GUIDE TO MONITORSHIPS

THIRD EDITION

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

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Publisher's Note

Guide to Monitorships is published by Global Investigations Review (GIR) – the online home for everyone who specialises in investigating and resolving suspected corporate wrongdoing.

It flowed from the observation that there was no book that systematically covered all aspects of the institution known as the 'monitorship' – an arrangement that is delicate and challenging for all concerned: company, monitor, appointing government agency and their respective professional advisers.

This guide aims to fill that gap. It does so by addressing all the pressing questions and concerns from all the key perspectives. We are lucky to have attracted authors who have lived through the challenges they deconstruct and explain.

The guide is a companion to a larger reference work – GIR's *The Practitioner's Guide to Global Investigations* (now in its sixth 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. You should have both books in your library: *The Practitioner's Guide* for the whole picture and the *Guide to Monitorships* for the close-up.

Guide to Monitorships is supplied in hard copy to all GIR subscribers as part of their subscription. Non-subscribers can read an e-version at www.globalinvestigationsreview.com.

Finally, I would like to thank the editors of this guide for their energy and vision, and the authors and my colleagues for the elan with which they have brought that vision to life. We collectively welcome any comments or suggestions on how to improve it. Please write to us at insight@globalinvestigationsreview.com.

Contents

PART III: INTERNATIONAL MONITORSHIPS AND RELATED ISSUES

PART IV: TOPICAL ANALYSES

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 a monitor can discover a broken culture; how a monitor can apply 'carrot and stick' and other approaches to address a culture of non-compliance; and the sorts of internal partnership and external pressures that 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 first and final reports. Next, 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 reaching the decisions to use and select a monitor. Finally, Pamela Davis and her co-authors, Suzanne Jaffe Bloom and Mariana Pendás Fernández at Winston & Strawn, explain how

a successful monitorship must consider the goals and perspectives of a variety of different constituencies; chief among a monitor's goals should be securing the trust of both the government and the organisation.

Part II contains three chapters that offer experts' perspectives on monitorships. Professor Mihailis E Diamantis of the University of Iowa provides an academic perspective, describing the unique criminal justice advantages and vulnerabilities of monitorships, and 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 general 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, Loren Friedman, Thomas Cooper and Nicole Sliger of BDO USA provide insights as forensic professionals by exploring the testing methodologies and metrics used by monitorship teams.

The five chapters in Part III examine the issues that arise in the context of cross-border monitorships and the unique characteristics of monitorships in different areas of the world. Gil Soffer, former Associate Deputy Attorney General, former federal prosecutor and a principal drafter of the Morford Memorandum, and his co-author Johnjerica Hodge – both 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. Nicholas Goldin and Joshua Levine, 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 US Foreign Corrupt Practices Act (FCPA). By their nature, FCPA monitorships involve US laws that regulate conduct carried out abroad, and so Goldin and Levine examine the difficulties that may arise from this situation, including potential cultural differences that may affect the relationship between the monitor and the company. Next, Switzerland-based investigators Simone Nadelhofer, Daniel Bühr and their co-authors, at 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-author at explore how UK monitorships differ from those in the United States. And litigator Jason Kang and former federal prosecutors Wade Weems, Daniel Lee and Scott Hulsey, at Kobre & Kim, examine the treatment of monitorships in the East Asia region.

Part IV has 10 chapters that provide subject-matter and sector-specific analyses of different kinds of monitorships. 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. Additionally, Rachel Wolkinson and Blair Rinne, at Brown Rudnick LLP, explore how monitorships are used in resolutions with the SEC. Next, 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 healthcare fraud monitorship led by the US Department of Justice (US DOJ), 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. 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. 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 Lisa Umans of Crowell & Moring LLP lend their perspectives to an examination of union monitorships. Ellen S Zimiles, Patrick J McArdle and their co-authors at Guidehouse explore the legal and historical context of sanctions monitorships. Jodi Avergun, a former chief of the Narcotic and Dangerous Drug Section of the US DOJ and former Chief of Staff for the US Drug Enforcement Administration, former federal prosecutor Todd Blanche and Christian Larson, of Cadwalader, Wickersham & Taft LLP, discuss the complexities of monitorships within the pharmaceutical industry. And Kevin Abikoff, Laura Perkins, Michael DeBernardis and Christine Kang at Hughes Hubbard & Reed explain the phenomenon of monitorships being imposed as part of the sanctions systems at the World Bank and other multilateral development banks.

Finally, Part V contains three 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. Roscoe C Howard, Jr, a former US Attorney for the District of Columbia, and Tabitha Meier at Barnes & Thornburg LLP, with Nicole Sliger and Pei Li Wong at BDO USA LLP, next examine situations in which an entity is subject to multiple settlement agreements or probation orders with different government agencies or oversight entities, which is referred to as 'concurrent monitorship'. And, finally, former US District Court Judge John Gleeson, now of Debevoise & Plimpton LLP, provides incisive commentary on judicial scrutiny of deferred prosecution agreements (DPAs) and monitorships. Gleeson surveys the law surrounding DPAs and monitorships, including the role and authority of judges in those respects, and separation-of-powers issues.

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The editors gratefully acknowledge Jenner & Block LLP for its support of this publication, and Jessica Ring Amunson, co-chair of Jenner's appellate and Supreme Court practice, and Jenner associates Tessa J G Roberts, Matthew T Gordon and Tiffany Lindom for their important assistance.

Anthony S Barkow, Neil M Barofsky and Thomas J Perrelli
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APPENDIX 1

About the Authors

Anthony S Barkow
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Anthony S Barkow, co-chair of Jenner & Block's investigations, compliance and defence practice, and managing partner of the firm's New York office, 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 US Department of Justice (US DOJ).

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 US$715 million settlement with the New York Department of Financial Services, part of a broader US$2.6 billion settlement that involved the US DOJ 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 on his experience as a former federal prosecutor and as the presidentially appointed first special inspector general of the historic US$700 billion Troubled Asset Relief Program (TARP), Mr Barofsky assists companies seeking to improve their corporate culture through compliance counselling and monitorships. He served as the monitor of Credit Suisse AG, following the bank's US$715 million settlement with the New York Department of Financial Services, part of a broader US$2.6 billion settlement that involved the US DOJ and the Federal Reserve. He currently is the independent Monitor of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW). 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 recognised as one of the National Law Journal's `winning' litigators. He was also recognised by the New York Law Journal as a 'trailblazer' in the field of monitorships and received similar recognition from the National Law Journal for his work in regulation and compliance.

Thomas J Perrelli
Jenner & Block LLP

Thomas Perrelli is a partner at and chair of Jenner & Block LLP. He co-chairs 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 US Department of Justice (US DOJ) and state attorneys general. He has served as monitor over three companies – Citibank, Bridgepoint Education and Education Management Corp. Prior to rejoining Jenner & Block in 2012, Mr Perrelli served as the Associate Attorney General of the United States, the third highest-ranking official at the US DOJ. 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 US$25 billion settlement to resolve claims against financial institutions for servicing of mortgages, and negotiated the creation of a US$20 billion fund to compensate victims of the Deepwater Horizon oil spill.

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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 for a public company that pleads 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

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1 Anthony S Barkow and Michael W Ross are partners at Jenner & Block LLP. Special thanks to Jenner & Block associates Tessa J G Roberts and Tiffany Lindom, who were instrumental in preparing this introduction to the first edition and in updating it for this third edition.

2 See, e.g., Rod J Rosenstein, 'Keynote Address on Corporate Enforcement Policy, NYU Program on Corporate Compliance and Enforcement', New York University School of Law (6 Oct. 2017), at 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', US Department of Justice (US DOJ) Memorandum (9 Sep. 2015), at https://www.justice.gov/archives/dag/file/769036/download; 'DOJ Announces Important Changes to Yates Memo', Sidley Austin (30 Nov. 2018), at https://www.sidley.com/en/insights/newsupdates/2018/11/doj-announces-important-changes-to-yates-memo (web pages last accessed 11 Mar. 2022).

3 See, e.g., 'DOJ Announces New Policy to Avoid "Piling On" of Duplicative Corporate Penalties', Jenner & Block LLP (5 May 2018), at https://jenner.com/library/publications/18003 (last accessed 11 Mar. 2022).

