaluating contenders for the role of forensic firm.

Industry and subject-matter expertise

As with engaging any professional services firm, it is important to assess the level of expertise the forensic firm has that is relevant to the monitorship at hand. As outlined at the beginning of this chapter, forensic firms often employ individuals with a variety of backgrounds. A forensic firm's prior experience in the subject matter and industry of the monitorship is an important consideration during the interview process, since the analysis required during

a monitorship into bribery and corruption concerns will involve different skill sets than a monitorship regarding environmental matters. For example, a monitorship of a global bank regarding money laundering concerns would require the ability to understand where specific compliance risks lie within a complex, global organisation. Therefore, a prudent selection for this matter would be a forensic firm that would staff the engagement with a team of experts with experience performing risk mappings of international financial institutions and evaluating the internal control framework and governance structure of a global bank within this risk mapping.

It is also important to consider what type of assessment the monitorship will entail. For example, enforcement monitorships – where the selected monitor has a highly prescribed roadmap of what the assessment should include – require a different type of analysis and prior experience than a monitorship with a broader mandate, such as one focused on FCPA issues where the monitor is tasked with performing a root-cause analysis. In the latter, it is critical to ensure that a monitor selects a forensic firm with sufficient experience and requisite subject-matter knowledge to be able to perform the required root-cause analysis.

Experience and credibility with regulators

Many forensic firms have significant experience working with certain regulators, and some even hire professionals who have worked for a regulator in the past. Engaging a forensic firm that has experience with a specific regulator (e.g., DOJ, Securities and Exchange Commission (SEC), Environmental Protection Agency) is crucial for understanding that regulator's expectations and anticipating potential areas where the regulator may have concerns as the monitorship progress.

Systems, data management and analytics expertise

Employing a forensic firm with deep information technology expertise is crucial for a number of reasons. First, at its most basic level, when assessments are conducted and recommendations are made, these insights should be as data and empirically driven as possible. Therefore, with data having such a foundational role in the work conducted during a monitorship, having a forensic firm with the expertise to identify, collect, analyse and report on data from a variety of sources, and in disparate formats, is crucial to their efficiency and effectiveness.

Global companies often have myriad data sources and systems, and navigating the systems to extract the necessary information can prove challenging. The IT systems landscape becomes increasingly complicated for companies that have expanded through acquisitions or maintain different systems in different locations. When handed a request for information (e.g., a list of global clients), companies often have a hard time figuring out how to pull the needed data from the various systems. A skilled forensic firm works with companies to navigate these challenges and is aware of potential pain points in the data collection process. As part of the monitor's team, a monitor-support forensic firm can ensure requests are specific, targeted and formulated in a way that will make sense to a company's IT team.

Depending on the type of monitorship, the forensic firm's technical skill sets will often also be valuable in assessing the technical and systems environment to ensure that it is appropriate and capable of supporting the operational and compliance functions within the company. This means that expertise around systems implementation and integration, data transfer, and data governance is necessary to not only make the right assessments, but also provide

the needed insight in remediation of issues or gaps that are identified. Such assessments can help a monitor's team evaluate controls embedded within systems and the governance around systems implementation efforts. It is also often important for a company-support forensic firm to have strong information technology skills to support the company.

Additionally, in cross-border and multi-jurisdictional engagements, it is inevitable that there will be data privacy and management hurdles to address while still ensuring that data can be collected, reviewed, and analysed in a way in that is fruitful and beneficial to the end goals of the monitorship. Forensic firms should not only have the experience in dealing with these constraints, but also be able to provide bespoke solutions to adhere to regulations while still proceeding with work plans and target deliverables.

Finally, the incorporation of data analytics in surveillance and monitoring activities within companies is no longer new or cutting edge, but a requirement as part of a robust and effective operational and compliance programme. This general expertise will likely exist within many companies in this day and age, but a good forensic firm will have data analytics specialists with experience in developing data analytics and data visualisations to help identify suspicious behaviour and mitigate risks. This expertise is necessary in assessing monitoring programmes, but even more useful in helping companies develop proactive monitoring programmes specifically tailored to the company's risk areas and profile.

A company-support forensic firm can develop sophisticated monitoring tools (i.e., risk-related analytics that can be visualised via, for example, dashboards) that allow the companies' management to quickly delve into large volumes of data to extract key observations and identify areas of potential risk. The monitor can also leverage dashboards to perform deeper analysis of trends (e.g., unusual spikes in sales), volume of activity (e.g., number and dollar value of payments), and activity by location (e.g., high-risk transaction types occurring in higher-risk jurisdictions). Insights gleaned from this data analysis can provide the monitor with better informed samples during a risk-based sample selection and testing.

Forensic firm's staffing and project approach

It is important to establish the forensic firm's approach to the assignment, including plans for staffing. A skilled forensic firm should ensure that its contributions are always in support of the monitor (or a monitor-response team), that teams are appropriately and sufficiently staffed, and that it plans to efficiently complete all tasks leading toward the conclusion of the monitorship. Above all, the forensic firm should have sufficient measures in place to ensure that it follows methodical and defensible analysis and reporting to meet the needs of the defined scope of the engagement as defined in the applicable settlement agreement.

Since monitorships often extend over multiple years, it is important to consider whether the potential forensic firm has sufficient depth to staff the engagement at present, as well as to add additional resources if necessitated by the scope or turnover among staffed resources. When retained for a sizable engagement, smaller forensic firms sometimes staff their teams with external contractors. Other forensic firms draw on external contractors for specific language or technical expertise. When interviewing a forensic firm that uses external contractors, it is important to inquire how the forensic firm exercises sufficient oversight over external resources to ensure consistent, defensible analysis and reporting.

Global experience

If a monitorship is cross-border, involving subsidiaries or entities located in multiple countries, it is important to consider the potential forensic firm's global experience. A forensic firm with global experience will likely have diverse language skills, experience working in multiple regions, and a more sophisticated understanding of potentially applicable regulations (e.g., related to data privacy and the transfer of data), as well as likely be more sensitive to cultural differences that can arise while working in foreign jurisdictions. It is important to understand whether the forensic firm has sufficient expertise in-house, will staff the engagement with personnel from other locations, or will hire external contractors (either to add to head count or to bolster specific language or technical expertise), with the objective of ensuring the forensic firm utilises sufficiently trained resources who are working under adequate oversight.

Independence

Like law firms, forensic firms need to ensure they do not accept work on matters that would present a conflict of interest to the potential client or any existing conflicts. It is important to understand whether a potential forensic firm would have any conflicts of interest during the hiring process. The types of conflicts that may arise – and how a forensic firm perceives them – varies based on the size and specific policies of the firm. A forensic practice that is part of a large audit firm, for example, will be conflicted from providing certain forensic services (monitorship- and non-monitorship-related) to current and future audit clients.

Engaging a forensic firm

The process for engaging a forensic firm is similar to that of retaining a law firm. Once the forensic firm assesses and clears any potential conflicts of interest with other parties involved in the matter, the forensic firm enters into an engagement agreement with the company retaining the forensic firm's services or the company's external counsel. These engagement agreements include key contractual terms such as the scope of the engagement (often closely linked to the regulator's mandate as set forth in the applicable settlement agreement) and how the forensic firm will bill for its services. Companies seeking a forensic firm for its monitor-response team should work with external counsel (if applicable) to determine whether the forensic firm should be retained such that the forensic firm's work product and communications would be covered under any attorney–client privilege the company maintains through its retention of external counsel.

Best practices for leveraging the forensic firm's expertise

Engagements are most successful when the forensic firm is involved throughout the life cycle of the monitorship, beginning with the initial stages of the process, so that all knowledge can be leveraged and the most efficient work plan can be created. For monitors, this would mean engaging a monitor-support forensic firm during the selection phase, as the monitor-support forensic firm can provide additional insight in the scoping and engagement planning stages. Decisions made early in the engagement, such as establishing a process for handling data privacy concerns on a cross-border assignment, can have a long-lasting impact if a monitorship spans multiple years, so it is important to seek the monitor-support forensic firm's guidance on these areas as early as possible.

The monitor should collaborate with the monitor-support forensic firm to define the cadence and team structure that makes most sense for the matter. Sometimes the monitor and monitor-support forensic firm work simultaneously (e.g., joint document review, site visits). In other instances, the monitor requests the monitor-support forensic firm perform site visits and testing ahead of the monitor's own assessment. While both strategies have pros and cons, it is essential to consider the specific nature of the monitorship (e.g., company size, breadth and depth of operations, regulator and data complexities) and strengths of the various parties comprising the monitor's team to establish the best approach. Proactive establishment of communication channels, timeline, and expected reporting is also essential to building strong working relationships across the monitor's team.

The price tag for engaging a forensic firm may seem expensive; however, companies should weigh this against the cost of not satisfying the requirements to conclude the monitorship. The potential exists for significant additional fines, professional and legal fees, monitor fees, and added reputational risk if a company fails to meet the monitor's requests and the monitor is unable to certify and requires an extension of the monitorship period.

We suggest that companies retain a company-support forensic firm as soon as a mandated monitorship becomes imminent – if not earlier. Many regulators, including the SEC and DOJ, consider whether a company has proactively started addressing concerns related to the alleged misconduct when assessing fines and penalties. However, if a company enters into a monitorship but has yet to retain a company-support forensic firm, it is not too late. For the reasons described above, forensic firms can support companies and monitors throughout all phases of a monitorship.

Part III

International and Cross-Border Monitorships

9

Monitorships in East Asia

Shaun Z Wu, Daniel S Lee, Ryan Middlemas, Jae Joon Kwon[1]

Monitorships are common in the United States and elsewhere, but in East Asia this is not yet the case. Generally, monitorships are initiated by a regulator or prosecutor, or out of a court's express order. Alternatively, they could be the result of internal corporate compliance needs. Regardless of the types or origins of monitorships, a growing global emphasis on legal and ethical compliance has led to their proliferation.

In the United States, monitorships are routinely imposed as a condition of certain orders or negotiated terms, such as deferred or non-prosecution agreements, and appointing a monitor has become increasingly popular in other jurisdictions, notably the United Kingdom. In East Asia, on the other hand, there is not a historical practice of monitorships. However, in an increasingly globalised market, East Asian businesses and organisations are not immune to monitorships and the issues they raise.

This chapter considers the application of monitorships in an East Asian context and their impact on East Asian organisations. We will also consider some of recent examples of the first monitorships imposed by governmental authorities in the region, in what may be the start of an emerging trend.

Domestic monitorships: growing compliance emphasis

As demonstrated by the increase in prosecutions and enforcement cases over the past 10 years since the 2007–2008 financial crisis, there is a growing emphasis on legal and ethical compliance in East Asia, and companies have struggled to meet the constantly evolving regulatory compliance requirements in the region. However, it is extremely rare for East Asian regulators and prosecutors to reach out to independent private parties to evaluate and monitor the subject organisation's level of compliance. There are numerous reasons why East Asia has not traditionally adopted this mechanism.

1 Shaun Z Wu, Daniel S Lee, and Ryan Middlemas and Jae Joon Kwon are lawyers at Kobre & Kim.

The primary reason is that the legal regime in most East Asian jurisdictions does not provide for the appointment of a monitor. Often, there is no procedure for the regulator or enforcer to settle a case; the government can simply decide to exercise its powers, bring a prosecution before a court or drop the investigation. At the cultural level, governmental authorities are reluctant to have a private party conduct an oversight role to ensure compliance and many view this as the government's responsibility. Also, there are various mechanisms in place that effectively achieve – or strive to achieve – the same goals that monitorships in the United States are seeking to achieve.

For example, in South Korea, the Financial Supervisory Service (FSS) monitors financial institutions pursuant to its four-part examination process, namely 'off-site monitoring', 'pre-examination preparation', 'on-site examination' and 'post-examination action'.

Off-site monitoring

FSS examiners analyse financial and operational reporting from financial institutions, evaluate quantitative safety and soundness measures, and work to identify areas of weaknesses and risks in need of supervision or action.

Pre-examination preparation

FSS examiners make quarterly and annual examination plans for examination of financial institutions. The examination plans set financial institutions (and branches) to be selected, the types of examination to be carried out (full-scope and targeted), the tentative dates, the number of examiners to be assigned, and the scope of the examination activities.

On-site examination

FSS examiners perform full-scope and targeted examinations of financial institutions. They conduct full-scope examination to evaluate financial institution's overall financial, management, operational and compliance performance. A targeted examination is limited in scope and is intended to address a narrow range of supervision matters and concern, such as incidents of irregularity and unsound business activity.

Post-examination action

According to the result of the FSS examiners' examination, the administrative sanctions may be imposed on the subject financial institution and individuals involved in serious violations of laws and regulations.

South Korea's legal regulations demand that listed companies with total assets of more than 500 billion won and financial institutions should have one or more compliance officers responsible for duties related to abiding by the above compliance guidelines. Even if compliance officers are not appointed by government, the mandatory compliance system helps to achieve the same goals that monitorships seek to achieve.

Foreign monitorships in an East Asian context

With these systemic cultural differences, it remains unclear whether East Asia will consider adopting the monitorship mechanism in the near future. Meanwhile, we are also seeing the

emerging trend of foreign government-imposed monitorships affecting parties based in the region becoming increasingly common.

Monitorships in the United States tend to be driven by three key areas: financial sector compliance; public protection, such as consumer safety or environmental standards; and criminal law compliance (e.g., corruption, sanctions or money laundering). In East Asia, US-ordered monitorships tend to be driven by the third category. This is a natural trend, given that almost all US-ordered enforcement actions in East Asia have been criminal in nature.

ZTE Corporation

Despite the frequency of criminal enforcement actions from the United States, there were few notable cases of monitorships in the region until 2017, when the United States imposed a monitorship on Chinese telecommunications giant ZTE Corporation, one of the first examples of a high-profile monitorship imposed in East Asia. The following is a sequence of events surrounding the monitorship.

ZTE relied on US-produced components for its smartphones and computer networking gear. By exporting its technology to Iran and North Korea, ZTE was found to be in violation of US sanction agreements. As a result, the United States forbid American companies from selling components to ZTE and its subsidiary, cutting off the company's supply to critical parts for its networking gear and smartphones from American companies such as San Diego-based chipmaker Qualcomm.

ZTE settled with the United States in March 2017, agreeing to pay fines of $890 million and accepting a monitor appointed by the District Court. A denial of American companies' export privileges was suspended based on ZTE's promise to implement the agreement. However, in April 2018 the United States alleged ZTE was failing to comply with the agreement, and once again cut American exports to the Chinese company. ZTE's ability to be supplied key products from American companies was shut off for three months, threatening bankruptcy for the company. Ultimately, ZTE agreed in June 2018 to pay additional fines of $1 billion and allow the US Department of Commerce to send a monitor to watch its business practice.

Subsequently, the monitorship term was extended from 2020 to 2022, and the powers of the monitor were expanded to police ZTE to the same degree as that of a second monitor appointed by the US Department of Commerce. Other conditions of the monitorship included replacing ZTE's entire board of directors and senior leadership.

From China's perspective, the appointment of a monitor and the imposition of the other strict measures in the *ZTE* case were a major intrusion into a key business. This reaction shows how countries should consider the symbolic significance of a foreign-appointed monitor when applied in a different cultural context. As an example, consider the reverse situation: if China were to appoint a Chinese citizen as a monitor to oversee all compliance activities of a major listed company in the United States, the decision would likely face stiff opposition from a number of different American stakeholders. While there is no suggestion that China will introduce such a mechanism, this is the context in which the monitor's role must be carried out when appointed to oversee an East Asian party.

Other issues in monitorships over Chinese companies could include Chinese state secrets. The current China–US trade war may see increased focus on the conduct of Chinese parties,

with greater enforcement activity being conducted under US sanctions law, FCPA, etc. *ZTE* may become a model for further monitorships to come.

Panasonic Avionics Corporation

Panasonic is another example of a monitorship imposed in the East Asian context. In 2007, a US-based subsidiary of Panasonic that produces in-flight media systems, Panasonic Avionics Corporation (PAC), hired a foreign official as a consultant, paying him over $875,000 over a six-year period while the consultant did little work for PAC. The payments were then accounted for in Panasonic's books and records as legitimate consulting expenses. Further, PAC employees concealed the use of certain sales agents who did not pass internal diligence requirements, formally terminating their relationship with these agents but secretly continuing to use them by re-hiring them as sub-agents of another company, subsequently hiding over $7 million in payments to at least 13 agents.

By providing false representations with the payments made to these consultants and agents to Panasonic, PAC led its parent company to falsify its books, records and accounts. Subsequently, the US Department of Justice (DOJ) charged PAC for violating the accounting provisions of the Foreign Corrupt Practices Act (FCPA) with respect to retaining consultants for improper purposes and concealing payments to third-party agents.

PAC entered into a deferred prosecution agreement with the DOJ on 30 April 2018 for this violation, agreeing to pay criminal penalties of $137 million and retain an independent corporate compliance monitor for at least two years. Further, in a related proceeding, the US Securities and Exchange Commission (SEC) filed a cease-and-desist order against Panasonic, and the latter entered into an administrative agreement with the former to disgorge $143 million as part of the resolution.

East Asian monitorships in an international development bank context

A further field in which monitorships have been seen in an East Asian context is through quasi-governmental organisations, particularly international development banks such as the World Bank. As China continues to implement its 'One Belt, One Road' initiative to finance a network of infrastructure in numerous jurisdictions in the region, the East Asian Infrastructure Investment Bank (AIIB) – developed by China to partly finance this initiative – will grow to ever-increasing levels of financing activity. It remains to be seen whether the AIIB will follow the World Bank and other development banks in adopting a compliance guideline framework including a provision for a compliance monitor where there are compliance concerns.

Monitorships in a development bank context arise where the recipient of funding from an international development bank or the participant in a project funded by an international development bank is found to be, or suspected of having been, involved in a breach of a law, compliance failure or inadequate standards of integrity. A development bank may subject the party to oversight by a monitor for a period of time as a condition of continued access to funding. This differs substantially from a monitorship in a prosecution context, where the monitorship may be imposed conditionally as part of a deferred prosecution agreement.

The clearest example of monitorships of this kind are those imposed by the World Bank. All parties involved in a World Bank investment project are subject to the World Bank Procurement Regulations for Borrowers (the Procurement Regulations). The Procurement

Regulations outline standards required of borrowers, and prohibit fraud, corruption, collusion, coercion and obstructive practices. A breach of any of these provisions may result in a sanction imposed by the World Bank. The default sentence, and the most commonly imposed, is 'debarment with conditional release'.

A debarment with conditional release prohibits a subject from access to World Bank loans for a specified period of time, with access to loans to be restored at the conclusion of the period, if certain requirements are met. These requirements commonly include the introduction of a more robust compliance framework, to be verified by an independent monitor before the entity's debarment can be lifted.

Disbarment from access to World Bank financing and the remedies imposed by, for example, the appointment of an independent compliance monitor, are recognised and enforced by certain other multinational development banks through an agreement known as the Agreement for Mutual Enforcement of Debarment Decisions. Whether through this mutual recognition procedure or under its own integrity regime, some other multinational development banks impose a similar integrity regime, which may include the appointment of an independent monitor. In East Asia, these institutions include the Asian Development Bank.

Two further development banks in the region that broadly follow the World Bank model in their policy objectives are the China Development Bank (CDB) and the Asian Infrastructure Investment Bank (AIIB). The CDB has not to date adopted a sanctions regime that allows debarment of a potential borrower, with provision for the appointment of a monitor to allow a borrower to regain borrowing privileges. This may be because the CDB's mandate is purely domestic.

By contrast, the AIIB's mandate is significantly more international. Founded by China in 2016, the AIIB has authority to fund projects throughout the Asia-Pacific region and receives funding from member nations throughout the world. As a result of the AIIB's multilateral structure, it is perhaps not surprising that the AIIB adopts a sanctions and debarment regime broadly based on the World Bank model, including maintaining an extensive list of entities debarred from accessing AIIB funding as a result of a compliance failing.

What we have not yet seen emerge in relation to the AIIB is a mechanism for debarred entities to be rehabilitated and subsequently regain their borrowing privileges. As the AIIB has only been in operation for three years at the time of writing, it may be that the bank has not yet had an opportunity to develop an arrangement of this kind. As the AIIB continues to build out its institutional structure in the coming years, it will be interesting to observe whether the AIIB continues to follow the World Bank model by imposing independent monitorships as a condition of a party being removed from the bank's list of debarred entities.

East Asia-imposed monitorships: an emerging trend?

While monitorships mandated by governmental authorities have not traditionally been a feature of legal and regulatory regimes in the region, there are some signs of East Asian authorities adopting the concept of monitorships. It is perhaps not unexpected that this trend has been seen in Singapore and Hong Kong – two international financial centres with common law legal systems, which maintain particularly close links with key western economies such as the United States.

The appointment of an independent monitor to oversee rectification efforts following a compliance breach is standard practice in many western financial regulatory regimes. Now

that the monitorship concept has been employed in Singapore, the practice will form part of the repertoire of Singapore regulatory authorities to employ in future cases.

A further example of the adoption of the independent monitor concept in Singapore is in the competition or antitrust context. The Competition and Consumer Commission of Singapore (CCCS) has the power to issue an 'interim measures direction', imposing conditions on the grant of approval for a transaction such as a merger. As a condition of approving a recent acquisition of ride-hailing app Uber's Southeast Asia business by competitor Grab, the CCCS imposed a requirement for an 'independent monitoring trustee' to be appointed.

The monitor's role is to supervise the newly merged business's compliance with a number of operational and legal restrictions imposed by CCCS. In the case of the *Uber/Grab* transaction, these conditions included maintaining certain pre-merger pricing, terminating some pre-existing exclusivity agreements and restrictions on access to operational data held by Uber. Monitorships in this context vary somewhat to the traditional format in that here the monitorship is forward-looking – the monitor's role is to pre-emptively ensure compliance with transaction approval conditions, rather than following a breach.

The concept of monitorship is also gaining ground in Hong Kong. There are no explicit legislative provisions permitting Hong Kong regulators to enter into deferred prosecution agreements (which would commonly require the appointment of a monitor). Nevertheless, despite the lack of a specific statutory footing, Hong Kong regulators have regularly found a means of replicating the effect and requiring the appointment of an independent consultant akin to a monitor.

Conclusion

Unlike the United States, East Asian jurisdictions have not traditionally adopted the concept or practice of monitorships to provide independent oversight and verification of compliance with obligations. This may well be due to a lack of a procedural mechanism in many East Asian legal systems equivalent to a deferred prosecution agreement, as well as a relative cultural reluctance to entrust a traditionally governmental oversight role to a private party. Nevertheless, monitorships imposed by authorities outside of the region – yet affecting East Asia-based parties – have become increasingly common. Monitorships imposed by quasi-governmental authorities, particularly international development banks, are a further avenue by which the concept of monitorship in the region has become more widely adopted. Both categories are likely to see further growth, and additional instances of the imposition of monitorships in East Asia.

Although at a relatively nascent stage, monitorship regimes organically developed in the region are beginning to spread their wings, particularly in East Asian jurisdictions that maintain a common law legal system and strong links with jurisdictions such as the United States where monitorship is more common. Overall, we are at an interesting point in time as the monitorship concept slowly emerges in East Asia.

10

Monitorships in Switzerland

Simone Nadelhofer and Daniel Lucien Bühr[1]

At present, monitorships – as traditionally understood – do not have a legal basis under Swiss criminal law, and thus Switzerland does not have an extensive history and experience with locally appointed monitors. However, similar mechanisms are available to the Swiss Financial Market Supervisory Authority (FINMA) for the investigation and monitoring of financial institutions. Further, we have seen the recent trend of voluntary monitorships becoming an element of penal orders in cases of corporate criminal liability investigated by the Swiss Office of the Attorney General (OAG). Although monitorships do not currently exist under Swiss criminal law, this chapter addresses similar mechanisms in financial market law and considerations for foreign monitorships operating in Switzerland. This chapter also addresses a recent proposal to include monitorships in the context of deferred prosecution agreements (DPAs), which has been submitted to the Swiss parliament for consideration later this year.

Monitoring of FINMA-supervised financial institutions

Unlike Swiss criminal law, Swiss administrative financial market law has included the use of monitors for some time. The Swiss Federal Financial Market Supervision Act (FINMASA) permits FINMA to appoint 'mandataries', corresponding to FINMA's term for third-party representatives of this kind,[2] based on Articles 24a and 36 FINMASA to 'implement supervisory measures ordered by it'.[3]

In the course of their appointment, the mandataries will review, investigate and evaluate facts related to supervisory actions. They may be tasked with auditing the institution as

1 Simone Nadelhofer and Daniel Lucien Bühr are partners at LALIVE SA. The authors would like to thank Katja Böttcher and Jonathon E Boroski for their contributions to this chapter.

2 Swiss Financial Market Supervisory Authority, FINMA mandataries, 2019, https://www.finma.ch/en/finma/finma-mandataries/.

3 Swiss Financial Market Supervisory Authority, FINMA mandataries: a key tool of supervision and enforcement, 1 January 2017, retrievable at: https://www.finma.ch/en/finma/finma-mandataries/.

instructed by FINMA in the context of FINMA's supervisory activities and may be deployed as part of FINMA-ordered enforcement audits, including the review of the implementation of compliance remediation measures ordered by FINMA.

Most recently, a number of multinational companies with subsidiaries in Switzerland have been subject to monitoring by FINMA.

1MDB investigations

Following the investigations into 1MDB, FINMA finalised enforcement proceedings in 2017 and 2018 against Coutts & Co SA, JP Morgan (Suisse) SA and Rothschild Bank SA.

Coutts & Co SA was investigated in 2017 for money laundering offences, resulting in FINMA's order to disgorge profits in the amount of 6.5 million Swiss francs. However, FINMA refrained from imposing organisational measures since Coutts had already decided to sell its business to Union Bancaire Privée, UBP SA, but reserved the right to pursue enforcement proceedings against the employees involved.[4]

FINMA also identified serious shortcomings at JP Morgan (Suisse) SA related to its anti-money laundering controls. In this case, FINMA chose to conduct an in-depth review of the bank's anti-money laundering system and appointed a mandatary to carry out an on-site review. FINMA also informed the Office of the Comptroller of the Currency, the US regulator responsible for the parent of the Swiss bank.[5]

FINMA also cited Rothschild Bank SA and one of its subsidiaries for lack of due diligence, reporting and documentation that led to breaches of their anti-money laundering obligations in the wake of the *1MDB* scandal. Owing to the steps already implemented by the bank, FINMA only appointed a monitor to review remediation measures already undertaken.[6]

With the conclusion of the enforcement proceedings against Rothschild Bank SA, the current investigations related to the *1MDB* scandal have been concluded.

Panama Papers

In January 2018, FINMA completed its investigation against Gazprombank (Switzerland) Ltd in connection with the *Panama Papers*. FINMA identified serious deficiencies in Gazprombank's due diligence, compliance and risk management systems, leading to a ban on the bank's expansion into further private client business and the appointment of an external monitor to closely supervise its remediation measures and efforts to improve its risk and control functions.[7]

4 Swiss Financial Market Supervisory Authority, 'FINMA sanctions Coutts for 1MDB breaches', 2 February 2017, https://www.finma.ch/en/news/2017/02/20170202-mm-coutts/.

5 Swiss Financial Market Supervisory Authority, 'Update on 1MDB proceedings against J.P. Morgan', 21 December 2017, https://www.finma.ch/en/news/2017/12/20171221-mm-jpm/.

6 Swiss Financial Market Supervisory Authority, 'FINMA concludes final 1MDB proceedings', 20 July 2018, https://www.finma.ch/en/news/2018/07/20180720-mm-rothschild/.

7 Swiss Financial Market Supervisory Authority, 'FINMA concludes Panama Papers proceedings against Gazprombank Switzerland', 1 February 2018, https://www.finma.ch/en/news/2018/02/20180201-mm-gazprombank-schweiz/.

Petrobras/Odebrecht investigations

According to the findings of FINMA, PKB Privatbank SA committed serious breaches of money laundering regulations by failing to carry out adequate background checks into business relationships and transactions linked to the petroleum company Petrobras and the Brazilian construction group Odebrecht. FINMA ordered the disgorgement of profits in the amount of 1.3 million Swiss francs and the appointment of an external auditor to monitor the implementation of remediation measures and the effectiveness of the same.[8]

Raiffeisen Switzerland SA

Most recently, FINMA determined that the board of Raiffeisen Switzerland SA failed to adequately supervise its former chief executive officer, who is under criminal investigation for mismanagement. FINMA requested remediation of the bank's corporate governance framework, including the evaluation of the transformation from a cooperative to a limited company, and the appointment of an auditor to assess the progress and implementation of the FINMA recommendations.[9]

During the course of their appointment, the monitors, whose activities are covered by official secrecy, report directly to FINMA. FINMA will only appoint accredited representatives without input from the supervised institution, which cannot oppose the engagement. A current list of accredited mandataries can be accessed on the FINMA website.[10]

Credit Suisse SA

In late 2018, FINMA concluded enforcement proceedings against Credit Suisse SA. FINMA identified deficiencies in the bank's adherence to anti-money laundering in relation to suspected corruption related to the International Federation of Association Football, Petrobras and the Venezuelan oil corporation Petróleos de Venezuela SA. In addition, FINMA also identified deficiencies in the anti-money laundering process related to a 'politically exposed person' and shortcomings in the bank's control mechanisms and risk management. Credit Suisse is now required to remediate its control systems and processes to detect, categorise, monitor and document higher-risk relationships adequately. To that end, FINMA will mandate a monitor to review the implementation of these measures.[11]

Foreign monitors in Switzerland

Swiss companies or foreign companies with Swiss subsidiaries may find themselves subject to monitors appointed by supervisory authorities from other countries, primarily from the United States. Recent examples include monitors appointed to oversee Swiss banks who

8 Swiss Financial Market Supervisory Authority, 'Money laundering prevention: FINMA concludes proceedings against PKB', 1 February 2018, https://www.finma.ch/en/news/2018/02/20180201-mm-pkb/.

9 Swiss Financial Market Supervisory Authority, 'Raiffeisen: major corporate governance failings', 14 June 2018, https://www.finma.ch/en/news/2018/06/20180614-mm-raiffeisen.

10 Swiss Financial Market Supervisory Authority, 'FINMA's List of Mandataries, 2019', retrievable at: https://www.finma.ch/en/finma/finma-mandataries/.

11 Swiss Financial Market Supervisory Authority, 'FINMA finds deficiencies in anti-money laundering processes at Credit Suisse', 17 September 2018, https://www.finma.ch/en/news/2018/09/20180917-mm-gwg-cs/.

settled with US federal and state supervisory agencies. For instance, in 2014, Credit Suisse agreed to the appointment of a US monitor as part of its consent agreement with the New York State Department of Financial Services (DFS). The same year, Bank Leumi USA and Bank Leumi Le-Israel entered into a consent order with the DFS and agreed on a US monitor, which also investigated Bank Leumi (Switzerland) Ltd. Following the settlement with the DFS, Bank Leumi sold its Swiss private client business to Bank Julius Bär and is now in the process of liquidation.

In the course of their engagement in Switzerland, foreign monitors and the monitored entity must comply with Swiss law and should coordinate their activities closely with Swiss regulators. Monitors are often granted unlimited access to confidential information related to the company, in particular to personal data of employees and clients, and business secrets. This access to confidential data raises several legal questions concerning data protection, employment law, and potential banking secrecy and criminal law aspects, in particular regarding the offences of unlawful activities on behalf of foreign states and industrial espionage, according to Articles 271 and 273 of the Swiss Criminal Code (SCC).

Unlawful activities on behalf of foreign states

According to Article 271(1) SCC, it is a criminal offence to carry out activities on behalf of a foreign state on Swiss territory without permission, where these activities are entrusted to a public authority or public official, or to entice, aid or abet these activities.

Article 271(1) SCC is derived from the principle of Swiss sovereignty over Swiss territory. It also aims to prevent the circumvention of the rules on international judicial assistance in criminal, administrative or civil matters. Article 271(1) SCC is often referred to as a 'blocking statute' as it prevents individuals in Switzerland from certain forms of collaboration with foreign authorities in the context of proceedings abroad.

Offences under Article 271(1) SCC are prosecuted *ex officio* by the Federal Office of the Attorney General.[12] Since the offence under Article 271(1) SCC qualifies as a 'political offence' according to Title 13 SCC, prosecution of the same by the OAG is subject to prior authorisation by the Swiss federal government.[13]

Perpetrators of Article 271(1) SCC can be subject to imprisonment of up to three years or a monetary penalty of up to 540,000 Swiss francs. Case law considering Article 271(1) SCC is relatively limited because the Swiss criminal system allows prosecutors, except for serious infringements, to sanction defendants by way of penal orders, which are in most cases not published by the OAG (but are made public on demand). However, Swiss criminal prosecutorial authorities take offences under Article 271 SCC seriously. Recent cases have resulted in lengthy and costly proceedings that have been heard before the Swiss Supreme Court.

To fall under Article 271(1) SCC, the offender must act on behalf or on account – although not necessarily at the express request – of a foreign state. The determining factor is whether the offender acts in the interest (i.e., for the benefit of the foreign state). According to case law, it is irrelevant whether the act in question is carried out by a foreign official or a private person. Foreign monitors acting on Swiss soil are subject to Article 271(1) SCC and

12 Article 23(1)(h) of the Swiss Code of Criminal Procedure.

13 Article 66 of the Swiss Act on the Organization of the Federal Criminal Authorities.

before engaging in any activity in Switzerland require permission from the Federal Council. The same also applies to a company subject to a monitorship and its directors and senior management. Permission pursuant to Article 271 SCC is required since foreign monitors are appointed by and report to a foreign authority and typically act with some degree of sovereign authority.

The Swiss government has previously granted permits under Article 271(1) SCC in the context of the US Swiss Bank Tax Compliance Program to foreign and Swiss independent examiners to investigate and supervise financial institutions in Switzerland and allowed Swiss banks to provide sensitive data to the United States outside of the traditional legal and mutual legal assistance procedures.[14] However, these permits were criticised by scholars as overly accommodating and being in violation of Swiss law, in particular regarding Swiss data protection and employment laws. Thus, it remains uncertain to what extent Article 271 SCC permits will be granted in future. Previous authorisations included extensive obligations on the monitors to comply with Swiss law, in particular data protection, employment and banking secrecy laws.

Data protection

Inevitably, foreign monitors will collect and process personal data in the course of their investigations, and therefore must comply with the Swiss Federal Data Protection Act (FDPA). Personal data includes all information relating to an identified or identifiable person. Data subjects are natural persons or legal entities whose data is processed.[15] Cross-border transfers of personal data must comply with the requirements of the FDPA, including that the data be transferred only to countries with adequate data protection laws.[16] Article 6 FDPA sets forth limited circumstances under which personal data may be disclosed outside Switzerland, such as by waiver from the data subject or for an overriding public interest. For a waiver to be considered valid, it must be in writing, given voluntarily and on the basis of adequate information and, as a rule, before the data is processed.

In recent cases, the Swiss Federal Supreme Court prohibited Swiss banks from disclosing information on bank employees and related third parties to US authorities in the context of ongoing tax investigations. The Federal Supreme Court argued that the predominant interest of the bank to transfer the personal data of bank employees and related third parties must be carefully assessed and should not be presumed.[17] Even if a bank enters into a DPA with the US Department of Justice, the obligation to protect personal data according to Swiss law remains in place. Thus, monitors reporting to foreign authorities will inevitably be forced to balance the intended transfer of personal data with Swiss data protection considerations.

14 For further information on the US programme, please see the explanation provided on the website of the Swiss State Secretariat for Internal Finance: https://www.sif.admin.ch/sif/en/home/bilateral/amerika/vereinigen-staaten-von-amerika-usa/bankenprogramm.html.

15 Article 3 FDPA.

16 A list of the countries deemed to have adequate data protection laws can be found on the website of the Swiss Federal Data Protection and Information Commissioner: https://www.edoeb.admin.ch/edoeb/en/home/data-protection/arbeitsbereich/transborder-data-flows.html.

17 Decision of the Federal Supreme Court, 26 July 2017, BGE 4A_73/2017 and 20 June 2018, BGE 4A_294/2018.

The FDPA is currently being revised to align it with the EU General Data Protection Regulation (GDPR), and the amended FDPA is expected to enter into force later in 2019. For foreign monitors acting in Switzerland, a well-drafted, up-to-date process to protect the data of individuals and legal entities is, therefore, crucial to ensure compliance with the FDPA.

Banking secrecy

Unlike data protection, which has grown in importance over the past several years, Switzerland has gradually reduced the protection of bank secrecy as a result of the increased automatic exchange of information between tax authorities and waivers granted to financial institutions by federal government. Nevertheless, Article 47 of the Swiss Federal Banking Act (SBA) remains unchanged. The provision prohibits corporate bodies, employees and representatives (such as, arguably, a monitor) from disclosing any information related to the clients of banks and, therefore, equally applies to (foreign) monitors of Swiss entities. Breaches of Article 47 SBA are subject to the imprisonment for a period up to five years or a fine.

In any case, foreign monitors of Swiss financial institutions must take proper measures to ensure that client data is not disclosed to third parties, including foreign supervisory authorities without legal justification. Thus, the monitors must either redact or otherwise anonymise client data or obtain waivers from those clients or individuals before transferring any data covered by Article 47 SBA to third parties or abroad.

Voluntary monitorships

A recent trend in Switzerland is voluntary monitorships, where companies under investigation commit to engage independent external compliance counsel to remediate compliance shortcomings. This development is certainly a result of the increased enforcement of the corporate criminal offence of failure to prevent bribery and money laundering, which requires companies to take all necessary and appropriate compliance measures to prevent such offences by their employees.[18] Companies violating this law face fines of up to 5 million Swiss francs and the disgorgement of profits resulting from the corporate criminal offence. In recent cases, disgorgement of profits has involved amounts up to 200 million Swiss francs. Further, criminal and civil liability for managers has become an important topic in practice and in the media in the context of corporate governance and compliance scandals at Swiss state-owned enterprises, multinational companies and Swiss banks.

In these cases, the best practice would be for the board to appoint an independent monitor who reports to the board. The monitor is typically commissioned to independently assess the maturity of the compliance management system and make recommendations for remediation and improvement. The most common benchmark for the assessment of compliance management systems is ISO Standard 19600 Compliance Management Systems, which is also available in the official languages of German and French and as a Swiss Standard.[19] Meanwhile, the ISO Standard has been introduced by a number of companies, some of which are independently certified under the Standard. Currently, several companies listed on

18 Article 102 SCC.

19 SN ISO 19600.

the SIX Swiss Exchange are seeking certification under the Standard. The ISO Standard has proven to be easy to implement, particularly as many Swiss companies are already familiar with a number of ISO management system standards.[20] In line with ISO 19600, monitors typically focus on good compliance governance, leadership, values, culture and remuneration or promotion processes and criteria. Also, communication, measurement of effectiveness, reporting and escalation mechanisms (including reporting mechanisms) are at the core of these verifications.

Future criminal law monitorships in Switzerland

A recent important development is the proposal by the OAG to introduce a new Article 318 *bis* to the CPC to establish DPAs for companies.[21] This proposal also includes the mandatory imposition of monitors. Article 318 *bis,* Paragraph 1 would allow the prosecutor to suspend an indictment against a company and conclude an agreement similar to a DPA concluded in common law countries such as the United States. To be considered for a DPA, the company must fully cooperate with the prosecutor at all stages of the investigation. A key and compulsory element of such an agreement would be the appointment of an independent monitor tasked with the review and reporting to the prosecutor on the basis of the terms of the agreement. These regular reports would be submitted to the OAG over the course of monitorship, which could last from two to five years. Should the company violate the terms of the agreement, the company would be afforded the opportunity to remedy the weaknesses. Once the company has met the conditions set forth in the agreement, the OAG would conclude the proceedings against the company without indictment. If the company fails to remedy the issues cited in the DPA, it would face indictment.

To date, it is unclear whether the proposal of the OAG to include a 'Swiss DPA' in the revision of the CPC will be adopted by the Swiss parliament. At present, the response from the legislature is expected in the coming months.

In summary, monitorships do not yet have a long tradition and do not currently have an explicit and refined legal basis in Switzerland. Nevertheless, as a result of increased enforcement, international cooperation and higher risks of liability, both mandatory and voluntary monitorships have been acknowledged and established their place in practice as an important and effective tool for sustainable and effective compliance remediation and improvement.

20 e.g., ISO 9001 Quality Management; ISO 27000 IT Security Management Systems; ISO 14001 Environmental Management Systems; ISO 31000 Risk Management; and ISO 37001 Anti-Bribery Management Systems.

21 The proposed draft of Article 318 *bis* can be found (in German) on the Swiss Federal Council website at: https://www.admin.ch/ch/d/gg/pc/documents/2914/Organisationen_Teil_1.pdf, page 42.

11

Monitorships in the United Kingdom

Judith Seddon, Chris Stott and Andris Ivanovs[1]

Monitorships are assuming an increasingly important role in corporate crime enforcement in the United Kingdom. Before the introduction of deferred prosecution agreements (DPAs) into the UK legal system, monitors were appointed under negotiated settlements entered into between cooperating corporate entities and enforcement authorities, but the statutory foundations for their appointment were less solid, and appointments were largely the product of prosecutorial improvisation. Monitors were perceived squarely as a feature of the US corporate crime enforcement landscape and their appointment in the United Kingdom drew significant judicial opprobrium.

Indeed, Lord Garnier QC, the architect of the statutory scheme introducing DPAs in the United Kingdom, has made clear that ensuring that DPAs provided (and were seen to provide) a mechanism for cooperating corporates to address historic misconduct constructively and efficiently was one of the UK government's key objectives. In the parliamentary debates that preceded the introduction of the legislation, the use of an independent monitor was one of the 'tough requirements' cited as something to which a company may be required to adhere, to avoid prosecution.[2] Recalling the lengthy discussions leading to their introduction, Lord Garnier emphasised that the UK government had to strike a careful balance. It was at pains to avoid encouraging the development of any perceived 'gravy train' for professional services firms (which would have seriously undermined public and judicial confidence) but recognised the useful role that could be played by monitors to ensure that corporates followed up on the promises they made during settlement discussions.

Certainly, the introduction of DPAs cleared a path for monitorships to become a more common way of concluding criminal investigations involving corporate entities in the United

1 Judith Seddon is a partner, Chris Stott is a senior attorney and Andris Ivanovs is an associate at Ropes & Gray International LLP. The authors would like to gratefully acknowledge the assistance of Michael Harris of Ropes & Gray International LLP, London.

2 Hansard, House of Commons Debate, 14 January 2013, Vol 556, Col 655.

Kingdom. Camilla da Silva, joint head of bribery and corruption at the Serious Fraud Office (SFO), noted in a speech in June 2018 that monitorships are considered as a tool 'to positively and genuinely assist in changing corporate behaviour'.[3] As may be expected, given her previous experience as a US prosecutor and a monitor in private practice, Lisa Osofsky, the director of the SFO, appointed in September 2018, has also hinted at the potential utility of monitorships, saying that:

> *favourable dispositions will not be available to corporations unless and until their compliance systems work . . . in a way that good practices are embedded into the corporate structure so that they cannot simply be undone when no longer convenient . . . Corporate rehabilitation requires a strong, ongoing compliance function. Window dressing will not suffice. Expect [the SFO] to ask tough questions on this subject, as [the SFO is] not in the habit – nor will [it] ever be – of recommending DPAs for recidivists.*[4]

It should not be assumed that monitorships in the United Kingdom will become as prevalent as they are in the United States, or that where they are used they will be as extensive in scope as their US counterparts. But with the SFO focusing on corporate integrity, it can be expected that the place of corporate monitorships in UK corporate crime enforcement practice will solidify. This chapter identifies the various statutory and other contexts in which monitorships (or equivalent arrangements) may arise in the United Kingdom; examines the shape they may take and lessons that may be drawn from analogous, longer established arrangements; and considers some specific issues that may be encountered in practice.