4 Yaron Nili, 'The Credit Suisse Guilty Plea: Implications for Companies in the Crosshairs', *Harv. L. Sch. Forum on Corp. Governance & Fin. Reg.* (9 Jun. 2014), at 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), at https://www.forbes.com/sites/shahgilani/2014/05/05/banks-being-forced-to-plead-guilty-to-criminal-charges-will-they-survive (web pages last accessed 11 Mar. 2022).

monitor. In recent years, household names such as 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 used as a tool by the US Department of Justice (US DOJ), numerous other regulators have appointed monitors following an inquiry, including the US Securities and Exchange Commission (SEC), the New York State Department of Financial Services and the United Kingdom Serious Fraud Office.

This guide takes an in-depth look at the corporate monitor – defined broadly by both the US DOJ and the SEC 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'.[5] The authors have extensive experience of 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, and how the monitor can succeed in the eyes of various stakeholders. Next, it provides first-hand perspectives on monitorships from a number of viewpoints, and then addresses a variety of issues that arise during specific types of monitorships, including cross-border and international monitorships, monitorships within specific industries and situations involving concurrent monitorships.

In an era when 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 more deeply into how monitorships work in practice.

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

5 US DOJ and US Securities and Exchange Commission (SEC), 'A Resource Guide to the U.S. Foreign Corrupt Practices Act', 73–74 (2nd Ed. July 2020), at https://www.justice.gov/criminal-fraud/file/1292051/download (last accessed 21 Mar. 2022).

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

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 40 years ago, the US 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 US DOJ filed at least 20 civil cases against unions asserting RICO violations,[10] and in almost all of them, the US DOJ successfully secured court appointment of a third party to oversee the implementation of institutional 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, facts 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 were being appointed to address corporate wrongdoing. In 1994, a federal court approved what some have described as the first deferred prosecution agreement (DPA), following the US 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

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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 (op. cit. note 6, above), 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.

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 *The Business Lawyer*, 61, 72 (Winter 2014/2015); Kurt Eichenwald, 'Brokerage Firm Admits Crimes in Energy Deal', *The New York Times* (28 Oct .1994), at https://www.nytimes.com/1994/10/28/us/brokerage-firm-admits-crimes-in-energy-deals.html (last accessed 11 Mar. 2022).

paid out returns from new investments (rather than from actual returns).[14] Among the sanctions extracted by the US DOJ was the appointment of an 'independent ombudsman' for a three-year term who would sit on Prudential's board of directors and would be required to submit quarterly reports to the US DOJ on any instances of criminal conduct or other 'material improprieties' at the company. To accomplish that, the DPA required Prudential to report any 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 eyes and ears of the US 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 US DOJ's increased reliance on internal investigations by law firms as part of the investigation process itself. In the 2000s, the US DOJ and other regulators began to incentivise companies to hire external counsel to conduct investigations and provide the results of those investigations to the US DOJ, both so that the US 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 increased since in both domestic and international investigations.[17]

By the early 2000s, the role of the monitor had 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 US$11 billion and its balance sheet by US$75 billion by fraudulently booking expenses as investments;[18] and, as part of the flurry of

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 SuLi, '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', *The Washington Post* (22 May 2011), at https://www.washingtonpost.com/business/economy/justice-department-sec-investigations-often-rely-on-companies-internal-probes/2011/04/26/AFO2HP9G_story.html (last accessed 11 Mar. 2022); see, generally, Eisinger (op. cit. note 16, above).

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

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] However, soon after his appointment, Breeden's role expanded significantly: with the 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, 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 for more than 10 years and a mandate that at least one member depart each year. Other recommendations included switching external auditors every 10 years and creating a website on which 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, and its successful reorganisation, the company would continue under a new name, MCI Inc, and eventually sell itself to Verizon Communications in 2005 for US$6.6 billion.[25]

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19 Litigation Release No. 17588, SEC, '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 Jun. 2002), at https://www.sec.gov/litigation/litreleases/lr17588.htm (last accessed 11 Mar. 2022).

20 *WorldCom,* at 432.

21 id.

22 Barnaby J Feder, 'WorldCom Report Recommends Sweeping Changes for Its Board', *The New York Times* (26 Aug. 2003), at https://www.nytimes.com/2003/08/26/business/worldcom-report-recommends-sweeping-changes-for-its-board.html (last accessed 11 Mar. 2022).

23 id.

24 *WorldCom,* at 432.

25 Timothy L O'Brien, 'WorldCom to Exit Bankruptcy and Change Name to MCI', *The New York Times* (24 Apr. 2003), at 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

The contemporary monitor

Since *WorldCom*, the US DOJ and others have come to use the appointment of a monitor regularly as a key tool in resolving investigations into corporate wrongdoing.[26] According to the University of Virginia's corporate prosecution registry, 30 independent monitors were appointed in US 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 US DOJ matched that pace, appointing at least 51 independent corporate monitorships after NPAs and DPAs, though, as discussed below, this pace has slowed slightly in more recent years.[28] This monitorship activity became so extensive that, in November 2015, the US 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 US Foreign and Corrupt Practices Act, 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]

Agrees to Acquire MCI for $6.6 Billion, Beating Qwest', *The New York Times* (14 Feb. 2005), at https://www.nytimes.com/2005/02/14/technology/verizon-agrees-to-acquire-mci-for-66-billion-beating-qwest.html (web pages last accessed 14 Mar. 2022).

26 Khanna and Dickinson (op. cit. note 6, above), at 1718.

27 Corporate Prosecution Registry, University of Virginia (18 January 2019), at https://corporate-prosecution-registry.com/ (last accessed 9 Feb. 2022) (exported data).

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

29 id.

30 See Parts III and IV of this guide; see also, e.g., SEC, Press release, 'Chemical and Mining Company in Chile Paying $30 Million to Resolve FCPA Cases' (13 Jan. 2017), at https://www.sec.gov/news/pressrelease/2017-13.html; SEC, Press release, 'Biomet Charged With Repeating FCPA Violations' (12 Jan. 2017), at https://www.sec.gov/news/pressrelease/2017-8.html (web pages last accessed 11 Mar. 2022).

31 Veronica Root, 'Modern-Day Monitorships', 33 *Yale Journal on Regulation*, 109, 109 (2016).

32 See Part IV of this guide.

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, harking 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 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 US DOJ. With the more frequent use of monitors, the US 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 the 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, required the company to endow an ethics chair at Christie's alma mater, Seton Hall University

33 See, e.g., *Prudential* DPA, at 3; see also Root (op. cit. note 31, above), 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 (op. cit. note 31, above), at 124–37 (providing examples).

35 American Bar Association (ABA), Criminal Justice Standards on Monitors (16 Jun. 2016), at https://www.americanbar.org/groups/criminal_justice/standards/MonitorsStandards (last accessed 11 Mar. 2022).

36 Lawrence A Cunningham, 'Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigation and Reform,' 66 *Fla. L. Rev.* 1, 68 (2015), at https://scholarship.law.ufl.edu/flr/vol66/iss1/1/ (last accessed 21 Mar. 2022).

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*).

School of Law.[38] In another, Christie appointed John Ashcroft – his former US DOJ boss – as the monitor in a matter that ultimately resulted in a one-page bill, with no hours tracked, for US$52 million in fees for 18 months of work.[39]

In the wake of outcry about these incidents, the US DOJ began to establish guidelines to ensure more transparent procedures around the appointment of monitors. In March 2008, the US DOJ issued the Morford Memorandum, its first policy memorandum addressing the selection and use of corporate monitors.[40] To eliminate unilateral selection of a monitorship candidate, the Morford Memorandum 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, the US DOJ issued a further memorandum, in October 2018, by Assistant Attorney General for the Department's Criminal Division, Brian A Benczkowski (the Benczkowski Memorandum), requiring an express analysis of whether a monitor is justified before appointing one in a particular case.[42] The focal point of the Benczkowski Memorandum was its requirement that the US 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

38 id.