The nature and scope of UK monitorships

The appointment of a monitor at the conclusion of an investigation into corporate misconduct by UK enforcement authorities is less routine than in the United States. Where monitors are appointed in the United Kingdom, the scope of their engagements is typically significantly narrower than under corresponding US arrangements.

In the United Kingdom, improvements to compliance arrangements and changes to key personnel are effectively preconditions to the commencement of DPA (or other) negotiations and court approval of proposed settlements. Corporate entities seeking to demonstrate a clean break with historic misconduct will commonly have put in place arrangements akin to those that may be ordered under monitorship programmes in other jurisdictions long before agreements are made with enforcement authorities or ratified by courts.

This differs significantly from the position in the United States. The threshold applied by the US Department of Justice (DOJ) when deciding whether corporate entities have

3 Camilla de Silva, SFO joint head of bribery and corruption, 'Corporate criminal liability, AI and DPAs' (Herbert Smith Freehills Corporate Crime Conference, London, 21 June 2018), https://www.sfo.gov.uk/2018/06/21/corporate-criminal-liability-ai-and-dpas/ (accessed 30 January 2018).

4 Lisa Osofsky, SFO director, 'Keynote address' (35th International Conference on the Foreign Corrupt Practices Act, Washington, DC, 4 December 2018), https://www.sfo.gov.uk/2018/12/04/keynote-address-fcpa-conference-washington-dc (accessed 30 January 2019). The use of the term 'recidivist' could be seen as another potential sign that the there could be closer alignment between US and UK enforcement authorities given the current SFO director's background. Under the FCPA Corporate Enforcement Policy of the Justice Manual, criminal recidivism is one factor that can weigh in favour of a criminal resolution of a case as opposed to a declination.

cooperated sufficiently to realistically expect to enter into a negotiated settlement is lower than that expected by the SFO and Crown Prosecution Service (CPS) in the United Kingdom. In the United States, remediation typically follows once a deal has been finalised.

The Crime and Courts Act 2013 (CCA) and the accompanying guidance permit and contemplate the possible appointment of monitors in appropriate cases but stop significantly short of prescribing or even encouraging it. The Deferred Prosecution Agreements Code of Practice (the DPA Code), which the SFO and the CPS are required to take into account when negotiating, applying to the court for and overseeing DPAs, sets out the roles, duties and mechanics of appointing monitors as a term of a DPA. The DPA Code sounds a note of caution in this regard,[5] stating:

> *An important consideration for entering into a DPA is whether [the corporate entity] already has a genuinely proactive and effective corporate compliance programme. The use of monitors should therefore be approached with care. The appointment of a monitor will depend upon the factual circumstances of each case and must always be fair, reasonable and proportionate.*[6]

This guidance reflects the comments of Lord Justice Thomas, who in *R v. Innospec* in 2010, expressed significant concerns about the costs of what he considered an expensive corporate probation order.[7] The fact that a settlement incorporating a three-year monitorship had been agreed between UK and US prosecutors meant that he was constrained from giving effect to his concerns but made clear his profound scepticism about the need for the installation of a monitor at all. He pointed in particular to the steps already taken to address the root causes of historic misconduct, including replacing key senior executives, and the fact that the company's auditors were aware of wrongdoing.

Statutory frameworks for monitorships in the United Kingdom

In the United Kingdom, a monitorship – or an arrangement similar to a monitorship – can arise pursuant to various statutory and contractual frameworks. As already touched upon, the most recent and high-profile of these is the CCA, which enables them to be used to oversee a compliance programme imposed under a DPA.[8] A review of the monitorships imposed under the CCA is set out below.

It is not the only scheme that may be used, however. The other statutory and contractual frameworks in which monitorships or similar arrangements may arise are discussed in more detail below.

5 Paragraph 6, Schedule 17, CCA 2013. DPAs are only available in England, Wales and Northern Ireland. Although negotiated settlements have been reached in Scotland, these have taken the form of civil recovery orders.

6 DPA Code, Paragraph 7.14.

7 [2010] Crim LR 665.

8 Section 45 and Schedule 17, Crime and Courts Act 2013 – see Paragraph 5(3)(e), Schedule 17.

Deferred prosecution agreements

Monitors appointed under UK DPAs have been, and are likely to continue to be, deployed in a more targeted manner than has been the case under US DPAs to date.[9] Consistent with the guidance set out in the DPA Code (and the concerns expressed by Lord Justice Thomas in *R v. Innospec*), the monitorship components of settlements agreed to date (summarised in the table below) could more accurately be described as quasi-monitorships.

Date	*Company*	*Summary of conduct*	*Monitorship elements*
November 2015	Standard Bank PLC	Standard Bank's sister company, Stanbic Bank Tanzania had paid $6 million to a local Tanzanian partner to induce favourable treatment of a $600 million proposal made by Standard Bank.	Required to commission a report on the company's anti-bribery and corruption (ABC) policies, including advice and recommendations on use of third-party intermediaries, ABC training systems and the effectiveness of their ABC programme and its awareness among employees. DPA concluded on 30 November 2018 as all terms had been complied with.
July 2016	XYZ	Between June 2004 and June 2012 the company's employees and agents systematically used bribes to win contracts in foreign jurisdictions.	None. XYZ's chief compliance officer was required to prepare annual reports for submission assessing the implementation of the company's new ABC policies.
January 2017	Rolls-Royce PLC	Rolls-Royce hired commercial agents across multiple jurisdictions, making tens of millions of dollars of corrupt payments to individuals to secure contracts.	Rolls-Royce had previously appointed a compliance monitor to conduct an independent review of the company's ABC compliance programme, who had completed two interim reports between 2013 and 2014. The DPA requires Rolls-Royce to: • use best endeavours to procure the production of a third interim report by 31 March 2017; • deliver that report to the SFO within five days of its completion; • within 24 months of that report being produced, complete, to the compliance monitor's satisfaction, the actions recommended in all interim reports; and • procure a final report from the compliance monitor in respect of the implementation of all actions recommended in interim reports, provided he or she is satisfied.

9 Although US monitorships have been more expansive than in the United Kingdom, there are indications that the US DOJ is seeking to impose more stringent controls on their scope and the associated costs. In October 2018, Assistant Attorney General Brian Benczkowski released a memorandum detailing the process whereby compliance monitors are to be appointed as part of negotiated settlements between corporate entities and the US DOJ, setting out criteria for the appointment of monitors (attaching greater importance to improvements already made to compliance systems and controls) and changes to key personnel before the settlement. This will, in theory, bring the United States more in line with the United Kingdom's approach; https://www.justice.gov/opa/speech/file/1100531/download.

Date	*Company*	*Summary of conduct*	*Monitorship elements*
April 2017	Tesco Stores Limited	From February to September 2014, financial statements were improperly amended by 'pulling forward' income that should properly have resided in subsequent reporting periods, creating an overstatement of their profits.	Within a month of the DPA being issued, Tesco was required to commission an accountancy firm to produce multiple reports and implementation plans commenting on: • controls applied to recognition of income; • operation of Tesco's commercial income governance body; • segregation of duties between commercial and finance; and • training and policies implementation.

The DPA Code states that a monitor's primary responsibility is to 'assess and monitor [the corporate's] internal controls, advise of necessary compliance improvements that will reduce the risk of future recurrence of the conduct subject to the DPA and report specified misconduct to [the SFO or the CPS as appropriate]'.[10] The specific tasks of the monitor will vary widely and will typically be set out in the terms of the DPA, but can include the monitoring of any facet of the company's compliance programme.[11] The appointment of a monitor, however, will not absolve the company's board of directors from the ultimate responsibility for identifying, assessing and addressing risks. The terms of the DPA will usually require the company to consent to the monitor's co-operation with the prosecuting authority.[12]

The DPA Code requires corporates to afford monitors 'complete access to all relevant aspects of the company's business during the course of the monitoring period as requested by the monitor'.[13] The terms of the DPA will typically require that the company permits the monitor to have access to any material the monitor could reasonably request to fulfil his or her function.[14] The DPA Code acknowledges though that a corporate subject to a monitoring arrangement may not be required to produce material subject to legal professional privilege (whether to the monitor or anyone else). The reports produced by the monitor are confidential, with disclosure restricted to the prosecution authority, the company and the court (unless otherwise permitted by law).[15]

Whether corporate entities entering into agreements with enforcement authorities that contain monitorship components should expect to be asked to produce privileged documents to monitors (and indeed the extent to which they are required to produce such documents in response to requests from monitors) is discussed more fully below. The extent to which monitors may be able or required to make onward disclosure of material provided to them in the course of their engagement is also considered below.

The DPA Code affords corporates and their representatives a much greater role in identifying appropriate candidates to act as monitors than was contemplated under previous legislation. As part of the DPA negotiations, corporates provide to the relevant prosecuting

10 DPA Code, Paragraph 7.12.

11 DPA Code, Paragraph 7.21.

12 e.g., *SFO v. Rolls-Royce PLC*, Deferred Prosecution Agreement (17 January 2017), Paragraph 31.

13 DPA Code, Paragraph 7.14.

14 e.g., *SFO v. Standard Bank*, Deferred Prosecution Agreement, Paragraph 29, *SFO v. Rolls-Royce PLC*, Paragraph 30 and *SFO v. Tesco Stores Limited*, Deferred Prosecution Agreement (10 April 2017), Paragraph 31.

15 DPA Code, Paragraph 7.20.

authority details of three potential monitors, including their relevant qualifications, specialist knowledge and experience, disclose any associations the potential monitors have had with the company, and identify their preferred monitor.[16] The DPA Code directs the CPS and the SFO that they should ordinarily accept the company's preferred monitor but confirms that the relevant authority may reject the choice if it considers that there may be a potential conflict of interest or that the preferred candidate does not have sufficient experience or authority.[17] Although not identical, these and other provisions of the DPA Code are reflective of guidance on the selection of monitors under US DPAs and non-prosecution agreements.[18]

If a monitorship is proposed to be a feature of the DPA, once agreement is reached on the identity of the monitor, the relevant prosecuting authority and the corporate entity will provisionally agree a detailed work plan for the first year, including the proposed method of review and frequency of reporting to the prosecutor.[19] An outline work plan will be agreed to govern the monitor's activities for the remainder of the monitorship period. The work plan and outline work plan will also need to address costs of the monitorship, since monitorship costs (including reasonable costs associated with monitorships incurred by the prosecuting authority) are paid by the corporate.[20] Some of the practical aspects of measuring the progress of ongoing monitorships and managing costs are discussed below.

The length of the monitorship will be agreed in the DPA following negotiations between the company and the prosecuting authority. It may be initially shorter than the term of the DPA itself, but can never exceed the term of the DPA. The monitor can recommend terminating or suspending the monitorship, if the company's policies and procedures are functioning properly without the need for further monitoring; or the monitor can recommend extending the monitorship, if the company has been, or will be, unable to successfully satisfy its obligations by the end of the monitorship period. The decision to terminate, suspend or extend the monitorship will ultimately be taken by the prosecuting authority.[21]

An important feature of the DPA regime is that the DPA, including any monitorship proposed, must be approved by the court. Sir Brian Leveson noted when reviewing (and ultimately approving) the proposed DPA between the SFO and Standard Bank that, in the United Kingdom, 'a DPA requires the informed, independent opinion of a judge before it can be effected; the agreement of the parties is not enough' and that the court will consider the prospective terms of the DPA 'individually and collectively, in order to determine whether to grant a declaration . . . that entering into it is likely to be in the interests of justice and that its proposed terms are fair, reasonable and proportionate'.[22]

16 DPA Code, Paragraph 7.15.

17 DPA Code, Paragraph 7.17.

18 e.g., US Assistant Attorney General Brian Benczkowski's 11 October 2018 memorandum 'Selection of Monitors in Criminal Division Matters' – https://www.justice.gov/opa/speech/file/1100531/download accessed 11 February 2019. In particular, it remains to be seen whether the SFO will follow the DOJ in expressly taking into consideration diversity and inclusion criteria when appointing monitors. For the US approach, see *United States of America v. Panasonic Avionics Corporation*, Deferred Prosecution Agreement (30 April 2018), Paragraph 12.

19 DPA Code, Paragraph 7.18.

20 DPA Code, Paragraph 7.13 and 7.18.

21 DPA Code, Paragraph 7.19.

22 *SFO v. Standard Bank PLC*, Approved Judgment (30 November 2015), Paragraph 64.

Serious crime prevention orders

Serious crime prevention orders (SCPOs) are governed by Part I of the Serious Crime Act 2007 (SCA). They were added to the statute book substantially before the introduction of the UK DPA regime, but were not specifically directed towards corporate crime. Although they have been used to impose restrictions on individuals (in some cases in respect of the activities of corporate entities) following conviction, mainly in cases concerning serious and organised crime, there are no reported instances of authorities using them to resolve white collar investigations.

Under the SCA, when a corporate defendant is convicted of a 'serious offence' (which includes fraud, bribery and money laundering offences) the Crown Court can, on the application of the SFO or the CPS in England and Wales, impose an SCPO enabling the authority to contract with a person to provide monitoring services (the authorised monitor). An SCPO can also be imposed without there having been a criminal trial if the High Court is satisfied that a corporate has been involved in serious crime (which means committing or facilitating a serious offence, whether in England and Wales or elsewhere) and where there are reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting the company's involvement in serious crime.[23]

An SCPO may require the person subject to it to provide information or documents to the authorised monitor or answer questions posed by the authorised monitor.[24] If deemed appropriate by the court, the person subject to the SCPO may also be required to pay some or all of the costs associated with the authorised monitor's engagement.[25] Any documents or information produced to the authorised monitor under the SCPO will be retained by the relevant enforcement authority for as long as it considers necessary.

SCPOs are available to various enforcement authorities but have principally been used by the CPS (although there have been examples of their use by the Financial Conduct Authority (FCA) in cases concerning unauthorised business). It is possible that the SFO and other authorities may explore their potential application in larger scale cases (although they would only be made as a part of the sentencing process following conviction rather than as part of a negotiated settlement).

Civil recovery orders

Civil recovery orders (CROs) (under Part 5 of the Proceeds of Crime Act 2002 (POCA)) are civil orders available to the CPS, SFO, FCA and other enforcement authorities as a tool to conclude criminal investigations (whether or not there has been a parallel prosecution).[26] They allow enforcement authorities to recover 'property obtained as a result of unlawful conduct'.[27] As civil remedies, the hurdles to be overcome by enforcement authorities are considerably lower than in criminal proceedings. Property is still susceptible to a CRO even if the 'unlawful conduct' was carried out by another person as it is only necessary for authorities to

23 SCA, Sections 1 and 2.

24 SCA, Section 39(3) and Section 5(5).

25 SCA, Section 39(4).

26 25 POCA, Section 240(2) and Section 316.

27 26 POCA, Section 242.

establish facts to the civil standard and there is no necessity to show from which particular offence or offences the property in question has been generated.

Before the introduction of DPAs, CROs were seen by enforcement authorities and cooperating corporate entities as a relatively attractive way of concluding investigations through negotiation. There is no equivalent to the DPA Code in respect of CROs and no constraints on the appointment of monitors under them (beyond those required to settle any civil proceedings, namely acceptable wording for a consent order and associated settlement documents). As noted in the table below, in some cases involving monitors, the latitude the CRO framework has afforded to cooperating corporate entities to negotiate settlements perceived as relatively favourable to them, and the limited extent to which the court may influence the contents of agreements, has drawn significant judicial criticism.

Date	*Company*	*Summary of conduct*	*Amount recovered*	*Monitorship*
October 2008	Balfour Beatty PLC	Irregularities concerning payments made as part of a joint venture bid to secure £22.5 million of work on the construction of the Alexandria Library in Egypt	£2.25 million	Included a form of external monitoring for an agreed period
July 2011	Macmillan Publishers Limited	Improper payments were made in relation to a tender to supply educational books to South Sudan	£11.3 million recovered through a CRO	External monitor imposed to report to SFO and World Bank
July 2012	Oxford Publishing Limited	Two subsidiaries of Oxford Publishing operating in Kenya and Tanzania made facilitation payments in connection with tenders for school books	£1.9 million recovered through a CRO (in addition to a £2 million voluntary payment to sub-Saharan African non-profit groups)	External monitor imposed to report to SFO and World Bank

The appointment of monitors was acknowledged in the CROs referred to above by way of relatively bland clauses included in consent orders. In contrast to the comparatively detailed provisions of the DPA Code, very little information is available in the public domain about the processes by which monitors appointed under CROs have been selected, the extent of any input allowed by the companies concerned and whether any agreement was reached in relation to the circumstances in which monitorship arrangements may be terminated early or extended.

Outside Scotland, where DPAs are not available as a tool to conclude investigations, CROs involving the appointment of monitors are now likely to be a thing of the past, at least to conclude investigations concerning offences in respect of which DPAs are now available and more likely to be used.

It is possible that CRO's incorporating monitorships could be used in different contexts. For example, at the time of writing, there have been no publicised orders made since the definition of 'unlawful conduct' was amended, for the purposes of the civil recovery regime in Part 5 of POCA, to include 'gross human rights abuses or violations' (under the 'Magnitsky

amendment' introduced in the United Kingdom through the Criminal Finances Act 2017).[28] Such orders are expected to be few and far between (if indeed any are made at all). At the time of writing, there are no indications that enforcement authorities are contemplating using CROs based on this provision to recover property in the hands of corporate entities.[29] It is conceivable though, particularly given the breadth of the definition of 'gross human rights abuses or violations', that applications for any such orders could be an area in which authorities may seek the appointment of monitors.

Appointment of skilled persons by the UK financial services regulators

The FCA and the Prudential Regulation Authority (PRA) have the supervisory power, conferred by Sections 166 and 166A of the Financial Services and Markets Act 2000 (FSMA), to appoint or to require firms they regulate to appoint an external third party, a 'skilled person', to undertake a review of a particular business area of that firm or to examine a particular issue. The power has historically been heavily used by the FCA in particular (and the predecessor Financial Services Authority from which it and the PRA emerged). Published data shows a steady decline in skilled persons appointed from 95 in 2010–2011 to 79 in 2018–2019 (with a spike of 113 in 2012–2013). It is possible that this decline is attributable at least in part to

28 See POCA, Section 241A (introduced by Criminal Finances Act 2017, Section 13). This, and corresponding amendments to asset recovery legislation in other jurisdictions, bears the name of Sergei Magnitsky, a Russian lawyer arrested in 2008 after making allegations that Russian officials had been involved in large-scale tax fraud. He later died in custody in 2009.

29 To show that a 'gross human rights abuse or violation' has occurred, the relevant enforcement authority must establish (on a balance of probabilities) that a person has been subjected to torture or other cruel, inhuman or degrading treatment or punishment in consequence of that person seeking, (1) to expose illegal activity carried out by or at the instigation or with the consent or acquiescence of a public official or a person acting in an official capacity, or (2) to obtain, exercise, defend or otherwise promote human rights and fundamental freedoms (POCA, Section 241A (2) to (4)). Conduct connected with a gross human rights abuse or violation is defined relatively widely by Section 241A(5) to include conduct involving, for example, 'acting as an agent for another in connection with activities relating to conduct constituting the commission of a gross human rights abuse or violation', 'profiting from such activities' (Section 241A(5)(c)) and 'materially assisting such activities' (Section 241A(5)(d)). The latter is in turn defined broadly as including 'providing goods or services in support of the carrying out of the activities, or otherwise providing any financial or technological support in connection with their carrying out' (Section 241A(8)). Conduct occurring outside the United Kingdom is caught by this definition if it would constitute the commission of an indictable or either-way offence in the United Kingdom (Section 241(2A)). The boundaries of these seemingly broad provisions have not yet been tested in reported cases (whether in respect of conduct by corporate entities or more generally). It is conceivable though that in due course they could be directed towards the operations of corporate entities involved in, for example, the extractive, garment manufacturing and hospitality industries (possibly in conjunction with those contained in the Modern Slavery Act 2015 where equivalent provisions exist in relevant national law). 'Public official' is not defined for these purposes, but analogous terms under other legislation suggest that it would be construed widely to encompass senior employees of state-owned enterprises. See Bribery Act 2010, Section 6(5)(b)(ii) and Paragraph 22 of Ministry of Justice guidance (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/181762/bribery-act-2010-guidance.pdf) and Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, Regulation 35(14)(g). This may indicate that enforcement authorities could seek to recover the proceeds of contracts with state-owned enterprises alleged to be involved in 'gross human rights abuses or violations' under CROs.

the controversy surrounding the publication of a Section 166 report in February 2018, following intervention by the Treasury Committee.[30]

The appointment of a skilled person is a supervisory tool, rather than part of the enforcement processes of the FCA or the PRA. For example, between September 2012 and September 2014, over 95 per cent of FCA-ordered skilled person reports did not lead to enforcement action.[31] Rather, the purpose of appointing a skilled person is to diagnose, monitor, limit or reduce identified risk or remedy crystallised risk.[32] The appointing firm bears the cost of the skilled person's work, which is typically significant. The average cost of FCA skilled person reports in 2017–2018 was £2,872,413.[33]

Skilled persons are usually appointed from specialist panels maintained by the regulators. Relevant guidance indicates that the FCA 'will normally contact the [subject of the report] before finalising its decision to require a report or the updating or collection of information by a skilled person' to 'provide an opportunity for discussion about the appointment, whether an alternative means of obtaining the information would be better, what the scope of a report should be, who should be appointed, who should appoint, and the likely cost'.[34]

However, in practice, the scope for firms to influence the identity of the skilled person or the scope of their engagement is usually relatively limited.

The skilled person's obligation is to cooperate with and ultimately report to the FCA (or PRA as the case may be). As a matter of practice, the skilled person will give the firm an opportunity to comment on the drafts of the report before it is finalised.[35]

Contractual monitoring arrangements

Arrangements similar to monitorships can arise in other contexts. Consistent with regulatory guidance on mitigating anti-corruption, anti-money laundering and trade compliance risks, equity investors will usually seek to negotiate the inclusion of contractual compliance protections in deal documents. Where specific and material compliance concerns are identified during the pre-investment stage, investors may seek to include robust compliance undertakings that will govern a corporate entity's post-acquisition compliance programme. Such undertakings could require the investee company to work with the investor's external compliance counsel to adopt compliance policies and procedures, develop a compliance function staffed by appropriately qualified compliance personnel, conduct a forensic audit, and take any other steps to address identified compliance concerns. In these situations, the investor's

30 https://www.parliament.uk/business/committees/committees-a-z/commons-select/treasury-committee/news-parliament-2017/rbs-global-restructuring-group-s166-report-17-19/; and request made to the Financial Conduct Authority pursuant to the Freedom of Information Act 2000, January 2019.

31 FCA, Freedom of Information: Right to know request (January 2015), https://www.fca.org.uk/publication/foi/foi3789-response.pdf (accessed 30 January 2019).

32 FCA Handbook, SUP 5.3.1G. See also PRA Supervisory Statement (SS7/14) 'Reports by Skilled Persons' (June 2014) (updated September 2015), Paragraph 1.5.

33 FCA Annual Report and Accounts 2017/18 (19 July 2018) Appendix 1. These figures stand in stark contrast with the costs of a PRA skilled person reports. In 2017–2018, PRA commissioned 16 skilled person reports. The total estimated cost of commissioned skilled person reviews was £6.3 million and the cost per review ranged from £40,700 to £2.3 million. See PRA Annual Report 1 March 2017 – 28 February 2018 (14 June 2018), p. 29.

34 FCA Handbook, SUP 5.4.2G.

35 FCA Handbook, SUP 5.4.13G.

external compliance counsel will effectively assume a quasi-monitorship role by taking the lead to drive the investee company's satisfaction of the compliance undertakings and addressing identified risk areas.

Practical points

As already noted, monitorships are still a comparative rarity in the United Kingdom. As such, there is not yet as established a body of practice in the United Kingdom relating to when and how monitors should be appointed and how they should carry out their engagements as in the United States. Each situation in which a monitor has been or may be appointed will raise specific questions and issues. Careful analysis at the outset to identify and explicitly deal with questions likely to arise during the course of the monitorship, will minimise and mitigate uncertainty and friction during the life of the monitorship. Some questions likely to arise are addressed below.

Cross-border monitorships

Can or should a monitor be appointed under a settlement with more than one enforcement authority?

Nothing prevents enforcement authorities from appointing a single monitor to oversee compliance arrangements in multiple jurisdictions. This course has been taken in numerous settlements with US authorities. However, enforcement authorities are increasingly recognising the benefits of retaining specialists in different jurisdictions.

Privilege

Can a monitor require access to legally privileged material?

No. The DPA Code acknowledges that: 'Any legal professional privilege that may exist in respect of investigating compliance issues that arise during the monitorship is unaffected by [CCA], this DPA Code or a DPA'.[36]

In many instances, this will not cause particular problems, as monitors will be less concerned with the contents of legal advice than the fact that it has been taken and appropriate action taken in response to it.

Enforcement authorities or monitors are of course not precluded from requesting that corporate entities provide privileged material voluntarily (whether on a limited waiver basis or more generally), although in most cases they and their representatives will be reluctant to do so given the potential for material to be disclosed further and used in or precipitate further litigation or investigations.

Can a monitor assert privilege in connection with his or her engagement?

Yes. Although monitors are often themselves lawyers, it will usually be necessary and prudent for them to seek specialist advice on particular aspects of their engagement. Communications passing between a monitor and his or her advisers may be subject to privilege in the same way as those passing between any lawyer and his or her client.

36 35 DPA Code, Paragraph 7.14.

Data protection considerations

What are monitors' obligations in relation to data?

Particularly in the context of fact-finding aspects of their appointments, monitors are likely to have to gather and review corporate documents, employee emails, data stored on work devices and other company data. That data could include personal data, collection, storage and processing of which could be subject to the Data Protection Act 2018 and the General Data Protection Regulation (or equivalents in other jurisdictions).

The monitor will need to assess his or her role under applicable data protection laws and may need to work with the corporate entity to ascertain an appropriate basis for the monitor's receipt, processing and storage of the personal data. Where relevant data is located in jurisdictions outside the United Kingdom, the monitor will need to work with the corporate entity to determine which data privacy laws may affect the data transfer to the United Kingdom and ensure that there is an appropriate basis under local law for the transfer, processing and storage of data.

It will usually be prudent for the monitor to seek specialist advice in the particular jurisdictions in which they are operating and to document in writing the corporate entity's and monitor's rights and obligations (including any appropriate indemnities) in relation to personal data.

Managing the relationship between monitor and subject entity

How should monitors deal with the senior management of the company?

In most instances, whether pursuant to a DPA or a skilled person review, the corporate entity concerned will not have anticipated a monitorship. Some degree of resistance from the company's senior management, who may regard dealing with a monitor as an expensive distraction from running the business, is therefore to be expected. The company is likely to treat the monitor as an unwelcome guest particularly if it has already expended significant resources in investigating misconduct and bolstering its compliance programme as part of the settlement negotiations with the enforcement authority.

The monitor will have a clear mandate enshrined in the terms of his or her appointment and should focus on carrying it out diligently, but the monitor should be sensitive in doing so and cognisant of the remedial steps the company has taken to date. The monitor should take time in the initial phase of the monitorship to understand the steps that the company has taken and is planning to take to improve the pertinent aspects of its compliance programme as those facts should inform the monitor's work plan and formulate a basis for the organic, self-sustaining growth of the company's compliance programme.

If the monitor's approach is perceived to be too intrusive, the company's management may accuse the monitor of impeding the company's business, or, at best, be less receptive to recommendations. However, the nature and purpose of tasks inherent in a monitorship may not always seem congruent with the objectives and priorities of senior managers, who owe duties to shareholders and others to maximise commercial performance. Transparent and effective communication by monitors is key to striking an appropriate balance in objectively monitoring the pertinent areas of the corporate entity's business, and discharging obligations to the prosecuting authority on the one hand and avoiding unnecessary friction with the company on the other. To the extent permitted by the terms of his or her appointment,

the monitor should give the company advance notice of, and an opportunity to comment on, any recommendations, findings or reports that the monitor will make to the enforcement authority.

The monitor should also aim to be transparent and upfront with the company about his or her working methods, including fees and expenses. This involves, for example, giving the company sufficient advance notice of any proposed meetings, document requests or employee interviews. The monitor should alleviate the company's concerns about the potential costs of the monitorship – considering in advance the proposed staffing and likely expenses, identifying cost efficiencies and offering cost solutions is likely to lead to a better working relationship between the company and the monitor.

There will be occasions when it is necessary for details of the tasks being undertaken by the monitor, and the reasons for them, to be kept confidential from senior managers. However, to the greatest extent possible, a constructive working relationship should be fostered by the release of as much information as is appropriate in the particular circumstances of each engagement to enable senior managers to understand the progress of the engagement, any areas where they may be able to assist with resources or information and the reasons why the monitor requires details on particular aspects of the business. Both monitors and corporate entities should bear in mind that the engagement will proceed more smoothly, is likely to be concluded more quickly and will result in more sustainable improvements to compliance systems and controls if an appropriately collaborative approach is taken.

What should monitors do if the relationship with the corporate entity deteriorates?

The monitor should work to repair his or her relationship with the company, but also critically assess why it may be deteriorating. If the relationship is being undermined by the company's perceived unwillingness to cooperate with the monitor's reasonable performance of his or her duties (e.g., by resisting disclosure to the monitor of information that reasonably would aid the monitor in the performance of his or her mandate), the monitor should evaluate whether those are matters that may have to be reflected in his or her reports to the enforcement authorities.

The monitor should be mindful, however, that his or her report to the enforcement authorities is a powerful tool that should be used only when genuine need demands it. The monitor should understand that he or she is not appointed to impose his or her will on the company; rather, the monitor's role is to aid the company's journey to developing robust compliance policies and procedures that address the cultural and controls deficiencies that led to the original misconduct and that work for that particular company's business model.

In many cases, external reporting to the enforcement authority of perceived friction or disagreements will not be necessary. For example, lack of cooperation when seeking information from junior or middle-ranking staff is likely to be more effectively dealt with, in the first instance at least, by a report to senior managers of the corporate entity, and joint steps by the corporate entity and the monitor to adequately explain to the affected staff the purpose of the monitorship and the benefits of collaborating with reasonable requests made by the monitor.

Similarly, a company's perceived reluctance or struggle to change certain practices or adopt certain procedures should prompt the monitor to assess the suitability of the proposed course of action, as well as the strength of buy-in from all relevant parts of business for that course of action. The monitor should work with key stakeholders in the company to

formulate an approach that fits the company's operations and risk profile. That process may require the monitor to encourage the company to work with him or her collaboratively to come up with appropriate compliance solutions, rather than adopting off-the-shelf policies and procedures. The monitor should also work with key stakeholders in the company to educate all relevant parts of the business on the company's compliance risks and the benefits of investing in compliance.

How should monitors deal with auditors?

The purpose of an audit is to provide an objective and independent examination and evaluation of a corporate entity's financial statements. If the monitor during his or her monitorship term encounters issues that may have an impact on the accuracy of financial statements, it is likely that the monitor would be bound by his or her confidentiality obligations to the corporate entity and would not be able to disclose the matter to auditors. In this instance, the prudent course of action is for the monitor to urge the company to investigate the matter and, if necessary, work with the company to bring the matter to the auditor's attention. The monitor should also assess whether the issue is one that would need to be included in the monitor's report to the enforcement authority pursuant to the terms of the monitorship.

How should monitors deal with the media?

The monitor will owe confidentiality obligations to the company and the enforcement authority. Unless there are exceptional circumstances, as a matter of professionalism, the monitor should avoid engaging with the press.

Information gathering

Which steps should monitors take to ensure that relevant documents are preserved, and when?

Monitors' evidence preservation plans and priorities will be similar to those applicable to conducting an internal investigation or responding to a regulatory investigation. The monitor may have to work with the company to preserve data (for example, by disabling automatic email deletion) and amend or disapply the company's document retention policies, or issue document hold notices in respect of categories of documents relevant to the scope of his or her engagement.

Where the monitor has been appointed pursuant to a settlement with enforcement authorities, it is likely that document preservation measures will already have been implemented when the company conducted its own internal investigation. The monitor should assess with the company whether those preservation measures need to be kept in place during the monitorship period.

When should monitors conduct fact-finding interviews? Are the subjects of interviews entitled to separate representation? Are monitors required to give *Upjohn* (or similar) warnings?

Depending on the terms of his or her appointment, the monitor may need to conduct fact-finding interviews with the company's employees. Those interviews could focus on particular compliance incidents or aspects of the company's compliance programme.

When compliance incidents occur (or even if none have occurred, if it is part of the monitor's stated task to conduct spot checks to ensure the effectiveness of particular compliance functions or systems), the monitor may want to conduct interviews with personnel with relevant first-hand knowledge. These interviews are quite separate from interviews conducted by the corporate entity's in-house or external counsel, and are conducted for a different purpose. Neither the monitor nor the corporate entity will be able to preclude the employees from engaging their own counsel at their own expense. Separately, however, the corporate entity is likely to wish to ensure that the company's legal representative is present during the monitor's interview with an employee to ensure that the corporate entity's privileged information is not disclosed.

Although the monitor is not required to give an *Upjohn* (or similar) warning to an employee at the beginning of an interview, the monitor should nonetheless take care to clarify his or her role and the purpose of the interview, and remind the employee of the confidentiality of the interview.

Confidentiality and market obligations

To whom do monitors owe duties of confidentiality? What is the extent of these duties?

Under the DPA regime, the reports of the monitor are confidential, with disclosure limited to the company, the prosecuting authority and the court. The monitor owes a duty of confidentiality to all three involved, but this duty of confidentiality can be overridden, if permitted by law (for example, if required pursuant to disclosure in civil litigation). Monitors' reports are exempt from disclosure under the Freedom of Information Act 2000.

Currently, there are no reported examples of instances of claimants in separate civil litigation seeking or obtaining disclosure of monitors' reports such as those seen in some cases in the United States. However, this is not to say that the confidentiality of reports prepared by monitors in the United Kingdom is unassailable or that attempts of this kind will not be made in future. One particular factor for monitors and corporate entities alike to bear in mind is that the UK Parliament has shown itself to be willing to publish confidential documents where it considers it to be in the public interest to do so (particularly where all or some of the contents of reports have previously been leaked).[37]

Which practical steps should the company and monitors take to protect inside information?

Where the company's shares are listed on a stock exchange, the company will have obligations with respect to the management and disclosure of inside information. The company may

37 See footnote 9. See also *Omers Administration Corporation and Others v. Tesco Plc* [2019] EWHC 109 (Ch), in which the High Court required Tesco to disclose to the claimants in civil litigation SFO's compelled interview transcripts and notes that Tesco, subject to confidentiality restrictions, obtained from the SFO as part of its DPA negotiations. The case is a reminder that courts will consider confidentiality of documents, but confidentiality alone is unlikely to be a bar to disclosure. In general, where documents are relevant, the needs of justice are 'very likely to favour production,' unless the information is available from another source without disproportionate difficulty. The courts are likely to adopt a similar approach if a civil litigant sought production of monitor's reports to the enforcement authority.

have to place the monitor on an insider list owing to the nature of the information that the monitor will have access to during the term of his or her appointment.[38] The company will also need to ensure that the monitor has systems in place to keep inside information strictly confidential that could prejudice the company's legitimate interests if disclosed.

Reporting the outcome of monitorships

What format should monitors' reports take?

The monitor should discuss with the prosecuting authority at the outset of the monitorship what format the monitor's reports should take. The prosecuting authority may find it preferable to receive periodic informal reports, with a formal report delivered at agreed milestones. The monitor should supplement any written report with offers to guide the authority through the report by phone or during an in-person meeting.

Should the monitor share his or her draft report with the company?

To the extent permitted by the terms of his or her appointment, the monitor should give the company advance notice of any reports that the monitor will make to the enforcement authority. The monitor should explain his or her findings and recommendations to the company and allow it to comment on those findings and recommendations. While the monitor has an independent duty to the enforcement authority to provide an objective report, the monitor should strive to avoid surprising the company with his or her findings, and formulate recommendations in collaboration with the company that achieve the objectives of the monitorship and that can be owned by the company long after the monitor's mandate is finished.

38 36 FCA Handbook, DTR 2.8.

12

US-Ordered Cross-Border Monitorships

Gil M Soffer, Nicola Bunick and Johnjerica Hodge[1]

A monitorship can be difficult to manage in the best of circumstances. Even the most basic arrangement requires the monitor to evaluate a company that he or she does not represent, report to an agency for which he or she does not work, and gather sensitive information without invading attorney–client privilege. Worse, the company will almost certainly not welcome the monitorship, let alone the intrusive features of it – including the monitor's examination of proprietary data, interviews of company personnel and customers, and findings that could require the company to abandon well-established practices or discipline long-standing employees.

A US-ordered cross-border monitorship poses all these challenges and more. To monitor a company with operations outside the United States, especially one with operations around the globe, is to contend with several if not dozens of disparate legal systems and business cultures. As a result, while the work that a monitor typically performs – such as conducting interviews, collecting data, and recommending discipline – can be accomplished with little difficulty in the United States, it may be sharply restricted in some countries. Moreover, practices or attitudes that are commonplace in one affiliate may be radically different in another affiliate of the same company.

In the face of these legal and practical challenges, the cross-border monitor would do well to consider a few key attributes of cross-border monitorships before proceeding. First, it is not the monitor's primary job to investigative misconduct. That is a basic tenet of almost any monitorship, but one that is not always well understood. Second, the monitor may not be able to visit every place a company does business – particularly when the company operates around the world – and consequently must devise ways to assess the company's compliance with that limitation in mind. Third, foreign privacy and labour laws may apply and must

1 Gil M Soffer is a partner, and Nicola Bunick and Johnjerica Hodge are associates at Katten Muchin Rosenman LLP.

carefully be considered, as they could impede the monitor's work (or worse). The same is true for foreign laws governing the imposition and publicising of employee discipline. Finally, while companies must implement a coherent global compliance programme, local variations will be appropriate and necessary to account for differences in local business culture and practice.

The role of the monitor

The monitor is not always an investigator

Infrequent in the United States, monitorships are entirely unknown in many parts of the world. The first challenge facing a cross-border monitor is, therefore, the most fundamental: clarifying the role of a monitor, and perhaps more importantly, what the monitor is not. As the Department of Justice's guidance on corporate monitorships makes clear, the monitor's 'primary responsibility is to assess and monitor a corporation's compliance with the terms of the agreement specifically designed to address and reduce the risk of recurrence of the corporation's misconduct[2] . . . [t]he 'monitor's mandate is not to investigate historical misconduct.'[3]

Clarity on this issue is important in any monitorship; only by understanding the purpose of their work can monitors design an appropriate work plan and discharge their mandate effectively. In a cross-border monitorship, clarity of purpose is crucial. Some countries prohibit or restrict corporate investigations of misconduct,[4] and in these jurisdictions, the consequences of overextending the monitor's role could be significant. If witnesses mistake the monitor for a criminal investigator, they may report the monitor to the local authorities. Those authorities, which may previously have been unaware of the monitorship,[5] could begin investigating the monitored entity or insist on exploring the contours of the monitorship with the monitor and the enforcement agency. At the very least, interference of this kind would unnecessarily complicate the monitorship and potentially delay the monitor's work.[6] Before beginning their work outside the United States, monitors must ensure that the company and its employees – particularly the witnesses they intend to interview – clearly understand the monitor's role.

2 Craig S Morford, US Department of Justice, 'Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations', at 2 (7 March 2008), https://www.justice.gov/sites/default/files/dag/legacy/2008/03/20/morford-useofmonitorsmemo-03072008.pdf.

3 id., at 6.

4 e.g., KPMG International, 'Cross-border investigations: Are you prepared for the challenge?', at 10 (2013), https://assets.kpmg/content/dam/kpmg/pdf/2013/12/cross-border-investigations.pdf. ('In some jurisdictions, it can be illegal for companies to investigate alleged employee misconduct because the local government considers itself to be the exclusive investigator responsible for law enforcement.')

5 In some countries, the monitor may be required to notify the local government or regulator if he or she is doing work there. Even where such disclosure is not required, it may still be considered good practice.

6 A similar risk exists in traditional internal investigations, where employees may 'seek the intervention of local government officials' in an attempt '[t]o deflect from the investigation.' John Frangos, 'Southeast Asia: Conducting Successful Corporate Internal Investigations', Society for Human Resource Management (28 August 2017), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/southeast-asia-investigations.aspx.

The monitor cannot go everywhere

When a company has wide-ranging operations across the world, potentially spanning multiple business lines, the monitor's team may be unable to visit each location during the course of the monitorship – nor should they. The monitor's goal is not to assess every facet of compliance in every jurisdiction where the company does business, but rather the company's overall compliance environment. Accordingly, the monitor must think critically about which sites to visit, bearing several considerations in mind.

First, the monitor should make a priority of reviewing the company's operations in jurisdictions that pose the highest risk. These will almost certainly include locations where the underlying misconduct occurred. They may also include countries where the company's largest operations are situated, or where the highest-risk functions take place. Another indicator of risk is the nature of the violations that led to the monitorship in the first place. In cases involving Foreign Corrupt Practices Act (FCPA) violations, for example, the monitor should focus on countries with a known corruption risk – taking into account Transparency International's Corruption Perception Index[7] and any risk rankings generated by the company itself.

The more difficult choices arise beyond the highest-risk locations. Because monitors cannot go everywhere, they should identify a representative sample of locations that will enable them to assess the company's global compliance efforts, which can be a formidable task. Compliance risks can vary not only by country but by business line, business unit and even by product. They can also depend on the business model. Joint ventures, in which authority is shared between the monitored entity and its partner, may pose a greater risk than wholly owned subsidiaries, over which the company has full control. Manufacturing plants may be riskier than commercial operations, and commercial operations riskier than distributorships. Recent acquisitions typically pose an enhanced compliance risk, especially where the acquired company's compliance culture is immature and not yet fully integrated into the company's global culture.

How can a monitor assess the adequacy of a company's global compliance programme under these circumstances? One viable strategy is to identify common operational or other relevant features among the company's different affiliates; group the affiliates according to those common features; visit an affiliate within a group; and extrapolate findings from that affiliate to others in the same group. Deciding which common features to select depends heavily on the company at issue, of course, but the following are a few options:

- Common reporting structure: the monitor should consider whether business operations fall under the same global reporting structure. If several sites report up to the same business unit or managers, they will at least have some elements of supervision in common. Depending on the conduct under review, the monitor may be able to draw some conclusions about the adequacy of compliance by evaluating the common supervisory team.
- Common processes: if the company has compliance processes that vary from region to region or among different business lines, the monitor can group sites according to the processes they share. In an FCPA inquiry, for example, the company might employ the

7 Transparency International, Corruption Perceptions Index, Overview, https://www.transparency.org/research/cpi/overview (last visited 4 February 2019).

same third-party due diligence procedures at five of 25 affiliates. The monitor could test the procedures at one of the five affiliates, and extrapolate his or her findings to the remaining four in the same group (after accounting for any site-specific anomalies).

- Common business models: a monitored company might employ different business models across the world, each with a different risk profile. The monitor should test each model – especially those that present heightened risk, like recent acquisitions.
- Common systems: a key component of any functioning compliance programme is internal controls, which are usually embedded within a company's enterprise resource planning and procurement systems. If the company employs a unified global platform across all of its affiliates, the monitor's examination of internal controls may be relatively simple. But if the company does not make use of a single platform – as is often the case for companies that have expanded through acquisitions – there may be multiple legacy systems, each with its own user interface and technical challenges. In these cases, the monitor should endeavour to visit representative sites where each of the systems is in use.

All of these approaches can be fruitful under the right circumstances. But they are of limited value for assessing a company affiliate that does not share common features with any other, and where the monitor simply cannot visit because of civil unrest, armed conflict, public health emergencies, or the like. Such affiliates are a vexing challenge for the monitor – especially in corruption cases, where they are often located in the same countries that pose the highest corruption risk – and dealing with these locations requires some creative thinking. Among others, the monitor team could perform remote transaction testing, conduct video interviews with in-country employees, and interview in person any employees outside the country who may be assisting the affiliate with implementing financial and compliance controls.

Observing privacy and labour laws

Privacy

Companies in cross-border monitorships must abide by the privacy laws of the countries in which they operate. The complexity of these laws can be daunting for the monitored entity and the monitor alike, but they are vitally important to the cross-border monitor: because the life blood of a monitorship is information, any limitations on acquiring it could jeopardise the monitor's ability to fulfil his or her mandate. It is, therefore, incumbent on the monitor team to identify applicable privacy laws in advance of its work, and take the steps necessary to comply with them.

Among the most recent and best known privacy laws that monitors must contend with is the EU General Data Protection Regulation (GDPR). The GDPR restricts the ability of companies that operate, provide services, sell goods, or even track the behaviour of individuals[8] in the European Union and Member States from processing personal information without first

8 European Commission, 'Who does the data protection law apply to?', https://ec.europa.eu/info/law/law-topic/data-protection/reform/rules-business-and-organisations/application-regulation/who-does-data-protection-law-apply_en (last visited 4 February 2019) ('The law applies to: 1. A company or entity which processes personal data as part of the activities of one of its branches established in the EU, regardless of where the data is processed; or 2. A company established outside the EU offering goods/services (paid or for free) or monitoring the behavior of individuals in the EU.')

obtaining permission to collect and distribute it, or satisfying one of several other specified criteria for processing the information.[9] Processing is defined broadly to include 'any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available'.[10]

Additionally, and perhaps most relevant to the activities of a monitor, the GDPR restricts companies from transferring personal data to countries lacking – in the eyes of the European Commission – adequate protection for personal data.[11] To satisfy the requirements of the GDPR, the monitor may need to enter into an agreement with the monitored entity to verify the steps the monitor will take to protect personal data being transferred by the monitored entity.[12] Further, depending on the monitorship, the monitor may hire third-party experts, accounting firms, data processing companies and others. The GDPR would govern the monitor's transfer of personal data from the monitored entity to any such third parties. As a result, the monitor may also need to enter into contractual arrangements with these vendors to ensure that the monitored entity can lawfully share information.

The monitor should also be aware that countries within the European Union are free to enact requirements that surpass those found within the GDPR. Thus, monitors must assess not only the GDPR, but any country-specific laws that may govern the transfer of information from the monitored entity to the monitor. And, of course, countries in the European Union are not alone in imposing privacy-related restrictions.[13]

In addition to restricting access to documents, privacy laws also address the manner in which the monitor and monitored entity receive reports of wrongdoing throughout the monitored entity.[14] Most multinational companies have established a reporting mechanism or 'hotline' through which employees can report potential misconduct either by company employees or by a third party associated with the company. Some countries permit companies to implement confidential-reporting systems, but others may require companies to

9 Regulation 2016/679 Of the European Parliament and of the Council of 27 April 2016, Article 6(1), GDPR, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02016R0679-20160504&from=EN. The GDPR imposes even stricter requirements on the distribution of information related to criminal offences. See also id., Article 10.

10 GDPR, Article 4(2).

11 GDPR, Article 45(1) ('A transfer of personal data to a third country or an international organization may take place where the Commission has decided that the third country, a territory or one or more specified sectors within that third country, or the international organization in question ensures an adequate level of protection.')

12 See GDPR, Article 46(2)(f); see also id. Article 46(3) (noting that a third party can receive personal data if there are, among other things, 'contractual clauses between the controller or processor or the recipient of the personal data in the third country or international organization').

13 e.g., KPMG, Overview of China's Cybersecurity Law at 8, https://assets.kpmg/content/dam/kpmg/cn/pdf/en/2017/02/overview-of-cybersecurity-law.pdf (listing the privacy-related restrictions in China); see also Daniel Chen and Michael R Fahey, 'Data protection in Taiwan: overview', https://uk.practicallaw.thomsonreuters.com/5-578-3485?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1 (discussing the privacy-related restrictions in Taiwan).

14 e.g., Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02016R0679-20160504&from=EN.

obtain permission from employees or government authorities before doing so.[15] Still other countries limit the types of conduct that can be reported, and others discourage any confidential reporting at all. [16]

In short, privacy laws can create stumbling blocks to the smooth transfer of information during the monitorship. The monitor and company must consider privacy issues as early as possible, and establish protocols for document and information transfers well in advance of the monitor's field work.

Labour

Local labour laws may also restrict the monitor's access to information, and to employees as well. Some countries in Europe, for example, require that employee representatives (known as work councils) must be consulted prior to an employee's interview.[17] In some countries, employees have the right to refuse to attend an interview or otherwise cooperate with the monitor. Employees in certain countries may also expect to receive, or at a minimum review, any notes taken during interviews or other materials prepared as a result of interviews.[18] Labour laws also limit the type of discipline companies can impose. Some labour laws impose penalties or other liabilities on companies for terminating an employee in a manner that does not comply with specified legal protections. Others restrict when employers can take disciplinary action against employees.[19] Such restrictions range from requiring an employer to impose discipline within a certain time frame to forcing an employer to follow a particular procedure before terminating an employee.[20]

There is, in short, great variety among the labour laws that companies and monitors may encounter. Sophisticated multinational companies are well aware of them. The monitor must thoroughly understand them as well, and can draw upon the company's own expertise for assistance. (The DOJ contemplates that very process, often requiring monitored companies

15 e.g., World Law Group, *Global Guide to Whistleblowing Programs,* 2016, 1, http://www.theworldlawgroup.com/wlg/Handbooks__Guides.asp (noting that, in Argentina, 'Companies must always notify their employees before the implementation of a whistleblower program'); See id. at 41(noting that 'the Czech Data Protection Authority has to be notified prior to the collecting or processing of personal data').

16 See id., at 62, 66, 69.

17 See e.g., Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009; see also Philipp von Holst, *Global Investigations Review: The European, Middle Eastern and African Investigations Review,* 2017 (25 May 2017), https://globalinvestigationsreview.com/benchmarking/the-european-middle-eastern-and-african-investigations-review-2017/1142027/germany ('[A] hostile works council can cause serious problems to an internal investigation from delaying it to blocking single measures and leaking information to the press').

18 See, KPMG International, 'Cross-border investigations: Are you prepared for the challenge?' at 17 ('Many countries have data privacy laws that allow a target or a witness to have access to certain investigatory material, including a written investigation report.')

19 See e.g., Juliana Sa de Miranda and Ricardo Caiado, 'Brazil: Handling Internal Investigations', *Global Investigations Review*: *The Investigations Review of the Americas,* (21 August 2018) https://globalinvestigationsreview.com/benchmarking/the-investigations-review-of-the-americas-2019/1173349/brazil-handling-internal-investigations ('As in many other Latin American countries, the Brazilian labour legislation is complex and inclined to protect employees. It is no overstatement that there is a culture of judicial claims by employees against employers in the country, even in cases of weak or lack of proper grounds').

20 See e.g., Donald C Dowling Jr, Lexology, Internal investigations in overseas workplaces, (2 April 2013), https://www.lexology.com/library/detail.aspx?g=8088dd7e-b170-43f4-a0ea-daf3fdfd2672.

to provide guidance to the monitor on applicable local law.) As with most aspects of the monitorship, careful planning is critical at the outset to account for and ensure compliance with local labour laws.

Publicising employee discipline

One of the monitor's most important tasks is to assess whether the monitored company has undertaken appropriate remedial measures in the wake of wrongdoing, and one of the most important of such measures is the disciplining of employees responsible for misconduct. Indeed, US regulators have repeatedly emphasised this component of a remediation programme. The Department of Justice Manual, for example, highlights appropriate discipline of employees as one of five components required for a company to demonstrate that it has timely and appropriately remediated FCPA violations. It also makes clear that discipline should extend not only to those who committed the misconduct, but also to those in oversight positions:

> *The following items will be required for a company to receive full credit for timely and appropriate remediation . . . Appropriate discipline of employees, including those identified by the company as responsible for the misconduct, either through direct participation or failure in oversight, as well as those with supervisory authority over the area in which the criminal conduct occurred.*[21]

The US Securities and Exchange Commission likewise emphasises appropriate discipline as a component of an effective compliance programme.[22]

Beyond underscoring the importance of discipline itself, the DOJ and SEC both encourage companies to turn discipline into a teaching opportunity. In describing how a company can effectively enforce its anti-corruption compliance programme, for example, those agencies have noted that '[m]any companies have found that publicizing disciplinary actions internally, where appropriate under local law, can have an important deterrent effect, demonstrating that unethical and unlawful actions have swift and sure consequences.'[23] The challenge for companies seeking to follow this guidance is discerning what, precisely, may or may not be 'appropriate under local law'.

The GDPR is a case in point. As noted, that law restricts the 'processing' of 'personal data'.[24] The regulation defines 'personal data' broadly to cover 'any information relating to an identified or identifiable natural person', the latter being any person 'who can be identified, directly or indirectly'.[25] This definition encompasses information that in the aggregate could be used to identify a particular person.[26] Likewise, 'processing' is defined broadly to include

21 2017 US Department of Justice Manual, Title 9-47.120(3)(c), available at https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977.

22 US Dep't of Justice & US Sec. & Exchange Comm'n, 'A Resource Guide to the U.S. Foreign Corrupt Practices Act' 59 (2012), https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf.

23 id.

24 GDPR, Article 6(1).

25 GDPR, Article 4(1).

26 Amelia Hairston-Porter, 'INSIGHT: EU Enacts New Data Privacy Regime with Potential Effects on Cross-Border Investigations', *Bloomberg Law* (28 September 2018), https://news.bloomberglaw.com/

the 'collection, recording, organization . . . storage . . . use . . . [or] dissemination' of personal data by either automated or non-automated means.[27] To the extent the GDPR applies to the dissemination of information about an incident of employee misconduct, a company would have to comply with the law's requirements before sharing any information. Among other steps, the company would be obliged to provide the employee with notice of how his or her data may be processed, and to conduct a legal analysis to assess whether the company has an appropriate legal basis to distribute the information.[28]

None of these data privacy protections should prohibit a company from publicising fully anonymised information about an incident of employee misconduct.[29] Nevertheless, companies operating in an environment of heightened sensitivity to employee privacy may be hesitant to engage in the legal analysis necessary to determine what information can be shared, and how, under local law. That is particularly true in countries where the privacy laws are new and the regulatory guidance sparse. Given the importance to US regulators of imposing and publicising appropriate discipline, however, monitors should be examining how companies make use of discipline – and companies should carefully consider what information they can share with employees.

Variations in local business culture and practices

Multinational companies must maintain a coherent global compliance programme, while at the same time contending with local distinctions in business culture and practice. That is no easy feat, especially for companies that span the globe, but the government and the monitor will expect nothing less. One key to success in this regard is understanding relevant local practices and adapting global compliance principles accordingly.

Corruption cases offer a useful illustration. Regardless of where a company operates, it can never, under the FCPA or other anti-bribery legislation, permissibly bribe a government official in exchange for business. The company's compliance policy must be unyielding on this point. But the means to prevent bribery from occurring may require some variation from country to country to account for the local business environment. In larger countries, for example, where the pool of qualified employees might be abundant, the company could, without jeopardising its business, choose not to hire any employee with close family ties to a distributor that sells company products to the government. In smaller countries, the relevant talent pool might be much smaller, making it impractical for the company to impose a blanket ban of this sort. Instead, the company might reasonably apply rigorous controls to its hiring process, like walling off potentially conflicted employees from any interactions with the distributor.

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white-collar-and-criminal-law/insight-eu-enacts-new-data-privacy-regime-with-potential-effects-on-cross-border-investigations.

27 GDPR, Article 4(2).

28 GDPR permits companies to process personal data in a limited number of instances, including where the employee consents (although consent can be revoked), where necessary to comply with a legal obligation, and where necessary to pursue a legitimate company interest after this interest is balanced against the interests and rights of the employee. See GDPR Article 6(1)(a), (c), and (f) (lawfulness of processing) and GDPR Article 7(3) (consent may be withdrawn at any time).

29 Companies will need to consult with local experts on the full range of laws and regulations that may limit their ability to disseminate information about employee discipline in a particular jurisdiction.

The number of examples of this nature is nearly limitless. The point is that one size does not necessarily fit all in the implementation of a global compliance programme. Variations may be entirely appropriate and often critical. If a company's policies create significant practical barriers to conducting business in a particular country, the company runs a greater risk that employees will circumvent compliance controls. By calibrating its programme to account for local variations in business practice, while still maintaining a compliant environment, a company can make its compliance policies both more practical and more likely to be effective in the long run. Like the other lessons for cross-border monitors noted above – clarifying the monitor's role, strategically choosing the right locations to visit, and being mindful of privacy and labour laws – careful attention to local culture and practice will position the monitor well to achieve his or her primary mission: assessing whether the company's compliance programme adequately addresses and reduces the risks that led to the monitorship in the first place.

Part IV

Sectors and Industries

13

The Healthcare Industry

David W Ogden, Ronald C Machen, Stephen A Jonas and Ericka Aiken[1]

For nearly 15 years, the Department of Justice (DOJ) has used independent monitors to address compliance issues with companies accused of violations of healthcare fraud statutes and regulations. The breadth and dynamic nature of those statutes and regulations, the ever-changing structure for delivery of healthcare, and the complexity of the operations of many of these companies present unique challenges to healthcare monitors. This chapter explores the history of healthcare monitorships and how they have worked in practice, with a focus on monitorships imposed by the DOJ's Criminal Division. The chapter proceeds by providing: the historical context; the legal context; enforcement actions and trends; unique challenges; and predictions for the future.

The historical context

The DOJ has prioritised healthcare fraud for more than two decades. In 1993, then-Attorney General Janet Reno cited healthcare fraud as a top priority.[2] Similarly, a 1997 DOJ Report referred to healthcare fraud as 'the crime of the nineties'.[3] During the 1990s, various government agencies underwent significant changes to meet the demand for increased healthcare enforcement. As one stark measure of the increased focus on healthcare fraud, the number of FBI agents assigned to investigate healthcare fraud in the 1990s increased nearly fivefold

1 David Ogden and Ronald Machen, partners at WilmerHale, are co-monitors in a healthcare fraud monitorship led by the Department of Justice's Criminal Division. Stephen Jonas, a WilmerHale partner, and Ericka Aiken, a WilmerHale senior associate, are members of that co-monitor team.

2 US DOJ Health Care Fraud Report Fiscal Years 1995 & 1996 (October 1997), https://www.justice.gov/archives/opa/us-department-justice-heatlh-care-fraud-report-fiscal-years-1995-1996.

3 id.

– from 112 in 1992 to 500 in 1999.[4] The number of criminal healthcare fraud investigations increased nearly sixfold during the same time period – from 520 to 3,000 investigations.[5]

Around the same time, Congress passed legislation that significantly shaped the landscape of healthcare enforcement, including the Health Insurance Portability and Accountability Act of 1996 (HIPAA).[6] HIPAA is best known for providing privacy protections to patients, but it also 'federalized much of the law of healthcare fraud'.[7] For example, HIPAA required the establishment of the Health Care Fraud and Abuse Control Program (HCFAC), which was designed to coordinate law enforcement efforts with respect to healthcare fraud and abuse at the federal, state and local levels.[8] The HCFAC operates under the joint direction of the Attorney General and the Secretary of the Department of Health and Human Services (HHS).[9] HIPAA not only fostered the establishment of the HCFAC, but it also helped secure funding for enforcement activities.[10] For example, HIPAA established a HCFAC account that provided $104 million for anti-healthcare fraud activities in fiscal year 1997.[11] In contrast, $279.5 million in mandatory funding was allocated to the account in fiscal year 2017, which was supplemented by an additional $725 million in discretionary funding appropriated by Congress.[12] These funds provide further evidence of the DOJ's commitment to combating healthcare fraud.

The enforcement and legal context

Coordinated efforts

Healthcare enforcement today is the result of coordinated efforts by federal, state and local law enforcement agencies. At the federal level, groups such as the Health Care Fraud (HCF) Unit of DOJ's Criminal Division, the joint HHS/DOJ Healthcare Fraud Strike Forces (the Strike Forces), the Civil Frauds Branch of DOJ's Civil Division, the US Attorneys' Offices (USAOs), the Federal Bureau of Investigation, and HHS OIG, all work collaboratively to combat healthcare fraud. The HCF Unit, within DOJ's Criminal Division, comprises approximately 60 prosecutors whose core mission is to prosecute healthcare fraud cases.[13] The unit works closely with the DOJ's 11 strike forces, which are located in over a dozen cities

4 Salinger, *Encyclopedia On White Collar And Corporate Crime*, Vol. 1, at 394 (2005).

5 id.

6 See Pub. L. No. 104-191, 5701 110 Stat. 1936 (1996).

7 Hyman, David, 'HIPAA and Health Care Fraud: An Empirical Perspective', *Cato Journal*, Vol. 22, No. 1, 155 (2002), https://pdfs.semanticscholar.org/98ff/f0f837ae669cdbad7c1ed5d8010e541635e0.pdf.

8 HHS-OIG, Health Care Fraud and Abuse Control Program Report, https://oig.hhs.gov/reports-and-publications/hcfac/index.asp.

9 id.

10 HHS-OIG; 'Health Care Fraud and Abuse Control Program Report for Fiscal Year 2017' (April 2018) https://oig.hhs.gov/publications/docs/hcfac/FY2017-hcfac.pdf.

11 US Gov't accountability Off., GAO 11-446, Health Care Fraud and Abuse Control Program: Improvements Needed in Controls over Reporting Deposits and Expenditures (2011), https://www.gao.gov/assets/320/318299.html. A portion of these funds are to be used only for activities of the HHS-OIG, with respect to the Medicare and Medicaid programmes. For example, HCFAC appropriations supported over 66 per cent of the DOJ's healthcare fraud funding and over 75 per cent of HHS-OIG's appropriated budget for FY 2017. *Supra* note 10.

12 *Supra* note 10, at 3.

13 US DOJ, Fraud Section Year in Review 2018 (January 2019), https://www.justice.gov/criminal-fraud/file/1123566/download.

across the United States, including Miami, Florida; Los Angeles, California; and Detroit, Michigan.[14] Originally launched in 2007 and expanded in 2009 in the Health Care Fraud Prevention and Enforcement Action Team HEAT Initiative,[15] the strike forces aim to focus on the 'worst offenders' engaged in healthcare fraud in the 'highest intensity regions'.[16] The strike forces employ a 'cross-agency collaborative approach', which combines resources from the FBI, HHS-OIG, the Centers for Medicare & Medicaid Services (CMS), and other agencies, along with the prosecutorial resources of USAOs.[17]

The USAOs have long played a major role in healthcare fraud enforcement. They bring criminal and affirmative civil cases to recover funds obtained through fraud, waste and abuse;[18] and litigate a variety of healthcare fraud matters, including false billings, overcharges by hospitals, Medicaid fraud, kickbacks, pharmaceutical and medical device fraud, and home health and hospice fraud. Each USAO also has designated criminal and civil healthcare fraud coordinators who work with outside agencies and trial attorneys, which further evidences the DOJ's commitment to healthcare enforcement.[19] Not surprisingly, all but one healthcare monitorship imposed through a non-prosecution agreement (NPA) or deferred prosecution agreement (DPA) resulted from a USAO-led investigation.[20]

Finally, the Civil Frauds Branch of DOJ's Civil Division leads civil enforcement of the Claims Act nationally, and also plays a key role in healthcare fraud enforcement nationwide.

Criminal statutes

The Criminal Division charges a variety of different crimes in healthcare fraud cases, such as:

- general healthcare fraud;[21]
- Anti-Kickback Statute (AKS) violations;[22]
- theft or embezzlement in connection with healthcare;[23]
- unlawful use of health information;[24] and
- Food, Drug, and Cosmetic Act (FDCA) violations.[25]

14 US DOJ, Strike Force Operations, https://www.justice.gov/criminal-fraud/strike-force-operations.

15 Eric Holder, Attorney General, US DOJ, Remarks at the HEAT Press Conference on Detroit Takedown (29 June 2009), https://www.justice.gov/opa/speech/attorney-general-eric-holder-heat-press-conference-detroit-takedown.

16 id.

17 id.

18 *Supra* note 10, at 72.

19 id.

20 See 'Enforcement actions and trends'.

21 18 U.S.C. Section 1347.

22 42 U.S.C. Section 1320a-7b(b).

23 18 U.S.C. Section 669.

24 42 U.S.C. Section 1320d-6.

25 21 U.S.C. Section 301 et seq. FDCA violations include off-label marketing; Good Manufacturing Practice (GMP) violations; and manufactured compound drugs.

The underlying misconduct that leads to these violations differs, but some common fraudulent activities include billing for no-show appointments; submitting claims for services at higher complexity levels or reimbursement levels than provided or documented; billing for services not furnished; and providing anything of value in exchange for referrals (i.e., providing kickbacks).

Civil statutes

Civil statutes also play a major role in protecting the government from healthcare fraud. The False Claims Act (FCA) and the Stark Law are two key civil statutes used to combat healthcare fraud. The FCA imposes liability on any person who knowingly submits a false claim seeking government funds.[26] Both the DOJ and private citizens, known as 'relators', are allowed to bring actions on behalf of the United States asserting FCA violations.

The Stark Law is a civil statute that, together with the Stark Regulations,[27] imposes prohibitions on physician referrals and billing where certain financial relationships exist involving physicians or physicians' immediate family members.[28] The Stark Law is discussed further in 'Unique aspects of healthcare monitorships', which details some of the unique challenges in healthcare monitorships.

Enforcement actions and trends

The rise of monitorships in the early 2000s

In the early 2000s, corporate scandals, such as *WorldCom* and *Enron*, led to increased focus on corporate misconduct, including healthcare fraud. For example, in 2000, the DOJ entered into what was then the largest government fraud settlement in US history – a plea agreement resolving healthcare fraud allegations. The plea agreement was between the DOJ and HCA-The Health Care Company (HCA), which was the nation's largest hospital chain at the time.[29] The agreement resolved allegations that, among other things, HCA engaged in fraudulent Medicare billing and paid kickbacks and other remuneration to doctors to induce referrals.[30] HCA agreed to pay $745 million to the government, but the total penalty was increased over a number of years through various additional agreements.[31] This was followed

26 See 31 U.S.C. Section 3729 et seq.

27 From 1991 through 1998, the Centers for Medicare and Medicaid Services (CMS) (formerly the Health Care Financing Administration) implemented a series of regulations (the Stark Regulations) to provide further guidance on the Stark Law. The Stark Regulations were codified as 42 C.F.R. Sections 411.350-411.389.

28 42 U.S.C. Section 1395nn(a)(1)(A).

29 Press Release, US DOJ, 'HCA – Largest Government Fraud Settlement in U.S. History' (December 2000), https://www.justice.gov/archive/opa/pr/2000/December/696civcrm.htm. One of the authors led the Civil Division as the Assistant Attorney General at the time DOJ reached this settlement with HCA.

30 id.

31 Press Release, US DOJ, 'HCA – Largest Government Fraud Settlement in U.S. History' (December 2000), https://www.justice.gov/archive/opa/pr/2000/December/696civcrm.htm.; see also Press Release, US DOJ, 'Largest Health Care Fraud Case in U.S. History Settled HCA Investigation Nets Record Total of $1.7 Billion' (26 June 2003), https://www.justice.gov/archive/opa/pr/2003/June/03_civ_386.htm; see also HCA 2003 Annual Report, 17, http://media.corporate-ir.net/media_files/irol/63/63489/pdfs/2003ar.pdf.

by numerous high-value criminal or civil settlements involving kickbacks, poor manufacturing practices, and illegal off-label promotion of pharmaceutical products.[32]

By the early 2000s, the DOJ was also more frequently entering into NPAs and DPAs, which provided useful vehicles for requiring defendant companies to strengthen their compliance programmes and systems through the retention of monitors for the life of the agreement.[33] From 2002 to 2005, the DOJ entered into twice as many NPAs and DPAs as it had over the previous 10 years combined.[34] In 2005, the US Attorney's Office for the District of New Jersey executed what is likely the first DPA to impose a monitor for healthcare fraud violations – a DPA with University Medicine and Dentistry of New Jersey (UMDNJ) that resolved allegations of double-billing Medicaid.[35] The government alleged that UMDNJ's University Hospital submitted claims to Medicaid for outpatient physician services that were also being billed by doctors working in the hospital's outpatient centres.[36] In addition to full reimbursement of Medicaid,[37] the DPA imposed a term of two years, with a monitor imposed for the full term.

The US attorney who led the UMDNJ investigation later suggested a rationale for the monitorship: 'It would be highly irresponsible to allow a corporation whose prosecution is being deferred to go unsupervised during the deferral period.'[38] Over the next several years,

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32 e.g., Press Release, US DOJ, 'TAP Pharmaceutical Products Inc. and Seven Others Charged with Health Care Crimes; Company Agrees to Pay $875 Million to Settle Charges' (3 October 2001), https://www.justice.gov/archive/opa/pr/2001/October/513civ.htm; Melody Peterson, 'Drug Maker to Pay $500 Million Fine for Factory Lapses', *NY Times* (18 May 2002), https://www.nytimes.com/2002/05/18/business/drug-maker-to-pay-500-million-fine-for-factory-lapses.html; Press Release, United States DOJ, 'Serono to Pay $704 Million for the Illegal Marketing of Aids Drug' (17 October 2005), https://www.justice.gov/archive/opa/pr/2005/October/05_civ_545.html; Press Release, US DOJ, 'Pfizer to Pay $2.3 Billion for Fraudulent Marketing' (2 September 2009), https://www.justice.gov/opa/pr/justice-department-announces-largest-health-care-fraud-settlement-its-history; Press Release, US DOJ, 'Johnson & Johnson to Pay More Than $2.2 Billion to Resolve Criminal and Civil Investigations' (4 November 2013), https://www.justice.gov/opa/pr/johnson-johnson-pay-more-22-billion-resolve-criminal-and-civil-investigations.

33 *Global Investigations Review*, Fountain Court Chambers, Clifford Chance LLP, 'Monitorships' (4 January 2017), https://globalinvestigationsreview.com/chapter/1079360/monitorships.

34 Matyas & Snyder, 'Monitoring The Monitor? The Need For Further Guidance Governing Corporate Monitors Under Pre-Trial Diversion Agreements', as appeared in BNA's Health Care Fraud Report, Epstein Becker Green (14 April 2009), https://www.ebglaw.com/news/monitoring-the-monitor-the-need-for-further-guidance-governing-corporate-monitors-under-pre-trial-diversion-agreements-as-appeared-in-bnas-health-care-fraud-report/#_ftn1; see also Russell Mokhiber, 'Crime Without Conviction: The Rise of Deferred and Non Prosecution Agreements', *Corporate Crime Reporter* (28 Dec. 2005), https://www.corporatecrimereporter.com/news/200/crime-without-conviction-the-rise-of-deferred-and-non-prosecution-agreements-2/.

35 The DOJ does not keep a comprehensive list of all NPAs and DPAs to-date on its website. Scholars and universities, however, have maintained repositories of NPAs and DPAs collected over the years. Multiple repositories suggest that the UMDNJ DPA is the first time a monitor was imposed in a criminal resolution to resolve alleged violations of healthcare fraud. See, e.g., University of Virginia Law, Corporate Prosecution Registry, Data and Documents, http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/browse/browse.html.

36 id.

37 id.

38 Christopher J Christie and Robert M Hanna, 'A Push Down the Road of Good Corporate Citizenship: The Deferred Prosecution Agreement Between the U.S. Attorney for the District of New Jersey and Bristol-Myers Squibb Co.', 43 *Am. Crim. L. Rev.* 1043, 1054 (2006). USA Christie's remarks were made in reference to the

the DOJ imposed monitors as a part of some, but not all, NPAs and DPAs. Some viewed the DOJ's monitorship decisions as 'unpredictable' and 'inconsistent'.[39] In fact, congressional leaders called for greater transparency into the monitor selection process, hoping to ensure greater consistency among NPAs and DPAs.[40] The DOJ responded by publishing general guidelines for monitor selections, such as the 2008 Morford Memo,[41] named after its author, then-Acting Deputy Attorney General Craig Morford. As discussed elsewhere in this guide, the memo instructed prosecutors to 'be mindful' of two broad considerations: 'the potential benefits that employing a monitor may have for the corporation and the public'; and 'the cost of a monitor and its impact on the operations of the corporation'.[42] The 2018 Benczkowski Memo, also described elsewhere in the guide as well as in 'Predictions for the future', supplemented the Morford Memo.

Healthcare fraud resolutions to date in which a monitor was imposed include:

- the 2007 settlements with DePuy Orthopedic, Inc; Smith & Nephew, Inc; Zimmer Holdings; Biomet; and Stryker (resolving allegations of kickback conspiracies through DPAs and NPAs, imposing 18-month monitorships on each company);[43]
- the 2009 settlement with WellCare Health Plans, Inc (resolving allegations of fraudulent billing through a three-year DPA, imposing an 18-month monitorship);[44]
- the 2010 settlement with Wright Medical Technology, Inc (resolving allegations of kickbacks through a DPA, imposing a 12-month monitorship);[45]
- the 2010 settlement with Exactech, Inc (resolving allegations of kickbacks through a DPA, imposing an 18-month monitorship);[46]

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imposition of a monitor against Bristol-Myers Squibb for alleged securities violations a few months before his office imposed the monitor in the UMDNJ resolution. While USA Christie did not directly address his reasons for imposing the UMDNJ monitor, his remarks shed light on his rationale.

39 See Kathleen Boozang, '"Monitoring" Corporate Corruption: DOJ's Use of Deferred Prosecution Agreements in Health Care', *Am. J. of Law & Med.* 35 (Feb. 2009).

40 Press Release, United States House of Rep, Remarks of Bill Pascrell (26 November 2007); see also The Accountability and Deferred Prosecution Act of 2014, H.R. 4540, 113th Cong. (2014) (calling for the establishment of rules for the selection of independent monitors for DPAs).

41 Memorandum from Craig S Morford, Acting Deputy Attorney Gen., to Heads of Department Components, United States Attorneys, 'Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations' (7 March 2008), https://www.justice.gov/sites/default/files/dag/legacy/2008/03/20/morford-useofmonitorsmemo-03072008.pdf.

42 id.

43 The settlements were with the USAO for the District of New Jersey. See News Release, US DOJ, Christopher J Christie, US Attorney, 'Five Companies in Hip and Knee Replacement Industry Avoid Prosecution by Agreeing to Compliance Rules and Monitoring' (27 September 2007), https://www.justice.gov/sites/default/files/usao-nj/legacy/2013/11/29/hips0927.rel.pdf.

44 See *WellCare* DPA at Paragraphs 10–11 (18 May 2009). The settlement was with the USAO for Middle District of Florida. See id.

45 See *Wright Medical* DPA at Paragraph 16. The settlement was with the USAO for District of New Jersey. See id. The Wright Medical DPA and monitorship were later extended by an additional 12 months. See Press Release, US DOJ, 'Wright Medical Technology, Inc. Deferred Prosecution Agreement with Government Extended for 12 Months' (15 September 2011), https://www.justice.gov/archive/usao/nj/Press/files/Wright%20Medical%20DPA%20Extension.html.

46 See *Exactech* DPA at Paragraph 16. The settlement was with the USAO for the District of New Jersey. See id.

- the 2011 settlement with Maxim Healthcare Services, Inc (resolving allegations of fraudulent billing through a DPA, imposing a two-year monitorship);[47]
- the 2016 settlement with Olympus Corporation of the Americas (resolving kickback allegations through a DPA, imposing a three-year monitorship);[48] and
- the 2016 settlement with Tenet HealthSystem Medical, Inc (resolving kickback violations through an NPA, imposing a three-year monitorship).[49]

Since 2005, the DOJ has imposed monitorships in at least 12 NPAs or DPAs resulting from violations of healthcare laws. Ten of the healthcare monitorships stemmed from investigations by the USAO for the District of New Jersey. Five of the 12 related to a conspiracy to pay kickbacks in the hip and knee industry. The other seven related to other kickback allegations and billing fraud. Most of these monitorships were for terms of 18 to 24 months. Three-year terms have been imposed only twice in the past 14 years, in resolutions with Olympus Corporation of the Americas and Tenet HealthSystem Medical, Inc. The defendants subject to the monitorships over this period have included hospital systems, home healthcare providers, medical technology companies, and medical equipment distributors.

Each of the monitorship agreements sets forth the duties and responsibilities of the monitor, generally to assess, oversee and monitor the company's compliance programme to reduce the risk of repeat violations of the healthcare laws. In fulfilment of those duties and responsibilities, monitors use guidance from both the DOJ and OIG[50] on effective compliance programmes, structuring their review to assess elements such as analysis and remediation of underlying misconduct, compliance department autonomy and resources, training and communications, policies and procedures, and audit and monitoring. In some cases, the monitors may be required to review employment practices and make recommendations regarding the hiring or firing of senior management, and other relevant personnel. The monitor provides periodic reports of its findings and recommendations to the DOJ and the company and monitors the implementation of earlier recommendations. Typically, the monitored company is required to implement the monitors' recommendations or explain to the DOJ why it has declined to do so. Accordingly, the monitor must also assess whether recommendations from an earlier monitor period were successfully implemented within the organisation before the monitorship comes to a close.

47 See *Maxim Healthcare* DPA at Paragraph 15. The settlement was with the USAO for the District of New Jersey. See id.

48 The settlement was with the USAO for the District of New Jersey. See Press Release, US DOJ, 'Medical Equipment Company will Pay $646 Million for Making Illegal Payments to Doctors and Hospitals in United States and Latin America' (1 March 2016), https://www.justice.gov/opa/pr/medical-equipment-company-will-pay-646-million-making-illegal-payments-doctors-and-hospitals.

49 The settlement was with the DOJ's Criminal Division and the USAO for the Northern District of Georgia. See Press Release, US DOJ, 'Hospital Chain Will Pay over $513 Million for Defrauding the United States and Making Illegal Payments in Exchange for Patient Referrals; Two Subsidiaries Agree to Plead Guilty' (3 October 2016), https://www.justice.gov/opa/pr/hospital-chain-will-pay-over-513-million-defrauding-united-states-and-making-illegal-payments.

50 US DOJ Criminal Division, 'Evaluation of Corporate Compliance Programs', https://www.justice.gov/criminal-fraud/page/file/937501/download (DOJ Evaluation of Corporate Compliance Programs); OIG Compliance Program Guidance for Hospitals, 63 Fed. Reg. 8987-02, 8988 (1998).

Corporate integrity agreements

Companies that avoid a monitor as a part of their criminal resolutions are not necessarily 'off the hook' when it comes to governmental oversight related to compliance systems. HHS-OIG commonly imposes separate civil agreements in healthcare enforcement actions, including corporate integrity agreements (CIAs). The first CIA was executed by HHS-OIG in the mid 1990s.[51] CIAs have been entered into by hospitals and health systems; physician practices; long-term care facilities, such as skilled nursing facilities; life science companies, including medical device manufacturers, pharmaceutical companies, and durable medical equipment suppliers; ambulance companies; laboratories; and rehab and therapy providers, such as wound care.

Similar in certain respects to monitorships, CIAs usually impose oversight by independent review organisations (IROs). In contrast to a monitorship, a CIA is agency-enforced. CIAs are usually more detailed and prescriptive than monitorship agreements. For example, CIAs usually require IROs to conduct specific claims reviews, such as the review of 50 randomly selected claims.[52] CIAs also require IROs to employ individuals with specific credentials to assist with the monitoring, including 'individuals who have a nationally recognized coding certification to conduct the coding portion' of the IRO's review.[53] Stipulated penalties are enforced for failure to comply with CIA obligations, and an entity's non-compliance can result in exclusion.[54]

Unique aspects of healthcare monitorships

Healthcare monitors perform the same general compliance monitoring and reporting duties as monitors in other contexts, but also face unique challenges relating to:

- the complex and dynamic nature of healthcare fraud;
- reporting requirements;
- corporate structure and governance;
- conduct of the monitorship;
- complicated accounting and financial assessments; and
- constantly changing modes of healthcare delivery.

The complexity of healthcare fraud

Healthcare fraud is complex for a number of reasons. First, under healthcare's traditional fee-for-service model, where providers (e.g., physicians, physician groups, hospitals) are compensated per unit of health service provided,[55] there are numerous steps in the provision of and payment for those services and, thus, numerous ways to commit fraud. To name a few,

51 HHS-OIG, Protecting Public Health and Human Services Programs: A 30 Year Retrospective, 38, https://oig.hhs.gov/publications/docs/retrospective/anniversarypub.pdf. In April 2016, HHS-OIG issued guidance noting that it would not require a CIA to resolve every healthcare fraud investigation and the number of civil resolutions not requiring a CIA does appear to be trending upward. See 2016 HHS-OIG Report.

52 HHS-OIG, Corporate Integrity Agreements, FAQ, https://oig.hhs.gov/faqs/corporate-integrity-agreements-faq.asp.

53 id.

54 id.

55 Rai, Arti, 'Health Care Fraud and Abuse: A Tale of Behavior Induced by Payment Structure', *Univ. of Chicago – J. on Legal Studies* (Jun. 2001).

providers can: bill for more expensive services than were actually provided or performed (known as upcoding); [56] bill each step of a procedure as if it were a separate procedure (known as unbundling);[57] or bill for the same service more than once (known as double-billing). Healthcare monitors must not only be familiar with these fraudulent practices, but they must also anticipate new ways in which healthcare fraud can occur in the future.

Second, pharmaceutical and device manufacturing companies present unique compliance challenges because their primary goal is to sell a product.[58] Employees at manufacturing companies often receive mixed messages from company leaders – they attend compliance trainings about the importance of integrity in business dealings, then attend a sales meeting where they are pressured to increase sales. Under these circumstances, monitors must remediate healthcare fraud under a profit-driven model. Monitors must scrutinise the company's business plans and place emphasis on strengthening the company's 'tone at the top' and 'conduct at the top'.[59] Considering compliance as a part of an employee's performance evaluation or compensation structure is particularly important in these cases. Employees should know that they will be rewarded for doing business the right way in a compliant fashion, not just for profitability.

Third, the multiple parties involved in the delivery of healthcare services and products enter into agreements that can run afoul of the law; for example, by providing something of value in exchange for referrals of patients or customers (known as kickbacks). The AKS makes it a felony to knowingly and wilfully solicit, receive, offer or pay anything of value in exchange for the referral of federal healthcare programme business.[60] The term 'anything of value' is construed broadly, and includes, among other things, gifts, discounts and free space.[61]

There are more than 30 safe harbours to the AKS, which scale back the broad prohibitions of the statute and simultaneously complicate it.[62] Take, for example, an analysis of physician compensation, one of the most significant AKS risks. Payments to physician employees of a hospital could constitute remuneration intended to induce the employees to recommend programme-related goods or services. The Bona Fide Employment Exception safe harbour, however, generally protects compensation arrangements between hospitals and hospital-affiliated physician practices. The exception covers any amount paid by an employer to a physician (or immediate family member) who has a bona fide employment relationship with the employer if certain enumerated conditions are met.

Further, kickbacks encompass more than cash exchanges, gifts, or traceable wire transfers. At first blush, kickbacks can appear as something completely innocuous, such as a job promotion, a directorship agreement, office space rented at below fair market value, a

56 National Health Care Anti-Fraud Association, What Does Health Care Fraud Look Like?, https://www.nhcaa.org/news/what-does-health-care-fraud-look-like.aspx.

57 id.

58 See Boozang, *supra* note 39, at 98.

59 See DOJ Evaluation of Corporate Compliance Programs, *supra* note 51.

60 See 42 U.S.C. Section 1320a-7b(b).

61 See *United States v. Westmoreland*, 2011 WL 4342721, at *25 (D. Mass. 15 September 2011) (The Anti-Kickback Statute 'makes it illegal to offer, pay, solicit or receive anything of value as an inducement to generate business payable by Medicare or Medicaid'.)

62 42 U.S.C. Section 1320a-7b(b)(3); see also HHS-OIG, Safe Harbor Regulations, https://oig.hhs.gov/compliance/safe-harbor-regulations/index.asp.

teaching agreement, an on-call agreement, or a consulting agreement. These are items of value, and there is the potential that they might unlawfully be provided in exchange for referrals. Accordingly, monitors should look beyond the traditional assessments of whether an agreement is in writing and payments match invoices. They must review fair market value of the compensation, the totality of the physician's job positions, roles and responsibilities, and the physician's volume of referrals to the hospital. Monitors should assess whether and how physician-specific volume data is generated, who has access to that data, and for what purposes. The number and variation of relationships that could give rise to a kickback, as reflected in the many AKS safe harbours, complicate the work of the healthcare monitor.

Not only must healthcare monitors develop expertise on applicable healthcare laws to provide meaningful recommendations for mitigating compliance risks, they must be prepared for constant change. For example, on 25 June 2018, HHS announced a Regulatory Sprint to Coordinated Care, led by Deputy Secretary Eric Hargan.[63] The initiative is designed to '[r]emov[e] unnecessary government obstacles to care coordination.'[64] The plan involves:

> *identifying regulatory requirements or prohibitions that may act as barriers to coordinated care, assessing whether those regulatory provisions are unnecessary obstacles to coordinated care, and issuing guidance or revising regulations to address such obstacles and, as appropriate, encouraging and incentivizing coordinated care.*[65]

On 30 January 2019, Deputy Secretary Hargan announced that HHS is close to finalising new healthcare fraud reforms related to this initiative, but he did not reveal the details of those reforms.[66] Additionally, OIG issued a Request for Information seeking input to, among other things, help 'identify ways in which it might modify or add new safe harbors to the' AKS in August 2018.[67] Providers will respond, as they must, to these regulatory changes, and so too must monitors. In short, healthcare monitors must manage the ever-changing nature of healthcare fraud laws and regulations.

Reporting requirements

NPAs and DPAs involving a monitor typically include reporting requirements for the company and for the monitor. Reporting requirements vary by agreement. Most are very broad, requiring the reporting of 'any credible evidence of criminal conduct or serious wrongdoing by, or criminal investigations of, the Company, its officers, directors, employees and agents,

63 Medicare Program; Request for Information Regarding the Physician Self-Referral Law, 83 Fed. Reg. 29,524 (25 June 2018), https://www.gpo.gov/fdsys/pkg/FR-2018-06-25/pdf/2018-13529.pdf.

64 id.

65 id.

66 James Swann, Government Close to Releasing Health Anti-Fraud Reforms, *Bloomberg Law* (30 January 2019), https://news.bloomberglaw.com/health-law-and-business/government-close-to-releasing-health-anti-fraud-reforms.