39 id.; see also House Judiciary Committee, Press release, 'Conyers and Sánchez Demand Ashcroft Testimony about $52 Million No-bid Contract' (30 Jan. 2008); Nina Totenberg, 'House Panel Questions Ashcroft on No-Bid Contract', NPR (12 Mar. 2008), at https://www.npr.org/templates/story/story.php?storyId=88132206 (last accessed 11 Mar. 2022).

40 Memorandum from Craig S Morford, Deputy Attorney General, US DOJ, 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 Mar. 2008) (Morford Memorandum), at https://www.justice.gov/sites/default/files/dag/legacy/2008/03/20/morford-useofmonitorsmemo-03072008.pdf (last accessed 11 Mar. 2022).

41 Lauren Giudice, 'Regulating Corruption: Analyzing Uncertainty in Current Foreign Corrupt Practices Act Enforcement', 91 *B. U. L. Rev.*, 347, 371 (2011); Morford Memorandum, 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, US DOJ (12 Oct. 2018); Memorandum from Brian A Benczkowski, Assistant Attorney General, US DOJ, to All Criminal Division Personnel, 'Selection of Monitors in Criminal Division Matters' (11 Oct. 2018) (Benczkowski Memorandum), at https://www.justice.gov/opa/speech/file/1100531/download (last accessed 11 Mar. 2022).

be derived from, a monitorship relative to the projected costs and burdens'.[43] Several commentators viewed this guidance as an attempt by the US DOJ to scale back on corporate monitorships, based on the costs that monitorships may impose on companies.[44] Benczkowski 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] However, only one corporate monitor was imposed by a DPA or NPA in 2018 and although the use of monitorships returned to pre-2018 levels in 2019, during which at least six monitorships were imposed,[46] only two monitorships were imposed in 2020 and only one in 2021.[47] Note, however, that monitorships may again become more prevalent with a new leader at the helm of the US DOJ. On 28 October 2021, the US DOJ issued

43 Benczkowski Memorandum, at 2 (emphasis added).

44 Anello (op. cit. note 28, above); Ronald C Machen, et al., 'The DOJ's New Corporate Monitor Policy', *Harvard Law Sch. Forum on Corp. Governance & Fin. Reg.* (5 Nov. 2018), at 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? DOJ Criminal Division issues new policy guidance regarding the imposition of corporate monitorships', DLA Piper (17 Oct. 2018), at https://www.dlapiper.com/en/us/insights/publications/2018/10/to-monitor-or-not-to-monitor (web pages last accessed 11 Mar. 2022).

45 Adam Dobrik, 'Criminal Division Chief Plays Down Talk of Monitorship Demise', Global Investigations Review (8 Mar. 2019), at https://globalinvestigationsreview.com/article/jac/1181316/criminal-division-chief-plays-down-talk-of-monitorship-demise (last accessed 11 Mar. 2022).

46 See Deferred Prosecution Agreement, *United States v. Sociedad Quimica y Minera de Chile, S.A.*, No. 17 Cr. 00013, Dkt. No. 2 (D.D.C. 13 Jan. 2017); Deferred Prosecution Agreement, *United States v. State Street Corporation* (17 Jan. 2017), at https://www.justice.gov/criminal-fraud/file/932581/download; Non-Prosecution Agreement, *Utah Transit Authority* (4 April 2017), at https://www.gibsondunn.com/publications/Documents/UTA-NPA.PDF; Deferred Prosecution Agreement, *United States v. Panasonic Avionics Corp.*, No. 18 Cr. 00118, Dkt. No. 2-1 (D.D.C. 30 Apr. 2018); Non-Prosecution Agreement, *Fresnius Medical Care AG & Co. KGaA* (25 Feb. 2019), at https://www.justice.gov/opa/press-release/file/1148951/download; Deferred Prosecution Agreement, *United States v. Mobile TeleSystems PJSC* (22 Feb. 2019), No. 19 Cr. 00167, Dkt. No. 10 (S.D.N.Y. 22 Feb. 2019); Deferred Prosecution Agreement, *United States v. Rick Weaver Buick GMC Inc.*, No. 16 Cr. 0030, Dkt. No. 191-1 (W.D.P.A. 15 Jan. 2019); Deferred Prosecution Agreement, *United States v. Telefonaktiebolaget LM Ericcson*, No. 19 Cr. 00884, Dkt. No. 6 (S.D.N.Y 6 Dec. 2019); Non-Prosecution Agreement, *Walmart Inc.* (20 Jun. 2019), at https://www.justice.gov/opa/press-release/file/1175791/download (web pages last accessed 14 Mar. 2022).

47 Corporate Prosecution Registry, University of Virginia, at https://corporate-prosecution-registry.com/ (last accessed 9 Feb. 2022) (exported data).

a memorandum from Deputy Attorney General (DAG) Lisa Monaco (dubbed the Monaco Memorandum) that revised and superseded the Benczkowski Memorandum's principles for the selection and imposition of a monitor. In providing the new guidance, DAG Monaco elaborated that prosecutors may 'require the imposition of independent monitors whenever it is appropriate', as compared with the Benczkowski Memorandum's guidance that monitors should be imposed when there is a demonstrated need and clear benefit relative to the costs and burdens.[48] In her remarks addressing the new guidance, DAG Monaco said that the Memorandum retracted any prior guidance that would suggest that monitorships are 'disfavored or are the exception'.[49] Time will tell what practical effect the new guidance will have on the frequency with which monitorships are imposed.[50]

In addition to requirements on when to appoint a monitor, US DOJ guidance has also placed restrictions around the functions that should be assigned to a monitor once appointed. The Morford Memorandum 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.[51] Thus, even when appointed, a US DOJ-appointed monitor is supposed to be circumscribed to the specific wrongdoing at issue.

The US 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.[52] 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

48 Benczkowski Memorandum, at 2.

49 Deputy Attorney General Lisa O. Monaco Keynote Address at the ABA's 36th National Institute on White Collar Crime (28 Oct. 2021), at https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute (last accessed 14 Mar. 2022).

50 The Monaco Memorandum is discussed further in Part IV of this guide.

51 Morford Memorandum, at 5.

52 Root (op. cit. note 31, above), at 109.

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).[53]

As commentators have noted, the cost and burdens of a monitorship to a company can serve as an effective deterrent against future corporate misconduct.[54] 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.[55]

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 Memorandum describes a chief purpose of a monitorship as providing a means to 'address and reduce the risk of recurrence of the corporation's misconduct'.[56] Consistent with that purpose, in a speech at the New York University School of Law in October 2018, Geoffrey Berman, the US Attorney for the Southern District of New York, argued that 'a monitor's role is remedial, not punitive'.[57] Indeed, the US DOJ's National Security Division revised its enforcement policy in 2019 to state that it would not impose a monitor if a company has implemented an effective compliance programme by the time

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

54 Khanna and Dickinson (op. cit. note 6, above), at 1715.

55 Ford and Hess (op. cit. note 12, above), at 703.

56 Morford Memorandum, at 5.

57 Geoffrey S Berman, 'U.S. Attorney Geoffrey Berman Keynote Speech on Monitorships', New York School of Law, Program on Corporate Compliance and Enforcement (12 Oct. 2018), at https://wp.nyu.edu/compliance_enforcement/2018/10/12/u-s-attorney-geoffrey-berman-keynote-speech-on-monitorships (last accessed 14 Mar. 2022).

of resolution.[58] 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 are likely to share the 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 in understanding, or practising in, this important area.

58 DOJ, 'Export Control and Sanctions Enforcement Policy for Business Organizations' (December 2019 Update), at https://www.justice.gov/nsd/ces_vsd_policy_2019/download (last accessed 14 Mar. 2022).

APPENDIX 1

About the Authors

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Anthony S Barkow, co-chair of Jenner & Block's investigations, compliance and defence practice, and managing partner of the firm's New York office, 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 (SDNY) 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 US Department of Justice (US DOJ).

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 SDNY, 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 US$715 million settlement with the New York Department of Financial Services, part of a broader US$2.6 billion settlement that involved the US DOJ and federal regulators.

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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 *New York 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 New York Department of Financial Services, and played a key role in the team monitoring numerous firearms dealers who 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 New York Police Department's warrant system that resulted in a six-figure settlement and a successful effort to reduce the sentence of a reformed teenage offender.

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Part I

An Overview of Monitorships

CHAPTER 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 of a monitor in effecting that type of cultural change is, in many ways, the unifying theme of this guide.

To be sure, when a corporation engages in unlawful behaviour and finds itself on the receiving end of a monitorship, the misconduct is sometimes committed by only a few bad apples. In other cases, the tree – or the whole orchard – may be rotten, in which case a few revised policies and revamped compliance processes

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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 Matthew T Gordon, 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)).

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 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 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 both to see the full picture and to illuminate problems that need fixing.

As noted in several of the chapters in this guide, regardless of whether a 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 later. 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.

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

Not every instance of corporate wrongdoing leads to a monitorship that will require efforts to reform a company's culture. In some cases, 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 removed, 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 – both those who caused (or ignored) the misconduct and those 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, 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 to 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 on existing structures that can be used to foster compliance, as well as reinforcing consistent (and repeated) communication about compliance. These tactics will help management to 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 level of seniority. A healthy compliance culture learns the hard lessons from each compliance breach, 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 within 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 government authority. It is absolutely essential to carefully educate the organisation's leadership of the monitor's findings rather than simply to impose reforms based on 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.

Assessing the tone from the top and the middle

Tone from the top, according to the Ethics and 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

4 e.g., US Department of Justice (US DOJ), Criminal Division, Fraud Section, 'Evaluation of Corporate Compliance Programs' (Jun. 2020), at https://www.justice.gov/criminal-fraud/page/file/937501/download; US DOJ, Criminal Division and US Securities and Exchange Commission (SEC), Enforcement Division, 'A Resources Guide to the US Foreign Corrupt Practices Act' (2020), at https://www.justice.gov/criminal-fraud/file/1292051/download (web pages last accessed 14 Mar. 2022).

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, it is critical to assess tone in the middle, given that middle managers typically have more extensive interactions with employees who ultimately will either embrace a culture of compliance or will not. As an initial part of the assessment, it is important to evaluate the reactions 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 to employees, does management describe the settlement that created the monitorship as a wake-up call and catalyst for necessary change to the organisation? Or is the monitorship portrayed 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 majority of employees at all but complains to his or her direct reports that the government investigation was an overreaching 'witch hunt' 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 affect the organisation's cultural approach to compliance in very different ways. Communications like these create a lasting impression, either positive or negative, that middle management echoes to their teams. If 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

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

that change is necessary have probably already set off along the path of change, making it far easier for the monitor to shepherd the company towards broader and longer-lasting reform.

Indeed, a company's efforts to install and support a robust compliance programme, through adequate resourcing and the tone set by leadership, has taken on increased significance. In October 2021, US Deputy Attorney General (DAG) Lisa Monaco delivered a speech and accompanying memorandum announcing several changes to the US DOJ's corporate criminal enforcement policies and practices, including rescinding prior Department guidance that 'suggested that monitorships are disfavored or are the exception'.[6] DAG Monaco announced that the US DOJ 'is free to require the imposition of independent monitors whenever it is appropriate to do so in order to satisfy our prosecutors that a company is living up to its compliance and disclosure obligations under the [deferred prosecution agreement] or [non-prosecution agreement]'.[7] DAG Monaco added that the US DOJ is 'committed to imposing monitors where appropriate in corporate criminal matters' and 'should favor the imposition of a monitor where there is a demonstrated need for, and clear benefit to be derived from, a monitorship'.[8] Prosecutors are guided by the following two broad considerations when assessing the need for and propriety of a monitor: '(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.'[9]

The Monaco Memorandum made clear that monitors still 'may not be necessary' when a corporation's compliance programme and controls are 'demonstrated to be tested, effective, adequately sourced, and fully implemented at the time of a resolution'.[10] On the other hand, even where a company is making enhancements to its compliance programme in response to misconduct, if those enhancements have not yet been tested, a monitorship still may be imposed.

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6 Memorandum from the Deputy Attorney General re: 'Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies' (28 Oct. 2021) (Monaco Memorandum), https://www.justice.gov/dag/page/file/1445106/download, at 3; US DOJ, 'Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime' (28 Oct. 2021) (Monaco ABA Remarks), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute (web pages last accessed 14 Mar. 2022).

7 Monaco ABA Remarks, at 3.

8 Monaco Memorandum, at 4.

9 id.

10 ibid., at 5.

Once installed, the monitor's assessment regarding organisational misconduct may join and build on prior government investigations. For example, in August 2020, the Bank of Nova Scotia (Scotiabank) entered into a deferred prosecution agreement (DPA) with the US DOJ, including the imposition of an independent compliance monitor, in connection with criminal charges in respect of a price manipulation scheme involving thousands of episodes of unlawful trading activity by four traders in the precious metals futures contracts markets.[11] The DPA set forth that Scotiabank's compliance function 'failed to detect and deter the four traders' unlawful trading practices', despite three Scotiabank compliance officers possessing substantial information regarding unlawful trading.[12] Despite 'significant investments' to improve Scotiabank's compliance function, the US DOJ determined that an independent compliance monitor was necessary because the remedial improvements had not yet been fully implemented and tested to demonstrate their effectiveness in detecting and preventing similar misconduct in the future.[13] As such, the monitor was armed with knowledge that the misconduct may have been limited to a few bad actors, but Scotiabank's compliance programme still needed to be solidified and tested.[14]

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 communicate with a large number of managers and employees. Similarly, committee meetings

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11 US DOJ, Office of Public Affairs Press Release, 'The Bank of Nova Scotia Agrees to Pay $60.4 Million in Connection with Commodities Price Manipulation Scheme' (19 Aug, 2020); Deferred Prosecution Agreement, *United States v. Bank of Nova Scotia* (19 Aug. 2020), Crim. No. 20-707, ECF No. 2.

12 Deferred Prosecution Agreement, at 3–4, *United States v. Bank of Nova Scotia* (19 Aug. 2020), Crim. No. 20-707, ECF No. 2. at https://www.justice.gov/opa/press-release/file/1306141/download.

13 See note 11, above. US DOJ similarly cited NatWest Markets' 'inadequate and ineffective compliance program and internal controls' compliance programme as a component of the need for an independent compliance monitor. Plea Agreement at 6–7, *United States v. NatWest Markets PLC* (21 Dec. 2021), Crim. No. 3:21-cr-187, ECF No. 9 (D. Conn.) ('based on the state of the Defendant's compliance program and the progress of its remediation, including the fact that certain of the Defendant's remedial improvements to its compliance program and internal controls have not been fully implemented or tested to demonstrate that they would prevent and detect similar misconduct in the future, the Fraud Section and the Office determined that an independent compliance monitor was necessary as set forth in Attachment D to this Agreement.').

14 See note 11, above.

of managers on areas that relate to the monitorship may also be fruitful in determining whether and how compliance-related communications have translated into running the business. The monitor can 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 a 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 a litigation adversary whose interests are antagonistic?
- 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 his or her 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 compliance framework shows how much the company values the importance of the compliance function in identifying and mitigating existential risks. A wealth of resources exist to help a monitor evaluate compliance programmes, including, to name a few:

- for the United States: the US Sentencing Guidelines,[15] the Justice Manual[16] and the 'Evaluation of Corporate Compliance Programs' guidance[17] from the US DOJ's Criminal Division;

15 US Sentencing Guidelines Manual § 8B2.1 (US Sentencing Commission 2021).

16 US DOJ, Justice Manual 9-28.800 (2018).

17 US DOJ, Criminal Division, Fraud Section, 'Evaluation of Corporate Compliance Programs' (op. cit. note 4, above).

- for the United Kingdom: the Serious Fraud Office's 'Evaluating A Compliance Programme' guidance released in January 2020;[18] and
- globally: the Organisation for Economic Co-operation and Development's 'Good Practice Guidance on Internal Controls, Ethics, and Compliance'[19] and its 'Anti-Corruption Ethics and Compliance Handbook for Business',[20] or the International Organization of Standards 19600 Compliance Management Systems guidelines.[21]

There is no shortage of guidance to be found beyond these resources,[22] and familiarity with the basics of good compliance programmes is essential to ensure that a monitor can capably identify any gaps in the company's 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.