67 Medicare and State Health Care Programs: Fraud and Abuse; Request for Information Regarding the Anti-Kickback Statute and Beneficiary Inducements CMP, 83 Fed. Reg. 43,607, 43,608 (27 August 2018), https://www.govinfo.gov/content/pkg/FR-2018-08-27/pdf/2018-18519.pdf.

of any type that become known to the Company after the Effective Date'.[68] Others are more narrow, requiring the reporting 'of evidence or allegations of actual or potential violations of the [AKS]'.[69] Both approaches can prove challenging.

In the case of broad reporting requirements, the company risks overreporting, which can be detrimental. It can consume so many resources to identify, report and investigate that larger issues cannot receive the attention they demand. Narrow reporting requirements, on the other hand, can be ill-defined, which can lead to inconsistent reporting. It is vital for companies and monitors to understand the relevant reporting requirements because a failure to report may result in a breach of the agreement and subsequent extension of the monitorship. In addition, failures to report may deprive the monitor of critical information to investigate potential compliance system weaknesses and may deprive the DOJ of information it needs both for enforcement purposes and to inform its prioritisation of future monitor reports. As such, companies should have candid and frequent conversations with the DOJ and the monitor to clearly delineate reporting requirements early on and to foster a reporting process that is driven by a compliance focus rather than a legal focus. Fundamentally, monitors and companies must approach their reporting obligations with a determination to identify circumstances of concern and report them quickly and with transparency.

The Stark Law provides a specific example of the complexity of reporting requirements in a monitorship focused on the AKS. The Stark Law prohibits a physician from referring a patient to an entity for the provision of designated health services if the physician or the physician's immediate family member has a financial relationship with that entity. [70] Additionally, the Stark Law prohibits entities from billing for designated health services furnished pursuant to a prohibited referral.[71] Like the AKS, the Stark Law also has its exceptions. [72] But unlike the AKS, the Stark Law is a civil statute that does not have an intent requirement. The Stark Law is a strict liability statute.

Because the Stark Law is civil, the AKS-focused monitorships have not required the reporting of Stark Law violations. Stark Law violations, however, can give rise to 'evidence' of an AKS violation, which is reportable. For example, the provision of services without a contract potentially violates the Stark Law, but without intent there is no AKS violation. The provision of services without a contract for a lengthy period of time, however, might suggest the absence of a contract is intentional, which may stem from an intent to induce referrals. The interplay between the AKS and the Stark Law is nuanced and complicates the monitor's role in ensuring the company meets its reporting obligations.

Finally, NPAs, DPAs, and associated monitorship agreements also impose reporting requirements directly on the monitors, and the complexity of healthcare fraud statutes and regulations and the potential implications for patient safety can introduce complications for the monitor. First, some reporting obligations arise from potential violations of the full range of healthcare fraud laws. That presents a challenge where those laws stretch beyond

68 *Maxim Healthcare Services*, DPA, at Paragraph 19 (2011); see also *Olympus Corporation of the Americas*, DPA, at Paragraph 22 (2016).

69 *Tenet HealthSystem Medical*, NPA, at Paragraph 5(e) (2016).

70 42 U.S.C. Section 1395nn(a)(1)(A).

71 42 U.S.C. Section 1395nn(a)(1)(B).

72 42 U.S.C. Section 1395nn(b).

the particular focus of the monitorship. Moreover, in some instances, the DOJ requires the monitor to report potential misconduct solely to the DOJ, and not to the company being monitored. This reporting requirement often relates to misconduct that presents an elevated risk to the public. This requires the monitor to make judgements not only on potential legal and compliance policy violations, but also on public safety risks.

Corporate structure and governance

Understanding the corporate structure and governance of an organisation is essential to making well-informed compliance recommendations. Healthcare providers and supplier networks are often comprised of several different types of facilities. Adding to the complexity, facilities are often spread out geographically, spanning several states and, in some instances, multiple countries. The decentralised nature of these companies makes it difficult to assess whether the compliance programme is appropriately resourced and structured. Some of the critical questions are:

- How many compliance coordinators and leaders should be placed at each facility?
- How many layers of oversight should there be between frontline employees and headquarters?
- How does the organisation foster consistency in compliance across different business or sales units?
- How should compliance responsibilities be divided?
- What is the appropriate amount of resources for the proposed compliance model?

The more complex the organisation, the more difficult it is to answer those questions.

Healthcare monitors are expected to be familiar with how the compliance programme works at all levels of the company, starting with the company's board of directors (the Board). The Board sets the compliance 'tone at the top', including through its allocation of resources, receipt of direct reports from the compliance department, and its prompt and effective handling of compliance weaknesses and failures. The Board can also provide information on company benchmarks, plans for future acquisitions and dissolutions, and plans for keeping up with an ever-changing regulatory landscape. Board engagement is a critical component of any successful monitorship. Monitors should confer with members of the Board early on and remain in contact throughout the monitorship. If possible, monitors should also attend Board meetings and review Board materials to foster transparency and open lines of communication. Monitor attendance at Board committees entrusted with compliance and ethics, and related functions such as audit, may be a critical way to gain insights.

Conduct of monitorship

The conduct of a monitorship in this area, as in others, demands significant interaction with the company's compliance department. The relationship between the monitor team and the compliance department should be a mutually supportive one. After all, achieving the best possible compliance programme and systems for the company is the central mission of both the monitor and the compliance department. And compliance department leadership and personnel are often the best sources of information for the monitor. At the same time, it is important for the monitor to remain independent of the compliance department and bring

independent judgement to assessing the information and activities presented by the compliance department.

The thorough assessment of a company's compliance system requires a number of key steps. The monitor must review compliance resources to determine whether they are adequate, appropriately distributed in the field, sufficiently independent, and influential with management at the facility, headquarters and executive levels. The monitor should conduct similar reviews of the legal department, audit department and other functional areas key to the compliance programme. The monitor should assess the compliance programme 'on paper' – for example, the adequacy of compliance policies, risk assessments, structures, procedures and training. But it is even more critical for the monitor to assess how the programme works in practice. That requires field visits for organisations that are decentralised and witness interviews of not only executive, compliance and legal personnel, but also operational personnel whose conduct is at the centre of the compliance risk.

In many respects, the nuts and bolts of the monitor's work is similar to that of an internal investigation conducted by company counsel – thorough collection and review of documents (including email) and witness interviews. But the independence of the monitor – the monitor is a lawyer, but the company is not her client – introduces differences from the typical investigation by counsel. For example, the involvement of the company's legal department in transactions of interest to the monitor may require the monitor to request that the company waive privilege for those transactions. Given the sensitivity of waivers, including the possibility that the company may face third-party requests for waived materials in the context of litigation, it is best for the monitor to request waivers only where necessary and craft the waiver requests as narrowly as possible. Moreover, *Upjohn* warnings[73] at the outset of witness interviews are not appropriate for monitor interviews because the monitor is not company counsel and the interviews are not covered by the attorney–client privilege. But it is appropriate to request that the interviewee does not discuss the interview with others, so as to encourage independent views of subsequent interviewees. In addition, it is important for the monitor to emphasise with interviewees that the purpose of the monitorship is to improve the company's compliance and that they should be candid with the monitor even when they have criticisms to share. Offering confidentiality to the interviewee (but there may be circumstances – for example, a subpoena – where the monitor would have to share the information with others) can help foster candour.

Another key component of a monitorship is testing. Whether the relevant legal issues involve the accuracy of coding and billing or agreements with referral sources that involve AKS risk, it is critical that the monitor sample relevant transactions for compliance with company policy and the law. The sample size (and distribution across a decentralised enterprise) and the substance of the testing must be adequate to satisfy the monitor that she will uncover any significant or systemic problems. The monitor should consider partnering with a forensic accounting expert in the area to assist with the sampling and testing.

There are a number of challenges for healthcare monitors, beginning with frequent corporate transactions. For example, a health system may acquire stand-alone hospitals or even an entire hospital network, consisting of dozens of hospitals or other facilities. Inevitably, some

73 *Upjohn* warnings are derived from *Upjohn Co v. United States*, 449 U.S. 383 (1981).

employees at the newly acquired facilities may leave the company or refuse to adopt change. Where the acquisition increases the geographic reach of the organisation, it may become difficult for company leaders, including the compliance and legal departments, to maintain an effective presence on the ground, which may embolden employees to ignore compliance guidance. Monitors are expected to assess their recommendations in light of how an acquisition (or dissolution) impacts the company's compliance system both to assist in the development of a new system that works given the current state of the company and is durable enough to accommodate future changes.

In addition, the healthcare field has the second highest turnover rate in the country – second only to hospitality.[74] High turnover on the Board and at executive levels can present challenges with the organisation's management of change, such as a lack of ownership over compliance issues and lack of commitment to long-term compliance goals. High turnover in mid-management and at the facility level also presents compliance challenges and risks. Monitors should consider conducting exit interviews of key departing employees to assess compliance risks and develop recommendations for dealing with change management.

Finally, the DOJ has repeatedly and consistently emphasised the need for a strong compliance culture, noting that positive 'change[] in corporate culture' is a key consideration when deciding whether to impose a monitor.[75] That culture should exist at every level within the company, from individual facilities, through market or regional management, to corporate executives, to the Board. Monitors assess culture through interviews with personnel at each level, detailed assessment of operations on the ground through field visits, and ethics and compliance surveys. Those surveys provide useful snapshots of the culture at different levels within the organisation and can help to guide both the company's compliance department and the monitor in terms of areas of future focus. In addition, repeating the survey, even after the completion of the monitorship, can provide company management with invaluable trending data on how well the company is developing its culture of compliance.

Complicated accounting and financial assessments

Internal audit functions and accounting practices play a critical role in detecting compliance issues, especially with respect to improper billing or kickbacks. As noted above, healthcare fraud schemes are varied in nature and often are not easily detected in a company's documentation, books and records. Yet, drilling down into those details can be an invaluable tool for uncovering and correcting flaws in the company's compliance programme. Payment documentation, such as ledgers, invoices, pay checks and other financial records must be examined by someone who understands, in detail, healthcare accounting and billing. Monitors often engage forensic accountants with healthcare billing and valuation experience to help identify and remediate compliance risks in the billing and kickback areas. The accountants can help test arrangements with referrals sources, review leases, provide recommendations for audit practices, and use predictive analysis to help identify compliance issues before they

74 Rosenbaum, Michael, 'Will 2018 be the year healthcare addresses its turnover problem?', *Becker's Hospital Review* (16 January 2018) https://www.beckershospitalreview.com/finance/will-2018-be-the-year-healthcare-addresses-its-turnover-problem.html.

75 US DOJ, Office of the Assistant Attorney General, Selection of Monitors in Criminal Division Matters (11 October 2018), https://www.justice.gov/opa/speech/file/1100531/download (the Benczkowski Memo).

occur. Healthcare monitors are not alone in turning to experts for assistance; but there is no question that the transactions that raise compliance risks in this area are of a particularly high degree of complexity and breadth.

Evolving modes of healthcare delivery

Healthcare monitors must also be familiar with the different compliance risks presented by evolving modes of delivery of healthcare services and products. For example, healthcare networks sometimes comprise a variety of facilities, including traditional acute care hospitals, but also newer ambulatory centres, short-stay hospitals, and urgent-care centres. Each type of facility presents a different risk profile. Acute care hospitals have dozens or even hundreds of agreements with referral sources, each presenting the risk that the network is paying the physician or other referral source to obtain referrals to the network in violation of the AKS or the Stark Law. ASCs and some surgical hospitals may be jointly owned by physician and the healthcare network. This presents an entirely different and potentially serious set of compliance risks for the monitor to evaluate, namely that the network is conditioning physician ownership on the volume or value of referrals to the facility in which the network has a financial interest.[76] These sorts of nuances permeate our healthcare system, and given the importance of healthcare in our political debate, more changes in healthcare delivery are inevitable. This will only further complicate the work of healthcare monitors.

Predictions for the future

The DOJ's priorities in the past few years have remained focused on healthcare fraud, but there may be a cooling of interest in monitorships in this area.

First, the DOJ has moved, and will likely continue to move, towards greater individual accountability. Historically, the DOJ placed greater emphasis on prosecuting organisations than on holding individuals responsible for the misconduct that led to the violations. Recently, the DOJ increased its focus on individuals, with the understanding that individual accountability may lead to greater deterrence.[77] In 2017, Deputy Attorney General Rod Rosenstein observed that high corporate fines 'do not necessarily directly deter individual wrongdoers' because 'at the level of each individual decision-maker, the deterrent effect of a potential corporate penalty is muted and diffused'.[78] Thus, he made clear the DOJ's continuing commitment to hold individuals accountable for corporate wrongdoing. In August 2018, HCF Unit Chief Joseph Beemsterboer noted that the HCF Unit and the USAOs are 'tackling . . . really bad professionals and doctors. . . . For the Health Care Fraud Unit, the focus is on individuals.'[79]

76 See 42 C.F.R. Section 411.362(b)(3)(ii)(B).

77 See Nate Raymond, 'Q&A: DOJ's Health Care Fraud Chief on Priorities', *Reuters Legal* (24 August 2018).

78 Rod Rosenstein, Deputy Attorney General, US Dep't of Justice, Remarks at NYU Program on Corporate Compliance & Enforcement (6 October 2017), http://www.law.nyu.edu/sites/default/files/upload_documents/Rosenstein%2C%20Rod%20J.%20Keynote%20Addr ess_2017.10.6.pdf.

79 See Raymond, *supra* note 77.

The statistics reflect the DOJ's shifting priorities. In 2016, the DOJ entered into five healthcare fraud-related NPAs or DPAs – two DPAs and three NPAs.[80] In 2017, the DOJ entered into four healthcare fraud-related NPAs or DPAs – three DPAs and one NPA.[81] In 2018, the DOJ entered into only one healthcare fraud-related criminal settlement – an NPA with Health Management Associates, LLC (HMA).[82] At the same time, there has been a significant increase in individual enforcement actions. For example, as compared to 2017, in 2018 the HCF Unit had a 56 per cent increase in opioid defendants, and a 40 per cent increase in the number of individuals charged.[83] Further, the DOJ announced two record-breaking recoveries against individuals within the past two years. In July 2017, the DOJ announced what was, at the time, the largest healthcare fraud enforcement action by the Medicare Fraud Strike Force against 412 individuals in 41 districts involving $1.3 billion in alleged fraud.[84] Charges included medically unnecessary treatments, treatments that were never provided, and kickbacks.[85] Many of the charges focused on opioid prescriptions and distribution.[86] Then in June 2018, the DOJ broke that record when it announced charges against 601 individuals in 58 districts involving more than $2 billion in alleged fraud.[87]

The DOJ has also refined its approach to corporate monitors. In October 2018, Assistant Attorney General (AAG) Brian Benczkowski issued new guidance regarding the decision whether to require a corporate monitor and the selection process in Criminal Division matters (the Benczkowski Memo).[88] AAG Benczkowski said the memo is intended to 'further refine the factors that go into the determination of whether a monitor is needed, as well as [to] clarify and refine the monitor selection process'.[89] When a monitorship is needed, financial costs of the monitorship are a central consideration – in other words, DOJ attorneys should consider whether the monitorship's scope is narrowly tailored 'to avoid unnecessary burdens to the business's operations'.[90] The guidance may lead to fewer monitorships.

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80 *Meiko America*, DPA (2016); *Olympus Corporation of the Americas*, DPA (2016); *B. Braun Medical, Inc*, NPA (2016); *GNC Holdings, Inc,* NPA (2016); *Tenet HealthSystem Medical*, NPA (2016).

81 *Aegerion Pharmaceuticals*, DPA (2017); *Baxter Healthcare*, DPA (2017); *PDQ Imaging Services, LLC*, DPA (2017); *Pharmaceutical Technologies, Inc,* NPA (2017).

82 HMA, NPA (2018).

83 *Supra* note 13.

84 US DOJ Press Release No. 17-768, 'National Health Care Fraud Takedown Results in Charges Against Over 412 Individuals Responsible for $1.3 Billion in Fraud Losses' (13 July 2017), https://www.justice.gov/opa/pr/national-health-care-fraud-takedown-results-charges-against-over-412-individuals-responsible.

85 id.

86 id.

87 US DOJ Press Release No. 18-866, 'National Health Care Fraud Takedown Results in Charges Against 601 Individuals Responsible for Over $2 Billion in Fraud Losses' (28 June 2018), https://www.justice.gov/opa/pr/national-health-care-fraud-takedown-results-charges-against-601-individuals- responsible-over.

88 The Benczkowski Memo, *supra* note 75.

89 Brian A Benczkowski, Assistant Attorney General, U.S. Dep't of Justice, Remarks at NYU School of Law Program on Corporate Compliance and Enforcement Conference on Achieving Effective Compliance (12 October 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-nyu-school-law-program.

90 The Benczkowski Memo, *supra* note 75, at 2.

In fact, the September 2018 settlement of a criminal investigation involving HMA is a good example of the DOJ's current views of monitorships.[91] The government alleged that HMA, among others:

- knowingly billed federal healthcare programmes for inpatient services that should have been billed as outpatient or observation services;
- paid remuneration to physicians in return for patient referrals; and
- submitted inflated claims for emergency department facility fees.

HMA entered into a three-year NPA with the DOJ, but no monitor was imposed. The DOJ noted that a compliance monitor was not necessary given 'HMA and HMA Parent's remediation and the state of their compliance program, the CIA between HHS-OIG and HMA Parent, and their agreement to' self-report compliance issues.[92]

Conclusion

Twenty years after the DOJ described healthcare fraud as 'the crime of the nineties', it remains a top priority of the DOJ. While the DOJ's current approach reflects a refinement of its approach to monitorships in corporate healthcare cases, we have surely not seen the end of monitors in this area. There is too much federal money in the healthcare system; too much fraud; and administrations and their priorities will change. Healthcare monitors will undoubtedly continue to face a set of compliance challenges from highly complex laws and regulations, ever-changing corporate structures and healthcare delivery modes, and high degrees of sophistication and variation in the manner by which fraud is perpetrated on the system.

91 US DOJ, Fraud Section Year in Review 2018, at 15, https://www.justice.gov/criminal-fraud/file/1123566/download.

92 *HMA*, NPA, at Paragraph 1(e).

14

The Financial Services Industry

Günter Degitz and Rich Kando[1]

'Independent monitor', 'independent examiner', 'compliance auditor', 'special representative' – the concept of monitors of financial institutions manifests under many different names in the United States and abroad, and has become a prominent tool for regulators and prosecutors worldwide. The formal title may vary, but the concept remains fundamentally the same across jurisdictions, generally involving an independent third party overseeing and testing the implementation of remedial compliance measures to address past deficiencies. Monitors have been mandated to investigate, test the compliance of, and report on myriad infractions at financial institutions ranging in size and spanning the various subsectors of the industry.

This chapter will focus on the inherent challenges of monitorships in the financial services industry and explore differences to other industries. Against the backdrop of examples collected from around the globe, this chapter will provide insight on the breadth of regulatory areas covered by monitorships and highlight practical considerations for an independent monitor of a financial institution.

Regulatory areas covered by financial services monitorships

The past decade has seen independent monitors installed for financial institutions operating in many different sub-sectors of the industry both in the United States and abroad. Monitors have been put in place for retail and commercial banks, broker-dealers, mortgage lenders and servicers, insurance companies, and investment advisers, among others. The breakdown in compliance and resulting risk faced by these financial institutions required monitoring by independent parties in a wide variety of regulatory areas.

1 Günter Degitz and Rich Kando are managing directors at AlixPartners. The authors would like to thank Philip Bacher, Carina Nilles and Kurt Wessel for their contributions to this chapter.

In the United States, various federal and state bodies have adopted the use of an independent monitor to assist with the resolution of criminal, civil and regulatory actions.[2] Internationally, the use of independent parties to monitor or examine a financial institution has similarly become more prevalent. In the United Kingdom, for example, independent reviews, such as that of Standard Bank Plc, have been agreed to as part of deferred prosecution agreements (DPAs) with the United Kingdom's Serious Fraud Office.[3] Further, the United Kingdom's Financial Conduct Authority (FCA) has demonstrated an increased preference to commission skilled persons' reports or appointments under Section 166 of the Financial Services and Markets Act 2000[4] with the intent to 'obtain a view from a third party . . . about aspects of a regulated firm's activities if [the FCA is] concerned or want[s] further analysis.'[5] The practice has been adopted by other European regulators as well, including Germany's Federal Financial Supervisory Authority (BaFin), and Switzerland's Financial Market Supervisory Authority (FINMA).

Each monitorship is governed by the specific terms of the underlying agreement between the authority and institution. The term, scope and requirements of the independent monitor of a financial institution can vary significantly, and the nature of the misconduct and regulatory findings are important influencing factors. The following topics are structured around those business or regulatory areas where independent monitors have become a prominent remedial tool, many of which are unique to, or particularly prevalent in, the financial services industry.

AML/CTF and OFAC/sanctions-compliance deficiencies and misconduct

There were several high-profile examples in the past decade of independent monitors appointed to oversee remedial activities related to financial institutions' anti-money laundering (AML) or counter-terrorist financing (CTF) and sanctions-compliance programmes. The monitors appointed in these instances have resulted from agreements with prosecutors and banking and financial regulators in the United States and internationally.

In the United States, actions involving a requirement to retain a monitor may originate from violations of the Bank Secrecy Act. Monitors have also been imposed owing to violations of US sanctions laws, which are primarily administered by the Office of Foreign Assets Control.[6]

2 Monitors have been imposed at financial institutions by US enforcement bodies such as the US Department of Justice (DOJ), Securities and Exchange Commission (SEC), various state attorneys general, the New York Department of Financial Services (NY DFS) and the Office of the Comptroller of the Currency.

3 News release, 'SFO agrees first UK DPA with Standard Bank', Serious Fraud Office (30 November 2015), https://www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank.

4 As amended by the 2012 Act. The FCA developed a 'skilled person panel', which lists firms based on subject categories. The FCA determines the scope of the skilled person's review, and the resulting costs are borne by the regulated firm.

5 Financial Conduct Authority, 'Skilled person reviews', https://www.fca.org.uk/about/supervision/skilled-persons-reviews.

6 Joseph T Lynyak III and Lanier Saperstein, 'AML and US Sanctions Laws—Recent Developments; Anti-Money Laundering Seminar' (24 January 2018), https://www.dorsey.com/~/media/files/uploads/images/saperstein-dorsey-ppt-presentation--deloitte-conferencev1.pdf?la=en.

Monitorships related to AML/CTF and sanctions are often preceded by the announcement of significant fines and penalties imposed by the governing authority. These monitorships can also be comparatively broad in scope. For example, HSBC Holdings Plc agreed to a joint settlement in 2012 carrying a total fine of approximately $1.9 billion in addition to the appointment of an independent monitor for a term of up to five years.[7] Several other monitorships in this area have accompanied fines totalling hundreds of millions or billions of US dollars and have generally ranged from one to five years in term. The term, however, can be extended in many cases at the discretion of the regulatory or enforcement entity, depending on the institution's progress or compliance with the agreement.

Regulatory focus on AML compliance has increased internationally as well, which can be observed in other recent monitor appointments. BaFin appointed an independent 'special representative' in accordance with the German Banking Act to address ongoing AML compliance concerns at Deutsche Bank AG in September 2018, marking the first instance where BaFin has appointed a monitor in relation to AML rules.[8] In Switzerland, the Financial Market Supervisory Authority commissioned an independent examiner in September 2018 to monitor the implementation of, and adherence to, measures directed at improving AML processes and controls at Credit Suisse AG.[9]

The AML/CTF and sanctions-compliance landscape is particularly complex. It involves significant resources and technology to perform adequate customer due diligence on the front end as well as robust ongoing monitoring and investigation of transactions to ensure that suspicious activities and potential sanctions violations are identified and reported accordingly. In this context, an effective independent monitor can provide a global view of the financial institution's compliance programme that a local regulator may not otherwise have. This is particularly important in the correspondent banking context where a single branch of a large bank may be relying, at least in part, on risk-mitigating controls of other branches of the financial institution to identify suspicious activity.

Tax-related offences

Tax-related compliance matters that resulted in the appointment of a monitor mostly occurred at Swiss banking institutions. In August 2013, the US DOJ announced the Swiss Bank Program, which set requirements for certain Swiss banks to be eligible for non-prosecution agreements related to criminal tax offences. This required qualifying Swiss banks to engage an independent examiner to report on compliance with the requirements of the Swiss Bank

7 DOJ Press Release No. 12-1478, 'HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit $1.256 Billion in Deferred Prosecution Agreement' (11 December 2012), https://www.justice.gov/opa/pr/hsbc-holdings-plc-and-hsbc-bank-usa-na-admit-anti-money-laundering-and-sanctions-violations.

8 BaFin Press Release: 'Deutsche Bank AG: BaFin orders measures to prevent money laundering and terrorist financing' (24 September 2018), https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Massnahmen/60b_KWG/meldung_180924_60b_deutsche_bank_en.html; Olaf Storbeck, 'Deutsche Bank ordered to tighten controls on money laundering' *Financial Times* (24 September 2018), https://www.ft.com/content/42d8f1c4-bffc-11e8-8d55-54197280d3f7.

9 'FINMA finds deficiencies in anti-money laundering processes at Credit Suisse', https://www.finma.ch/en/~/media/finma/dokumente/dokumentencenter/8news/ medienmitteilungen/20180917-mm-gwg-cs.pdf?la=en.

Program.[10] To date, more than 75 Swiss banking institutions have entered into agreements as part of the programme, and collectively paid over $1.3 billion in penalties.[11] Other examples outside of the Swiss Bank Program include Credit Suisse AG, which, as part of a 2014 consent order with the NY DFS, paid a civil penalty of $715 million and agreed to engage an independent monitor for a period of up to two years to perform a comprehensive review of the bank's compliance programmes, policies and procedures in place, which failed to prevent its New York representative's office from allegedly facilitating US tax evasion.[12] Bank Leumi USA[13] also agreed with the NY DFS to engage an independent monitor to address allegations involving its assistance to US clients regarding the concealing of assets offshore and evasion of US tax.[14]

Monitors imposed to address tax-related violations or deficiencies necessarily require specific qualifications and expertise with the applicable tax regimes. Further, an effective monitor will seek to employ a comprehensive set of data analytics tools to identify relevant information in structured and unstructured data. As an illustrative example, indications of a financial institution's client's taxation status may be found in sources beyond a financial system's structured client-relationship record, such as a US place of birth indicated in a non-US passport scanned by the financial institution.

Mortgage/lending and servicing misconduct

In the wake of the US financial crisis, the US mortgage finance and servicing industries were subject to significant enforcement action, which included the imposition of independent monitors in a number of high-profile instances. For example, on 12 March 2012, the DOJ, the US Department of Housing and Urban Development, and 49 state attorneys general filed a landmark $25 billion agreement with the five largest US mortgage servicers relating to servicing and foreclosure abuses (the National Mortgage Settlement).[15] As part of the agreement, an independent monitor was appointed and tasked with overseeing, enforcing and reporting on the subjects' compliance with the consent judgment for a term of three and a half years.[16] In another example, in 2017, Deutsche Bank AG[17] settled with the DOJ claims related to the bank's residential mortgage backed securities activities in 2006 to 2007 by paying fines of over $7 billion and further consented to having an independent monitor oversee and

10 DOJ Press Release No. 13-975, 'United States and Switzerland Issue Joint Statement Regarding Tax Evasion Investigations', https://www.justice.gov/opa/pr/united-states-and-switzerland-issue-joint-statement-regarding-tax-evasion-investigations.

11 US DOJ: Swiss Bank Program, https://www.justice.gov/tax/swiss-bank-program.

12 NY DFS: Consent Order Pursuant to Banking Law Section 44-a, *In the Matter of Credit Suisse AG,* https://www.dfs.ny.gov/about/ea/ea140519.pdf.

13 The New York subsidiary of Bank Leumi le-Israel.

14 NY DFS: Consent Order Pursuant to Banking Law Section 44 And 44-a, *In the Matter of Bank Leumi USA, Bank Leumi Le-Israel, B.M.,* https://www.dfs.ny.gov/about/ea/ea141222_leumi.pdf.

15 US DOJ: '$25 Billion Mortgage Servicing Agreement Filed in Federal Court', http://www.nationalmortgagesettlement.com/files/Settlement-USDOJ-FILING-news-release.pdf.

16 National Mortgage Settlement, 'Fact Sheet: Mortgage Servicing Settlement', http://www.nationalmortgagesettlement.com/files/Mortgage_Servicing_Settlement_Fact_Sheet.pdf.

17 Including on behalf of its current and former subsidiaries.

report on compliance with the terms of the agreement.[18] Another large US mortgage servicer, Ocwen, was subject to unique monitorship oversight. In a 2012 consent order, Ocwen agreed to retain an 'independent compliance monitor' for the period of two years to conduct a comprehensive review of the entity's servicing operations, including its compliance programme, and operational policies and procedures.[19] The independent compliance monitor identified deficiencies that in part led to a subsequent consent order in 2014 requiring Ocwen to retain an independent 'operations monitor' for two years. The operations monitor was tasked with assessing the adequacy and soundness of Ocwen's operations as part of its mandate.[20]

Other violations across the industry

Misconduct by financial institutions is not exclusive to the subject areas above. A variety of alleged wrongdoing has resulted in the imposition of a monitor, including as related to capital markets misconduct, retail consumer practices and violations found in other industries. In 2015, Deutsche Bank AG entered into a DPA with the DOJ as part of pleading guilty to manipulating Libor[21] for US dollars and several other currencies.[22] As part of the DPA, Deutsche Bank AG agreed to retain a corporate monitor for a term of three years.[23] The stipulation of the monitor is in addition to a total of over $2.5 billion in monetary penalties and disgorgement levied by multiple regulatory bodies, including the US Commodity Futures Trading Commission, NY DFS, DOJ and the UK FCA against the financial institution.[24] Independent parties have also been installed as part of DPAs and consent agreements related to several other areas of wrongdoing by financial institutions in the capital markets subject areas, including violations related to foreign exchange trading,[25] swap reporting,[26] spoofing[27] and wire fraud.[28] The SEC has demonstrated a proclivity to include the concept of independ-

18 Monitor of the 2017 Deutsche Bank Mortgage Settlement: 'About the Monitor', https://deutschebankmortgagemonitor.com/about-the-monitor.

19 NY DFS: 'Consent Order Pursuant To Banking Law § 44' *In the Matter of Ocwen Financial Corporation, Ocwen Loan Servicing, LLC*, https://www.dfs.ny.gov/about/ea/ea141222.pdf.

20 ibid.

21 London Interbank Offered Rate.

22 'Deutsche Bank's London Subsidiary Agrees to Plead Guilty in Connection with Long-Running Manipulation of LIBOR' (23 April 2015), https://www.justice.gov/opa/pr/deutsche-banks-london-subsidiary-agrees-plead-guilty-connection-long-running-manipulation.

23 ibid.

24 ibid.

25 e.g., *In re Barclays Bank Plc (and Barclays Bank Plc, New York Branch)*, NYDFS Enforcement Action: Consent Orders to Barclays Bank PLC (20 May 2015 and 17 November 2015), https://www.dfs.ny.gov/about/ea/ea150520.pdf, https://www.dfs.ny.gov/about/ea/ea151117.pdf.

26 e.g., *In re Deutsche Bank AG*, 'Opinion & Order Appointing Independent Monitor' (20 October 2016), https://cases.justia.com/federal/district-courts/new-york/nysdce/1:2016cv06544/461758/23/0.pdf?ts=1477063193.

27 e.g., *In re Igor B. Oystacher, and 3 Red Trading LLC*, Consent Order with the US Commodity Futures Trading Commission (20 December 2016), https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfoystacherorder122016.pdf.

28 e.g., *In re State Street Corporation*, Deferred Prosecution Agreement (17 January 2017), https://www.justice.gov/criminal-fraud/file/932581/download.

ent parties to review and report on corrective actions in many of these areas, with the scope, term and reporting requirements of each laid out in the agreement.[29,30]

There are still further areas of wrongdoing where independent parties have been imposed at financial institutions, including to address alleged Foreign Corrupt Practices Act violations,[31] antitrust or price fixing,[32] securities fraud,[33] client billing practices,[34] breach of fiduciary duty,[35] and instances of misleading advertising or marketing materials by investment advisers.[36]

Challenges and considerations in financial services monitorships

The particularities of the industry present unique challenges and considerations for an independent monitor. The modern financial services industry is unique in its international reach and interconnectedness among competitors, dense and complex regulation across jurisdictions, and sophisticated governance and operating models, which are required to effectively manage global client processes and high volumes of transactions. Financial institutions operations are also generally more data- and technology-intensive compared to most industries.

These complexities and attendant-inherent risks, in addition to law enforcement and regulatory actions, caused many financial institutions to invest heavily in compliance and information technology systems a decade or more ago. The results of these investments include compliance organisations with hundreds or thousands of personnel and a combination of in-house developed and vendor-provided systems that maintain millions of data points impacting the compliance organisation. Below, these industry characteristics are explored in more detail, highlighting the implications and practical considerations for independent monitors.

Global systems and interdependencies

The present state of the financial services industry represents a densely connected international network of global operations involving complex transactions and numerous parties. For example, a client of Mexican nationality may walk into the London branch of a Swiss bank to take out a loan to pay for an invoice from an Australian company in US dollars – and

29 The SEC generally has imposed two types of monitors: an 'independent compliance consultant' and an 'independent compliance monitor'. The former typically has a more focused scope and generally results from a stand-alone enforcement action. The latter generally arises out of parallel criminal or civil proceedings, and tends to have a broader mandate and more reporting requirements.

30 Jonny J Frank, 'SEC-Imposed Monitors', *SEC Compliance and Enforcement Answer Book* (2017 Edition), pp. 9-2, 8, 9, http://stoneturn.com/wp-content/uploads/2017/07/2017-SEC-Compliance-and-Enforcement-Answer-Book_SEC-Imposed-Monitors.pdf.

31 e.g., *In re Och-Ziff Capital Management Group, LLC*, Exchange Act Release No. 89,989 (29 September 2016).

32 e.g., *In re DOJ deferred prosecution agreement with Deutsche Bank*, 23 April 2015, https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/05/22/2014-04-23-deutsche-bank-deferred-prosecution-agreement.pdf.

33 e.g., *In re Insurance Service Center Inc,* http://iaicm.org/wp-content/uploads/formidable/ISC-Inc-Crt-Ordr-SEC-12Feb2015.pdf.

34 e.g., *In re Marco Investment Management, LLC*, https://www.sec.gov/litigation/admin/2016/ia-4348.pdf.

35 e.g., *In re Royal Alliance Associates, Inc,* https://www.sec.gov/litigation/admin/2016/34-77362.pdf.

36 e.g., *Alpha Fiduciary, Inc,* https://www.sec.gov/litigation/admin/2015/ia-4283.pdf); *Trust & Investment Advisors, LLC* (https://www.sec.gov/litigation/admin/2015/ia-4087.pdf.

the bank may package the loan in a portfolio and refinance it via a Luxembourg facility. To facilitate these transactions, banking institutions utilise subsidiaries or branches chartered in different countries for cross-border or correspondent payments and clearing activities, and payment chains may further include intermediary institutions to provide access to global markets and currencies. Indeed, this network, used to facilitate transactions, necessarily affects multiple jurisdictions and regulators. Considering the high level of lending and other relationships between financial institutions across borders, it is equally obvious how significantly international financial markets are intertwined and how actions taken in one market influence the other.

For an independent monitor, this implies that multiple international dimensions may need to be considered and addressed in the scope of its review and workplan. While the monitor's mandate may limit the scope to a particular operating entity under the agency's jurisdiction, it is possible that root causes of deficiencies or the misconduct itself are borne out of other entities and jurisdictions. The monitor may, therefore, need to scrutinise the institution's international client base and operations, be it via subsidiaries, branches, correspondent banks, funds, or offshore vehicles to the extent that transactions or operations in one area may impact the other. The monitor will consider the legal and regulatory framework across jurisdictions, for example, relating to data privacy restrictions and the necessary use of information barriers. While these traits may also be found for monitorships in other industries, they are of predominant significance here, given the global nature of transactions and the risk involved.

A monitor of a financial institution is well advised to consider early on the international implications of his or her mandate and ensure that these aspects are addressed in the initial workplan. This includes establishing the necessary controls and safeguards, identifying the relevant location or operating entities to be reviewed and ensuring the requisite knowledge and experience of the monitor team.

Dense regulation and complex oversight across jurisdictions

The financial services industry is highly regulated, and the level of regulatory oversight and pressure with extraterritorial effect has notably increased since the early 2000s. Regulatory ambitions for the industry inherently include those that are relevant to other industries, such as ethics and employee misconduct, fraud, accounting and reporting, IT security, antitrust, and health and safety. The industry is further subject to additional laws and regulations intended to address concerns specifically relevant to financial institutions, including financial crime compliance, consumer financial protection, and safety and soundness. As noted above, independent monitors have been imposed in relation to several of these regulatory topics.

Even within a jurisdiction, regulations governing financial institutions are complex compared to other industries. In the United States, for example, the responsibility of regulatory oversight over financial institutions is fragmented across multiple federal and state agencies, many of which have overlapping authorities.[37]

37 See Government Accountability Office, Financial Regulation, GAO-16-175, February 2016, Figure 2 and p. 9, https://www.gao.gov/assets/680/675400.pdf.

In parts of Europe, a single financial institution will also have overlapping oversight by banking regulators. Criminal investigative and prosecutorial authorities at the local, state or federal level could add a further level of government interest if allegations arise of intentional misconduct at the financial institution.

For a monitor, the extent to which the scope may extend beyond the area of the original infraction is often a matter of the situation at hand. Transparency and communication between the monitor, the financial institution, and the government authority is paramount in determining the scope of review and reporting. Additionally, although the monitor may be put in place by one regulatory agency, the monitor may be explicitly required to produce a report, or reports, to several regulatory or law enforcement bodies. Further, it may occur that regulators that supervise the entity in other jurisdictions may request the monitor's reports.

Governance and compliance framework complexity

The continually evolving requirements and heightened regulatory pressure have resulted in financial institutions developing more sophisticated and robust governance and compliance frameworks compared to many other industries. Institutions develop their own risk-based approaches to compliance based on their operational models, relevant compliance risks and risk appetites. As a result, each institution's compliance programme is unique. Acknowledging these differences, regulators and independent monitors will still expect to see effective governance in the form of clearly documented standards, policies and procedures, and supervisory controls. Further, an institution should ensure a culture of compliance and risk management is embedded across the organisation, from the front line to the back office.

The Basel Committee on Banking Supervision prescribes the three lines of defence concept as a framework for effective governance, wherein the business (the first line of defence) has 'ownership' of the risks it incurs through its activities; the compliance and risk management departments (second line) define policies and standards and monitor the risks; and the internal audit function (third line) conducts independent risk-based reviews to assure effective compliance.

The mandate of many financial institution monitorships includes an assessment of the governance and global compliance programmes. Accordingly, a monitor in the financial services industry requires significant knowledge of corporate governance, compliance organisations, and internal control frameworks, which includes how to effectuate change to implement the three lines of defence consisting of thousands of employees. A monitor should ensure the institution establishes a clear risk appetite to drive decision-making, a strong tone from the top reflected in visible management decisions, and a well-founded compliance culture with sufficient resourcing for the second and third line of defence (see Chapter 1).

Data and IT intensity

Another characteristic impacting compliance efforts in the modern financial services industry is its significant reliance on IT. Financial institutions capture high volumes of data, for example, transactional and customer data, which is typically managed in complex relational databases. Further, institutions routinely use a variety of in-house developed or third-party software and systems to execute key compliance processes. Evolving regulations and growing compliance-driven costs will likely lead to an increased reliance on software and system

solutions and concurrently heighten the focus of institutions and regulators on adequate IT and data governance.[38]

The data and IT-intensive operations in the industry have implications for the required competencies of a monitor and his or her team. Depending on the mandate, the monitor's focus may go beyond the review of policies and procedures to an in-depth assessment of the institution's IT systems and data. A financial services monitor will, therefore, need to proactively consider questions of data systems, availability and review procedures early on. Often, this will require identification of, and access to, the institution's relevant live systems or separate secure data environments to conduct thorough independent reviews of the institutions' client base and transactions, as well as the adherence to the defined policies and procedures.

A monitor must ensure its team has the right competencies for an effective review of IT systems and large volumes of data, which may include IT, data analytics, and e-discovery experts to identify potential issues in the data and assist with the review of structured and unstructured data.

Guidelines for monitors in driving remediation

A monitor will work to drive change through the issuance of recommendations to the financial institution. An effective monitor will leverage the required competencies noted above to identify deficiencies at the institution and endeavour to develop recommendations that address the root causes of these deficiencies. Recommendations may allow for the institution to consider alternative approaches to remediation, given that there is more than one way to mitigate risk in most instances and the use of a risk-based approach allows for certain flexibility.

For example, the monitor may identify deficiencies in an institution's IT system impacting compliance. The monitor's resulting recommendation should not necessarily require replacement of the IT system with a specific third-party software solution. Rather, the recommendation should identify the root cause of the deficiency and allow the institution to propose a method of remediation, for example, by enhancing the current system and adding additional controls that adequately address the relevant risk.

Similarly, the monitor should be mindful of specifying time frames or target dates of remediations. Large-scale remediations, whether related to a complex system implementation or the review of thousands of customers, can take time. The monitor must coordinate with the institution to help prioritise and set reasonable target dates to achieve sustainable change.

More generally, the monitor should establish and maintain an open dialogue and respectful rapport with the institution while maintaining its independence. This is crucial to pre-empting contentious issues and helps ensure a common understanding of remedial progress.

38 e.g., the NY DFS memorandum 'DFS Cybersecurity Regulation – First Two Years and Next Steps,' (21 December 2018), https://www.dfs.ny.gov/about/cyber_memo_12212018.pdf.

Conclusion

Against the backdrop of tightening regulation and worldwide enforcement, we expect monitorships to remain an important tool for authorities and regulatory bodies around the globe to enforce, supervise, and track financial institutions' adherence to rules and regulations. Monitorships have been established across a wide spectrum of issues related to myriad financial products and services, and further innovation in the industry may result in additional monitorships if compliance programmes do not evolve at the same pace.

If a financial institution finds itself with a requirement to impose a monitor, there are certain steps the financial institution can take early on to facilitate an efficient monitorship. The below guidance gives hands-on advice to financial institutions regarding the initial phase of a monitorship.

Practical guidance for financial institutions entering into a monitorship	
Be prepared	Initiate a comprehensive and thorough remediation programme in writing, which can be shared with the monitor. Establish adequate project governance, resourcing and infrastructure to swiftly respond to the monitor requests.
Agree on clear scope and approach	Seek to align the mandate and scope of a monitorship as precisely as possible with the regulator or regulators and monitor, including the business lines and geographies to be reviewed.
Define access and interaction	Define and agree to how the monitor will interact with different stakeholders in the institution. Seek to establish a single point to facilitate all communications between the monitor and the financial institution (e.g., via a liaison or project management office), and a consistent, reliable, and auditable way to deliver data and records requested by the monitor.
Set up data assessment environment early	Establish access to relevant bank data and formulate clear information and data requirements early in the process. Be prepared to provide a secure data environment for the monitor's review of the data.
Define a clear governance structure	Ensure a thorough understanding of the legal and regulatory environment, in particular cross-jurisdictional, to support the implementation of the three lines of defence globally.
Focus on effectiveness and sustainability	Focus on the effectiveness and sustainability of the relevant new controls required when developing actions plans for monitor recommendations. Prepare for monitor testing by identifying internal testing that the financial institution can complete in advance of monitor testing.