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18 UK Serious Fraud Office, 'Evaluating a Compliance Programme', *SFO Operational Handbook* (Jan. 2020), at https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/evaluating-a-compliance-programme/ (last accessed 14 Mar. 2022).

19 Organisation for Economic Co-operation and Development (OECD), 'Good Practice Guidance on Internal Controls, Ethics, and Compliance' (18 Feb. 2010), at https://www.oecd.org/daf/anti-bribery/44884389.pdf (last accessed 14 Mar. 2022).

20 OECD, 'Anti-Corruption Ethics and Compliance Handbook for Business' (2013), at http://www.oecd.org/corruption/Anti-CorruptionEthicsComplianceHandbook.pdf (last accessed 14 Mar. 2022).

21 International Organization of Standards (ISO), 19600 on Compliance Management Systems – Guidelines, at https://www.iso.org/obp/ui/#iso:std:iso:19600:ed-1:v1:en:edB1:v1 (last accessed 14 Mar. 2022).

22 e.g., ECOA/ECI Handbook (op. cit. note 5, above). The ECI's website, in particular, hosts a number of resources covering the basics of high-quality compliance programmes and more specific guidance regarding topics such as incentive structures, messaging regarding compliance, internal complaint reporting mechanisms, etc. For example, the ECI regularly issues topical reports based on findings from its Global Business Ethics Survey, and in 2018 issued a report setting forth a measurement framework for high-quality ethics and compliance programmes. See ECI, *Measuring the Impact of Ethics and Compliance Program* (Jul. 2018), at https://www.ethics.org/press-release/measuring-the-impact-of-ethics-and-compliance-programs/; ECI, *High-Quality Ethics and Compliance Program Measurement Framework* (2018), at https://www.ethics.org/wp-content/uploads/2018/09/ECI-Framework-Final.pdf (web pages last accessed 22 Mar. 2022).

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.[23] For example, consider an organisation with a strict global anti-corruption policy that forbids giving anything of more than US$25 in value to a government official 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 favours. A more diligent monitor would do a more careful assessment, which could include testing employees' understanding of the training and 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 written approval in advance;
- employees carry out 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 different.

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

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 conducting or reviewing employee surveys or interviews to identify what information is (or is not) being internalised.[24] 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.[25] It is also important to evaluate the metrics used to evaluate 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 training sessions.[26] Better metrics include whether the incidence of high-risk behaviour decreases after employees receive training, whether reporting on issues

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

25 Deloitte, 'Testing and monitoring: The fifth ingredient in a world-class ethics and compliance program', at https://www2.deloitte.com/content/dam/Deloitte/us/Documents/risk/us-aers-testing-and-monitoring-the-fifth-ingredient.pdf; US DOJ, Criminal Division and SEC, Enforcement Division, 'A Resources Guide to the U.S. Foreign Corrupt Practices Act' (Second Edition, July 2020), at 1, available at https://www.justice.gov/criminal-fraud/file/1292051/download (web pages last accessed 14 Mar. 2022).

26 See Chen and Soltes (op. cit. note 23, above). In a classic (and often-cited) example of how incorrect or incomplete metrics can hide a paper programme, when the US 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 (FCPA), 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 DOJ Press release No. 12-534, 'Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA' (25 Apr. 2012), at https://www.justice.gov/opa/pr/former-morgan-stanley-managing-director-pleads-guilty-role-evading-internal-controls-required; Singh and Bussen (op. cit. note 24, above), at 6–7.

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 employees on their comprehension of the applicable policies and procedures.

The monitor's assessment should also evaluate whether the maturity and sophistication of the compliance function correlates with 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 procedures – 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 them vulnerable to employee misconduct.[27] 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.

27 Alison Taylor, 'What Do Corrupt Firms Have in Common?', Center for the Advancement of Public Integrity, Issue Brief (Apr. 2016).

Assessing the proposed remediation

A monitorship begins months, or even years, after the company first becomes aware of problems with its employees, compliance programme or corporate culture. Consequently, the company almost certainly will have already taken 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 these proposals are viewed as flawed and incomplete, the monitor must resist the temptation to reject them out of hand and impose on the monitored company his or her 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 thus far 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 existing remedial plan has presumably already been accomplished, and it will be far easier to convince management of the utility of improving an existing programme than to start a resource-intensive exercise 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 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 a monitor's initial assessment of a company's culture is its evaluation of the people in the organisation – at a multitude of levels.

The monitor can play an important part in helping the company make sure all the direct participants in the misconduct are gone. Under the US Sentencing Guidelines, for example, companies must make reasonable efforts to remove personnel in positions of substantial authority that the organisation knew (or should have known) were engaged in misconduct.[28] 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, there is 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 with key personnel, can help management identify personnel who 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 his or her concerns with more senior management, the CEO, the board of directors or even the appointing government authority if the monitor believes that the individual will be an impediment to the reforms necessary for the company to avoid recidivism.

The monitor's role can also be important in helping a company identify and potentially empower 'change agents' who are already within the company's ranks. Change agents are those within an 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.[29] 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

28 US Sentencing Guidelines Manual § 8B2.1 (US Sentencing Commission 2021).

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

within the organisation, rather than from external forces. The monitor can help to facilitate that process, identifying voices that may not have previously been heard, searching for obstacles that may have held them back and helping to 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 government 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.[30] And Harvard Business School Dean Nitin Nohria and Professor Michael Beer contend that about 70 per cent of corporate change initiatives fail because, in the rush to change their organisations, managers immerse themselves in 'an alphabet soup of initiatives' – failing to recognise the real human toll of efforts to change and, ironically, focusing on too many conflicting ideas about how to change a company rather than a single coherent strategy.[31]

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 on existing structures, and reinforcing consistent, repeated messaging.

Obtaining internal (and business) buy-in

A monitor is most effective in shepherding large-scale change when he or she 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 by an outsider against the company's will. When imposed from the outside, change tends to

30 id.

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

dissipate quickly after the monitorship has ended. Of course, internally driven change demands willing partners. This strategy works best when senior leadership – as demonstrated through the work done in the monitor's initial assessment or otherwise – is invested in effectuating change.

On the other hand, senior leadership's failure to buy in to needed cultural change can have significant consequences. For example, Standard Chartered Bank had its independent compliance consultant's term extended multiple times for sanctions violations, most recently in April 2019, because, despite paying substantial fines and making substantial efforts to improve its compliance culture, the business and senior compliance leaders had still failed to take steps to block or better identify prohibited transactions, even after identifying compliance risks.[32]

Perhaps the most important constituency to bring on board for cultural change, however, 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 recognises, an effective compliance programme 'aligns with the larger objectives of the business'.[33] A more compliant culture requires 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 up 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 government 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

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32 New York Department of Financial Services, Press release, 'Department of Financial Services and Manhattan District Attorney Fine Standard Chartered $463.4 Million For U.S. Sanctions Violations' (9 Apr. 2019), at https://www.dfs.ny.gov/reports_and_publications/press_releases/pr1904091; Standard Chartered Bank Consent Order Under New York Banking Law §§ 39 and 44 (9 Apr. 2019), at https://www.dfs.ny.gov/system/files/documents/2019/04/ea190409_standard_chartered_bank.pdf (web pages last accessed 14 Mar. 2022).

33 Thomas R Fox, 'Measuring the Impact of Ethics and Compliance Programs,' *FCPA Compliance Report* (27 Jul. 2018), at https://www.jdsupra.com/legalnews/measuring-the-impact-of-ethics-and-61469/ (last accessed 22 Mar. 2022) (discussing ECI, 'Measuring the Impact of Ethics and Compliance Programs' (2018)); ECI, *High-Quality Ethics & Compliance Program Measurement Framework* (op. cit. note 22, above).

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 ensure 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 government authority that appointed the monitor to get management to see the light. The monitor can inform the board or the government authority of management's intransigence, either informally or formally through the monitor's reports. If these efforts are unsuccessful, the monitor can issue his or her recommendations, use the remaining period of the monitorship 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 – it is to be hoped – 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.

If business managers do not embrace cultural change, they may also jeopardise the company's resolution with the US DOJ. As announced by DAG Monaco, the US DOJ will impose 'serious consequences' on companies that breach the terms of their DPAs or non-prosecution agreements (NPAs).[34] In October 2017, NatWest Markets'[35] broker-dealer subsidiary, NatWest Markets Securities Inc,[36]

34 Monaco ABA Remarks, at 3–4 ('We will hold accountable any company that breaches the terms of its [deferred prosecution agreement] or [non-prosecution agreement]. [Deferred prosecution agreements] and [non-prosecution agreements] are not a free pass, and there will be serious consequences for violating their terms.').

35 Formerly known as The Royal Bank of Scotland Plc.

36 Formerly known as RBS Securities Inc.

entered into an NPA with the US DOJ following a years-long securities fraud scheme involving allegations about misrepresentations in the purchase and sale of collateralised loan obligations and residential mortgage-backed securities.[37] In December 2021, the US DOJ imposed an independent compliance monitor and issued another US$35 million fine, restitution and forfeiture on NatWest Markets after it 'breache[d] the terms of [the 2017 non-prosecution agreement] with the government'.[38] Labelled a 'repeat offender', NatWest Markets pleaded guilty to various fraud schemes in the markets for US Treasury securities and futures contracts.[39] DAG Monaco noted that '[c]ompany executives should realize that investment in compliance programs can avoid situations like this, and take action accordingly'.[40]

Efforts to reform in one business unit, even with the help of a monitor, can leave a company vulnerable to cultural problems in other business units, leading to additional legal and reputational risk or the appointment of another monitor. For example, State Street Corporation, already working with a monitor pursuant to a 2017 DPA concerning one business unit's[41] failure to disclose commissions to customers on billions of dollars of securities trades,[42] entered into a new DPA

37 US DOJ, U.S Attorney's Office District of Connecticut, Press release, 'RBS Securities Inc. Agrees to Pay $35 Million Penalty Related to Securities Fraud Scheme' (26 Oct. 2017), at https://www.justice.gov/usao-ct/pr/rbs-securities-inc-agrees-pay-35-million-penalty-related-securities-fraud-scheme; Non-Prosecution Agreement with RBS Securities Inc. (25 Oct. 2017), https://www.justice.gov/file/1006796/download (web pages last accessed 14 Mar. 2022).

38 US DOJ, Office of Public Affairs, Press release, 'NatWest Markets Pleads Guilty to Fraud in U.S. Treasury Markets' (21 Dec. 2021), at https://www.justice.gov/opa/pr/natwest-markets-pleads-guilty-fraud-us-treasury-markets (last accessed 14 Mar. 2022); Plea Agreement, *United States v. NatWest Markets PLC* (21 Dec. 2021), Crim. No. 3:21-cr-187, ECF No. 9 (D. Conn.).

39 US DOJ, Office of Public Affairs, Press release, 'NatWest Markets Pleads Guilty to Fraud in U.S. Treasury Markets' (op. cit. note 38, above); Plea Agreement, *United States v. NatWest Markets PLC* (21 Dec. 2021), Crim. No. 3:21-cr-187, ECF No. 9 (D. Conn.).

40 US DOJ, Office of Public Affairs, Press release, 'NatWest Markets Pleads Guilty to Fraud in U.S. Treasury Markets' (op. cit. note 38, above).

41 State Street Corporation's transition management business unit falls within its Portfolio Solutions Group, which is part of State Street Global Markets. See Deferred Prosecution Agreement, *United States v. State Street Corp.* (18 Jan. 2017), Crim. No. 17-10008, https://www.justice.gov/criminal-fraud/file/932581/download (last accessed 14 Mar. 2022).

42 US DOJ, Office of Public Affairs, Press release, 'State Street Corporation Agrees to Pay More than $64 Million to Resolve Fraud Charges' (18 Jan. 2017), https://www.justice.gov/opa/pr/state-street-corporation-agrees-pay-more-64-million-resolve-fraud-charges (last accessed 14 Mar. 2022); Deferred Prosecution Agreement, Statement of Facts, at 1–2, *United States v. State Street Corp.* (op. cit. note 41, above).

and agreed to hire another monitor as a result of a different business unit's[43] failure to disclose markups to routine charges for out-of-pocket expenses to custody clients.[44]

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 when a monitor must demonstrate the 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 the monitor's recommendations are respected as necessary and practical. The alternative – dictating reforms without regard to the underlying business imperatives – will inevitably frustrate the process and diminish the monitor's credibility, and therefore his or her ability to achieve sustainable reform.[45] 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 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 may have to be prepared to exit that market.

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43 State Street Corporation's custody business unit in the United States fell within the Global Services America division of the Investor Services division of State Street Bank and Trust Company, which was owned by State Street Corporation. See Deferred Prosecution Agreement, at 1, *United States v. State Street Corp.* (13 May 2021), Crim. No. 21-10153, https://www.justice.gov/usao-ma/press-release/file/1394071/download (last accessed 14 Mar. 2022).

44 US DOJ, U.S. Attorney's Office, Press release, 'State Street Corporation to Pay $115 Million Criminal Penalty and Enter Into Deferred Prosecution Agreement in Connection With Scheme to Overcharge Custody Customers' (13 May 2021), https://www.justice.gov/usao-ma/pr/state-street-corporation-pay-115-million-criminal-penalty-and-enter-deferred-prosecution (last accessed 14 Mar. 2022); Deferred Prosecution Agreement, *United States v. State Street Corp.* (op. cit. note 43, above).

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

Getting business unit buy-in may also require marshalling historical facts to give business management the needed wake-up call. When 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. If 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 in which the company has engaged. 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. If a monitorship has no historical component, a monitor should look to the results of internal investigations, regulatory investigations and his or her 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 part 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 on 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 being remedial, rather than punitive.[46]

Leverage and build on existing structures

As discussed above, one of the greatest effects 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.

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46 A view expressed by Southern District of New York US Attorney Geoffrey S Berman in his keynote speech on monitorships at the 2018 New York University (NYU) Program on Corporate Compliance and Enforcement conference – see https://wp.nyu.edu/compliance_enforcement/2018/10/12/u-s-attorney-geoffrey-berman-keynote-speech-on-monitorships/ (last accessed 14 Mar. 2022).

A company rarely needs to start entirely from scratch. There are typically existing processes or procedures already in place that could be used more effectively to enhance compliance or to communicate new compliance values. For example, enterprise risk assessments, internal audit processes and existing data sources can all be used as a starting point for a company to better understand and assess its compliance risks.[47] Data analytics, discussed further below, is an increasingly important tool to mine existing data sources for suspicious conduct. 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 this finding with senior management, the monitor declined the invitation to propose a 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 his or her own solutions to problems when the company is unable or unwilling 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 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 affect employees (sometimes negatively). Inculcating a compliant culture

47 Deloitte, *Building world-class ethics and compliance programs: Making a good program great – Five ingredients for your program* (2015), at 16, at https://www2.deloitte.com/content/dam/Deloitte/us/Documents/risk/us-aers-g2g-compendium.pdf (last accessed 14 Mar. 2022).

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'.[48]

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;
- make compliance a core part of the company's code of conduct, which is key to 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;[49]
- 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 dismissal. 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 through the management ranks.

As the ECI's *Ethics and Compliance Handbook* notes: 'Setting 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.'[50] Guidance from the US DOJ echoes this sentiment, telling prosecutors to look at how senior leaders have encouraged or discouraged compliance 'through their words and

48 Singh and Bussen (op. cit. note 24, above), at 79.

49 ECOA/ECI Handbook (op. cit. note 5, above), at 55; Singh and Bussen (op. cit. note 24, above), at 63–64.

50 ECOA/ECI Handbook (op. cit. note 5, above), at 43.

actions'.[51] That means senior managers, as well as lower-level managers, must not only talk the talk, they must walk the walk.[52] A manager who walks the walk, for example, will often confront tough decisions, such as terminating the contract of a top-performing salesperson who regularly circumvents the rules, even if that decision causes a short-term hit to the manager's financial performance.