15

Energy and the Environment

Mark Filip, Brigham Cannon and Nicolas Thompson[1]

Monitorships in the energy and environmental contexts present many of the same issues and challenges as monitorships generally, but there are concerns specific to those contexts of which practitioners and companies should be aware. This chapter discusses some of those concerns, as well as the structure of monitorships more broadly in the energy and environmental sectors.

There are several ways to think about the different forms of monitorship and various valid methods of classification. This chapter differentiates them according to how they arise and who implements or enforces them. In this sense, there are three main categories of monitorships commonly faced by companies in the energy and environmental sectors:

- monitorships imposed by US court order;
- monitorships imposed by agreement with a US governmental agency, such as the Department of Justice (DOJ), the Securities and Exchange Commission (SEC), or the Environmental Protection Agency (EPA); and
- for companies participating in energy or infrastructure projects that receive World Bank funding, monitorships imposed by the World Bank.

Types of monitorships arising in the energy and environmental sectors

The applicable legal frameworks for monitors

In cases involving potential US criminal violations, the legal authority for imposing a monitorship stems from the US Criminal Code and the Sentencing Guidelines promulgated thereunder.[2] Pursuant to this authority, monitorship is just one potential term of corporate probation that courts may choose to impose on defendants.

1 Mark Filip, Brigham Cannon and Nicolas Thompson are partners at Kirkland & Ellis LLP,.

2 See 18 U.S.C. Section 3563(b)(22); U.S.S.G. Sections 8B2.1 and 8D1.3.

Section 3563 of Title 18 of the US Criminal Code provides for the terms and conditions of criminal probation generally, while Section 3563(b)(22) of that same title is a catch-all provision allowing courts to impose discretionary conditions of probation that require defendants to 'satisfy such other conditions as the court may impose'. Similarly, Section 8D1.3(c) of the Sentencing Guidelines provides courts with broad authority to propose any conditions of corporate probation 'that (1) are reasonably related to the nature and circumstances of the offense or the history and characteristics of the organization; and (2) involve only such deprivations of liberty or property as are necessary to effect the purposes of sentencing'. Section 8B2.1 of the Guidelines, meanwhile, contains a more detailed outline for the structure of monitorships, mandating that a 'compliance and ethics program' be 'reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct'. Consideration of a company's specific industry is relevant: 'An organization's failure to incorporate and follow applicable industry practice or the standards called for by any applicable governmental regulation weighs against a finding of an effective compliance and ethics program.'[3]

In civil cases where a US court orders a compliance monitor, the terms of monitorship may look similar to the criminal context, but the authority stems from the court's plenary authority to enforce settlements reached by the parties, or from Federal Rule of Civil Procedure 53. Federal Rule 53 allows the court to appoint special masters to 'perform duties consented to by the parties' and to address various post-trial matters.[4]

A court order is not a necessary predicate for a monitorship. Companies and US government agencies can, of course, agree to a monitorship without such an order. For example, the DOJ enters into deferred prosecution agreements and non-prosecution agreements with parties, pursuant to which the DOJ agrees not to prosecute as long as the party fulfils its obligations under the agreement, and those obligations can include engaging an independent compliance monitor. Courts have recognised that they have no authority to substantively manage, enforce or pass judgment on such agreements.[5] Companies often have incentive to seek such an agreement rather than face prosecution and the prospect of a court order that could involve more severe penalties.

While most monitorships in the energy and environmental contexts arise from US criminal and civil law or from agreements made between the parties in the shadow of this law, they can arise from other sources as well. The World Bank, for example, has developed a compliance regime related to projects financed by the bank that can include a monitorship. Companies that work on World Bank-financed projects can be suspended or debarred from World Bank (and other multilateral development bank) contracts if the bank finds that they engaged in corruption or similar misconduct. Debarment with conditional release, meaning debarment until the company establishes a compliance programme satisfactory to the World

3 U.S.S.G. Section 8B2.1.

4 See Fed. R. Civ. P. 53(a).

5 See, e.g., *United States v. Fokker Servs.*, 818 F.3d 733, 746 (DC Cir. 2016) ('[A]lthough charges remain pending on the court's docket under a DPA, the court plays no role in monitoring the defendant's compliance with the DPA's conditions.')

Bank, is the default sanction.[6] The World Bank's integrity compliance officer monitors a debarred party's performance of required conditions during debarment, and may require that an independent monitor be engaged.[7] In addition, a party that voluntarily discloses misconduct to the World Bank can engage an independent monitor to help avoid further sanctions. The legal authority for the World Bank's compliance regime is its contractual arrangements with companies that work on World Bank-financed projects (which agree to be audited), and the World Bank's fiduciary duty to protect the use of bank financing.[8]

Regardless of the exact source of authority, it is important for companies and practitioners to recognise that US courts and governmental agencies, as well as international bodies like the World Bank, have broad discretion to impose, define and enforce terms of monitorship. The relevant statutes, guidelines and contracts typically contain few specific limitations.[9]

Court-ordered energy and environmental monitorships

Court-ordered monitorships can arise in a variety of contexts, including when an environmental crisis heightens the degree of public scrutiny and the government desires to seek a conviction, guilty plea, or liability verdict, as demonstrated by the following examples.

BP and the Deepwater Horizon drilling rig

In November 2012, oil and gas company BP agreed to plead guilty to 11 counts of felony manslaughter under federal law, as well as misdemeanour criminal violations of the Clean Water Act[10] and the Migratory Bird Treaty Act of 1918.[11] The guilty plea was reached with the DOJ after the Deepwater Horizon explosion and subsequent oil spill that occurred in the Gulf of Mexico in April 2010. In January 2013, the US District Court for the Eastern District of Louisiana sentenced BP to a fine, probation and a term of monitorship.

Pursuant to the guilty plea, the court imposed dual terms of monitorship: BP was required to retain, subject to the DOJ's approval, an ethics monitor to review and offer improvements to BP's corporate code of conduct and its implementation; and a process safety monitor with special experience in safety and risk management procedures applicable to oil and gas drilling. In contrast to the ethics monitor, the purpose of the process safety monitor was to provide a more technical review and recommendations relating to BP's safety and accident prevention policies and procedures.

The court's order outlined the process for selecting the monitors and many of their duties. BP was permitted to select a list of candidates in rank-order of preference, subject to the DOJ's approval. The term of monitorship was set to last for four years unless earlier terminated by the DOJ. The DOJ was provided sole discretion to resolve disputes that might arise

6 Frequently Asked Questions, Integrity Compliance at the World Bank Group, available at http://pubdocs.worldbank.org/en/162741449169632232/ICO-FAQs.pdf.

7 The World Bank Group's Sanctions Regime: Information Note at 23, available at http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/The_World_Bank_Group_Sanctions_Regime.pdf.

8 id., at 14.

9 See, e.g., 18 U.S.C. Section 3563(b) (outlining as prerequisites only the commission of a misdemeanour or felony and requiring only that the conditions imposed be 'reasonably related' to relevant sentencing factors).

10 33 U.S.C. Sections 1319(c)(1)(A) and 1321(b)(3).

11 16 U.S.C. Sections 703 and 707(a).

between BP and the monitors, and BP was required to pay the monitor's expenses. The court described the process safety monitor's duties in broad strokes:

> *[T]o review, evaluate and provide recommendations for the improvement of defendant's process safety and risk management procedures, including, but not limited to, the defendant's major accident/hazard risk review of drilling-related process safety barrier and mitigations, for the purpose of preventing future harm to persons, property and the environment resulting from deepwater drilling in the Gulf of Mexico by the defendant and its Affiliates.*[12]

The court granted the monitors a large degree of authority to carry out their duties and imposed on BP an obligation to fully cooperate. It ordered the monitors to take steps to maintain the confidentiality of all non-public information, and made clear that BP did not automatically waive the attorney–client privilege or work product protections over any material simply because it was provided to the monitors to carry out their duties.[13] The court ordered the monitors to prepare periodic reports on their findings and on BP's progress, to be shared with the DOJ (but not the public).[14]

PG&E and the San Bruno pipeline[15]

In August 2016, a federal jury found Pacific Gas & Electric Company (PG&E) guilty of, among other things, violations of the Natural Gas Pipeline Safety Act of 1968. The guilty verdict stemmed from the September 2010 incident where a natural gas pipeline in San Bruno, California exploded. The US District Court for the Northern District of California sentenced PG&E to a term of probation, at the DOJ's request, that included a corporate compliance and ethics monitorship. Similar to the *BP* example discussed above, the monitor's duties outlined in the court order include preparation of periodic reports on the status of PG&E's compliance efforts.[16] The order also contemplates that the final report issued by the monitor be publicly available.[17]

Monitorships created by agreement with the government

As part of settlements, consent decrees and agreements to defer prosecution, federal agencies such as the DOJ, the SEC and the EPA may agree to terms of monitorship that contain similar provisions to the court-ordered monitorships described above. If there are disputes regarding these agreements, the relevant agency may still in some cases seek intervention from the courts. As such, these may be considered hybrid monitorships, where the provisions are

12 Guilty Plea Agreement, Ex. B at 1, *United States v. BP Exploration & Production, Inc,* No. 2:12-cr-00292 (E.D. La. 2012), ECF No. 2-1.

13 id., at 4.

14 id., at 5.

15 The author of this chapter was selected as the corporate compliance monitor in the PG&E matter. Neither the author nor the law firm of which he is a partner, Kirkland & Ellis LLP, expresses in this chapter an opinion regarding that monitorship or the events leading up to it, and no confidential information has been disclosed in this description.

16 Order at 7–8, *United States v. Pacific Gas and Electric Company*, No. CR-14-00175 (N.D. Cal. 2014), ECF No. 916.

17 id.

closely negotiated with the opposing party, but the final terms may ultimately be enforced, if necessary, by a court. In the case of a deferred prosecution agreement, the government may simply decide to pursue charges and prosecute the case if the agreement is breached. While the process by which these hybrid agreements develop differs from their court-ordered counterparts, their impact can be similar.

Wood Group PSN and West Delta 32

In February 2017, Wood Group PSN Inc entered into a plea agreement with the DOJ to pay $9.5 million for a violation of the Clean Water Act relating to conduct that led to an oil spill in the Gulf of Mexico. The case involved a failure to properly inspect and maintain facilities for which Wood Group had responsibility on the Outer Continental Shelf's Creole Loop. This led to an explosion at an offshore oil production facility in the West Delta 32 area of the Gulf of Mexico and to the discharge of oil into the Gulf.

Although the case was brought by the US Attorney's Office in Louisiana, the investigation was led by the US Department of the Interior's Office of Inspector General (OIG) and the EPA.[18] As part of Wood Group's plea agreement with the DOJ, the company agreed to enter into an 'administrative agreement' with the EPA – essentially a corporate compliance programme dictated by the agency.[19]

Wood Group's administrative agreement with the EPA was detailed and imposed many duties and responsibilities on the company. Wood Group was required to maintain a corporate ethics and compliance officer who would report directly to a safety, assurance and business ethics subcommittee of the company's board to ensure that communications regarding compliance activities and fraud risks would be shared regularly and directly with company leadership. The administrative agreement also overhauled the requirements of Wood Group's existing ethics and compliance training programme, including by imposing new requirements relating to record-keeping, tracking and review protocols for training materials used in the programme, in addition to other substantive changes.[20]

The administrative agreement required Wood Group to hire an independent monitor for the duration of the agreement (three years), subject to the EPA's approval. The monitor was required to be a subject-matter expert capable of evaluating the company's compliance with the agreement's many provisions. In addition, the monitor was tasked with performing periodic reporting on Wood Group's compliance activities and progress toward the goals of the company's corrective action plan, as well as performing on-site audits. The monitor was required to share its reports, which covered several predetermined subject-matter categories, with both the EPA and Interior Department's OIG.[21]

18 Press Release, 'Company to Pay $9.5 Million for False Reporting of Safety Inspections and Clean Water Act Violations That Led to Explosion in Gulf of Mexico' (23 February 2017), available at https://www.justice.gov/opa/pr/company-pay-95-million-false-reporting-safety-inspections-and-clean-water-act-violations-led.

19 Guilty Plea Agreement at 3, *United States v. Wood Group PSN, Inc,* No. 16-CR-00192 (W.D. La. 2016), ECF No. 5.

20 Administrative Agreement at 10-25, *In re: John Wood Group PLC*, EPA Case No. 16-0731 (22 February 2017).

21 id., at 26–30.

Citgo and the Lemont Refinery

In November 2016, Citgo entered into a consent decree with the DOJ and the EPA over Citgo's alleged violations of the Clean Air Act involving a failure to control pollutants released from a refinery in Lemont, Illinois. The consent decree, which was the product of a long period of negotiation and cooperation between Citgo and the government, did not involve the appointment of a traditional monitor per se, who would have broad authority to oversee improvements and make recommendations. However, the decree did contain detailed requirements regarding specific emissions at the refinery and required appointment of an independent technical auditor who would measure the rates of leaks of various pollutants to determine if they exceeded allowable limits as part of the agreement's 'Leak Detection and Repair' programme.[22]

The consent decree in the *Citgo* case was more detailed than typical court orders implementing monitorships, likely in large part because it resulted from years of input from the EPA's and the DOJ's environmental subject-matter experts.

Total SA and the Foreign Corrupt Practices Act

Allegations of violations of the Foreign Corrupt Practices Act (FCPA) may lead to monitorships for companies in every industry, and the energy industry is no exception.

In May 2013, French oil and gas company Total S.A. (Total) entered into a deferred prosecution agreement with the DOJ relating to allegations that it violated the anti-bribery, internal controls and books-and-records provisions of the FCPA.[23] The charges related to the payment of $60 million in bribes meant to induce Iranian officials to give Total rights to certain oil supplies.

Total agreed to a monetary penalty and a three-year term of monitorship in exchange for deferred prosecution. It also entered a related settlement with the SEC to resolve a parallel FCPA civil action. As part of the agreement with the DOJ, Total admitted the facts included in the DOJ's criminal information, and agreed that if it breached the agreement, and the DOJ pursued the deferred prosecution, it would not contest the charges.[24]

The monitor's mandate included ongoing evaluation of Total's internal controls, bookkeeping, and financial reporting policies in light of US and French anti-corruption laws. The agreement required the monitor to report on the company's progress, but also expressly provided that the reports would stay confidential and not be disclosed to the public.[25]

Monitorships imposed by the World Bank

The World Bank's Integrity Vice Presidency, which is responsible for deterring and investigating corruption in World Bank projects, has imposed sanctions on hundreds of companies and individuals since 2010, including in the energy and environmental sectors. The bank has its own internal monitor, the integrity compliance officer, but can also mandate third-party monitorships, as shown by the following examples.

22 Consent Decree at 37–38, 63–67, *United States v. Citgo Petroleum Corp*, No. 16-cv-10484 (N.D. Ill. 2016), ECF No. 4-1.

23 See 18 U.S.C. Section 371; 15 U.S.C. Sections 78m(b)(2)(A), 78m(b)(5), and 78ff(a).

24 Deferred Prosecution Agreement at 2, *United States v. Total, SA*, No. 13-cr-00239 (E.D. Va. 2013), ECF No. 2.

25 Deferred Prosecution Agreement, Attachment D at D-2, *United States v. Total, SA*, No. 13-cr-00239 (E.D. Va. 2013), ECF No. 2.

SNC-Lavalin

In April 2013, the World Bank debarred subsidiaries of Canadian infrastructure and energy construction group SNC-Lavalin for 10 years after finding that the company had paid bribes to officials in Bangladesh and Cambodia in connection with infrastructure and power transmission projects that the World Bank financed.[26]

As part of a negotiated resolution between the company and the bank, the company agreed to engage an independent compliance monitor. The monitor reports directly to the World Bank at least twice per year on the company's progress. Specifically, the monitor reviews the implementation and effectiveness of the company's ethics and compliance programme, measuring it against the World Bank's Integrity Compliance Guidelines. The monitor also offers recommendations for improvements.[27] The debarment period can potentially be shortened to a period of eight years if the company implements an effective compliance programme and complies with all other aspects of the settlement.

Alstom SA

In February 2012, the World Bank debarred two subsidiaries of Alstom S.A. (Alstom) for three years owing to improper payments to a former government official in Zambia connection with a World Bank-financed hydropower project. As part of a negotiated resolution, Alstom agreed to engage an independent compliance monitor. The monitor was responsible for verifying that Alstom would design and implement a compliance programme consistent with the World Bank's Integrity Compliance Guidelines.[28]

In December 2014, Alstom entered into an unrelated plea agreement in the United States for violations of the FCPA that involved bribes to officials in countries including Indonesia, Saudi Arabia, Egypt, and the Bahamas. As part of the plea, the court and the DOJ agreed not to impose a second compliance monitor, and instead took the somewhat unusual step of deferring to the Word Bank monitorship that was already in place. If the company satisfied the requirements of the World Bank monitorship, no DOJ monitorship would be required.[29] In February 2015, the World Bank determined that Alstom had implemented an appropriate corporate compliance programme, released Alstom from debarment and ended the monitorship.[30]

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26 Press Release, 'World Bank Debars SNC-Lavalin Inc. and its Affiliates for 10 years' (17 April 2013), available at http://www.worldbank.org/en/news/press-release/2013/04/17/world-bank-debars-snc-lavalin-inc-and-its-affiliates-for-ten-years.

27 Press Release, 'SNC-Lavalin announces agreement to settle class actions brought in 2012' (22 May 2018), available at http://www.snclavalin.com/en/media/press-releases/2018/snc-lavalin-announces-agreement-settle-class-actions-brought-2012.aspx.

28 Press Release, 'Enforcing Accountability: World Bank Debars Alstom Hydro France, Alstom Network Schweiz AG, and their Affiliates' (22 February 2012), available at http://www.worldbank.org/en/news/press-release/2012/02/22/enforcing-accountability-world-bank-debars-alstom-hydro-france-alstom-network-schweiz-ag-and-their-affiliates.

29 Plea Agreement at D-1, *United States v. Alstom SA*, No. 14-CR-246 (D. Conn. 22 December 2014), ECF No. 5.

30 Press Release, 'Alstom Released from Debarment' (23 February 2015), available at http://www.worldbank.org/en/news/press-release/2015/02/23/alstom-released-debarment.

Unique challenges in the energy and environmental sectors

Many of the challenges posed by compliance monitors in the energy and environmental industries are the same challenges faced by companies in all industries, including the costs relating to engaging a monitor and implementing new compliance regimes; the disruption of company operations; managing difficult or overzealous monitors; and protecting the company's confidential information from public disclosure or leaks. There are some issues, however, that practitioners and companies should be particularly sensitive to in the energy and environmental contexts.

Technical complexity

Practitioners should be prepared for and comfortable with the high level of complexity that attends companies in this sector (typically oil and gas, power generation or infrastructure companies). While these companies are not the only ones that exist against a highly complex and technical backdrop, there is a broad range of statutes, including environmental statutes, that can serve as hooks for liability, and such liability may lead to terms of monitorship that are substantively different from those of a typical FCPA compliance programme, for example.

Managing complexity and the related costs

The *BP* monitorship discussed previously is a good example of the complexity that can be associated with monitorships in this industry. The *BP* probation order called for dual monitorships: one was the more typical ethics monitor intended to police the company's code of conduct; the other was a more technical process safety monitor, responsible for assessing BP's risk management and safety policies and suggesting improvements, with the goal of preventing future incidents like the one that occurred on the Deepwater Horizon.

The court's order in *BP* required the process safety monitor to have expertise specifically applicable to oil and gas drilling.[31] As such, the monitor would likely need to be an engineer, or supported directly by engineers, with knowledge of oil drilling and related matters. Such a monitor represents a relatively new development in corporate compliance, in that the monitor is not just applying legal standards and assessing compliance, but is appointed specifically to engage in a form of root-cause analysis, to determine how the company's internal systems led to the violation in the first instance.[32] In the case of *BP*, the process safety monitor would need to know, from a technical perspective, how BP's risk management systems were deficient in the first place before recommending new procedures or mitigation.

Legal practitioners representing energy and environmental clients in connection with monitorships should be prepared to engage subject-matter experts to help address technical complexities where necessary. Moreover, practitioners and their clients should recognise that engaging specialised experts can be costly and disruptive, beyond what may be typical in other industries. In addition, monitors like the process safety monitor in *BP* may have highly

31 Guilty Plea Agreement, Ex. B at 1, *United States v. BP Exploration & Production, Inc,* No. 2:12-cr-00292 (E.D. La. 2012), ECF No. 2-1.

32 See Veronica Root, 'Modern-Day Monitorships', 33 *Yale Journal on Regulation*, 109, 127-30 (2016) (describing 'root-cause analysis' often required to be conducted by the monitor in corporate compliance monitorships).

technical, data-driven thresholds that they require companies to meet, which can cost more in terms of both money and time to achieve than more flexible, non-technical standards.

A corollary to the points above regarding anticipating and managing complexity, practitioners should also be familiar with the many environmental statutes that may lead to liability in these cases and thus result in subject-matter specific compliance monitors. Many of these statutes involve criminal in addition to civil liability for violations. A non-exhaustive list of such environmental statutes with criminal provisions includes: the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, the Hazardous Materials Transportation Act, the Safe Drinking Water Act, the Toxic Substances Control Act, the Endangered Species Act, and the Migratory Bird Treaty Act of 1918, and the Natural Gas Pipeline Safety Act of 1968.

Resolving disputes with monitors against a highly technical backdrop

Although supervised by a government authority, monitors in the energy and environmental sectors may, as a practical matter, wield a larger amount of discretion than usual because they possess a level of expertise that at least some at the relevant government agency may not. Practitioners should thus be prepared to identify and push back on unreasonable or unfounded monitor recommendations that the relevant agency may be less able to detect, and should contest such recommendations articulately and plainly if a court or a government agency must mediate a dispute.

Significantly, the DOJ's policy manual anticipates disputes with monitors, and provides a path for companies to contest burdensome or unfounded recommendations. The DOJ's Grindler Memorandum from 25 May 2010 states:

> *With respect to any Monitor recommendation that the company considers unduly burdensome, impractical, unduly expensive, or otherwise inadvisable, the company need not adopt the recommendation immediately; instead, the company may propose in writing an alternative policy, procedure, or system designed to achieve the same objective or purpose. As to any recommendation on which the company and the Monitor ultimately do not agree, the views of the company and the Monitor shall promptly be brought to the attention of the Department. The Department may consider the Monitor's recommendation and the company's reasons for not adopting the recommendation in determining whether the company has fully complied with its obligations under the Agreement.*[33]

The DOJ's Grindler memorandum suggests that monitors should not be allowed to exceed their mandates, and practitioners should be proactive in defining the company's relationship with the monitor early in the process. Effectively working with a monitor in this context requires up-front and clear communication with the monitor and, perhaps more importantly, the supervising government agency about the appropriate scope of work and objectives. Such proactive management also requires the ability to understand and engage with complex and technical industry-specific topics.

33 Gary G Grindler, 'Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations' (Grindler Memorandum), US Department of Justice (25 May 2010), available at https://www.justice.gov/jm/criminal-resource-manual-166-additional-guidance-use-monitors-dpas-and-npas.

Maintaining confidentiality and privilege

Although applicable to any context, it is imperative that practitioners in this area do everything they can to protect confidentiality and privilege during the pendency of a monitorship. Just because a monitorship may involve as many or more technical matters than legal ones does not lessen the importance of legal advice or diminish the role of the lawyer in guiding the client through the process. Moreover, the fact of monitorship does not waive attorney–client privilege with respect to the monitor. Indeed, the applicable order or agreement that creates the monitorship, whether a plea, consent decree or deferred prosecution, is often sensitive to the fact that the company's confidential information will be shared with the monitor, an outside party.

Practitioners should take all steps necessary to ensure that privilege protections are included in whatever agreement governs the monitorship. In the *BP* example discussed above, the order entered by the court after the guilty plea explicitly stated that providing privileged materials to the monitor would not automatically waive such privilege.[34] Another provision required the DOJ or monitor to give notice to the company before seeking disclosure of any privileged material, presumably so the company would have the opportunity to challenge any such disclosure in court.[35] The court was also sensitive, generally, to the sort of confidential information BP would be providing in the course of the monitorship:

> *Each monitor shall maintain as confidential all non-public information, documents and records it receives from the defendant, subject to the monitor's reporting requirements herein. Each monitor shall take appropriate steps to ensure that any of his/her consultants or employees shall also maintain the confidentiality of all such non-public information.*[36]

Further, companies can, and often do, engage their own experts to conduct work similar to what the monitor will undertake, both to prepare for the monitor and to improve further their operations and risk profile. Such work can be done under the protection of the attorney–client privilege if appropriate steps are taken in advance. The work should always be done, for example, at the direction of counsel and for the purpose of providing legal advice (e.g., compliance with the company's legal obligations). This work may involve experts who are not familiar with working under these conditions, and it is crucial that both the in-house and outside attorneys directing the work are vigilant in instructing all involved of the importance of maintaining best practices for maintaining privilege and confidentiality in this area.

Finally, despite the fact that many cases historically have expressly made reports by the monitor confidential, there is an increasing push to make monitors' reports public. Practitioners should be prepared for public disclosure and, in light of the possibility of such disclosure, take steps to prevent privileged information from ever being provided to the monitor.

34 Guilty Plea Agreement, Ex. B at 4, *United States v. BP Exploration & Production, Inc,* No. 2:12-cr-00292 (E.D. La. 2012), ECF No. 2-1.

35 id.

36 id.

The future of monitors in the energy and environmental sectors

In many industries, there may be reason to believe that the number of monitorships sought by US authorities will decrease. The DOJ's Criminal Division released a memo on 11 October 2018 noting that 'the imposition of a monitor will not be necessary in many corporate criminal resolutions, and the scope of any monitorship should be appropriately tailored to address the specific issues and concerns that created the need for the monitor'.[37] The memorandum elaborates that in evaluating the prudence of a monitor, the government should consider:

> *(a) [W]hether the underlying misconduct involved the manipulation of corporate books and records or the exploitation of an inadequate compliance program or internal control systems; (b) whether the misconduct at issue was pervasive across the business organization or approved or facilitated by senior management; (c) whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal control systems; and (d) whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future.*[38]

The memorandum was widely seen as a signal that the DOJ would exercise more restraint in future cases in determining whether to seek a compliance monitor.

Whether this apparent policy shift will impact monitorships in the energy and environmental space remains to be seen. Given the scale and public attention often accompanying environmental incidents, it is possible, and perhaps even likely, that companies in this sector in particular will continue to face a high risk of monitorships.

37 Brian A Benczkowski, 'Selection of Monitors in Criminal Division Matters' (Benczkowski Memorandum) at 2, US Department of Justice (11 October 2018), available at https://www.justice.gov/criminal-fraud/file/1100366/download.

38 id.

16

Unions

Glen G McGorty and Joanne Oleksyk[1]

For as long as labour unions have served as catalysts for the humane treatment of workers and fair wages, they have also been a target for criminal organisations that seek to harness the power of unified workers for their own corrupt ends. State and federal law enforcement have worked tirelessly to eradicate these influences from unions, and the most powerful tool in this effort has been the Racketeer Influenced and Corrupt Organizations Act (RICO).[2] Enacted in 1970, RICO provides for both criminal and civil remedies for racketeering activities connected to an ongoing enterprise or organisation, and it is via civil RICO actions that most union monitorships have arisen.[3]

The central mandate of union monitors is to provide independent oversight of anti-corruption compliance measures imposed upon unions following such law enforcement actions. Although monitorships have been used by law enforcers to address organised crime in other contexts, union monitorships are in many respects unique. The differences between union monitorships and corporate or government department monitorships arise from the democratic principles unions are designed to embody. While strengthening the democracy of the union is a key objective of any union monitorship, the democratic aspects of a union also create challenges. Any union monitor must navigate the difficulties of monitoring elections, the pitfalls of balancing crucial investigative confidentiality with the members' need for transparency and, finally, the demands of the various union stakeholders.

1 Glen G McGorty is a partner and Joanne Oleksyk is an associate at Crowell & Moring LLP.

2 18 U.S.C.A. Section 1961 et seq.

3 James B Jacobs, Eileen M Cunningham and Kimberly Friday, 'The Rico Trusteeships After Twenty Years: A Progress Report', 19, *The Labor Lawyer*, 419, 419-20 (2004). This work provides an excellent overview of the history and structure of the RICO union monitorships in the 1980s and 1990s.

Monitors in the fight against organised crime and union corruption

The vast majority of union monitorships began within a 20-year period from the 1980s to the early 2000s when prosecution of traditional organised crime was at its height. Organised crime in unions took many forms, ranging from extortion, bribery and other forms of public corruption, to financial crimes such as embezzlement and theft. A civil RICO action was first brought by the United States Department of Justice (DOJ) against a union in 1982, and this strategy has been used numerous times in the decade since as part of DOJ's efforts to vanquish organised crime families, such as Cosa Nostra, from union dominance.[4] By targeting the unions these crime syndicates controlled, the DOJ undermined bases of organised crime's economic and political power.[5] Although several of these union RICO actions have terminated,[6] some form of monitorship arising from many of these actions are still ongoing to this day.[7]

Monitorships can be imposed on unions by a judge after a civil RICO trial[8] or as a condition of probation following a guilty plea or verdict in a criminal RICO case.[9] Most frequently, however, they occur as part of a negotiated settlement between the union and the government.[10] Union monitors' primary mandate is to investigate and eradicate the influence of organised crime that remains after DOJ's often preceding RICO actions against individual union officials.[11] Because of the context in which these monitorships arise, union monitors most often have a background as a criminal prosecutor, frequently with experience investigating and prosecuting organised crime.[12] This background is especially pertinent in the early stages of a monitorship when union leadership is typically most hostile to the intrusion of a monitor.[13]

There is much flexibility in the way a union monitorship can be designed. At one end of the spectrum, a monitor can be an all-powerful administrator, imbued with the powers of all the officers of the union.[14] The effectiveness of this type of monitorship – really a trusteeship – has been questioned because in a world of finite resources, a heavy administrative

4 id., at 419-20 & n.4.

5 See James B Jacobs and Lauryn P Gouldin, 'Cosa Nostra: The Final Chapter?', 25 *Crime and Justice,* 129, 140-43 (1999).

6 See Jacobs et al., *supra* note 2, at 427.

7 See, e.g., *United States v. Dist. Council of New York City and Vicinity of the United Brotherhood of Carpenters ad Joiners of America et al.*, No. 1;90–cv-05722, 1994 WL 704811 (SDNY 16 December 1994) (hereinafter, 'Dist. Council'); *United States v. Int'l Bhd. of Teamsters*, No. 88 Civ. 4486 (SDNY 14 March 1989) (IBT).

8 Fed. R. Civ. P. 53(a)(1)(C) (permitting a court to appoint a master to 'address . . . post-trial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district').

9 See U.S. Sentencing Comm'n, Guidelines Manual Section 8D1.4 (November 2018).

10 Jacobs and Gouldin, *supra* note 4, at 171.

11 id.

12 James B Jacobs and Ronald Goldstock, 'Monitors & IPSIGS: Emergence of a New Criminal Justice Role', 43 *Crim. Law Bulletin No. 2*, 'Evolution of the IPSIG Role' at pp. 218–222.

13 See, e.g., James B Jacobs and Dimitri D Portnoi, 'Combating Organized Crime with Union Democracy: A Case Study of the Election Reform in United States v. International Brotherhood of Teamsters', 42 *Loy. L.A. L. Rev.* 335, 344 (2009) ("The relationship between the court-appointed officers and the union in the months following the finalization of the consent order proved so contentious that Judge Edelstein called this period "The Autumn of Discontent".') (quoting *United States v. Int'l Bhd. of Teamsters*, 728 F. Supp. 1032, 1040 (SDNY 1990).

14 Jacobs et al., *supra* note 2, at 427 (listing possible administrative powers, including 'negotiating contracts, handling grievances, and initiating collective action, including strikes').

load is bound to detract from the efforts to investigate and eradicate organised crime.[15] On the other end of the spectrum, a monitor needs at a minimum investigatory powers, including authority to access information and the ability to pursue removal of officers who committed crimes or associated with organised crime in violation of the consent decree.[16] Responsibilities entrusted to monitors generally include 'bringing and adjudicating disciplinary charges against union officers and members believed to be members of or to be knowingly associating with organized crime figures'.[17] Additionally, monitors may have a role in administering and reforming the union's business operations, governance and compliance functions or elections.[18] Therefore, depending on the scope of the monitorship, the monitor may need to assemble a support team, including labour lawyers, accountants or investigators, to fulfil the mandate of the monitorship.[19]

Challenges of democratic elections

Election monitoring duties were cemented as an a pillar of the union monitor's role in *United States v. International Brotherhood of Teamsters*, No. 88 Civ. 4486 (SDNY 28 June 1988), the first civil RICO case the DOJ brought against an entire international union.[20] A dissident group of International Brotherhood of Teamsters (IBT) members successfully intervened on appeal and persuaded the government to make election reform part of the settlement,[21] and a provision requiring direct elections of leadership by the rank and file was ultimately included in the consent decree.[22] The consent decree in that case created the role of an election monitor (the election officer).[23] However, the scope of the election officer's duties was not well defined: the election officer's mandate was to 'supervise' the IBT's election.[24] When the election officer sought to promulgate guidelines governing the selection of delegates to the convention where nominations for international union office would be made, the IBT contended such action was outside the scope of 'supervision' of the rank-and-file members' direct election of the international officers.[25] The court sided with the election officer, finding that the 'spirit and intent of the Consent Decree, requires that the term "supervise" be interpreted in its most expansive and proactive meaning'.[26]

15 id.

16 id.; see also *Stipulation and Order in Dist. Council*, No. 1:90-cv-05722, ECF No. 1806 at 6–7 (SDNY filed 1 June 2018) (imbuing the independent monitor with the power to recommend the removal of officers to the Executive Committee, and appeal the Executive Committee's decision to the court).

17 Jacobs et al., *supra* note 2, at 427.

18 id.

19 Jacobs et al., *supra* note 2, at 425 (noting that only a few union monitors have had a labour law background).

20 Jacobs and Portnoi, *supra* note 12, at 421 ('The government broke new ground in *United States v. International Brotherhood of Teamsters* by seeking electoral reform as an anti-labor racketeering remedy.')

21 id., at 338.

22 id., at 343.

23 Consent Decree in IBT, No. 88 civ. 4486, at 7 (SDNY filed 14 March 1989), available at http://www.irbcases.org/pdfs/ConsentDecree.pdf.

24 id., at 15.

25 Jacobs and Portnoi, *supra* note 12.

26 *United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, AFL-CIO, 723 F. Supp. 203, 206 (SDNY 1989), aff'd, 931 F.2d 177 (2d Cir. 1991).

Since then, election monitors have exercised a broad array of powers in carrying out their duties with respect to monitoring elections. Although most consent decrees establishing monitorships have not gone as far as the IBT in requiring wholesale reform of the union's electoral system,[27] courts have imbued monitors with substantial authority to oversee democratic elections. For example, the consent decree in *United States v. District Council of New York City and Vicinity of the United Brotherhood of Carpenters and Joiners of America et al.*, No. 90 civ. 5722 (SDNY 4 March 1994), afforded specific powers to its monitor in connection with election supervision including the supervision of union executive elections; filling of vacancies in previously elected positions; promulgating election rules; and resolving all disputes concerning the conduct of elections.[28] In 2017, these powers were put to the test when election rules drafted by the independent monitor and approved by the court were applied in an election for district-wide leadership. The District Council's consent decree and by-laws established a process by which the candidates must undergo proper vetting, nomination procedures, and campaigning, ultimately culminating in an election in which every member has an equal vote in a secret written mail-in ballot. This system differs notably from that utilised by the rest of the United Brotherhood of Carpenters' political divisions, where the rigorous anti-corruption measures imposed by the District Council's consent decree are not in place.

Despite the intensive democracy-promoting election rules in place, some members were dissatisfied with their enforcement during the 2017 election. Granted, most, if not all, of those filing complaints during the election were either candidates on the slate that was ultimately defeated or their supporters, but this provides a good example of how a union monitorship is quite different from a corporate one. In a more traditional monitorship, when a monitor reaches a conclusion about a potential compliance issue it does not give rise to accusations that the monitor is engaging in a political choice or worse, propagating the corrupt system the monitor has been appointed to correct. Here, the slate that found itself on the losing side of both the election and the related election protests complained that the monitor's decision was not on the merits but rather a pre-disposition to support the incumbent slate and ultimately it fell to the United States District Court to adjudicate the losing slate's appeal. Though the monitor's rulings were affirmed by the District Court, these events demonstrate that, in such a democratic setting, the monitor must be extremely sensitive to the political environment of the union that he or she oversees and thoughtful about both the substance and the optics of every decision that is made.[29] When overseeing an election, even the most minor decisions or the monitor will be challenged by those who disagree with the outcome, which makes it crucial that all processes and decisions are well reasoned and documented.

Transparency versus confidentiality

Another unique aspect of union monitorships is the issue of confidentiality. The extent of confidentiality applied to a monitor's activities and reports thereof may depend on whether

27 Jacobs and Portnoi, *supra* note 12, at 420-21 (noting that a large number of the other civil RICO labour racketeering cases filed by the DOJ did not include systemic electoral reform).

28 Consent Decree in Dist. Council, No. 1:90-cv-5722-VM, ECF 410 at 10 (SDNY filed 4 March 1994).

29 See *District Council*, No. 1:90-cv-5733-VM, ECF 1803 (SDNY filed 4 May 2018).

the monitorship was consented to or unilaterally imposed, and the type of activities at issue.[30] Union monitors typically publicly file reports on their activities and the union's progress towards the goals embodied in the consent decree.[31] Union monitors may also utilise other distribution methods, such as the union's newsletter or website to communicate directly to the membership.[32] Being transparent with the membership about the progress of the union under the monitorship is essential to achieving an open and democratic union. Without this level of transparency, members cannot make informed decisions when casting their ballots in union elections and the goal of a developing a democratically maintained union for the sole benefit of its members would be undermined.

However, some confidentiality is necessary for the functioning of the monitorship. Some members may only come forward with information critical to investigating organised crime in the union on the condition their identity is kept confidential. Ongoing investigations may also need to be kept confidential pending a determination, much like the privilege that appends to law enforcement investigations.[33] Disclosure of investigations that did not lead to a conclusive finding of misconduct could prompt spurious litigation that drain the union's resources. Even some non-investigatory matters may require confidentiality, such as where it may be in the best interests of the union, as with any organisation, to enter into a contract that contains a nondisclosure clause (e.g., a settlement with an employee totally unrelated to racketeering activity). Striking the right balance between transparency with the membership and confidentiality in their own interest is crucial to maintaining the trust of the membership and therefore the effectiveness of the monitorship.

Demands of disparate stakeholders

The stakeholders in a union monitorship are also unique. The union members are not just passive beneficiaries of the monitorship, as the public or stockholders may be in the monitorship

30 Compare Brandon L Garrett, 'The Public Interest in Corporate Settlements', 58 *B.C. L. Rev.* 1483, 1530 (2017) (stating that corporate monitorships arising out of criminal deferred prosecution agreements are 'almost never' made public) with *supra* at 1527–28 ('It is standard for reports of policing monitorships established through DOJ consent decrees to be made public.')

31 See, e.g., *Stipulation and Order in Dist. Council*, No. 1:90-cv-05722, ECF No. 1806 at 12 (SDNY filed 1 June 2018) (requiring semi-annual reports); Consent Decree in IBT, No. 88 civ. 4486, at 17 (SDNY filed 14 March 1989), available at http://www.irbcases.org/pdfs/ConsentDecree.pdf (requiring quarterly filed reports on the activities of the administrator, investigations officer, and elections officer); see also Final Agreement in IBT, No. 88 civ. 4486, ECF No. 4409-1, at 21 (SDNY filed 14 January 2015) ('The Independent Review Officer shall be responsible for preparing and distributing to the membership annual reports of the work of the IBT Disciplinary Officers, which reports shall include detailed descriptions of the disciplinary, trusteeship, compliance, and other actions taken by the IBT Disciplinary Officers during the preceding year, including a summary of the number and types charges referred by the Independent Investigations Officer, the disposition of those charges, and an analysis of those dispositions as compared with the dispositions of similar charges in previous years.')

32 Consent Decree in IBT, No. 88 civ. 4486, at 16 (SDNY filed 14 March 1989), available at http://www.irbcases.org/pdfs/ConsentDecree.pdf (permitting the administrator to reasonably distribute materials to the membership and authorising the administrator to publish a report in each issue of *International Teamster*).

33 See, e.g., 6th Interim Report of the Independent Monitor in Dist. Council, No. 1:90-cv-05722, ECF No. 1828 at 13 (SDNY filed 31 December 2018) (referencing information regarding ongoing investigations provided to the court under seal).

of a corporation. They are active, vocal and physically present participants that need to be engaged and won over to the pursuits of the monitorship. Nor is the union merely a source of employment for its members, as a corporation is for its employees. The union is fundamental to their livelihood throughout their entire career and as well as their identity, especially where union membership has been a multigenerational family tradition. Moreover, the union operates only because of their financial support in the form of dues. The ownership that members have over the union is also reflected in its political structure. The union is fundamental to their livelihood throughout their entire career and as well as their identity, especially where union membership has been a multigenerational family tradition. Moreover, the union operates only because of their financial support in the form of dues. The ownership that members have over the union is also reflected in its political structure. It is important to remember that even though one of the aims of a monitorship is a democratic union, whatever powers are given to the monitor are taken from officers that are ostensibly the members' representatives. With members' sense of ownership comes an expectation of access and transparency that the monitor must be prepared to navigate.

It is not sufficient for a monitor merely to interact with the executive leadership of the union. Although they may enjoy broad support, a true understanding of how the union is serving its members can come only from listening to different perspectives. All unions have 'dissident' groups that invariably challenge the leaderships' – or the monitor's – decisions. While a monitor's time must be spent efficiently, some of the most impactful changes at mobbed-up unions would not have been possible without dissident groups leading the charge.[34] Accordingly, it is necessary for a union monitor to have an open mind and door when dealing with every faction within a union. All members must feel that they are able to voice their complaints and concerns and that they have a line of communication directly to the monitor or his or her investigators, whether it be through a hotline, email communications or in-person meetings. Similarly, the monitor or his or her representatives should regularly attend union leadership and delegate meetings to both be informed about the day-to-day activities of the union, but also to be present to address issues and field questions as they arise.