Set the right tone from the middle

Middle management serve 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 to 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 part 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.

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 affect their compensation and promotion, as key signals regarding how much attention they should pay to compliance.

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51 US DOJ, Criminal Division, 'Evaluation of Corporate Compliance Programs: Guidance Document' (op. cit. note 4, above).

52 Singh and Bussen (op. cit. note 24, above), at 78.

Government enforcement actions underscore the cost of getting incentives and compensation wrong. For example, when federal regulators fined Wells Fargo US$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 sales incentives, including an incentive-based compensation programme, as influencing employees to engage in improper sales practices.[53] Employees described a toxic sales culture with impossibly high targets, in which employees who did not meet daily sales goals were chastised and demeaned in front of peers[54] or threatened with dismissal.[55] And when Wells Fargo settled criminal and civil claims brought by the US DOJ and the Securities and Exchange Commission (SEC) regarding the bank's improper sales practices for US$3 billion in February 2020, the government pointed to the bank's 'onerous sales goals and accompanying management pressure' as leading 'thousands of its employees to engage in unlawful conduct'.[56] In particular, the government noted that senior leadership 'contributed to the problem by promoting and holding out as models of success managers

53 Consumer Financial Protection Bureau, *In the Matter of Wells Fargo Bank, N.A.*, Consent Order (8 Sep. 2016), at https://files.consumerfinance.gov/f/documents/092016_cfpb_WFBconsentorder.pdf (last accessed 14 Mar. 2022).

54 E Scott Reckard, 'Wells Fargo's pressure cooker sales culture comes at a cost,' *Los Angeles Times* (21 Dec. 2013), at https://www.latimes.com/business/la-fi-wells-fargo-sale-pressure-20131222-story.html (last accessed 14 Mar. 2022).

55 Matt Levine, 'Wells Fargo Opened a Couple Million Fake Accounts', *Bloomberg* (9 Sep. 2016), at https://www.bloomberg.com/opinion/articles/2016-09-09/wells-fargo-opened-a-couple-million-fake-accounts; *The People of the State of California v. Wells Fargo & Company, et al.*, No. BC580778, Complaint (4 May 2015), at https://assets.bwbx.io/documents/users/iqjWHBFdfxIU/rPxi_pVaKx2Y/v0 (web pages last accessed 14 Mar. 2022).

56 US DOJ, Settlement Agreement Between (a) the United States of America, Acting Through the Civil Division of the DOJ and the Attorney's Office for the Central District of California, and (b) Wells Fargo & Co. and Wells Fargo Bank, N.A. (20 Feb. 2020), at https://www.justice.gov/usao-cdca/press-release/file/1251331/download; see also US DOJ, Deferred Prosecution Agreement Between the United States Attorney's Office for the Central District of California and the United States Attorney's Office for the Western District of North Carolina, and Wells Fargo & Co. and Wells Fargo Bank, N.A. (20 Feb. 2020), at https://www.justice.gov/usao-cdca/press-release/file/1251336/download. Notably, the deferred prosecution agreement explains that Wells Fargo escaped imposition of a monitor based on extensive remedial measures, including the enhancement of its compliance programme and significant management turnover, and 'the fact that it is operating under the close supervision of its prudential regulators'. id., at. ¶ 2(h) (web pages last accessed 14 Mar. 2022).

who tolerated and encouraged sales integrity violations'.[57] Although, fortunately, situations this extreme are uncommon, a monitor must be sensitive to a culture that incentivises misconduct and must work with the company to realign this 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.[58] 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 their compliance responsibilities and is that measurement a factor in 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 different basis in any given company. 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.

The question of whether to reward ethical conduct – or simply to expect it as the norm – is one that has generated controversy. Publicising when an employee makes choices in line with an 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.[59] As one example, at a monitor's

57 SEC, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, *In the Matter of Wells Fargo & Company* (21 Feb. 2020), at https://www.sec.gov/litigation/admin/2020/34-88257.pdf (last accessed 14 Mar. 2022).

58 Singh and Bussen (op. cit. note 24, above), at 79.

59 ECOA/ECI Handbook (op. cit. note 5, above), at 112.

suggestion, a business division that sought to improve its culture of compliance devised metrics to evaluate personnel on compliance-related topics, 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. The US DOJ's guidance for evaluating corporate compliance programmes similarly noted that 'some companies have also found that providing positive incentives – personnel promotions, rewards, and bonuses for improving and developing a compliance program or demonstrating ethical leadership – have driven compliance'.[60] In 2020, the US DOJ reinforced the importance of positive incentives and observed the use of compliance metrics to reward behaviour: 'some companies have even made compliance a significant metric for management bonuses and/or have made working on compliance a means of career advancement.'[61]

Another 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 a recidivist employee receive 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: 'Employees are careful observers of how their employers impose discipline.'[62] When a 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 suggested. 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.[63]

60 US DOJ, Criminal Division, 'Evaluation of Corporate Compliance Programs: Guidance Document', at 9 (op. cit. note 4, above).

61 id.

62 ECOA/ECI Handbook (op. cit. note 5, above), at 114.

63 ibid., at 108.

Data analytics

Companies are now awash with data – from their employees, contractors and customers – and many struggle with how to employ that data in their compliance programmes. It is imperative that they do so. For example, regulators have made clear they are using 'big data' to investigate wrongdoing and they expect companies to do the same. Indeed, at a conference in November 2019, the Assistant Director of the SEC's Foreign Corrupt Practices Act (FCPA) unit and Acting Principal Assistant Chief of the US DOJ's FCPA unit expressed that they expect it will soon be the norm for companies to make use of data analytics in their compliance programmes, including to better detect corruption and fraud, with the SEC's FCPA Assistant Director noting that 'from the SEC point of view the answer is pretty clear: it's absolutely a good thing'.[64] In fact, Wells Fargo received significant cooperation credit in its 2020 resolution with the US DOJ and the SEC in part because it assisted prosecutors 'in complex data analytics projects' as part of their investigation.[65]

Big data can also be a useful tool in assessing the health of a company's compliance culture. At the outset of a monitorship, data analytics can serve to help identify compliance weaknesses and pockets of resistance to cultural change. And as the monitorship progresses, data analytics can serve as an important tool in the monitor's toolkit to assess, using qualitative data and concrete metrics, whether policy changes, training and changes in the tone at the top are in fact taking root in the organisation and effecting cultural change, or whether old habits continue to persist, and where. For example, a company can analyse trading activity to assess whether brokers are adhering to newly implemented restrictions, or mine travel and expense data to test whether sales personnel are complying with stricter rules on interactions with government officials. It is thus increasingly important for a monitor to consider carefully how a company can be encouraged to use data

64 Clara Hudson, 'SEC, DOJ emphasize importance of data analytics', Global Investigations Review (7 Nov. 2019), at https://globalinvestigationsreview.com/article/jac/1210726/sec-doj-emphasise-importance-of-data-analytics (last accessed 14 Mar. 2022).

65 US DOJ, Deferred Prosecution Agreement Between the United States Attorney's Office for the Central District of California and the United States Attorney's Office for the Western District of North Carolina, and Wells Fargo & Co. and Wells Fargo Bank, N.A. (op. cit. note 56, above), ¶ 2(c)(vii).

analytics to drive and measure cultural change, and to tailor use of the data to the specific risks and data sources of the company. In considering how to do so, a monitor should start with a few basic questions:

- What data sources already exist in the company (for example, third-party payments data, internal expense reports, 'know your customer' data or other financial transaction reports)? Can these data sources be analysed to detect compliance risks? How?
- What data does the company already analyse for reports to management and to track financial performance? Can that data be analysed from a different perspective to identify high-risk areas or weaknesses in the company's controls? For example, if a company's management regularly receives reports about new business being generated, can that information also be analysed to identify high-risk geographical regions where the company's customer base is expanding and anti-corruption controls may not be keeping pace with business growth?
- How do the company's existing data sources align with its compliance risk areas? For example, if the company faces significant corruption risk because of its global nature, does the company analyse vendor payments, travel and entertainment expenses and funds to distributors (such as margin payments, discounts and marketing support) for anomalies that could indicate potentially corrupt transactions?
- Are the right people given access to data? Do senior managers and compliance officers receive the requisite granularity to manage risks within their functions? For example, if a company is required by government contracting rules to meet certain country-of-origin requirements for materials purchased from suppliers, do compliance personnel and senior supply chain managers have access to data regarding the country of origin for each material or part purchased on a given contract?