Transition from outside monitorship

The ultimate goal of any monitorship is to make itself obsolete. This is accomplished by developing compliance frameworks and mechanisms and transitioning their management and oversight to the union itself over time. Once the obvious criminal elements have been removed from power, non-corrupt administration of a union can be accomplished through the adoption of rules that serve the rank-and-file membership and that are openly and uniformly enforced. A culture of transparency and compliance with these beneficial rules is supported by the clear delineation of responsibilities, standard operating procedures that can be referred to in carrying out those responsibilities, and documentation of the decisions of officers and employees. The establishment of an organisation-wide culture of compliance is especially vital given that the entire union leadership can change at once with an election. Of course, these efforts require the commitment of appropriate resources, such as the hiring of a

34 Jacobs and Portnoi, *supra* note 12, at 422 ('In retrospect, no change could have occurred without Teamsters for a Democratic Union, an entrenched rank-and-file dissident group.')

compliance officer or operations director. As in any organisation, the technological advancements over the past 20 years have made compliance and financial integrity at unions much easier to track.[35]

Transitioning a monitor's investigation and enforcement responsibilities back to the union is not as easy as the administration aspects. A prerequisite to this transition is to establish a role with these responsibilities internally. For example, in the *District Council* case, the Review Officer established the internal union Office of the Inspector General to 'investigate corruption and malfeasance involving the District Council, inform [the Review Officer's] office, law enforcement and union decision makers of the results of investigations and file internal union charges as appropriate'.[36] Over time, additional responsibilities were transferred to this office, such as site visits,[37] and eventually the initial investigation of United Brotherhood of Carpenters Constitution and District Council by-law violations.[38] However, the categorical transfer of certain investigations to the internal inspector can be a challenge, as the full scope and implications of conduct being investigated is often not known at the outset.

Another method of monitor role-reduction is to transition the monitor's power from one of fiat or veto to one of recommendation to an internal union body. This re-involves the union leadership in punishing corruption and allows them to take the ownership over those kinds of decisions that will be necessary after the monitorship has ended. The District Council has made this transition with some success. When transitioning from the review officer to an independent monitor in 2015, the review officer's 'veto' power over a variety of decisions such as expenditures, contracts (excluding collective bargaining agreements), employment, eligibility to hold office and by-law amendments,[39] was replaced with the independent monitor's ability to recommend such decisions to the District Council's Executive Committee and the additional ability to appeal any determination the Executive Committee made to the court.[40] Although this procedure operated without issue for a number of years, a recent attempt to place more discretion over a shop steward's punishment in the hands of the Shop Steward Review Committee faltered when the committee applied incorrect standards.[41]

Determining when to terminate a union monitorship completely is a difficult issue. Many union monitorships continue to persist in some form decades after their first incarnation.[42] For example, the IBT, which was subject to a consent decree for over 25 years, agreed in a final agreement and order to a permanent external disciplinary enforcement mechanism

35 See, e.g., Second Interim Report of the Review Officer in Dist. Council, No. 1:90-cv-05722, ECF No. 1071, at 49–50 (SDNY filed 3 June 2011) (discussing a pilot programme for electronic recording of hours worked).

36 First Interim Report of the Review Officer in Dist. Council, No. 1:90-cv-05722, ECF No. 1020, at 20 (SDNY filed 3 December 2010).

37 Second Interim Report of the Review Officer in Dist. Council, No. 1:90-cv-05722 ECF No. 1071, at 49 (SDNY filed 3 June 2011).

38 Sixth Interim Report of the Independent Monitor in Dist. Council, No. 1:90-cv-05722, ECF No. 1828, at 6 (SDNY filed 31 December 2018).

39 See *Stipulation and Order in Dist. Council*, No. 1:90-cv-05722, ECF No. 991, at 5–6 (SDNY filed 3 June 2010).

40 See *Stipulation and Order in Dist. Council*, No. 1:90-cv-05722, ECF No. 1595, at 4–6 (SDNY filed 18 November 2014).

41 Sixth Interim Report of the Independent Monitor in Dist. Council, No. 1:90-cv-05722, ECF No. 1828, at 10 (SDNY filed 31 December 2018).

42 See Jacobs et al., *supra* note 2, at 427.

consisting of an independent investigations officer and an independent review officer.[43] Intuitively, remedial actions that are sufficient to stave off a monitorship in the first place should provide insight into what may be sufficient to completely terminate any form external monitorship. When faced with a threat by the DOJ to file a draft RICO complaint, the Laborers' International Union of North America established a disciplinary code, suspended officers, and created four new investigative and enforcement positions that it filled with unaffiliated individuals.[44] The government did not file the complaint.[45] However, it is possible courts may have more rigorous expectations to terminate a monitorship than the government has to decline bringing a civil RICO suit.

Conclusion

Although some union monitorships that began decades ago are still ongoing today in one form or another, there have been no new monitorships imposed pursuant to civil RICO suits in recent years. Even if a resurgence of organised crime occurs, we are unlikely to see a return to the heyday of the union monitorship. First, unions have lost ground economically and politically in recent decades and are unlikely to be as important for organised crime to capture as in the past. Second, criticism of the cost–benefit proposition of monitorships has risen.[46]

Where ongoing oversight is still warranted, courts may impose or the parties may agree to less invasive form of monitoring, such as the 'decreeship' implemented in *United States v. Local 30, United Slate, Tile and Composition Roofers*.[47] There the monitor had only the authority to observe contract negotiation meetings and certify the ensuing collective bargaining agreements, but not the broad powers like those of the review officer in the *District Council* case.[48] Additionally, technological developments in areas such as election tools, record digitisation, database software and other systems that limit human intervention (and, therefore, corrupt manipulation) may also allow for less intensive and intrusive union monitorships in the future. That said, even if more efficient and less expensive tools continue to aid in the mission against corruption within unions, it seems likely that there will always be some role for a human monitor. Even if that role is limited or only focused on elections or another specific aspect of union life, having someone with the requisite independence, experience, temperament and, above all else, authority interacting with union officials and members, is essential to the effort to keep the influence of organised crime at bay.

43 Final Agreement in IBT, No. 88 civ. 4486, ECF No. 4409-1, at 14 (SDNY filed 14 January 2015).

44 See *Serpico v. Laborers' Int'l Union of N. Am.*, 97 F.3d 995, 997 (7th Cir. 1996).

45 Jacobs and Gouldin, *supra* note 4, at 173.

46 See Veronica Root, Modern-Day Monitorships, 33 *Yale J. on Reg.* 109, 113 (2016) ('Controversies have arisen related to monitorship costs.'); see also Daniel J Fetterman and Mark P Goodson, 'Defending Corporations & Individuals in Government Investigations, Section 13:17 Collateral effects of FCPA violations' (2017) ('Following the issuance of the Grindler memorandum and continued criticism of the costs of monitorships, the government in 2011 departed from the general longstanding pattern of requiring external monitors [in settlements of FCPA cases].')

47 686 F. Supp. 1139 (E.D. Pa. 1988).

48 Jacobs and Gouldin, *supra* note 4, at 174 (internal citation omitted).

17

Consumer-Relief Funds

Michael J Bresnick

Introduction[1]

Before the 2007–2008 financial crisis, federal and state authorities generally limited their appointment of monitors to cases that required the settling entity to establish ongoing compliance with a particular subject matter, such as issues with regard to the Bank Secrecy Act/Anti-Money Laundering (BSA/AML) laws, the Foreign Corrupt Practices Act (FCPA), healthcare or the environment, among others. This changed dramatically on 9 February 2012, when, following a years-long coordinated investigation, the US Department of Justice (DOJ), the US Department of Housing and Urban Development (HUD), and 49 state attorneys general announced a $25-billion settlement (the *National Mortgage Settlement*) with the United States' five largest mortgage servicers to address mortgage loan servicing and foreclosure abuses committed during the housing crisis. As part of this settlement, the federal government and states appointed the former North Carolina Commissioner of Banks, Joseph A Smith Jr, as monitor. In addition to being tasked with overseeing compliance with comprehensive new mortgage loan-servicing standards to be implemented by each of the settling servicers – Bank of America Corporation, JP Morgan Chase & Co, Wells Fargo & Company, Citigroup Inc, and Ally Financial Inc (formerly GMAC) – Mr Smith was also appointed to ensure that the servicers dedicate $20 billion worth of 'consumer relief' to struggling homeowners.

This novel approach to settlements and the use of monitors marked a drastic departure from what previously had been the norm. No longer were settlements to be limited to correcting internal deficiencies and requiring ongoing compliance with the law and best

1 Michael J Bresnick is a partner at Venable LLP and the DOJ-selected independent monitor of the consumer relief settlement agreement with Deutsche Bank AG. Mr Bresnick expresses his deep gratitude to Venable partners Andrew E Bigart and Michael S Blume, and Venable counsel Meredith L Boylan and Alexandra Megaris, and to Control Risks LLC's partner Brian Mich and all members of the monitorship team, for their assistance with this chapter.

practices. Instead, the servicers were required to provide relief to borrowers who were struggling to maintain their homes, or had lost their homes to foreclosure, likely as a result of the housing crisis, whether or not these borrowers suffered any loss directly as a result of unlawful conduct by the settling entities. The servicers, for example, were required, *inter alia*, to:

- provide principal forgiveness for borrowers who were delinquent or facing imminent default;
- refinance loans for borrowers who were 'underwater', meaning that they owed more than their homes were worth;
- offer forbearance for unemployed borrowers;
- support anti-blight programmes; and
- offer short sales.

As Iowa Attorney General Tom Miller, one of the four individuals announcing the settlement, bluntly put it, the settlement 'provides badly needed relief to homeowners'.[2]

Soon after the announcement of the *National Mortgage Settlement* – which addressed unfair, deceptive and unlawful servicing, and loss mitigation, unlawful foreclosures, misconduct in bankruptcy and violations of the Servicemembers Civil Relief Act, among other things – consumer relief provisions, to be overseen by monitors, were common in many federal and state settlements with global banks, with a particular focus on banks that had unlawfully packaged and sold residential mortgage-backed securities (RMBS) during the period leading up to the 2007–2008 financial crisis. The list of settling banks includes: JPMorgan Chase & Co,[3] Bank of America Corporation,[4] Citigroup Inc,[5] Goldman Sachs & Co,[6] Morgan Stanley,[7] Deutsche Bank AG,[8] Credit Suisse Securities (USA) LLC[9] and the Royal

2 See https://www.justice.gov/opa/pr/federal-government-and-state-attorneys-general-reach-25-billion-agreement-five-largest.

3 This settlement was announced by the DOJ and the attorneys general in California, Delaware, Illinois, and Massachusetts in 2013. Mr Smith was appointed independent monitor of this settlement.

4 The DOJ and the attorneys general in California, Delaware, Illinois, Maryland, New York and Kentucky announced this settlement in 2016. Professor Eric D Green was appointed independent monitor of this settlement. He is one of the pioneers of alternative dispute resolution in the United States and around the world, and co-founder of alternative dispute resolution and mediation firms, Endispute (now part of JAMS) and Resolutions LLC.

5 The DOJ and the attorneys general in California, New York, Delaware, Illinois, and Massachusetts announced this settlement in 2014. Thomas J Perrelli, the former Associate Attorney General at the US Department of Justice and architect of the RMBS Working Group within the presidentially created Financial Fraud Enforcement Task Force, was appointed independent monitor of this settlement.

6 The DOJ and the attorneys general in California and Illinois announced this settlement in 2016. Professor Eric D Green was appointed independent monitor.

7 The attorney general in New York announced this settlement in 2016. Professor Eric D Green was selected to serve as independent monitor of this settlement.

8 Michael J Bresnick, the author and former executive director of the presidentially created Financial Fraud Enforcement Task Force within the US DOJ, and former federal prosecutor, was selected to serve as independent monitor of this settlement, announced by the DOJ and the attorney general in Maryland in 2017.

9 Neil M Barofsky was appointed as independent monitor for this settlement, announced by the DOJ in 2017. Mr Barofsky is the former – and first – presidentially appointed special inspector general of the historic $700 billion Troubled Asset Relief Program (TARP), and former prosecutor within the US Attorney's Office for the Southern District of New York.

Bank of Scotland.[10] The consumer relief that was required as part of these settlements was in a form substantially similar to the relief required in the *National Mortgage Settlement*, specifically, principal reduction for first-lien mortgages, short sales, refinancings, affordable housing financing and similar assistance to homeowners in need. It was the monitor's responsibility to ensure that each settling bank fulfilled its obligation in a manner prescribed by the applicable agreement and consistent with the broader public goal of helping homeowners.

Role of the independent monitor in consumer relief settlements

While each consumer relief settlement is unique, and may differ from the others in various respects, they all typically contain an annex to the settlement agreement, referred to as the 'Consumer Relief Annex', which enumerates the monitor's responsibilities. For example, the Consumer Relief Annex usually instructs the monitor to report on the bank's progress towards completion of its consumer relief obligation; report on credits earned by the bank; and ultimately determine and certify the bank's compliance with the consumer relief terms of the settlement. The banks, in turn, earn credits by fulfilling different options available on a 'menu' of items contained in the Consumer Relief Annex.

Menu items and other provisions of the Consumer Relief Annex

Although the menu items in each Consumer Relief Annex may differ from the others in certain respects, they generally contain some or all of the following options:

- first-lien principal forgiveness – relief of this type can help the borrower gain equity in the house;
- principal forgiveness of forbearance – this provision can help a homeowner gain equity in the house;
- first-lien forbearance – this form of relief can help reduce a homeowner's monthly mortgage payment for a period of time;
- assistance to borrowers to refinance with a new lender – homeowners who are having trouble refinancing as a result of the costs associated with it are given assistance under this menu item;
- second-lien extinguishment – under this menu item, the bank may receive credit for extinguishing a borrower's second lien, although credit will be denied if the bank also owns or services the first lien and attempts to foreclose on the first lien within the first six months of extinguishment of the second lien;[11]
- junior-lien and unsecured mortgage debt principal forgiveness or extinguishment – the bank may receive credit for forgiving all of a borrower's junior lien (a loan secured by the borrower's residence and with less priority than second liens), and unsecured mortgage debt (debt originally secured by real property that the borrower subsequently lost to foreclosure or short sale), which may result in a reduced monthly payment and may create

10 The attorney general in New York announced this settlement in 2018. Professor Eric D Green was selected to serve as independent monitor.

11 This six-month prohibition was not included in the first Consumer Relief Annexes, and was added only after Mr Perrelli, monitor of the *Citigroup RMBS* settlement, recognised the need for it during the course of his monitorship. See Citi Monitorship Fourth Report, at p. 8, http://www.citigroupmonitorship.com/wp-content/uploads/2016/01/Citi_Monitorship_fourth_report_1-29-2016.pdf.

some equity in the home for the homeowner. As with the prior menu item, the bank will be denied credit under this menu item if it also owns or services the first lien and attempts to foreclose on the first lien within the first six months of extinguishment of the junior lien or unsecured mortgage debt;

- mortgage-rate reduction – the bank may earn credit for reducing mortgage interest rates, for paying certain costs associated with refinancing, or for forgiving principal to make a refinancing possible;
- low-to-moderate income and other lending – the bank may earn credit for originating loans to:
  - low-to-moderate-income first-time homebuyers;
  - buyers in the 'hardest hit areas' as defined in the Consumer Relief Annex; and
  - borrowers who previously lost a home to foreclosure or short sale;
- community reinvestment and neighbourhood stabilisation – the bank may obtain credit for forgiving the entire principal balance on an occupied home where foreclosure has not been pursued, and extinguishing any liens; and
- financing for affordable housing – the bank may receive credit for providing financing at a loss to the bank to facilitate the construction, rehabilitation, or preservation of affordable low-income rental, and low or moderate income for-sale, housing developments.

Some of the settlements contain certain minimum and maximum requirements for particular menu items, such as first-lien loan modifications, refinancings or affordable housing refinancing. Further, some of these allow the settling bank to receive additional credit depending on the timing of the relief provided.

For all the menu items in each of the settlements, no credit may be earned for relief implemented through a policy that violates the Fair Housing Act, the Equal Credit Opportunity Act, or any other federal or state law. The Fair Housing Act prohibits housing providers from discriminating against consumers on the basis of race, colour, national origin, religion, sex, familial status or disability. Examples of prohibited conduct include refusing to provide information on loans or imposing different terms or conditions on loans offered to consumers based on one of the factors noted above. Similarly, the Equal Credit Opportunity Act prohibits discrimination on the basis of race, colour, religion, national origin, sex, marital status or age in connection with a credit transaction.

The settlements also provide that, subject to very limited exceptions, no consumer relief may be conditioned on a waiver or release by a borrower of his or her rights. Further, the bank is typically required to hold or sponsor a certain number of consumer outreach events each year in 'geographically dispersed' locations.[12]

The monitor's initial steps

Given the breadth of these specific requirements in the various Consumer Relief Annexes, the monitor usually makes it his or her first order of business to hire an expert consultant, such as a consulting firm with statistical sampling and transactional testing expertise to assist

12 The idea is to make sure the outreach events are available to as many people throughout the country as possible, rather than have them all clustered in and around the same area.

in reviewing and verifying that any requests for credit satisfy the eligibility requirements and other applicable conditions set forth in the Consumer Relief Annex.[13] The monitor may also hire firms that specialise in applied statistics to analyse statistical data for evidence of unfair lending or servicing practices, in light of the need to be sure that consumer relief being provided does not violate the Equal Credit Opportunity Act (ECOA) or the Federal Housing Administration (FHA).

In addition, these monitorships include a public reporting requirement and generate a substantial amount of public interest. Accordingly, the monitor usually creates a website containing information about the settlement and the monitor and other information for homeowners, such as resources available to help with foreclosure proceedings. The monitor may also want to request the bank to establish a hotline for homeowners to call with questions about the settlement and whether they might be entitled to relief. If such a hotline is established, it is especially important that the bank appoint a single point of contact within the bank responsible for responding to homeowners. Information about any hotline that is established for members of the public interested in contacting the bank directly should be included on the monitor's website.

Relatedly, the monitor should expect to receive a substantial amount of inquiries from the public about the settlement. The monitor could hire a vendor to handle these calls, emails, and letters, or he or she could direct the public to reach out to the monitor directly. In either event, the monitor should endeavour to create a process to receive and respond in a timely manner to every inquiry made.

Since the Consumer Relief Annexes provide the banks with a wide variety of options, pursuant to which they may satisfy their obligations, the monitor also should establish regular calls and meetings with the bank to keep track of progress, address questions and discuss any complications that might arise. In particular, the monitor should meet with representatives of the bank early in the process to understand precisely how it expects to provide relief under the settlement. In this way, the monitor and the bank can begin to discuss the testing protocols associated with each relevant menu item and the evidence necessary to satisfy it.

This process can be difficult at times, particularly since there inevitably arise questions that are not directly addressed by the Annex. For example, the Annex may authorise loan originations to certain 'credit-worthy borrowers,' but leave it to the monitor to define what it means to be 'credit-worthy'; or the Annex may allow for loan originations to be made to certain 'first-time homebuyers', but not include a definition of this term.[14] Similarly, the monitor might be called on to interpret the meaning of 'substantially', where the Annex allows the

13 For example, as independent monitor of the Deutsche Bank AG RMBS settlement, Mr Bresnick hired the expert consulting firm Control Risks LLC to help develop the processes to ensure the integrity of the information submitted by the bank, test and validate the data submitted by the bank in connection with requests for credit, verify that such requests are eligible for credit, and calculate the amount of credit awarded for these requests.

14 It might seem to some that the term 'first-time homebuyer' is not ambiguous at all or subject to personal interpretation. In fact, HUD and Internal Revenue Service guidance define a first-time homebuyer as someone who has not owned a principal residence in the past three years. See 'HUD HOC Reference Guide, First-Time Homebuyers', Ch. 3-02 (archived 7 November 2012), available at https://archives.hud.gov/offices/hsg/sfh/ref/sfhp3-02.cfm; Internal Revenue Service, 'First-Time Homebuyer Credit Questions and Answers: Basic Information' (updated 6 August 2017), available at https://www.irs.gov/newsroom/first-time-homebuyer-credit-questions-and-answers-basic-information.

bank to offer modifications to borrowers with 'loans with rates substantially above Freddie Mac's Primary Mortgage Market Survey'. Discussions of these and similar questions before the bank begins to provide relief are essential to a successful monitorship.

In addition to identifying the proof necessary to establish each menu item, the monitor should consider the manner in which the specific relief will be provided, specifically, whether the relief will be provided in a manner that actually helps, rather than harms, homeowners. A Consumer Relief Annex might not prohibit certain loan features or terms in a menu item allowing loan modifications. A monitor in this instance, then, may want to determine if he or she will permit the bank to submit loans that include the assessment of prepayment penalties, a negative amortisation feature, a balloon or lump-sum payment (except in the case of forbearances), or interest-only loan terms for the life of the loan. These features have been associated with predatory practices, which put borrowers at increased risk of default. Other considerations for the monitor include whether to prohibit the bank from seeking credit for modifications in which the loan's interest rate is higher than the pre-modification rate, or is adjustable over the life of the modification (such as an adjustable rate mortgage or step-rate loan). A monitor should give careful consideration to questions of this sort when analysing each menu item.

Similarly, the monitor will need to ensure that the bank does not seek credit for relief where the debt is time-barred by the applicable statute of limitations. This can be a challenging exercise, since state laws regarding the length of the statute of limitations vary, and the event that triggers the statutes frequently differs by state. An analysis of this issue, including discussions about it with the bank, are essential. The monitor also may consider it appropriate to require the bank to determine if a borrower who was offered a modification was in active bankruptcy at the time and, if so, to prove that specific requirements arising from the bankruptcy proceeding had been satisfied. Another significant concern is to ensure that the bank does not seek credit for consumer relief provided where the debt has been discharged in bankruptcy.

These and similar issues make the consumer relief settlements particularly challenging for monitors, and regardless of how precise and specific the Annexes may be, it is inevitable that a question will arise during the course of the monitorship that had not previously been raised, but that must be answered. In these circumstances, the monitor must understand the purpose of the settlement agreement, consider fully the benefits and risks associated with the particular issue, look to relevant guidance, and do his or her best to ensure that the broader public policy behind the consumer relief provision – providing relief to homeowners – is protected.

The monitor and his or her expert consultant also will want to review the bank's system of record (SOR) to confirm the integrity and validity of the data contained. This process will include interviewing the personnel responsible for maintaining the SOR and reviewing technical documentation to ensure that sufficient controls and processes are in place.

Moreover, the monitor will likely want to review the bank's internal governance and structure by which it expects to handle its consumer relief responsibilities. For example, although not required, most banks in this situation have created an Internal Review Group (IRG),[15] an independent organisation within the bank that, pursuant to a work plan created

15 The concept of an IRG finds its origin in the *National Mortgage Settlement*, which required each of the settling servicers to designate such an entity of this type.

in consultation with the monitor, reviews the bank's formal requests for consumer relief credit, certifies and submits them to the monitor for validation, and responds to any questions the monitor may have regarding the submissions, as well as, also in consultation with the monitor, create process flows, testing scripts, and testing protocols for each of the available menu items.

Last, the monitor may decide to conduct interviews of the IRG's members and other individuals within the bank responsible for supporting the bank's consumer relief efforts, including key members of the bank's management board. The purpose of these interviews is to learn about each individual's anticipated role in the bank's consumer relief efforts; verify that the members of the IRG are independent from the bank's business operations; ensure that the individuals involved possess the requisite experience and are otherwise qualified for the job; and confirm that they understand and are committed to following the relevant consumer protection laws and regulations related to the consumer relief options, and their plans for doing so. Another purpose of these interviews is to verify that the internal oversight of the bank's consumer relief effort is rigorous and reflects the appropriate 'tone from the top'.

Beyond these initial steps, the ongoing work of the consumer relief monitor is varied and complex. For example, under the ongoing Deutsche Bank monitorship, the bank is allowed to provide consumer relief, such as loan originations and modifications, through financing arrangements with counterparties. The Annex contemplates that the bank and the monitor will perform due diligence on these counterparties under certain circumstances. As part of this diligence process, the monitor interviewed the management and operations teams of the counterparties, reviewed their relevant policies and procedures, and attempted to learn how they implement their policies and procedures in their day-to-day operations. This process included on-site visits, requesting and reviewing specific documentary material, and requesting additional interviews when necessary.[16]

In addition, as noted above, each of the Consumer Relief Annexes state that the bank cannot obtain credit for relief that is provided in violation of the Equal Credit Opportunity Act or the Fair Housing Act. On the one hand, a monitor could determine that it is sufficient to conduct interviews and review the entity's fair lending programme, policies and testing practices to ensure they are reasonably designed to prevent and detect violations of the FHA and ECOA. A more robust practice, on the other hand, would be to conduct a statistical analysis of the relief provided, which the monitor should discuss with the bank in advance.

The monitor of the Citigroup consumer relief settlement, moreover, conducted interviews with developers and visited construction sites of affordable rental housing developments 'to learn more about the process from their perspectives', understand the importance of the bank's loans 'to the success of the project', and discover any 'improvements that could be made in any future settlements of this type'.[17]

16 See Deutsche Bank AG Monitorship Second Report, at 4, available at: https://deutschebankmortgagemonitor.com/wp-content/uploads/2017/11/Second-Monitor-Report-November-2017.pdf.

17 See Citi Monitorship Sixth Report, at 17, available at http://www.citigroupmonitorship.com/wp-content/uploads/2017/02/Citi_Monitorship_sixth_report_2-21-2017.pdf.

Expectations for the future

From 2012 to 2017, the inclusion of consumer relief provisions – and the related appointment of monitors – in bank settlements with the DOJ was relatively routine. Then, just as suddenly as the concept was introduced in the *National Mortgage Settlement*, it ended. Specifically, on 5 June 2017, then-US Attorney General Jeff Sessions issued a memorandum, 'Prohibition on Settlement Payments to Third Parties'.[18] In this memo, Sessions criticised prior settlements that directed payments to 'non-governmental, third-party organizations' that were 'neither victims nor parties to the lawsuit' and stated that the practice would stop going forward. He was careful to note, however, that this prohibition does not apply to restitution payments to victims or payments that 'otherwise directly remedies the harm that is sought to be redressed'.[19] Thus, this memo went straight to the heart of the consumer relief settlements, since they never required proof that the individuals obtaining relief were directly harmed by the settling entities' unlawful conduct.

Not surprisingly, following the issuance of this memorandum, the DOJ's settlements with banks relating to similar misconduct did not contain consumer relief provisions. In particular, in 2018, the DOJ settled with Barclays, HSBC, RBS, Wells Fargo, and Nomura for unlawfully packaging and selling RMBS. None of these settlements contained a consumer relief provision or required the appointment of a monitor.[20]

It seems clear, therefore, that, at least for the near future, the DOJ will no longer impose consumer relief requirements upon settling banks. This change in policy, however, has not stopped the states from continuing to include them. In 2018, for example, the New York Attorney General announced RMBS settlements with UBS and RBS that required the banks to provide consumer relief, overseen by a monitor, to New York residents.

Conclusion

Whether the approach to consumer relief created in the *National Mortgage Settlement* and subsequent settlements is correct or whether the reasoning of the Sessions Memo is more appropriate is beyond the scope of this chapter. Certainly, the consumer relief settlements required the banks to help struggling homeowners through a variety of means. First-lien principal forgiveness that reduces a loan-to-value to 100 per cent or lower, for example, provides the homeowner with an opportunity to earn some equity in the home. Similarly, forbearance can reduce a homeowner's monthly payments. Or the banks can help homeowners who may be unable to take advantage of available lower interest rates and refinance a loan because the costs associated with a refinancing are too expensive.

On the other hand, critics of these settlements have argued that the relief was going to individuals whose suffering had nothing to do with the banks' misconduct. Another group of critics have complained that the consumer relief provisions allowed the banks to obtain credit for operating 'business as usual,' since they would have offered these modifications even in the absence of the settlements because it is in their interest to turn non-performing loans into

18 See https://www.justice.gov/opa/press-release/file/971826/download.

19 id.

20 In November 2018, the DOJ filed a lawsuit against UBS for similar misconduct and, to date, this case has not been resolved.

performing loans. Still others have argued that the consumer relief provisions provided the banks with a profit opportunity, especially since the agreements do not impose any limitation on the ability of the banks to profit from their consumer relief activities.[21]

One thing, however, is certain: as long as there are consumer relief settlements, whether through the work of federal or state authorities, for them to have any chance at success, the selection of the monitor is critical. The monitor will preferably have a strong and demonstrated background in protecting the public from housing-related and similar misconduct. He or she should possess a deep understanding of issues involving origination, mortgage loan servicing, refinancing, a variety of modifications and affordable housing financing, and the manner in which these issues have been regulated and enforced by federal and state authorities. For loan originations, for example, the monitor must understand the key laws and regulations governing them (such as the TILA-RESPA Integrated Disclosure Rules[22]), and other indicia of potentially unlawful, even fraudulent, activity in the transaction (for example, unexplained discrepancies in borrower income or assets provided in connection with a loan application). And for modifications, the monitor must know the mortgage servicing rules contained in the Real Estate Settlement Procedures Act and its implementing regulation, Regulation X, and issues involving mitigation, early intervention, bankruptcy, foreclosure, short sales, error resolutions or requests for information, and servicing transfers, among others.

Equally important, since the consumer relief agreements have a public-reporting requirement, the monitors must be prepared to provide full transparency into the activities of both the bank and the monitor. This includes describing what actions have been taken and, ultimately, offering detailed explanations for his or her decisions, even when there does not seem to be any clear answer to the particular issue. The accountability to the public that is a part of these consumer relief settlements makes it markedly different from many other monitorships, which often remain confidential and, if filed with a court, under seal.

The goal of all consumer relief settlements is to provide 'badly needed relief to homeowners'.[23] Each monitor who is selected understands the enormity of this responsibility and the complexities associated with it, accepts the role with gratitude, and approaches it with diligence.

21 The sole exception is the banks' ability to obtain consumer relief credit through the subordinate financing of affordable housing developments, which is calculated by the amount of loss incurred by the banks.

22 Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z), 78 Fed. Reg. 79730 (31 December 2013), as amended (codified at 12 C.F.R. pts. 1024 and 1026).

23 See, *supra*, fn.2.

Part V

Key Issues

18

Privilege and Confidentiality

Daniel W Levy and Doreen Klein[1]

Privileges are generally conceived of as the principle-based reason for information to remain available to only those possessing the privilege and, conversely, immune from outsiders to the relationships recognised by the applicable privilege. It is well established that there is no attorney–client privilege between a monitor and a monitoree. Virtually every recently documented resolution that has resulted in a monitorship confirms the parties' agreement to that principle. Further, the legal area of privilege as it bears on monitorships is relatively underdeveloped and it is uncommon for a circumstance to arise where it could be developed, such as where an outsider to the monitorship seeks to obtain a report written by a monitor. From the broader perspective of confidentiality, however, there is quite a bit to consider.

Knowing that no attorney–client relationship exists between the monitor and monitoree, parties invested in a successful monitorship typically seek to preserve confidentiality to the greatest extent possible. Confidentiality concerns are at the forefront of every monitorship.

For example, the monitor will want to robustly investigate the compliance programme of a financial institution with an eye towards its improvement. To do so, it needs the freedom to communicate with the financial institution, its employees and its regulator without fearing that information about newly discovered compliance problems, let alone information about their solutions, will be made available to those who could exploit that information. Further, the prosecutor or regulator that installed the monitor may have an institutional interest in ensuring the confidentiality of reports generated by the monitor, such as a newly discovered activity that requires follow-up investigation or enforcement.

1 Daniel W Levy is a principal and Doreen Klein is a senior counsel at McKool Smith. This chapter specifically concerns monitorships in the United States.

But it is not always clear from whom information should remain confidential and when recognised interests in confidentiality should be overridden by other interests. For example:

- Under what circumstances does the public have a First Amendment right to obtain the reports of a monitor that are the result of a judicially supervised resolution?
- When should the monitor's discovery of new or ongoing criminal activity be brought to the attention of the prosecutor or regulator that installed the monitorship, but kept confidential from the monitoree?
- When should a private litigant be able to obtain by subpoena otherwise non-privileged information developed by the monitor and summarised in a written report to the prosecutor or regulator that installed the monitorship?
- If the confidentiality of a monitor's report cannot be guaranteed under US law, how might foreign regulators be persuaded to allow a monitor access to an entity under a US monitorship that is also subject to the jurisdiction of a foreign regulator?

This chapter seeks to explore these questions and the nature of privilege and the broader issue of confidentiality in connection with monitorships.

No privilege between monitor and monitoree

The common theme underlying monitorships arising from deferred prosecution agreements, non-prosecution agreements,[2] and other similar types of resolutions, for example, resolutions with the Securities and Exchange Commission (SEC) that require retention of a consultant as a result of a resolution of a civil suit or administrative proceeding, is that the monitor or consultant must be independent of both the government and the corporation it is tasked with monitoring.

The requirement of independence assures, among other things, that the monitor will act neutrally in pursuit of the facts and in otherwise satisfying the mandate of the monitorship to which the monitoree and the government have agreed. Independence is typically ensured as part of the monitor-selection process[3] and in the frequent requirement that the monitor not enter into any employment, consulting or attorney–client relationships for a period of time after completion of the monitorship or consulting arrangement.

This independence predominantly drives the answer to the question of whether the information that the monitor obtains, and the work product that it generates in carrying out its responsibilities, can be deemed privileged or otherwise protected from disclosure.

In guidance issued by the Department of Justice (DOJ) concerning the use of monitors in deferred prosecution agreements and non-prosecution agreements with corporations, then-Acting Deputy Attorney General Craig Morford stressed the principle that a

2 In the federal context, deferred prosecution agreements are filed in federal court, are predicated on the filing of a charging document, and are subject to some limited court approval. Non-prosecution agreements are agreements between the DOJ and the corporation. There are no charges filed and the agreement is not reviewed by a court. Craig S Morford, Acting Deputy Attorney General, 'Memorandum Regarding Selection and Use of Monitors in Deferred Prosecution Agreement and Non-Prosecution Agreements With Corporations' (7 March 2008) (the Morford Memorandum).

3 See generally Brian A Benczkowski, Assistant Attorney General, 'Memorandum Regarding Selection of Monitors in Criminal Division Matters' (11 October 2018).

monitor 'is an independent third-party, not an employee or agent of the corporation or of the Government'. Because '[t]he monitor is not the corporation's attorney . . . the corporation may not seek to obtain or obtain legal advice from the monitor. Conversely, a monitor also is not an agent or employee of the Government.'[4] The American Bar Association agrees.[5]

Consistent with this policy view, virtually every resolution providing for a monitorship explicitly indicates that '[t]he parties agree that no attorney-client relationship shall be formed between the Company and the Monitor'.[6] Non-DOJ resolutions, such as one with the Department of Commerce, are similar:

> *No attorney–client relationship shall be formed between [the entity] and the [special compliance coordinator]. No documents or information created, generated, or produced by the [special compliance coordinator] will be considered privileged from disclosure to [the US Department of Commerce, Bureau of Industry and Security] or other US federal government agencies, nor shall [the entity] assert such a claim of privilege.*[7]

The ABA Criminal Justice Standards on Monitors notes, however, that '[i]t is clear under these Standards that the [m]onitor should not treat the [corporation] as its client, and therefore, for example, the [m]onitor does not have a duty of zealous representation or a duty to maintain most confidences.'[8] Moreover, to carry out his or her responsibilities, the monitor must have the discretion and, where authorised by the settlement agreement, the obligation, to report to the court, the government, or both, concerning the corporation's conduct.[9]

Resolutions with the SEC that require the installation of an independent compliance consultant also do not create an attorney–client relationship between the compliance consultant and the entity agreeing to the resolution.

Typically, such resolutions with the SEC require the entity to retain a consultant to review the entity's policies and procedures in a particular area, make recommendations for changes and improvements, and conduct periodic reviews. To ensure independence of the consultant, the entity is frequently precluded from terminating the consultant without the approval of the SEC.

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4 Morford Memorandum at 4–5.

5 See ABA Criminal Justice Standards on Monitors at 2 (noting that monitors serve various functions, but 'have certain central features in common, including being independent of both the Government and the [corporation]') (ABA Standards).

6 See, e.g., *United States v. Sociedad Química y Minera de Chile, SA*, Case No. 17 Cr. 13, Deferred Prosecution Agreement, Attach. D at Paragraph 5 (DDC 13 January 2017).

7 See, e.g., *In the Matter of Zhongxing Telecom. Equip. Corp.*, Superseding Order at 7 (8 June 2018).

8 ABA Standards at 35.

9 See Morford Memorandum at 6 ('The monitor must also have the discretion to communicate with the Government as he or she deems appropriate', including 'issues arising from the drafting and implementation of an ethics and compliance program'; moreover, 'it may be appropriate for the monitor to make periodic written reports to both the Government and the corporation regarding' inter alia 'whether the corporation is complying with the terms of the agreement' and 'any changes that are necessary to foster the corporation's compliance with the terms of the agreement'); ABA Standards at 2 (the monitor has 'obligation to report to the court, the Government, or both, concerning the [corporation's] conduct').

Such resolutions foreclose, at the outset, invocation of the attorney–client privilege or even the attorney work-product protection:[10] 'Respondent shall not invoke the attorney–client privilege or any other doctrine or privilege to prevent the Consultant from transmitting any information, reports, or documents to the Commission staff.'[11]

It is important to distinguish monitors and independent consultants retained as part of a resolution from those that are pre-emptively retained by an entity or an entity's counsel during an investigation. Frequently, entities under investigation hire outside subject matter experts, often through counsel, to implement an effective compliance programme in an effort to pre-empt the need for a monitor. The DOJ has noted that, under some circumstances, a monitor may not be required as part of a resolution 'if a company has, at the time of resolution, implemented an effective compliance program'.[12] Similarly, the SEC has cited early remedial actions undertaken by an entity as reasons for a particular resolution.[13] On the flip side, regulators have noted in some instances that institutions had, prior to the resolution, failed to effectively remediate problems after an external consultant was retained to assist.[14] Such pre-resolution arrangements, and arrangements by which an entity is permitted to monitor itself,[15] may be protected by attorney–client and attorney work-product privilege.

Confidentiality

Despite the lack of a recognised attorney–client privilege between the monitor and monitoree, there is a high level of interest of all concerned in maintaining confidentiality. For example, the monitoree wants to ensure that its trade secrets remain as tightly protected as can reasonably be accomplished. The monitor has a great interest in ensuring that employees

10 The attorney work-product doctrine protects materials prepared in anticipation of litigation. However, monitorships are typically imposed after the threat of litigation has ended and as part of a resolution. And the mandate of a monitorship is typically to ensure compliance with the terms of a resolution and investigative in nature, efforts that, without more, do not comfortably fit into the category of efforts in anticipation of litigation. As such, in the typical situation, there is little basis to protect information gathered and work done under the rubric of the attorney work-product doctrine.

11 *In the Matter of Yucaipa Master Manager LLC*, Order Instituting Cease-and-Desist Proceedings Paragraphs 37(1-5), Admin. Proceeding File No. 3-18930 (13 December 2018).

12 DOJ, Fraud Section, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance at 8 (5 April 2016). The converse is also true: a company may agree to a monitorship if its previously undertaken remedial measures were incomplete. *Sociedad Química y Minera de Chile, SA*, Deferred Prosecution Agreement Paragraph 4(d) ('Although the Company has taken a number of remedial measures, the Company is still in the process of implementing its enhanced compliance program, which has not had an opportunity to be tested, and thus the Company has agreed to the imposition of an independent compliance monitor for a term of two years to diminish the risk of reoccurrence [sic] of the misconduct').

13 *In the Matter of Barclays Capital Inc,* Order Instituting Administrative and Cease-and-Desist Proceedings Paragraphs 62, 65, Admin. Proceeding File No 3-17077 (31 January 2016).

14 *In the Matter of Mashreqbank, PSC*, New York State Dept. of Fin. Servs., Consent Order (10 October 2018) ('Transaction monitoring remained a significant challenge for the Branch. The New York Branch's system at that time was generating nearly 2,000 transaction monitoring alerts monthly. Although the Bank had engaged third-party consultants to help implement a more effective transaction monitoring system, substantial deficiencies persisted.')

15 *United States v. SBM Offshore N.V.*, Case No. 17 Cr. 686, Deferred Prosecution Agreement, Attach. C, D (S.D. Tex. 29 November 2017) (requiring defendant to engage in ongoing monitoring and reporting on implementation of agreed-upon procedures).

have a mechanism to be candid and self-critical so as to allow real improvements in the entity's culture of compliance. Finally, the prosecutor or regulator has institutional concerns about ensuring that compliance programmes are assessed, and improvements identified and implemented, out of the view of those who might exploit compliance blind spots.

Contractual confidentiality

There are mechanisms for improving the chances that documents generated by the monitor, including its reports to the monitoree and the government, and communications with the monitor, remain confidential.

One mechanism is purely contractual, with typical language of a deferred prosecution agreement being:

> *The reports [generated by the monitor] will likely include proprietary, financial, confidential, and competitive business information. Moreover, public disclosure of the reports could discourage cooperation, or impede pending or potential government investigations and thus undermine the objectives of the monitorship. For these reasons, among others, the reports and the contents thereof are intended to remain and shall remain non-public, except as otherwise agreed to by the parties in writing, or except to the extent that the Department determines in its sole discretion that disclosure would be in furtherance of the Department's discharge of its duties and responsibilities or is otherwise required by law.*[16]

In instances where an entity is permitted to, in essence, self-monitor by retaining a consultant pursuant to a non-prosecution or deferred prosecution agreement, even a component of the government that did not specifically require the self-monitoring is included within those to whom monitor-generated documents may be provided. Typical language provides that:

> *For the duration of this Agreement, the Office, as it deems necessary and upon request to [the entity], shall: (a) be provided by [the entity] with access to any and all non-privileged books, records, accounts, correspondence, files, and any and all other documents or other electronic records, including e-mails, of [the entity] and its representatives, agents, affiliates that it controls, and employees, relating to any matters described or identified in the [reports generated pursuant to related settlements with other governmental authorities] and (b) have the right to interview any officer, employee, agent, consultant, or representative of [the entity] concerning any non-privileged matter described or identified in the [reports generated pursuant to related settlements with other governmental authorities].*[17]

16 *United States v. Odebrecht SA*, Case No. 16-643, Plea Agreement, Attach. D, Paragraph 23 (EDNY 21 December 2016).

17 *United States v. Société Générale SA*, Case No. 18-cv-10783, Deferred Prosecution Agreement Paragraphs 21–22 (SDNY 18 November 2018) (filed in connection with civil forfeiture complaint).

Limited confidentiality in select cases

There is some precedent for the enforcement of these types of confidentiality provisions in the context of consent decrees where the material comes into existence because the consent decree requires it to be generated.

In *United States v. Bleznak*, defendants were required to implement a compliance programme that included recording and monitoring the telephone conversations of its stock traders pursuant to a consent decree. The Second Circuit shielded the material from disclosure to third parties on the strength of a confidentiality provision stating that tapes made pursuant to the agreement would not be subject to civil process, except for a request by the government and certain regulatory agencies and self-regulatory organisations.[18] However, the court introduced a cautionary note, stating that it did not 'quarrel with the principle asserted by [the requesting third-party plaintiffs] that parties may not use a consent decree to limit non-party rights that would otherwise prevail'.[19]

Similarly, where a defendant created training materials and policies required by its consent decree, the court shielded that material from disclosure to third parties, but held that the defendant was required to produce any similar materials that predated the consent decree, notwithstanding the broad terms of a confidentiality provision.[20] Moreover, because the consent decree merely allowed, but did not require, the defendant to conduct an internal investigation into complaints similar to those that originally gave rise to the consent decree, the court ordered the defendant to produce documents that it sent to the government concerning the results of that investigation.[21]

The ABA Standards envision the monitor's ability to allow individuals to speak confidentially or anonymously to increase the flow of information to the Monitor: '[i]f the flow of information includes proprietary or confidential information, the Monitor is under a duty to safeguard that information.'[22] However, it is not certain that even an explicit expression of the parties' intent to keep the information confidential will be honoured by the courts.

Judicial action in monitorships created by deferred prosecution agreements[23]

The judiciary has been active in scrutinising confidentiality provisions and one additional avenue to buttress the confidentiality of monitor-related materials is to enlist the aid of the judiciary itself. Accordingly, where a corporation enters into a deferred prosecution agreement,

18 *United States v. Bleznak*, 153 F. 3d 16 (2d Cir. 1998). The Second Circuit endorsed the view of the district court that, without the consent decree, 'there would be no tapes to discover or use as evidence'. id., at 19.

19 id.

20 *McCoo v. Denny's Inc,* 192 F.R.D. 675 (D. Kan. 2000). The provision stated that information that was 'generated, maintained, produced or preserved' pursuant to the agreement would be kept confidential, and would not be disclosed to anyone not a party to the agreement, including any person seeking the information in other litigation.

21 Pursuant to the consent decree, Denny's obtained the monitor's permission to conduct an internal investigation of a discrimination complaint, and subsequently wrote to the Kansas Human Rights Commission with the results of that investigation. The court ordered Denny's to produce the letters. id., at 682.

22 ABA Standards at 38.

23 See 'Judicial Scrutiny of DPAs and NPAs' in the guide for more information.

which is filed with the court, the parties can request that the court issue a protective order directing that such materials are protected from discovery.[24]

In *United States v. Computer Associates Int'l, Inc,* where the court appointed an independent examiner pursuant to a deferred prosecution agreement, the parties did just that. In their joint application, the government, the defendant and the independent examiner cited the need to 'encourage a free flow of information to and from the Independent Examiner, without threat that such information will be discoverable'.[25]

The application argued as a basis for the proposed order the 'quasi-judicial immunity frequently accorded court-appointed examiners for the protection of testimony, documents and other information obtained by examiners through their court-ordered powers', relying upon cases concerning bankruptcy examiners.[26] The court then entered a sweeping protective order providing not only that information and material provided to, and generated by, the independent examiner would be protected from disclosure, but also that the independent examiner and his agents were not subject to deposition or other discovery requests.[27]

As an outgrowth of the protective order permitted in *Computer Associates*, an additional, albeit untested, mechanism that may protect from disclosure information provided to a monitor appointed pursuant to the judicially supervised deferred prosecuted agreement is Federal Rule of Evidence 502(d–e), a provision added to the Federal Rules of Evidence only in 2008. In general, under Rule 502(d), the court may issue an order providing that a party's disclosure of documents protected by the attorney–client privilege or work product protection does not waive the privilege. Under Rule 502(e), if an agreement between the parties to that effect is embodied in a court order, it can bind persons other than the litigants that entered into the order (unless there was an intent to waive the privilege).[28]

Without benefit of a prospective court order, the parties are left to argue the issue of confidentiality before the court, with high stakes and uncertain results.[29] The courts have struggled with how to evaluate the work of persons acting in a monitor-like capacity in the context

24 Parties can also seek clarification from the court where agreements are silent on the issue of disclosure. See *SEC v. Am. Int'l Group*, 712 F. 3d 1 (DC Cir. 2013) (parties filed joint motion to clarify that the independent consultant's reports were intended to be confidential); see also *United States v. Philip Morris USA, Inc,* 793 F. Supp. 2d 164 (DDC 2011) (collecting cases where parties sought clarification of consent orders from the court).

25 See *United States v. Computer Associates Int'l, Inc,* Case No. 04 Cr. 837, Pitofsky Letter (19 April 2005).

26 id.

27 The court entered a jointly filed Stipulated and Agreed Protective Order providing that all information obtained by the independent examiner, as well as the independent examiner's 'files, notes and mental processes' were protected from disclosure to third parties, and the independent examiner and his 'agents, counsel, accountants and other experts shall not be required to answer any subpoena seeking materials referenced in paragraphs one and two of this Order and shall not be subject to any depositions or other discovery requests'. See *United States v. Computer Associates Int'l, Inc,* Case No. 04 Cr. 837, Stipulated and Agreed Protective Order (19 April 2005).

28 See Fed. R. Evid 502(d-e).

29 The ABA Standards note that 'there are . . . compelling reasons for keeping Monitor reports confidential', including the release of proprietary, confidential or competitive business information that may harm the corporation; the monitor's inability to promise confidentiality may inhibit the free flow of information; individuals named or easily identifiable in the report may not be able to challenge what they perceive as unfair denigration; other entities may be deterred from cooperating; and disclosure of the report may dissuade other entities from agreeing to the engagement of a monitor. ABA Standards at 40. Even disclosure of the monitor's fees might be seen by an entity as concerning, for fear that high monitor costs will be seen by others as evidence that the entity engaged in serious misconduct. id., at 33.

of traditional privileges designed to protect information from public access. Some courts have refused to find that existing protections extend to the work of the monitor, adhering to the traditional contours of the cited privilege.[30] Other courts have had to finesse the issue of where precisely the authority to protect these materials from disclosure derives.

In *In re LTV Sec. Litigation*, the court recognised a 'special officer privilege' where such an official had been appointed pursuant to a corporation's consent decree with the SEC.[31] The special officer was required to report to the SEC as well as to the corporation's audit committee. The court reasoned that his function was a 'hybrid of two roles, those of government investigator and privately retained counsel'; as such, because attorney–client and work-product privilege are 'reasonably flexible', and because the court must 'construe claims of privilege in their true factual context to ensure that the underlying policy justifications are served', the court refused to compel discovery of the special officer's work to shareholders in a class action brought against the corporation. The court specifically commented on the 'immediate adverse impact on the ongoing investigation' of the corporation, and focused on the concern that corporations would be less willing to engage in self-investigation were the special officer's reports to be disclosed. The court concluded that 'changing circumstances require courts constantly to review the need for and extent of existing privileges'.[32]

United States v. HSBC Bank USA, NA, represents a stark example of the high stakes involved when it comes to protecting the work of the monitor and the tenuous nature of those protections in the hands of an independent judiciary. In *HSBC*, the district court employed what it termed a 'novel' approach to its supervisory power, holding that it was authorised to monitor the execution and implementation of HSBC's deferred prosecution agreement with the government and directing the parties to file quarterly reports with the court.[33] Subsequently, the court received a letter from a *pro se* complainant, stating that

30 See *Osterneck v. E.T. Barwick Industries, Inc,* 82 F.R.D. 81 (N.D. Ga. 1979) (special counsel retained to assist in investigation and preparation of committee report to board of directors pursuant to consent agreement with SEC was not retained to give legal advice and work was neither privileged nor done in anticipation of litigation; court ordered special counsel to appear for depositions and produce documents concerning its work); see also *Litton Indus., Inc v. Lehman Bros. Kuhn Loeb, Inc,* 125 F.R.D. 51 (SDNY 1989) (receiver was an agent of the court and not the government and not entitled to common law deliberative process or law enforcement investigative privilege, nor work-product protection because interviews were not in anticipation of litigation and 'work product immunity requires a more immediate showing than the remote possibility of litigation').

31 *In re LTV Sec. Litigation*, 89 F.R.D. 595 (N.D. Tex. 1981).

32 In *Hofmann v. Schiavone Contr. Corp*, 630 Fed. Appx. 36 (2d Cir. 2015), the Second Circuit cited *LTV* in considering, but ultimately sidestepping, the concept of the 'special officer privilege'. In affirming the district court's grant of a motion to quash an application seeking materials from an ethical practice attorney, the Second Circuit noted that '[i]n our Circuit, we have not adopted a blanket "investigatory" or "special officer" privilege for consent decree monitors', but that under the facts of the case there was no need because '[t]he EPA was operating under continuous anticipation of litigation given his role under the consent decree'. Examination of the consent decree shows that the EPA had a mandate to investigate and eliminate corruption, with broad powers to interview union members, oversee and monitor the elections, issue subpoenas, take sworn testimony, commence disciplinary proceedings and recover assets that were dissipated or otherwise misappropriated. See *Hofmann v. Schiavone*, Case No. 11 Civ. 2346 (2d Cir.), Letter Motion, Ex. B (Consent Decree) (17 October 2012). Absent these broad powers, it is unclear whether the Court would have strained to find any privilege protection for the ethical practice attorney's work.

33 *United States v. HSBC Bank USA, NA*, Case No. 12 Cr. 763, 2013 U.S. Dist. LEXIS 92438 (EDNY 1 July 2013).

the monitor's report had a 'bearing' on a complaint he had filed against HSBC with the Consumer Financial Protection Bureau and that the report would validate his claims that HSBC was in violation of 'multiple sections of multiple Consent Decrees'.[34]

The district court reasoned that the report was a judicial document subject to a presumptive First Amendment right of access by the public, and that the *pro se* letter was a motion to unseal. The court directed the government to file the monitor's report itself, over the objection of both the government and HSBC, and despite the government's assurances that HSBC was acting in good faith to comply with the agreement.[35] The government argued that criminals could exploit the information[36] and HSBC argued separately that it was legally obliged to protect the confidential information it had provided the monitor.[37] Because HSBC had a global footprint and the monitorship's activities implicated various non-US jurisdictions, multiple interested parties advanced their views, including the Board of Governors of the Federal Reserve,[38] the United Kingdom's Financial Conduct Authority,[39] the Hong Kong Monetary Authority[40] and a Malaysian banking regulator.[41]

On appeal, the Second Circuit reversed.[42] The Court held that 'a federal court has no roving commission to monitor prosecutors' out-of-court activities just in case prosecutors might be engaging in misconduct', and had no 'freestanding supervisory power to monitor the implementation of a [deferred prosecution agreement]'. Accordingly, the Second Circuit held that the monitor's report was not relevant to the performance of the judicial function and, therefore, the district court abused its discretion in ordering it unsealed pursuant

34 See *United States v. HSBC Bank USA, NA*, Case No. 12 Cr. 763, Moore Letter (5 November 2015).

35 *United States v. HSBC Bank USA, NA*, Case No. 12 Cr. 763 2016 US Dist. LEXIS 11137 (EDNY. 2016).

36 See *United States v. HSBC Bank USA, NA*, Case No. 12 Cr. 763, Motion for Leave to File Monitor's Report Under Seal by USA (1 June 2015).

37 See *United States v. HSBC Bank USA, NA*, Case No. 12 Cr. 763, Letter in Support of the Motion for Leave to File Monitor's Report Under Seal by USA (1 June 2015).

38 See *United States v. HSBC Bank USA, NA*, No. 12 Cr. 763, Motion for Leave to File Monitor's Report Under Seal by USA, Exhibit 35-2 (1 June 2015) (letter stating that publication of the report would reduce the monitor's effectiveness because HSBC personnel would be less forthcoming, which could impact Federal Reserve examiners similarly, and because foreign regulators would be reluctant or unwilling to authorise the monitor to obtain information in their jurisdictions).

39 See *United States v. HSBC Bank USA, NA*, No. 12 Cr. 763, Motion for Leave to File Monitor's Report Under Seal by USA, Exhibit 35-3 (1 June 2015) (letter stating that it had a shared interest in regulating HSBC, the monitor was bound by confidentiality restrictions that applied to the FCA, publication of the monitor's report would risk foreign jurisdictions' refusal to allow the monitor to assess HSBC's operations throughout the remaining term of the deferred prosecution agreement, and would enable money launderers to evade sanctions.)

40 See *United States v. HSBC Bank USA, NA*, No. 12 Cr. 763, Motion for Leave to File Monitor's Report Under Seal by USA, Exhibit 35-4 (1 June 2015) (letter stating that it viewed the monitor's work as strong support for its own supervision of HSBC and the publication of the report may limit the extent to which whistleblowers and staff would come forward and candidly communicate with the monitor).

41 See *United States v. HSBC Bank USA, NA*, No. 12 Cr. 763, Motion for Leave to File Monitor's Report Under Seal by USA, Exhibit 35-5 (1 June 2015) (letter stating that it had previously granted approval for the monitor to access confidential information from HSBC Malaysia and its customers based on the assurance that the information would be kept confidential to evaluate internal controls).

42 *United States v. HSBC Bank USA, NA*, 863 F. 3d 125 (2d Cir. 2017).

to the First Amendment objection.[43] Notwithstanding that the Second Circuit restrained the district court, the case remains an example of how significant the confidentiality concerns are in monitorships and the challenges in maintaining confidentiality in the face of legal uncertainty.

Federal and state banking law privilege

There are a handful of federal and state statutes and regulations that bear on privilege and confidentiality in connection with financial institutions. While a full discussion of these provisions and their intricacies is beyond the scope of this chapter, a basic introduction is important for an understanding of the manner in which monitorships of federal- and state-regulated financial institutions may implicate the protection of confidential and privileged information.

Federal bank examination privilege, confidential

Supervisory information and anti-waiver provision

Bank examinations are a regular and important part of the life cycle of a financial institution. The purpose, in general, is to assess the safety and soundness of the financial institution and to ensure its compliance with a host of requirements applicable to banks. These examinations, the reports regulators make of them, and other materials generated by bank regulators in the performance of their duties with respect to specific institutions, are non-public and are not easily obtained as a result of federal regulations that make them privileged.[44]

Beyond these specific regulations, there is a qualified common law privilege widely recognised by US courts: '[s]tated broadly, the bank examination privilege is a qualified privilege that protects communications between banks and their examiners in order to preserve absolute candor essential to the effective supervision of banks.'[45] It is not without its limits, however, and has frequently been held to be confined to opinions and recommendations, not factual material.[46] Indeed, in opposing the disclosure of the report of the monitor in *HSBC*, the Board of Governors of the Federal Reserve Board invoked the bank examination privilege

43 In a strongly worded concurrence, Judge Pooler urged Congress to consider legal reforms addressing more oversight over deferred prosecution agreements, writing, '[a]s the law governing [deferred prosecution agreements] stands now . . . the prosecution exercises the core judicial functions of adjudicating guilt and imposing sentence with no meaningful oversight from the courts.' In *United States v. Toyota Motor Corp.*, 278 F. Supp. 3d 811 (SDNY 2017), the court granted the government's motion to dismiss its prosecution on the basis that the defendant had complied with a deferred prosecution agreement, but endorsed Judge Pooler's views, noting that deferred prosecution agreements 'introduce opaqueness to criminal proceedings and have created a cottage industry of monitorships doled out by the Department of Justice', and urging Congress to 'step in to clarify the contours of a court's authority in connection with corporate prosecutions'.

44 See generally 12 C.F.R. Section 4.36 (Office of the Comptroller of the Currency); 12 C.F.R. Section 261.20 (Federal Reserve Board); 12 C.F.R. Section 309.6 (Federal Deposit Insurance Corporation); 12 C.F.R. Section 1070.41 (Consumer Financial Protection Bureau).

45 *Wultz v. Bank of China Ltd*, 61 F. Supp. 3d 272, 281 (SDNY 2013).

46 *Schreiber v. Soc'y for Sav. Bancorp, Inc,* 11 F.3d 217, 220 (DC Cir. 1993).

and, while not quite contending that it was applicable to the monitor of *HSBC*, noted the similarity between bank examinations and the monitor's endeavour.[47]

Finally, 12 U.S.C. Section 1828(x) of Title 12 permits a financial institution to disclose privileged information to a wide variety of federal, state and foreign banking authorities, without waiving the privilege as to third parties to whom the disclosure is not made. It is, in effect, a federal statute that permits selective waiver:

> *The submission by any person of any information to the Bureau of Consumer Financial Protection, any Federal banking agency, State bank supervisor, or foreign banking authority for any purpose in the course of any supervisory or regulatory process of such Bureau, agency, supervisor, or authority shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information under Federal or State law as to any person or entity other than such Bureau, agency, supervisor, or authority.*

New York Banking Law Section 36.10

There is a wide variety of state law relevant to the question of whether any privilege or confidentiality attaches to information and documents. Given its importance as a financial centre, the number of US and global banks with operations in New York, and the prominent role of its banking regulator, the most significant such state statute is Section 36.10 of the New York State Banking Law.[48]

Section 36.10 identifies a broad category of documents and materials that constitute 'confidential communications'. Such documents include '[a]ll reports of examinations and investigations, correspondence and memoranda concerning or arising out of such examination and investigations' held, in general, by entities supervised by the New York State Department of Financial Services (DFS). Section 36.10 provides that confidential communications 'shall not be subject to subpoena and shall not be made public'.

Indeed, Section 36.10 has become significant beyond the express purpose of shielding information from discovery and has been used, in effect, as a stand-alone enforcement mechanism. For example, in connection with concerns about the work done by consulting firms on behalf of entities supervised by DFS, the then-Superintendent of DFS noted that, under the resolution with one of those firms:

> *If [the firm] breaches this agreement, DFS could issue an order pursuant to New York Banking Law § 36.10 barring regulated financial institutions from sharing confidential supervisory information with [the firm]. Under New York Banking Law § 36.10, a statute that dates back to 1892, DFS can revoke a consultant's access to confidential supervisory information if continued access to that information would not serve 'the ends of justice and the public advantage . . .*

47 See *United States v. HSBC Bank USA, NA*, Case No. 12 Cr. 763, Letter from Jack Jennings, Senior Associate Director, Division of Banking Supervision and Regulation 2-4 (29 May 2015) (Docket Entry 35-2).

48 For a discussion of the laws of other states, which are similar, but by no means uniform, see generally Eric B Epstein, 'Why the Bank Examination Privilege Doesn't Work As Intended', 35 *Yale J. on Reg. Bull.* 17 (2017).

> *Regulators basically hold the keys to the kingdom for consultants in the form of access to confidential supervisory information. We have the power to shut off the spigot. Using that authority could be a way to impose accountability in an area that's seen precious little of it.*[49]

But Section 36.10 has been subjected to scant testing and has not always resulted in the maintenance of the confidentiality of monitor-generated documents. For example, in a False Claims Act case brought in Texas, the relator sought via subpoena documents generated by the monitor of a mortgage servicing company that had entered into a consent order with DFS. In the litigation, the monitoree and DFS opposed the subpoena and asserted, among other grounds, Section 36.10.

The district court denied the motion to quash. The court found, first, that the monitor's report were not settlement communications protected by Federal Rule of Evidence 408[50] because they were generated long after the resolution with DFS. The court then applied a balancing test to determine whether Section 36.10 should be recognised under Federal Rule of Evidence 501[51] and considered a variety of factors:

> *(1) whether the communications originated in a confidence that they will not be disclosed; (2) whether confidentiality is essential to the full and satisfactory maintenance of the relation between the parties; (3) whether the relation is one in which the opinion of the community ought to be sedulously fostered; and (4) whether the injury that would inure to the relation by the disclosure of the communications is greater than the benefit gained for the correct disposal of litigation.*

Ultimately, the court rejected recognition of Section 36.10 under Federal Rule of Evidence 501 and ordered the monitor's reports to be produced.[52]

Additional monitor–monitoree considerations

Discovery of new or ongoing unlawful conduct

Monitorships are increasingly global in nature. More and more, the conduct that resulted in the monitorship and the work of the monitorship spans many areas of an institution's

49 New York State Department of Financial Services, Excerpts From Superintendent Lawsky's Remarks On Consulting Reform At American Bar Association Financial Services Regulatory Forum (24 June 2013) (available at https://www.dfs.ny.gov/reports_and_publications/press_releases/pr1306242); see also *In the Matter of Promontory Fin. Grp, LLC*, Agreement (18 August 2015) (available at https://www.dfs.ny.gov/docs/about/ea/ea150818.pdf).

50 Federal Rule of Evidence 408 precludes the use at trial of evidence of settlement communications, but only in certain circumstances and not for all purposes. Rule 408 does not, however, control the discoverability of settlement-related communications. See Fed. R. Evid. 408 advisory committee's 2006 and 1993 notes.

51 Federal Rule of Evidence 501 requires a district court, in the absence of a constitutional right, specific federal statutes, or federal rules, to apply the common law 'as interpreted by United States courts in the light of reason and experience' to questions of privilege. If state law provides the rule of decision for a claim or defence, state law governs.

52 *United States ex rel. Fisher v. Ocwen Loan Servicing LLC*, Case No. 12 Civ. 543, 2015 WL 3942900 (E.D. Tex. 26 June 2015); see also *Rouson ex rel. Estate of Rouson v. Eicoff*, Case No. 04 Civ. 2734, 2006 WL 2927161 (EDNY 11 October 2006).

operations and in different countries. As a result, there is frequently present the possibility that the monitor will uncover new or ongoing unlawful or problematic conduct. Recent deferred prosecution agreements provide the monitor significant discretion to determine how to proceed upon the discovery of such conduct, including immediate disclosure of actual misconduct to the DOJ, with the option to disclose the actual misconduct to the monitoree's general counsel, chief compliance officer or audit committee; immediate disclosure of possible misconduct to the DOJ, but not the company, under certain circumstances; and immediate disclosure of possible misconduct to the monitoree's general counsel, chief compliance officer or audit committee, with optional disclosure to the DOJ.[53]

Other monitorships have given the monitor more flexibility in determining how to respond to newly discovered conduct:

> *If potentially illegal or unethical conduct is reported to the Monitor, the Monitor may, at his or her option, conduct an investigation, and/or refer the matter to the Office.* ***The Monitor should, at his or her option, refer any potentially illegal or unethical conduct to [the entity]'s compliance office.*** *The Monitor may report to the Office whenever the Monitor deems fit but, in any event, shall file a written report not less often than every four months regarding: the Monitor's activities; whether [the entity] is complying with the terms of this Agreement; and any changes that are necessary to foster [the entity]'s compliance with any applicable laws, regulations and standards related to the Monitor's jurisdiction as set forth in [the agreement].*[54]

Whenever the company itself learns of the misconduct, it will typically conduct its own investigation, separately from the monitor, to preserve whatever privilege may attach to its findings. An additional consideration here is when the government has asked either the monitor or the company's counsel to defer to the other in looking into this misconduct as part of a deconfliction effort.[55]

Monitor's access to privileged monitoree information

Monitorships are typically governed by a written mandate setting out the scope of the monitor's work. Frequently, the mandate of the monitorship is forward-looking, that is, the monitor is tasked with ensuring that the monitoree complies with the terms of its resolution with the government going forward.

Often, the key component of the resolution is to ensure the robustness of the monitoree's current compliance programme so as to reduce of the risk of recurrence of the conduct that resulted in the enforcement effort that brought about the monitorship. As one resolution described the monitor's mandate:

53 *Odebrecht SA*, Plea Agreement, Attach. D, Paragraph 20(a-c).

54 *United States v. Toyota Motor Corp*, Case No. 14 Cr. 186, Deferred Prosecution Agreement at 9 (SDNY 19 March 2014) (emphasis added).

55 For a general discussion of deconfliction, see Lanny A Breuer and Mark T Finucane, DOJ 'Deconfliction' Requests: Considerations and Concerns, *Law360* (1 March 2017).

> *The Monitor's primary responsibility is to assess and monitor the Company's compliance with the terms of the Agreement, including the Corporate Compliance Program . . . so as to specifically address and reduce the risk of any recurrence of the Company's misconduct. During the Term of the Monitorship, the Monitor will evaluate, in the manner set forth below, the effectiveness of the internal accounting controls, record-keeping, and financial reporting policies and procedures of the Company as they relate to the Company's* ***current and ongoing compliance*** *with the [Foreign Corrupt Practices Act] and other applicable anti-corruption laws (collectively, the 'anti-corruption laws') and take such reasonable steps as, in his or her view, may be necessary to fulfill the foregoing mandate (the 'Mandate'). This Mandate shall include an assessment of the Board of Directors' and senior management's commitment to, and effective implementation of, the corporate compliance program described [elsewhere in] the Agreement.*[56]

There are, however, monitorships that have an historical or retrospective component that may require the monitor to investigate matters of the past. For example, one recent resolution required the monitor to review and report on various current compliance issues as well as '[t]he elements of the Bank's corporate governance that *contributed to or facilitated the improper conduct* discussed in this Consent Order and that permitted it to go on'.[57]

These types of monitorships, with both an historical and prospective component, can be uniquely challenging. Experienced corporate monitor Bart M Schwartz of Guidepost Solutions has expressed strong views of the difficulties of successfully completing monitorships having both backward- and forward-looking components. He has written:

> *[A] Monitor should be forward looking. It is NOT 'another investigation.' I have turned down assignments where a company asked me to investigate wrongdoing and help build a compliance program. You can do one or the other; but I believe doing both is difficult, if not impossible, and if undertaken will cause problems on both sides of the equation. Think about it, how can one assign blame on one day and then seek cooperation the next day? It will not work.*[58]

A contrary and perhaps equally valid view is that an investigation of historical practices may inform future improvements, particularly where management and line-level employees have remained in place between the time of the conduct that resulted in the monitorship and the present.

Whether Schwartz is correct or not in his view of the impossibility of contemporaneously 'investigat[ing] wrongdoing and help[ing] build a compliance program', dual historical and prospective monitorships do generate unique issues regarding privilege. Namely, if the mandate of the monitor is to 'investigate the investigation' that the entity undertook when it

56 *Sociedad Química y Minera de Chile, SA*, Deferred Prosecution Agreement, Attach. D, Paragraph 2 (emphasis added).

57 See *In the Matter of Commerzbank AG*, New York State Department of Financial Service, Consent Order Paragraph 49(a) (12 March 2015) (emphasis added).

58 See Bart M Schwartz, Guidepost Solutions LLC, 'Clarifying the Role of a Monitor' (24 February 2014) (available at http://www.guidepostsolutions.com/insight/clarifying-role-monitor).

became aware of the misconduct or when the government was investigating the misconduct, will the monitor by necessity be required to delve into information that may otherwise be protected by the attorney–client privilege and work-product protections?

If the answer to this question is yes, the monitorship may require a resolution of what are likely to be complicated questions of privilege. No easy solutions to the question of a monitor's access to company-privileged information are identifiable, even in solely prospective monitorships with no historical investigation required. Given the difficulties of solving these problems in advance, recent monitorships – including those with only a going-forward perspective – have directed the monitor and the monitoree to work cooperatively to solve these problems:

> *In the event that the Company seeks to withhold from the Monitor access to information, documents, records, facilities, or current or former employees of the Company that may be subject to a claim of attorney–client privilege or to the attorney work-product doctrine, or where the Company reasonably believes production would otherwise be inconsistent with applicable law, the Company shall work cooperatively with the Monitor to resolve the matter to the satisfaction of the Monitor.*[59]

The alternative to the monitor and monitoree's resolution on their own of thorny questions of privilege or, for that matter, complicated questions of access to material under foreign law, is to put the government in the unenviable position of mediating these disputes:

> *If the matter cannot be resolved, at the request of the Monitor, the Company shall promptly provide written notice to the Monitor and the Department. Such notice shall include a general description of the nature of the information, documents, records, facilities or current or former employees that are being withheld, as well as the legal basis for withholding access. The Department may then consider whether to make a further request for access to such information, documents, records, facilities, or employees.*[60]

It is notable that recent resolutions that employ this language do not provide that the government will resolve such disputes. The recent language provides simply that the dispute will be brought to the attention of the government for further action.

Conclusion

Everyone involved in a monitorship has a vested interest in its success. The monitoree has a desire to improve its compliance programme, prevent future unlawful conduct and allow the monitor to complete its work in as timely, efficient and cost-effective a manner as possible. The monitor seeks to drive real improvement in the monitoree's compliance programme and ensure lasting change so the problems of the past do not recur by completing its work within

59 *Odebrecht SA*, Plea Agreement, Attach. D, Paragraph 5; see also *Toyota Motor Corp.*, Deferred Prosecution Agreement at 7 ('To the extent that the Monitor seeks access to information contained within privileged documents or materials, [the entity] shall use its best efforts to provide the monitor with the information without compromising the asserted privilege.')

60 *Odebrecht SA*, Plea Agreement, Attach. D, Paragraph 6.

the time allotted by the monitoree's resolution with the government. And the government has an interest in preventing further unlawful conduct by leveraging the expertise and resources of an external party.

That said, each of the parties involved in a monitorship approaches the issues of privilege and confidentiality from very different perspectives. Given the unsettled nature of some important questions of privilege and confidentiality in the monitorship context, the most successful monitorships will frequently arise where there is a repository of trust, good faith and flexibility on the part of all concerned.

19

Judicial Scrutiny of DPAs and NPAs

John Gleeson[1]

The increased use of deferred prosecution agreements (DPAs) to resolve criminal investigations into allegations of corporate misconduct has raised questions about the role of the court. Unlike non-prosecution agreements (NPAs), which resolve investigations in what is essentially a private contract between the company and the government, ensuring no role for the judiciary, DPAs result in the filing of a criminal charge. Though the DPA contemplates the dismissal of that charge at the end of the term of the agreement, its filing nonetheless commences a federal criminal case. What is the role, if any, of the court in that case? Does it include any responsibility to approve or disapprove the terms of the DPA? What is the court's role, if any, with respect to the conduct of the years-long monitorships those agreements typically impose upon the company?

The Supreme Court of the United States has yet to weigh in on these issues. However, the nature and boundaries of the authority of courts to scrutinise DPAs and the monitorships they create have been the focus of two significant decisions from United States courts of appeals, one from the Second Circuit and the other from the DC Circuit. There will likely be more guidance in future cases, but this is clear already: the authority of the executive branch in this context is expansive, and indeed when it comes to the decision whether to charge a crime, that authority is plenary. Judicial authority, by contrast, is correspondingly narrow. The circumstances giving rise to that narrow authority will require further refinement by the courts, but they will almost certainly require clear evidence of government misconduct. In the absence of such evidence, the judicial scrutiny of DPAs and monitorships in the United States is essentially non-existent.

1 John Gleeson is a partner at Debevoise & Plimpton LLP. The author would like to thank Fabricio Archanjo and Victoria Recalde for their extremely valuable contributions to this chapter.

The development of the narrow judicial role

The two most significant opinions addressing the role of judges with respect to DPAs and monitorships are the Second Circuit's 2017 decision in *United States v. HSBC Bank USA, N.A.*[2] and the DC Circuit's decision a year earlier in *United States v. Fokker Services, B.V.*[3] As discussed below, both courts adopted an extremely narrow view of the role and authority of the judge after a DPA is filed. These decisions have shaped the legal landscape in this area, and though their placement of federal judges on the sidelines has been the subject of substantial criticism and scholarly debate, that landscape is unlikely to undergo significant change in the years ahead.

The Second Circuit's decision in *HSBC*

In December 2012, the government and HSBC entered into a DPA to resolve an investigation into allegations of money laundering and sanctions violations by the bank. Pursuant to the agreement, the government filed an information charging HSBC with, among other things, violating the Bank Secrecy Act and the International Emergency Economic Powers Act.[4] The DPA was accompanied by a Corporate Compliance Monitor agreement.

At the first appearance before the district court, the parties jointly moved for an order holding the case in abeyance for five years – the duration of the monitorship – and an order excluding those five years from the 70-day period within which trials must otherwise commence under the Speedy Trial Act. They further contended that the authority of the court was limited to determining whether to order such an exclusion (i.e., the court had no authority to approve or disapprove the DPA itself).[5]

The district court disagreed. Acknowledging the government's 'absolute discretion to decide not to prosecute', and its 'near-absolute power' to dismiss a criminal charge after it has been brought, the court observed that the government had chosen neither path; rather, it had built into the DPA a criminal prosecution that would remain on the court's docket for five years.[6] 'There is nothing wrong with that', the court reasoned, 'but a pending criminal case is not window dressing . . . By placing a criminal matter on the docket of a federal court, the parties have subjected their DPA to the legitimate exercise of that court's authority.'[7]

In light of the '[s]ignificant deference' owed to an executive branch determination of the appropriate terms on which to resolve an investigation, together with the institutional limitations on a judge's ability to second-guess those determinations, the district court concluded that the decision to approve the DPA itself was 'easy, for it accomplishes a great deal'.[8] But it further held that it had the authority pursuant to the supervisory power of federal courts to oversee the future implementation of the DPA over its five-year span. The point of the supervision, the court reasoned, was to protect the integrity of the judiciary by ensuring that

2 *United States v. HSBC Bank USA, NA*, 863 F.3d 125 (2d Cir. 2017).

3 *United States v. Fokker Servs. B.V.*, 818 F.3d 733 (DC Cir. 2016).

4 *United States v. HSBC Bank USA, NA*, No. 1:12-CR-763, 2013 WL 3306161 at *1 (EDNY 2013). Full disclosure: I was the district judge in *HSBC*.

5 id., at *1–2.

6 id., at *5.

7 id.

8 id., at *7–8.

the court did not lend its imprimatur to conduct 'that smacks of lawlessness or impropriety'.[9] As examples of such impropriety, the court posited four situations:

- the government requires the company to waive privileges, in violation of ethical rules and Department of Justice (DOJ) policy;
- it requires a company to violate the Fifth and Sixth Amendment rights of its employees;
- it selects a patently unqualified person, who is an intimate friend of the prosecutor, to serve as the monitor; and
- it directs a company to remediate a breach of a DPA by endowing a chair at the prosecutor's alma mater.[10]

To facilitate its oversight of the implementation of the DPA, the court directed the parties to file quarterly reports with the court 'to keep it apprised of all significant developments in the implementation of the DPA'.[11] The parties did not seek appellate review of the district court's order.

Two and a half years later, the district court filed a second decision in the case.[12] In response to one of the government's quarterly submissions, which purported to summarise a report by the monitor, the court had directed the parties to file the report itself under seal. After that, a member of the public sought an order unsealing the monitor's report pursuant to the First Amendment right of access to judicial documents, and the court granted that application subject to an order permitting certain redactions necessary to ensure that the monitor could effectively perform its role.[13] Both sides appealed the unsealing and redaction orders.

The Second Circuit reversed. At the heart of its decision was the holding that the district court's assertion of the supervisory power of the courts over the DPA ran 'headlong into the presumption of regularity that federal courts are obliged to ascribe to prosecutorial conduct and decision-making'.[14] A district court 'has no roving commission' to monitor out-of-court conduct 'just in case prosecutors might be engaging in misconduct'.[15] Since government misconduct had not actually been brought to the court's attention, any authority the court might have pursuant to the supervisory power had not been triggered. The court thus held that '[b]ecause the Monitor's Report is not now relevant to the performance of the judicial function, it is not a "judicial document" and the district court erred in ordering it unsealed'.[16]

While rejecting the district court's holding that the supervisory power of federal courts permitted the district court to monitor the implementation of the DPA 'based on the theoretical possibility' of government misconduct, the Second Circuit explicitly acknowledged that such authority 'might very well be justified' if clear evidence of such misconduct comes 'to a district court's attention (for example, through a whistleblower filing a letter with the court)'.[17] However, only allegations of misconduct that 'smack[] of impropriety' can authorise

9 id., at *4–6.
10 id., at *6.
11 id., at *11.
12 *United States v. HSBC Bank USA, NA*, No. 1:12-CR-763, 2016 WL 347670 (EDNY 2016).
13 id., at *5–7.
14 *HSBC*, 863 F.3d at 131.
15 id., at 137.
16 id., at 129.
17 id., at 136–37.

a court to act; criticisms of the pace of the remediation efforts required by the DPA or of the corporate culture of the company subject to the DPA do not suffice.[18]

In sum, the Second Circuit articulated a narrow role indeed for judges when DPAs are brought before them: 'Absent unusual circumstances not present here, a district court's role vis à vis a DPA is limited to arraigning the defendant, granting a speedy trial waiver if the DPA does not represent an improper attempt to circumvent the speedy trial clock, and adjudicating motions or disputes as they arise.'[19] The 'unusual circumstances' that broaden that authority occur only when a third party comes forward with clear evidence of impropriety.

The DC Circuit's decision in *Fokker*

The defendant in *Fokker* was an aerospace company that violated the International Emergency Economic Powers Act by selling aircraft parts to customers in sanctioned countries, principally Iran.[20] Pursuant to a DPA, the government filed an information charging a scheme to evade the sanctions. Among other things, the DPA required the defendant pay $10.5 million, continue to cooperate with the government, and implement a new compliance programme. Provided those and other conditions were met, the charge would be dismissed after 18 months.[21]

When the criminal charge was filed, the parties argued that the district court had minimal authority to review the DPA. Inspired by the district court's decision in *HSBC* (which had not yet been reversed), the court invoked the supervisory power and concluded that the integrity of the judicial process would be compromised by approving an overly lenient prosecution.[22] Citing the government's failure to bring criminal charges against individuals, its failure to insist on a monitor, and the short time period of the DPA, the court held that 'it would undermine the public's confidence in the administration of justice and promote disrespect for the law' if the court allowed the defendant to be 'prosecuted so anemically for engaging in such egregious conduct'.[23] The court rejected the DPA as an '[in]appropriate exercise of prosecutorial discretion'.[24] Both sides joined in an appeal to the DC Circuit, which emphatically reversed the decision.

'The Executive's primacy in criminal charging decisions is long settled,' the DC Circuit held, citing Article II of the Constitution, and, correspondingly, that is an area where 'judicial authority is . . . at its most limited'.[25] Accordingly, judges lack the authority to second-guess executive branch determinations about whether to initiate charges, whom to prosecute, which charges to bring, and whether to dismiss pending charges. Like the Second Circuit, the DC Circuit noted that executive branch decisions of this sort are entitled to a presumption of regularity, absent clear evidence to the contrary.[26] Nowhere, the court reasoned, is judicial authority to review executive branch decisions more limited than in the precise setting of

18 id., at 137 n. 4.

19 id., at 129.

20 *United States v. Fokker Servs. BV*, 79 F. Supp. 3d 160, 162 (2015).

21 id., at 164.

22 id., at 164-66.

23 id., at 167.

24 id.

25 id., at 741 (internal citations and quotation marks omitted).

26 id., at 741-72.

dismissing charges – and, by analogy, deferring prosecution. Withholding approval of the government's decision to defer criminal charges would be 'a substantial and unwarranted intrusion on the Executive Branch's fundamental prerogatives'.[27] As for the implementation of the DPA, 'the court plays no role . . . Rather, the prosecution – and the prosecution alone – monitors a defendant's compliance with the agreement's conditions and determines whether the defendant's conduct warrants dismissal of the pending charges.'[28]

Prospects for change

The tension addressed by *HSBC* and *Fokker* arose from the fact that the DOJ, by choosing to resolve investigations of companies through DPAs, deliberately implicated the federal courts by filing criminal charges. When agreed-upon resolutions of criminal investigations contemplate a plea of guilty, judges not only have the power to approve or disapprove the agreement,[29] but the duty to ensure that there is a factual basis for the guilty plea before accepting it.[30] The judicial reflexes grounded in that power and duty no doubt informed the various examples of district judges stepping in to ensure that the terms of DPAs adequately served the public interest.[31] What the Second Circuit and the DC Circuit made clear, however, is that DPAs, notwithstanding the filing of a criminal charge, are but one manifestation the power not to prosecute, a power vested exclusively in the executive branch. In short, judges have neither the power nor the duty to vet the truthfulness, reasonableness or accuracy of the government's factual allegations, or the charges called for (or foregone) by the DPA.

Though the Second Circuit and the DC Circuit are only two of the 12 regional courts of appeals in the United States, they are widely regarded as among the most influential. And their expansive view of executive branch power in this context, which is grounded in both the Constitution and Supreme Court case law, will not likely be disturbed by the Supreme Court. As a result, their narrow view of the judicial role with respect to DPAs and monitors has been followed by lower courts within and without those circuits,[32] and is essentially now the law of the land.

The fact that the law seems settled, however, does not mean that it is uncontroversial. On the contrary, there is criticism from all quarters. One of the circuit judges in the *HSBC* case wrote a concurring opinion calling upon Congress to enact legislation requiring greater transparency of DPAs, and calling for judicial review to ensure they serve the public interest.[33] US Senator Elizabeth Warren, who is currently seeking the US presidency, introduced

27 id., at 744.

28 id.

29 See Fed. R. Crim. P. 11(c)(3)-(5); U.S.S.G. Section 6B1.2.

30 Fed. R. Crim. P. 11(b)(3).

31 In addition to *HSBC* and *Fokker*, see, e.g., *United States v. WakeMed*, No. 5:12-CR-398, 2013 WL 501784 (EDNC 2013) (approving a DPA after twice rejecting the adequacy of the agreement and equating the settlement to a 'slap in [sic] the hand' for a 'corporate giant' defendant that was 'too big to jail'. (Transcript of Docket Call, WakeMed, No. 5:12-CR-398 (EDNC 17 Jan. 2013)).

32 See, e.g., *United States v. U.S. Bancorp*, No. 1:18-CR-150 (SDNY 2018); *United States v. Transp. Logistics Int'l, Inc*, No. 8:18-CR-11 (D. Md. 2018).

33 *HSBC*, 863 F.3d at 142 (Pooler, J, concurring).

a bill entitled 'Ending Too Big to Jail Act', which would implement these changes.[34] The title of the bill derives from the seminal book *Too Big To Jail*, in which Professor Brandon L Garrett criticised DOJ's 'sweetheart deals' with US companies in the wake of the financial crisis, and calling for greater judicial involvement in monitoring both the terms of DPAs and the monitorships they create.[35] And recently adopted DPA programmes in other countries uniformly reject the US approach, providing for meaningful judicial review of the terms of such agreements.[36]

Despite the controversy, change appears unlikely. First, the DOJ has twice amended its internal guidelines regarding DPAs and monitors in response to criticism.[37] Second, there is no sign of a consensus in either house of Congress that legislative change is afoot or even necessary. Finally, because the executive branch powers at issue are grounded in Article II of the Constitution, any legislation seeking to curtail those powers would be subject to constitutional challenge on separation of powers grounds.

Conclusion

Although the Supreme Court has yet to rule on how much supervision, if any, judges can exercise over DPAs and monitorships, the Second Circuit and the DC Circuit have severely limited the court's authority to exercise their supervisory power over DPAs. The terms of a DPA, like the government's changing decisions, are not subject to judicial scrutiny. As for the monitorships those agreements establish, absent clear evidence of government impropriety, there is simply no role for the court.

34 Introduced on 14 March 2018. The bill aims to 'create accountability in deferred prosecution agreements' by requiring a judicial determination that the agreements are in the 'public interest' according to various factors. See S. 2544, 115th Cong. Section 4 (2018).

35 Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* 283 (2016); See also Peter R Reilly, 'Sweetheart Deals, Deferred Prosecution, and Making a Mockery of the Criminal Justice System: U.S. Corporate DPAs Rejected on Many Fronts', 50 *Ariz. St. L. J.* 1113 (2019).

36 See Reilly, *supra* note 35 at 1140-59 (discussing DPA programmes in Australia, Canada, France, Ireland, Singapore and the United Kingdom and noting the 'common denominator' among all programmes is 'meaningful judicial review of the terms of each agreement').

37 See Memorandum from Craig S Morford, Acting Deputy Attorney General, US Dep't of Justice, to Heads of Department Components and US Attorneys, Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (7 March 2008); Memorandum from Brian A Benczkowski, Assistant Attorney General, US Dep't of Justice, to All Criminal Division Personnel, Selection of Monitors in Criminal Division Matters (11 October 2018).

Conclusion

Anthony S Barkow, Neil M Barofsky and Thomas J Perrelli[1]

In recent years, numerous prosecutorial authorities and regulators have come to see the installation of an independent monitor as a valuable tool when resolving an investigation into corporate wrongdoing. Monitorships have been used in matters covering an array of legal topics (from fraud and corruption to tax and privacy violations) and in an array of industries (from banking and energy to healthcare and housing) involving both private and government entities. And although the United States may have been the first country to regularly implement monitorships as part of the settlement process, as this guide demonstrates, they are becoming increasingly common throughout the world. As a result, even as the regulatory appetite for monitorships may ebb and flow in any particular jurisdiction, with their breadth of usage worldwide in so many areas, monitorships are here to stay. It is therefore critical that companies, legal practitioners and regulators understand how monitorships operate, what the best practices are, and what potential they have to effect lasting cultural change.

This guide provides an important roadmap to understanding these best practices for making monitorships effective. When performed correctly, and with the proper cooperation between the monitor and the monitoree, monitorships can be a valuable tool for implementing lasting corporate reform. An improvement of this kind serves the goals of the government and the corporation, which have a shared interest in ensuring that the company's misconduct is firmly in its rear-view mirror, and in instilling a positive corporate culture that will help the company avoid the perils of recidivism. By compiling insights from the leaders in the field, this guide is a key resource for anyone who wants to learn about this emerging area of legal practice.

1 Anthony S Barkow, Neil M Barofsky and Thomas J Perrelli are partners at Jenner & Block.

Appendix 1

About the Authors

Ericka Aiken
WilmerHale

Ms Aiken is a senior associate in WilmerHale's white-collar defence and investigations practice. Ms Aiken has represented individuals, private companies and financial institutions in criminal, civil and regulatory matters involving the Department of Justice, the Securities and Exchange Commission and the Consumer Finance Protection Bureau. Her litigation practice has included representing private companies in congressional investigations and in government investigations involving alleged violations of the Foreign Corrupt Practices Act and the Fair Housing Act. Ms Aiken currently serves as a team member in the monitorship of a major healthcare corporation.

Anthony S Barkow
Jenner & Block LLP

Anthony S Barkow, co-chair of Jenner & Block's investigations, compliance and defence practice, represents companies and executives in global/cross-border and national criminal and regulatory investigations. He also conducts internal investigations, provides counsel to senior management on enforcement and compliance issues, and serves as a corporate monitor. As a federal prosecutor for 12 years in the US Attorney's Office for the Southern District of New York and for the District of Columbia, and in Main Justice, he prosecuted some of the country's most significant international terrorism and white-collar criminal cases. He has tried more than 40 cases and briefed and argued more than 10 cases on appeal. In 2005, Mr Barkow was awarded the Attorney General's Award for Exceptional Service, the highest award bestowed by the Attorney General within the Department of Justice. At Jenner & Block, Mr Barkow served as one of the team leaders conducting an investigation and producing an internal report to the board of directors for General Motors Company (GM) with regard to events leading up to certain recalls stemming from faulty ignition switches, and represented GM in a related investigation by the US Attorney's Office for the Southern District of New

York, culminating in the resolution of the matter through a deferred prosecution agreement. He also co-led the monitorship of Credit Suisse AG following the bank's $715 million settlement with the New York Department of Financial Services, part of a broader $2.6 billion settlement that involved the US Department of Justice and federal regulators.

Neil M Barofsky
Jenner & Block LLP

Neil M Barofsky, the head of Jenner & Block's monitorships practice, is an accomplished trial lawyer and well-known authority on a variety of issues at the intersection of economics, law, business, policy and politics. Drawing upon his experience as a former federal prosecutor and as the presidentially appointed first special inspector general of the historic $700-billion Troubled Asset Relief Program (TARP), Mr Barofsky assists companies seeking to improve their corporate culture through compliance counselling and monitorships. He also focuses on white-collar investigations and complex commercial litigation, often with a public interest component. He is a prolific author and speaker who has developed a national reputation in the compliance and white-collar arenas. In 2015, he was named one of the *National Law Journal*'s 'winning' litigators. He was also recognised by the *National Law Journal* as a regulatory and compliance 'trailblazer'.

Ashley Baynham
Brown Rudnick LLP

Ashley Baynham represents some of the world's leading companies and their executives as well as other prominent individuals in high-stakes and sensitive matters involving the Department of Justice (DOJ), the Securities and Exchange Commission (SEC), and other federal and state agencies.

Ashley focuses on white-collar criminal defence, securities enforcement actions, and complex commercial litigation. Her services include: defending clients in SEC enforcement actions; defending clients in federal criminal and regulatory proceedings with a focus on the financial and healthcare industries; representing clients in cross-border, multi-agency criminal and civil investigations; and advising clients regarding internal investigations and corporate governance matters.

Michael J Bresnick
Venable LLP

Michael Bresnick is a partner in Venable LLP's Washington, DC office, serving as chair of the financial services investigations and enforcement practice. He advises executives, directors, banks and other financial services companies in anti-money landering, consumer protection, and other civil and criminal investigations and enforcement actions by a variety of government agencies. He also currently serves as the independent monitor for Deutsche Bank AG following the bank's $7.2 billion settlement with the US Department of Justice over the sale of residential mortgage-backed securities.

Mr Bresnick previously served as executive director of President Obama's Financial Fraud Enforcement Task Force within the DOJ. In that role he worked directly with US Attorney

General Eric Holder and other leaders throughout federal and state government to lead the largest interagency coalition ever assembled to combat financial fraud.

In total, Mr Bresnick spent 10 years in DOJ (where he also served as a supervisor in the Criminal Division's Fraud Section and assistant US attorney in the US Attorney's Office for the Eastern District of Pennsylvania), leading 16 federal jury trials and representing the government before the United States Court of Appeals for the Third Circuit on numerous occasions.

Daniel Lucien Bühr
LALIVE SA

Daniel Lucien Bühr joined LALIVE in 2011 and is based in our Zurich office. His main areas of practice are regulatory and banking law and white-collar crime and compliance, mostly focusing on investigations and best practice risk and compliance management. He also manages complex cross-border legal and compliance projects and monitors corporate compliance remediation projects.

Daniel is a member of the International Bar Association, Swiss Management and the International Association of Independent Corporate Monitors. Daniel is also a member of the Swiss Association for Standardization and co-chair of the Standards Committee 207 (Governance of Organizations) and is a member of the Expert Committee on Compliance Management Systems of the International Organization for Standardization. He is also an accredited ISO Compliance Management System Auditor and co-founder and vice-chair of Ethics and Compliance Switzerland.

Before joining LALIVE, Daniel Lucien Bühr was regional counsel for a Swiss multinational, responsible for all legal matters in Europe, Russia, the Near East and Africa (2006–2011). During this period, he served as member of the investment committee of Venture Incubator Ltd (a private equity fund of leading Swiss companies). He previously founded and managed a Swiss venture company, developing and industrialising a fashion accessory (2004–2007) and served as company secretary and legal counsel of a global retail group in Zug, Switzerland (1993–2003).

Nicola Bunick
Katten Muchin Rosenman LLP

Nicola Bunick concentrates her practice on litigation and enforcement matters relating to the financial services industry, regulatory and internal investigations, and other complex commercial disputes. She has experience with federal litigation and has represented individuals and corporations in matters involving various government agencies.

Prior to joining Katten, Nicola served as senior counsel to US Senator Joe Donnelly. She also worked as an associate at a law firm in Washington, DC, focusing on antitrust matters, including government investigations, merger reviews and antitrust counselling.

Brigham Cannon
Kirkland & Ellis LLP

Brigham Cannon is a partner in Kirkland's Houston office who concentrates his practice in the areas of white-collar criminal defence, internal investigations and False Claims Act litigation. Brigham joined the firm after spending more than four years as a prosecutor with the Department of Justice in the Fraud Section of the Criminal Division. He joined the Department of Justice as a Trial Attorney through the Attorney General's honours programme and led investigations and prosecutions into a wide variety of white-collar crimes, including bank, wire, mail and securities fraud, money laundering, and the FCPA. Brigham has defended corporations and individuals in government investigations and other criminal and regulatory proceedings in connection with the Foreign Corrupt Practices Act, healthcare fraud and securities fraud.

Matthew D Cipolla
Jenner & Block LLP

Matthew D Cipolla is an accomplished litigator who represents corporations and individuals in high-profile criminal and regulatory matters, including before the US Department of Justice, the Securities and Exchange Commission, and New York state and local prosecutors' offices. He specialises in complex cross-border investigations and monitorships and works at the intersection of US and international laws and regulations, particularly financial crimes, corruption, trade sanctions and privacy law. He also counsels clients on attendant civil regulatory and private litigations, including securities law and the Financial Institutions Reform, Recovery, and Enforcement Act. In addition, he counsels corporations regarding improvements to the design of their compliance programmes. In 2016, Mr Cipolla was recognised by the *New York Law Journal* as a 'Rising Star' and by the National LGBT Bar Association as one of the 'Best 40 Under 40' in the country.

Günter Degitz
AlixPartners

Günter Degitz brings more than 25 years of professional experience in international investigations and electronic discovery projects involving misconduct, compliance, antitrust, the Foreign Account Tax Compliance Act, tax fraud, and money laundering by focusing on strategy, IT, and forensic consulting for international financial institutions and corporations. Günter has advised leading banks in high-profile forensic investigations and monitor roles as well as international listed companies in antitrust, compliance, dispute resolution, and product liability cases. Günter has a master's degree in informatics from the University of Karlsruhe and has served as chairman at conferences on compliance, antitrust, data protection and M&A.

Mihailis E Diamantis
University of Iowa College of Law

Mihailis E Diamantis is an associate professor of law at the University of Iowa College of Law. He researches and writes about corporate and white-collar crime. His current scholarship

focuses on incentivising corporate compliance using different standards of liability and modes of sanction.

Prior to joining the faculty at Iowa, Professor Diamantis clerked for the Ninth Circuit Court of Appeals and worked on white-collar investigations as an attorney at Debevoise & Plimpton LLP. He is a graduate of Yale Law School and holds a PhD in philosophy from New York University.

Mark Filip
Kirkland & Ellis LLP

Mark Filip is a partner in Kirkland's Chicago and Washington, DC offices. Mark leads the Firm's government enforcement defence and internal investigations group, and he serves as one of the members of the firm's worldwide management committee. Mark has deep experience in both private practice and in government service. In private practice, he leads internal investigations for a wide array of boards and companies, involving numerous industries, settings and countries around the world. Mark also represents, for example, several multinational healthcare companies in government investigations concerning their core products. His clients include some of the largest financial institutions in the world, as well as Fortune 500 companies in diverse industries, including professional sports, energy, defence contracting, mining, manufacturing, agricultural production, gaming and heavy infrastructure.

His experience includes investigations by the Department of Justice, Securities and Exchange Commission, Federal Trade Commission, Department of Labor, Environmental Protection Agency, Department of Defense, Department of Homeland Security, Congress, Federal Reserve, New York Department of Financial Services, state attorneys general, and foreign regulators, as well as special board committees convened in response to shareholder demands. On the civil side, Mark has an active class-action defence practice. This includes, for example, a broad securities practice for clients in a variety of industries. Mark has substantial experience with the federal multi-district litigation process, and he has served as a judge in class-action matters during his tenure on the federal bench, and as an advocate in such cases in private practice. He is also a fellow in the American College of Trial Lawyers.

John Gleeson
Debevoise & Plimpton LLP

John Gleeson is a partner at Debevoise & Plimpton LLP in New York, where he is a member of the white-collar and regulatory defence group as well as the commercial litigation group. In addition to his active trial and appellate practice, handling both criminal and civil cases, Mr Gleeson advises company boards, conducts internal investigations, mediates disputes, and serves both public and private entities and individuals in various expert capacities.

For 22 years before joining Debevoise in 2016, Mr Gleeson was a United States District Judge in the Eastern District of New York. He authored more than 1,500 published opinions (including 14 opinions for the United States Court of Appeals for the Second Circuit, sitting by designation) and presided over more than 200 civil and criminal jury trials. Mr Gleeson was a member and chair of the Defender Services Committee of the Judicial Conference of the United States.

Before his appointment to the bench in 1994, Mr Gleeson was an Assistant United States Attorney. He served as chief of appeals, chief of special prosecutions, chief of organised Crime, and chief of the criminal division. He was lead counsel in the successful racketeering and murder trials of John Gotti and Vic Orena, the bosses of the Gambino and Colombo crime families of La Cosa Nostra, respectively, and he received the Attorney General's Distinguished Service Award for his role in the *Gotti* case.

Mr Gleeson has taught law for 30 years and currently teaches at New York University School of Law and at Harvard Law School.

Nicholas S Goldin
Simpson Thacher & Bartlett LLP

Nick Goldin is a former federal prosecutor described by clients in *Chambers USA* as 'the complete package', 'incredibly insightful', 'highly responsive' with a 'very practical approach', and 'able to connect the dots probably better than any other attorney I've worked with'. Nick represents a wide variety of clients in significant white collar criminal and regulatory matters, internal investigations, related civil litigation, and a range of other sensitive situations. Nick also provides ongoing counsel to clients on compliance and corporate governance matters, including FCPA anti-corruption, trade sanctions and securities trading. From 2015–17, Nick served as counsel to the DOJ and SEC FCPA compliance monitor of Avon Products Inc. Nick previously served in the US Department of Justice as an Assistant United States Attorney in the US Attorney's Office for the Southern District of New York.

Neil Goradia
Forensic Risk Alliance

Neil Goradia is a partner at Forensic Risk Alliance who specialises in using data analytics to create transparency and drive strategic decision-making in investigative, dispute, and compliance matters. He has built and led forensic data analytics teams both in the United States and in Europe.

Through Neil's 20 years of data management, forensics and analytics experience, he has specialised in analysing large and disparate data sets to deliver valuable and concise insights to both legal and corporate clients. He uses his experience in data mining and visualisation techniques to uncover anomalies and patterns to piece together stories and properly advise clients in a wide range of legal and risk-related matters including FCPA, AML/OFAC, class-action cases, pricing disputes, trademark infringement, securities fraud, and FCA matters, among other things. Neil has also worked across various industries, including banking, energy, airline, gaming, technology and healthcare. Finally, over the past decade, Neil has used this experience to help companies both prepare and respond to monitors as well as supporting monitors with the same goal in mind: helping companies develop and sustain robust, efficient, and effective compliance programmes.

Johnjerica Hodge
Katten Muchin Rosenman LLP

Johnjerica Hodge concentrates her practice on internal and government investigations, corporate compliance, environmental litigation and appellate litigation. She represents healthcare providers in investigations and related False Claims Act matters arising from allegations of Medicare and Medicaid fraud and abuse and violations of the Anti-Kickback Statute. Additionally, she provides counsel on billing and coding issues related to state laws. Johnjerica is a member of the independent compliance monitor team appointed in connection with a significant Foreign Corrupt Practices Act settlement by a pharmaceutical company, and she counsels clients on various environmental law, administrative law and constitutional law issues. Johnjerica has substantial experience in motion practice in state and federal courts and also devotes a portion of her practice to corporate compliance and business ethics issues.

Prior to joining Katten, Johnjerica served as a clerk for Chief Judge Carl E Stewart of the US Court of Appeals for the Fifth Circuit. During law school, she contributed to and was a member of the *Alabama Law Review*. She also interned in the Federal Tort Claims Act Litigation Section of the US Department of Justice and with the Honorable Lawrence S Coogler of the US District Court for the Northern District of Alabama.

Emma Hodges
Forensic Risk Alliance

Emma Hodges is a partner at Forensic Risk Alliance and has over 15 years' experience conducting multi-jurisdictional forensic accounting reviews and investigations, internal controls reviews, and audits. She has performed in-country assignments across Latin America, Asia, Australia, Europe, Africa, and the Middle East. Over the past 12 years, Emma has also developed significant experience working with companies post-investigation in monitorship scenarios.

Emma has provided forensic accounting support in the context of six different FCPA and fraud-related deferred prosecution agreements for companies operating in the oil and gas, engineering, aviation and financial services industries. Emma has worked both in support of DOJ-appointed independent compliance monitors and with multinational companies preparing for the compliance reviews of their DOJ-appointed monitor.

Emma has also supported the New York State Department of Financial Services-appointed monitor to an international bank, focusing on anti-money laundering and sanctions compliance, as well as designing and implementing customer account and transactional testing to assess efficacy and strength of the compliance programme and controls to prevent future misconduct.

Examples of Emma's multi-jurisdictional investigations experience include supporting a major engineering company under investigation by United States, United Kingdom and Swiss authorities into allegations of millions of dollars of corrupt payments, and leading a forensic accounting team during an internal investigation into bribery and corruption allegations surrounding a Middle-East agent and distributor of a US-headquartered company in relation to multimillion-dollar equipment sale transactions throughout the CIS.

Emma is a chartered accountant with the Institute of Chartered Accountants in Australia, and a certified fraud examiner.

Andris Ivanovs
Ropes & Gray International LLP

Andris Ivanovs joined Ropes & Gray in 2018 as an associate in the litigation and enforcement practice group. Andris has experience advising clients on compliance with anti-corruption laws, anti-money laundering laws as well as sanctions and export or trade controls. Andris regularly counsels companies conducting cross-border internal and regulatory investigations, compliance risk assessments and pre-acquisition due diligence in M&A transactions. Andris has represented clients in the energy, life sciences, consumer goods and financial services sectors.

Prior to joining the firm, Andris was an associate at the London office of an international law firm. During that time, Andris was seconded to the legal department of a global pharmaceutical company where he advised on a range of commercial and regulatory matters.

Stephen A Jonas
WilmerHale

Mr Jonas is co-chair of WilmerHale's white-collar defence and investigations practice. His practice focuses on representing corporations and individuals in investigations and criminal defence and grand jury matters. Mr Jonas' work includes the full range of representation of clients in this area from internal corporate investigations to federal grand jury representation to criminal trials and appeals. He has represented clients in jurisdictions around the country, as well as in cross-border investigations.

Mr Jonas also handles related False Claims Act cases, government enforcement proceedings and civil litigation. He has substantial experience in the areas of federal healthcare fraud, immigration fraud, accounting fraud, securities fraud, economic espionage and environmental crimes. Mr Jonas also has experience in the unique issues of representing corporate and outside legal counsel in government investigations. Mr Jonas frequently represents clients in investigations and litigation involving state attorneys general. Mr Jonas currently serves as a lead team member in the monitorship of a major healthcare corporation.

Rich Kando
AlixPartners

Rich Kando specialises in government investigations, asset tracing, monitorships, and anti-money laundering and anti-tax evasion compliance matters. He has led financial services monitorships and internal investigations in international jurisdictions, and has testified as an expert in forensic accounting matters. Rich's prior experience includes serving as a special agent for the Internal Revenue Service's Criminal Investigation unit in New York. Rich has a bachelor's degree in accounting from the University of Richmond and is a certified public accountant. He also graduated from the Federal Law Enforcement Training Centers. Rich has received awards from the US Department of Justice and the Internal Revenue Service for his government service.

Doreen Klein
McKool Smith PC

Doreen Klein is senior counsel in McKool Smith's New York office. She has represented clients in federal and state criminal and regulatory government investigations involving securities fraud, tax fraud, environmental crimes, and bribery and kickback schemes. She has conducted internal investigations for corporate clients in cases involving embezzlement, violations of internal processes, and SEC disclosures. She has represented clients in cross-border investigations, and was a member of the monitor's team appointed by the NYS Department of Financial Services to review the compliance function of an international bank.

Doreen previously spent 15 years with the New York County District Attorney's Office, where she served in the frauds, trial and appeals bureaus.

Jae Joon Kwon
Kobre & Kim

Jae Joon Kwon is an international lawyer focused on cross-border disputes. He represents clients in disputes involving multiple jurisdictions on behalf of Korea-based clients and companies with interests and issues in Korea.

Before joining Kobre & Kim, Mr Kwon practised at Bae, Kim & Lee LLC in Korea.

Daniel S Lee
Kobre & Kim

With significant experience as a US Department of Justice (DOJ) prosecutor, Daniel S Lee focuses his practice on representing multinational companies in US regulatory investigations and enforcement actions, with particular experience in matters involving Korea. Mr Lee regularly investigates fraud allegations, including those related to financial fraud, government contracts fraud, money laundering and public corruption.

Before joining Kobre & Kim, Mr Lee was a DOJ prosecutor (as an Assistant US Attorney for the Western District of Texas and Special Assistant US Attorney for the District of Hawaii). While serving in that capacity, Mr Lee focused on white-collar criminal cases involving investment fraud, healthcare fraud, defence contractor fraud, and multijurisdictional asset forfeiture and tracing. Earlier in his career, he was a trial attorney for the US Department of Defense, litigating major crimes for the Pacific region, including Korea, Japan, Hawaii and Guam.

Daniel W Levy
McKool Smith PC

Daniel W Levy is a principal in McKool Smith's New York office. Prior to joining the firm, he served as an Assistant United States Attorney in the Southern District of New York for 11 years.

Mr Levy focuses on white-collar matters, trial practice, complex business disputes and internal investigations. He has served as lead counsel in more than a dozen cases that have gone to trial or been arbitrated. Mr Levy's work frequently involves a cross-border component

and multiple regulatory agencies and prosecutors. He has briefed and argued more than 15 appeals before the United States Court of Appeals for the Second Circuit.

He was appointed by the New York State Department of Financial Services to serve as the monitor of a foreign financial institution.

Alex Lipman
Brown Rudnick LLP

Alex Lipman has over 25 years of experience both in private practice and government with a focus on SEC enforcement, white collar, securities litigation, regulatory and corporate governance matters. His practice focuses primarily on representing individuals and organisations in connection with SEC enforcement and criminal matters relating to insider trading, corporate financial irregularities, and securities sales practices.

Alex's government experience includes serving as a Special Assistant United States Attorney on the Securities and Commodities Fraud Task Force at the US Attorney's Office for the Southern District of New York. In that position, he prosecuted and tried cases involving accounting fraud, mail and wire fraud, and insider trading. Alex also served as a branch chief in the SEC's Enforcement Division, where he conducted numerous high-profile investigations into securities law violations, including cases stemming from the collapse of Enron.

Glen G McGorty
Crowell & Moring LLP

Glen G McGorty is a partner in Crowell & Moring LLP's white-collar and regulatory enforcement group, serves as the managing partner of the firm's New York office, and is a member of the firm's management board. Glen is an experienced trial lawyer who served almost 15 years as a federal prosecutor in the US Attorney's Office for the Southern District of New York and the US Department of Justice in Washington, DC. Glen represents corporate entities and individuals in federal and state criminal and regulatory matters. Specifically, he represents clients in investigations conducted by grand juries, congressional committees, independent and special counsel, and international, federal, and state law enforcement and regulatory agencies, as well as corporate internal organisations.

In 2014, Glen was appointed by the US District Court for the Southern District of New York to serve as the independent monitor of the NYC District Council of Carpenters and related Taft-Hartley benefit funds.

Frances McLeod
Forensic Risk Alliance

Frances McLeod is a founding partner of Forensic Risk Alliance and head of its US offices. She is a former investment banker and has over 25 years of experience advising diverse clients on sanctions, anti-corruption, fraud, internal controls, asset tracing and money laundering issues.

Frances has been deeply involved in all of Forensic Risk Alliance's compliance monitorship work, to include US DOJ and SEC FCPA monitorships, a New York Department of

Financial Services bank monitorship, the Ferguson City monitorship, a PCAOB monitorship and a US DOJ fraud-related monitorship.

Frances has extensive experience in addressing complex international data-transfer issues whether in regulatory investigations or cross border litigation. She led the FRA team responding to anti-corruption investigation data requests in all jurisdictions for Alstom in the United States, United Kingdom, Brazil, Indonesia, Poland, Sweden, etc., which included addressing French data privacy and Blocking Statute issues. She is leading FRA's GDPR compliance initiative leveraging FRA's decades of experience in addressing data protection issues in cross-border litigation and investigation.

Ronald C Machen
WilmerHale

Mr Machen is co-chair of WilmerHale's white-collar defence and investigations practice and is also a member of the firm's global management committee. His practice focuses on government enforcement actions, corporate and congressional investigations, and litigating complex civil business disputes across the globe. An experienced litigator who has tried more than 35 cases to verdict, Mr Machen routinely helps clients navigate high-stakes, crisis situations that garner the attention of multiple regulators, enforcement authorities, Congress and private litigants.

Prior to rejoining the firm in 2015, Mr Machen served for over five years as the US Attorney for the District of Columbia. During his career, Mr Machen has acquired substantial experience in both prosecuting and defending federal criminal and civil healthcare fraud matters and currently serves as a co-monitor to a major healthcare corporation.

Ryan Middlemas
Kobre & Kim

Ryan Middlemas represents commercial clients and individuals in white-collar and US regulatory defence matters, internal investigations, and insolvency and debtor-creditor disputes, often with cross-border components.

His experience includes representing clients, particularly those in the financial services industry, in enforcement actions brought under the US Foreign Corrupt Practices Act and by Hong Kong regulatory authorities such as the Hong Kong Securities and Futures Commission, the Hong Kong Monetary Authority, and the Hong Kong Independent Commission Against Corruption.

He has also acted for trustees, liquidators, creditors and debtors in contentious insolvency proceedings, restructurings and financial distress situations.

Before joining Kobre & Kim, Mr Middlemas practised at Allen & Overy in Hong Kong and London, and completed a secondment in Japan with Nissan Motor Co, Ltd.

Simone Nadelhofer
LALIVE SA

Simone Nadelhofer joined LALIVE in 2009 and is a partner based in the Zurich office. She specialises in white-collar crime and regulatory investigations and advises clients on crisis management, compliance and remedial action. She is regularly retained by corporate clients in cross-border investigations by Swiss and foreign authorities, including US authorities, and leads large-scale internal investigations. She also assists clients in international legal and administrative assistance, as well as victims of crime in the tracing and freezing of assets. Simone Nadelhofer regularly acts as counsel in complex commercial and banking disputes before state courts.

Simone Nadelhofer is a member of several professional associations, including the Swiss Association of Experts in Economic Crime Investigation, the Zurich and Swiss Bar Association and the European Criminal Bar Association. She is the chair of the Anti-corruption and the Rule of Law Committee at the Inter Pacific Bar Association (IPBA) and a member of the advisory board of the Master Economic Crime Investigations studies at the Lucerne University. Furthermore, Simone Nadelhofer acts as the external ombudsperson for tesa SE.

Before joining LALIVE, Simone Nadelhofer practised in Zurich as an attorney with renowned law firms, as a foreign attorney with an international law firm in New Delhi, India (2002–2003) and as legal counsel with a major Swiss bank (2001–2002).

David W Ogden
WilmerHale

Mr Ogden is chair of WilmerHale's government and regulatory litigation group. He served as the Deputy Attorney General of the United States from 2009 to 2010, and in that capacity played a role in developing the Health Care Fraud Prevention and Enforcement Action Team (HEAT), an initiative led by the Secretary of the Health and Human Services and the Attorney General and co-chaired by the Deputy Secretary and Deputy Attorney General. He also served as the Assistant Attorney General for the Civil Division at the US Department of Justice from 1999–2001, where he supervised the US government's enforcement of the False Claims Act among other responsibilities.

In private practice, he handles major disputes, often with governments and government agencies, currently serves as a co-monitor to a major healthcare corporation, and has spoken and written extensively on enforcement and compliance policy.

Joanne Oleksyk
Crowell & Moring LLP

Joanne Oleksyk is an associate in Crowell and Moring's white-collar and regulatory enforcement group in New York.

She represents individuals and entities throughout all stages of criminal regulatory and internal investigations. Joanne's practice has focused on the financial services and pharmaceutical industries, and she also practised commercial litigation. She has assisted on the court-appointed monitorship of the Carpenters' Union since its inception.

Thomas J Perrelli
Jenner & Block LLP

Mr Perrelli is a partner at Jenner & Block LLP and chair of the firm's government controversies and public policy litigation practice group. He regularly represents companies facing complex litigation, regulatory and public policy issues. He has significant expertise in dealing with disputes and investigations involving the Department of Justice and state attorneys general. He has served as the monitor over three companies – Citibank, Bridgepoint Education and Education Management Corp. Prior to re-joining Jenner & Block in 2012, Mr Perrelli served as the Associate Attorney General of the United States, the third highest-ranking official at the US Department of Justice. In that role, he oversaw the Department's Civil, Antitrust, Civil Rights, Environment and Natural Resources, and Tax Divisions, the United States Trustee Program, the Office of Justice Programs and the Office on Violence Against Women, among others. Among numerous high-level, multiparty negotiations, he led the US government's efforts to negotiate a $25 billion settlement to resolve claims against financial institutions for servicing of mortgages and negotiated the creation of a $20 billion fund to compensate victims of the Deepwater Horizon oil spill.

Michael W Ross
Jenner & Block LLP

Michael W Ross is a litigation partner in Jenner & Block's complex commercial litigation and securities litigation practices. Michael maintains a demanding commercial litigation practice that has taken him across the country and the globe, handling court cases and arbitrations, as well as criminal enforcement matters and investigations. Recognised as a 'rising star' in business litigation by *NY Law Journal* and *Super Lawyers*, he represents companies in disputes in industries as diverse as financial services, media and manufacturing, and handles matters across a wide array of legal areas, including commercial contracts, securities law, antitrust and intellectual property. He has significant experience in government and internal investigation, and was a leader on the team monitoring Credit Suisse AG following the bank's settlement with the NY Department of Financial Services, and played a key role in the team monitoring numerous firearms dealers that were sued by The City of New York. Michael also maintains an active pro bono practice and co-chairs the firm's Pro Bono Committee. He has defended immigrant children against deportation and led teams that have helped numerous children remain safely in the United States. Other high-profile pro bono matters include a challenge to the NYPD's warrant system that resulted in a six-figure settlement and a successful effort to reduce the sentence of a reformed teenage offender.

Erin R Schrantz
Jenner & Block LLP

Erin R Schrantz is an experienced litigator who represents clients across a variety of industries in investigations, complex litigation and compliance risk assessments. She specialises in monitorships, cross-border investigations into financial crimes and corruption, and developing comprehensive compliance programmes and cultural reforms that reflect an organisation's values. She has published and lectured on a variety of topics, including internal investigation strategies, effective anti-corruption compliance programmes, compliance strategies for US

joint ventures in China, and risk-based compliance audit techniques. *Global Investigations Review* recognised Ms Schrantz in 2018 as one of the top 100 worldwide 'Women in Investigations', and the *National Law Journal* named Ms Schrantz a 'Chicago 40 Under 40' in 2013. *Illinois Super Lawyers* and *Benchmark Litigation* identified her as a 'Future Star in Illinois'.

Bart M Schwartz
Guidepost Solutions LLC

Described by *The New York Times* as the person 'often sought out in . . . thorny situations' by corporations, Bart M Schwartz has wide experience providing advice and support to corporations, governments and individuals.

Mr Schwartz has served as a trial lawyer, corporate adviser and chief executive officer of a private company and a unit of a public company. For more than 30 years, he has managed complex investigations, prosecutions and security assessments, and provided sophisticated investigative services to a wide array of clients. Mr Schwartz is currently the chairman of Guidepost Solutions and serves on the board of HMS Holdings Corp. (NASDAQ:HMSY) where he is chairman of the Compliance Committee and a member of its Audit Committee. He also serves on the board of directors of the Stuyvesant High School Alumni Association.

Judith Seddon
Ropes & Gray International LLP

Judith Seddon specialises in all areas of national and international white-collar crime, fraud, corruption and regulatory and criminal investigations and prosecutions. She has deep experience and expertise in advising corporates, financial institutions and individuals in internal investigations and when facing complex investigations and enforcement action by regulators and prosecutions, both domestically and cross-border. She has worked and is working on some of the most complex and high-profile investigations and prosecutions.

Judith joined Ropes & Gray in 2018 to co-lead the London anti-corruption and international risk practice. Prior to joining Ropes & Gray, Judith was a partner at a Magic Circle firm in London, where she represented major financial institutions and corporates in relation to regulatory and criminal enforcement action, and before that, at a specialist criminal law practice.

Judith is consistently ranked as a band-1 leading practitioner by *Chambers* and *The Legal 500*. *Who's Who Legal 2018* named Judith 'Business Crime Lawyer of the Year', and listed her on a shortlist of 10 'Thought Leaders'.

Judith is a regular commentator and speaker at conferences and on panels on white-collar and corporate crime issues. She has co-chaired two GIR Live London conferences and is co-editor of GIR's *The Practitioner's Guide to Global Investigations* in its first (2017), second (2018) and third (2019) editions.

Gil M Soffer
Katten Muchin Rosenman LLP

Gil M Soffer is managing partner of Katten's Chicago office, national co-chair of the firm's litigation practice and a member of the board of directors. A former federal prosecutor, Gil provides experienced counsel to individuals and companies under investigation by the Department of Justice (DOJ), Securities and Exchange Commission, Federal Trade Commission and other government regulators.

Gil's practice runs the gamut of white-collar criminal and civil fraud matters, with particular emphasis on the Foreign Corrupt Practices Act (FCPA), healthcare fraud, securities fraud and fraud involving government programmes. Gil has particular experience in the area of independent corporate monitorships. As Associate Deputy Attorney General, Gil was a principal drafter of the DOJ's Corporate Monitor Principles (the Morford Memo). He has testified before the US House of Representatives Judiciary Committee's Subcommittee on Commercial and Administrative Law regarding the use and selection of corporate monitors in criminal cases. In February 2017, the DOJ and SEC appointed Gil as the global corporate compliance monitor for the world's largest manufacturer of generic pharmaceuticals, in one of the most substantial FCPA resolutions to date.

Mark J Stein
Simpson Thacher & Bartlett LLP

Mark Stein, a former prosecutor and seasoned trial lawyer, has represented public companies, boards and individuals in criminal and regulatory investigations involving allegations of financial fraud, violations of the Foreign Corrupt Practices Act, insider trading, money laundering and antitrust conspiracies. These representations regularly involve investigations by the US Department of Justice, the SEC, the CFTC, and numerous state attorneys general. From 2015–17, Mark was the DOJ and SEC FCPA monitor of Avon Products Inc. He was an Assistant US Attorney in the Southern District of New York, ending his tenure there as Deputy Chief of the Criminal Division. Mark is a fellow of the American College of Trial Lawyers and is consistently recognised as a leader in his field by *Chambers USA*, *The Legal 500* and Euromoney's *Benchmark Litigation*.

Chris Stott
Ropes & Gray International LLP

Chris Stott is a member of Ropes & Gray's litigation and government enforcement practice group, based in London. Chris focuses his practice on criminal, contentious regulatory and internal investigations.

Chris has over 10 years' experience advising and representing individuals and corporations in connection with investigations and prosecutions by criminal and regulatory enforcement authorities in the United Kingdom and numerous other jurisdictions.

Chris also assists clients with designing and implementing effective compliance and governance arrangements to anticipate and respond to regulatory change. Chris was previously seconded to a multinational bank to advise it and senior executives on its 'senior managers and certification regime' implementation programme.

Jeffrey A Taylor
Fox Corporation

Jeff A Taylor is the executive vice president and chief litigation counsel for Fox Corporation. Mr Taylor oversees litigation, labour and employment, content protection and compliance for all of FOX's operations, including the FOX Network, Sports, FS1, FS2, Deportes, News Channel, Business Network, Television Stations and its multiplatform assets.

Mr Taylor earlier served as deputy general counsel and chief compliance officer for General Motors, where he was responsible for the company's compliance programme and lead the company's interactions with an independent monitor appointed under a deferred prosecution agreement with the United States Department of Justice. From 1995 to 2009, Mr Taylor served in the United States Department of Justice, including as the United States Attorney for the District of Columbia from 2006 to 2009.

Mr Taylor holds a BA in history from Stanford University and a JD from Harvard Law School.

Nicolas Thompson
Kirkland & Ellis LLP

Nicolas Thompson is a litigation partner in Kirkland's Houston office with broad experience in government and internal investigations as well as complex commercial litigation. He has represented clients in litigation involving the False Claims Act, the Foreign Corrupt Practices Act, healthcare fraud and securities fraud. He has also represented businesses at both the trial and appellate level in state and federal court in a variety of complex commercial litigation matters, with a particular focus on the energy and technology industries.

Jenna Voss
Forensic Risk Alliance

Jenna Voss is a director at Forensic Risk Alliance with extensive experience providing guidance to clients in sensitive cross-border matters across multiple industries. She leads teams in performing anti-bribery and corruption compliance reviews and investigations, conducting white-collar investigations, and providing accounting expertise on litigation matters. She has led teams conducting assessments in a monitorship context globally, including in Russia, Brazil, Mexico, Germany, and the United Kingdom.

Jenna is currently leading a global team in performing a multi-year forensic assessment at the direction of the monitor of a Brazilian-based company that engaged in misconduct related to bribery and corruption.

She has also directed a global team in executing an anti-money laundering monitorship mandated by the New York Department of Financial Services, including leading assessments of the company's know-your-customer, compliance and internal audit processes. Jenna also has experience conducting whistleblower investigations, performing accounting and anti-corruption due diligence, building complex financial models, and advising financially troubled companies in bankruptcy and restructuring situations across the globe, including the United Kingdom, Mexico, Germany, the Netherlands, Poland, Brazil and Russia.

She is a certified public accountant, certified fraud examiner, certified anti-money laundering specialist and certified in financial forensics.

Shaun Z Wu
Kobre & Kim

Shaun Z Wu is an accomplished litigator at Kobre & Kim who focuses on high-stakes multi-jurisdictional disputes and US government investigations involving China.

Mr Wu is serving as the independent integrity compliance monitor to a large Chinese state-owned enterprise in connection with its debarment by the World Bank. Mr Wu has acted in a wide range of cross-border disputes involving governments, state-owned enterprises, multinational corporations, financial institutions and high-net-worth individuals, including litigation and arbitration under the International Chamber of Commerce, United Nations Commission on International Trade Law, Hong Kong International Arbitration Centre and other rules. These matters often include cross-border enforcement, offshore asset recovery, debtor-creditor, bankruptcy, insolvency and other commercial disputes.

Chambers Asia-Pacific ranked Mr Wu as a Recognised Practitioner for 'Corporate Investigations/Anti-Corruption' in 2019, while The Legal 500 *Asia Pacific* ranked him as a top-tier 'leading individual' for 'regulatory/compliance' in 2019 and a key partner for 'regulatory: anti-corruption and compliance' in 2018. In recognition of his achievements, Mr Wu has consistently been named a finalist for 'Disputes Star of the Year' at the annual Asialaw Asia-Pacific Dispute Resolution Awards in 2018, 2017 and 2016, and won an 'Individual of the Year' award for dispute resolution at the ALM China Law & Practice Awards 2015 in Beijing, China. Mr Wu is admitted to the Chartered Institute of Arbitrators and Hong Kong Institute of Arbitrators, and is regarded as a leading authority for China-foreign disputes. Mr Wu is a native Mandarin Chinese speaker and also speaks Cantonese.

Appendix 2

Contributors' Contact Details

AlixPartners
909 Third Avenue
New York, NY 10022
United States
Tel: +1 212 490 2500
Fax: +1 212 490 1344
gdegitz@alixpartners.com
rkando@alixpartners.com
www.alixpartners.com

Brown Rudnick LLP
7 Times Square
New York, NY 10036
United States
Tel: +1 212 209 4800
Fax: +1 212 209 4801
alipman@brownrudnick.com
abaynham@brownrudnick.com
www.brownrudnick.com

Crowell & Moring LLP
590 Madison Ave 19th Floor
New York, NY 10022
United States
Tel: +1 212 223 4000
Fax: +1 212 223 4134
gmcgorty@crowell.com
joleksyk@crowell.com
www.crowell.com

Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022
United States
Tel: +1 212 909 6000
Fax: +1 212 909 6836
jgleeson@debevoise.com
www.debevoise.com

Forensic Risk Alliance
Audrey House
16–20 Ely Place
London EC1N 6SN
United Kingdom
Tel: +44 20 7831 9110

2550 M Street, NW
Washington, DC 20037
United States
Tel: +1 202 627 6580

Penthouse
434 W 33rd Street
New York, NY 10001
United States
Tel: +1 646 571 2257

ngoradia@forensicrisk.com
ehodges@forensicrisk.com
fmcleod@forensicrisk.com
jvoss@forensicrisk.com
www.forensicrisk.com

Fox Corporation
1211 Avenue of the Americas
New York, NY 10036
United States
Tel: +1 310 369 3652
jeff.taylor@fox.com
www.foxcorporation.com

Guidepost Solutions LLC
415 Madison Ave
11th Floor
New York, NY 10017
United States
Tel: +1 212 817 6700
bschwartz@guidepostsolutions.com
www.guidepostsolutions.com

Jenner & Block LLP
353 N Clark Street
Chicago, IL, 60654-3456
United States
Tel: +1 312 222 9350

919 Third Avenue
New York, NY 10022
United States
Tel: +1 212 891 1600

1099 New York Avenue, NW
Suite 900
Washington, DC 20001-4412
United States
Tel: +1 202 639 6000
Fax: +1 202 639 6066

abarkow@jenner.com
nbarofsky@jenner.com
mcipolla@jenner.com
mross@jenner.com
eschrantz@jenner.com
tperrelli@jenner.com
www.jenner.com

Katten Muchin Rosenman LLP
525 W Monroe Street
Chicago, IL 60661
United States
Tel: +312 902 5200
nicola.bunick@kattenlaw.com
johnjerica.hodge@kattenlaw.com
gil.soffer@kattenlaw.com
www.kattenlaw.com

Kirkland & Ellis LLP
300 N LaSalle
Chicago, IL 60654
United States
Tel: +1 312 862 2000
mark.filip@kirkland.com
brigham.cannon@kirkland.com
nicolas.thompson@kirkland.com
www.kirkland.com

Kobre & Kim
800 Third Avenue
New York, NY 10022
United States
Tel: +1 212 488 1200
jaejoon.kwon@kobrekim.com
daniel.lee@kobrekim.com
ryan.middlemas@kobrekim.com.hk
shaun.wu@kobrekim.com.cn
www.kobrekim.com

LALIVE SA
Stampfenbachplatz 4
8042 Zurich
Switzerland
Tel: +41 58 105 2100
snadelhofer@lalive.law
dbuhr@lalive.law
www.lalive.law

McKool Smith PC
One Bryant Park, 47th Floor
New York, NY 10036
United States
Tel: +212 402 9400
Fax: +212 402 9444
dlevy@mckoolsmith.com
dklein@mckoolsmith.com
www.mckoolsmith.com

Ropes & Gray International LLP
60 Ludgate Hill
London
EC4M 7AW
United Kingdom
Tel: +44 20 3201 1500
Fax: +44 20 3201 1501
judith.seddon@ropesgray.com
chris.stott@ropesgray.com
andris.ivanovs@ropesgray.com
www.ropesgray.com

Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, NY 10017
United States
Tel: +1 212 455 2000
ngoldin@stblaw.com
mstein@stblaw.com
www.stblaw.com

University of Iowa College of Law
Boyd Law Building, No. 442
Iowa City, IA 52242
United States
Tel: +1 319 335 9105
mihailis-diamantis@uiowa.edu
www.law.uiowa.edu

Venable LLP
600 Massachusetts Avenue, NW
Washington, DC 20001
United States
Tel: +1 202 344 4583
mjbresnick@venable.com
www.venable.com

Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
United States
Tel: +1 202 663 6000
ericka.aiken@wilmerhale.com
stephen.jonas@wilmerhale.com
ronald.machen@wilmerhale.com
david.ogden@wilmerhale.com
www.wilmerhale.com

Since *WorldCom*, the United States Department of Justice and other agencies have imposed more than 80 monitorships on a variety of companies, including some of the world's best-known names.

The terms of these monitorships and the industries in which they have been employed vary widely. Yet many of the legal issues they raise are the same. To date, there has been no in-depth work that examines them.

GIR's *The Guide to Monitorships* fills that gap. Written by contributors with first-hand experience of working with or as monitors, it discusses all the key issues, from every stakeholder's perspective, making it an invaluable resource for anyone interested in understanding or practising in the area.

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