The answers to these questions will inform a monitor's efforts to help the company successfully integrate data analytics into its compliance programme efficiently and effectively, leveraging existing data and resources where possible. When data that are already being collected can be repurposed to analyse a company's compliance risks, this may be an easy lift. But if this is not the case, a monitor can help the company make risk-based decisions about where collecting new data or investing in new technology makes sense – and where it does not.

The use of data analytics to root out misconduct before it gets reported to a hotline or develops into a more systemic failure serves to emphasise a company's commitment to rooting out problems and addressing them. Data analytics, however,

rarely work well as a compliance tool when used in insolation. Instead, they should be viewed as simply one component of a holistic approach to compliance. In guiding a company along the path to cultural change, a monitor should emphasise the importance of integrating data analytics into a broader approach to compliance embedded deep in a company's culture, without abandoning the human judgement and analysis that form the core of any successful compliance programme.

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 – not an insider but also not the government – that allows him or her 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 made the appointment, and as a result, a monitor's words are amplified. For management, a report criticising a monitor's 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 managers in the eyes of the board of directors and the company's regulators. The monitor must use his or her credibility and the power of reporting to incentivise change, and give management every chance to earn a positive report, while never wavering from his or her duty to provide truthful and accurate information about the company's challenges and failures.

Another important characteristic of monitorships in achieving cultural change is the monitor's experience and credibility as an external 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 within the organisation in the past. 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 him or her in a uniquely strong position to help a company chart a path with full awareness of how to avoid 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 established with the monitor, so that cultural change will endure long after the monitorship has concluded.

APPENDIX 1

About the Authors

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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 on his experience as a former federal prosecutor and as the presidentially appointed first special inspector general of the historic US$700 billion Troubled Asset Relief Program, Mr Barofsky assists companies seeking to improve their corporate culture through compliance counselling and monitorships. He served as the monitor of Credit Suisse AG, following the bank's US$715 million settlement with the New York Department of Financial Services, part of a broader US$2.6 billion settlement that involved the US Department of Justice and the Federal Reserve. He currently is the independent monitor of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW). 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. He has been recognised as one of the *National Law Journa*l's 'winning' litigators. He was also recognised by the *New York Law Journal* as a 'trailblazer' in the field of monitorships and received similar recognition from the *National Law Journal* for his work in regulation and compliance.

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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

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CHAPTER 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 that 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 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 that they obtained enough to argue about meaning later. That tendency in negotiations can result in the most significant areas of dispute in a monitorship. When an agreement states that 'the monitor must ensure that policies and procedures comply with X law', does that require a paper review of policies and procedures

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.

or a review of how these policies and procedures are implemented? These are vastly different enterprises. If an agreement authorises a monitor to interview employees, does the agreement permit the company[3] to have a representative present for those interviews? When an agreement directs a monitor to review compliance issues in a particular line of business, does that include only compliance of the type that led to the monitorship or all compliance matters in the line of business? Does a 'review' of customer records and transactions mean examination of all such records and transactions or is sampling expected or sufficient?

When, in the middle of a monitorship, the parties have a significant disagreement regarding the scope of the monitor's duties, there is no easy mechanism to resolve the dispute. For that reason, it is best to identify and resolve as many disputes as possible 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 involving the government, the party undergoing the monitorship and the monitor have some value, separate meetings are far more desirable because the monitor needs to hear from both sides in a candid manner. The monitor can explain his or her approach during these meetings but their primary purpose is for the monitor to obtain information from the parties.

From the government, the monitor needs to understand the underlying facts – not because the monitor necessarily will be doing a retrospective investigation but because he or she 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 (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.

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

In many cases, the company and the government will have very 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 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 meetings, the monitor will often have a short list of issues about which 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. In most circumstances, however, a monitor should seek to get agreement on key issues at the outset or, at a minimum, to set expectations.

If 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 about the meaning of the agreement. The agreement is, after all, that of the parties, not the monitor. Parties, however, are 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. However, the focus here is on addressing 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 expenditure.[4] Although there have been cost caps in some monitorships,[5] they are rare. Caps are a relatively crude, but effective, means of focusing a monitorship's scope. For the monitored party, a cap or limit on 'how big' the monitorship might get responds directly to the most significant concern that monitored parties have (at least, in the abstract, at the beginning of a monitorship). For the monitor and the government, caps can raise significant concerns if they create an incentive for the monitored party to drive up the cost to the monitor, including by delaying or resisting production of documents. Even where a cap is acceptable to both sides (again, that is rare), it may be difficult to set a cap at the outset of a monitorship.

Notably, in some cases, the government also has concerns about costs and may be (somewhat) aligned with the company. Increasingly, government lawyers have put pressure on monitor candidates to keep costs down, primarily in the name of avoiding public or judicial criticism. With monitor-selection processes becoming increasingly subject to requests for proposals or similar submissions, 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. Although 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

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4 Consent Judgment, *State of Iowa v. Education Management Corp.*, Equity No. EQCE079220, (D.Ct. Polk, 16 Nov. 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 US Federal Trade Commission 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.

in a substantial matter – a real effort to budget (probably after the work plan), a heads-up when costs will significantly exceed what has been anticipated, and a discussion about steps the monitor and the company can take to keep costs down.

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 who is responsible for interacting with the monitor and making sure that the company is responsive. This individual needs to have 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 come 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? The parties may also need to consider whether, and under what circumstances, the monitor may share information with law enforcement agencies or entities other than the government entity that signed

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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 Sep. 2015) (requiring the 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).

the agreement. Finally, 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 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, a monitor can become the weak link in the protection of this type of information. If the information is provided to the monitor and then lodged on a law firm's or a 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 some of the monitored party's systems, but not connected to a law firm's or a consulting firm's system. These arrangements ensure that the monitor's access is no less secure than that of a senior employee of the monitored party. Finally, in any request for information, the monitor should consider minimising the need for any PII that would be removed from the systems the company has implemented to protect it.

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 a testimony, the court, if one is involved, may want to hear from the monitor.[10]

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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.

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, this 'testimony' may simply be an extension of the monitor's reporting function. Where the 'testimony' veers into a dispute between the government and the monitored party, however, all the same concerns arise.

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 is likely to provide this 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 situations is attractive for the monitor. For that reason, where not otherwise covered by the agreement, a monitor's engagement letter should make it exceptionally clear that the monitor will not be called to testify 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, it 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 a monitor's tasks – in the agreement, as refined in the work plan – goes hand-in-hand with building a team to complete those tasks.

Increasingly, monitors put together a team of lawyers, auditors, consultants and subject-matter experts as part of the monitorship selection process. Even when 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 the parties and discussing 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 a monitorship under the US Foreign Corrupt Practices Act 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 constituents 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 and, in some cases, internal audit group, 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 factor in continued and sustained compliance by the company. Allowing a monitor to take full advantage of the company's own work has many advantages: it can reduce costs, convey transparency and candour, and focus the work the monitor needs to do.

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 one of 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.

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11 Some agreements specifically require the monitor to maximise, 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.

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 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 evolve significantly, however, during the course of the monitorship.

Tasks and testing methodologies

Work plans can come in many forms but most will include both a rough calendar for planned tasks and 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. However, a monitor cannot accept a work plan that limits his or her ability to adjust if circumstances change.

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14 For monitorships that require detailed review of specific transactions, such as the National Mortgage Settlement and the residential mortgage-backed securities 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).

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] Although 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 regarding those activities would be inappropriate), absent such an 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. However, it is better practice for a monitor not to approach testing compliance like a civil litigant demanding huge amounts of email with metadata. Rather, the monitor should focus on what is required to reasonably ensure compliance. That could involve a substantial email review; however, 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 for the company to be better able to comply at the end of the monitorship. No company can, on a continuing basis, attempt the impossible in its approach to compliance; it will have to implement controls, make reasonable choices, invest sufficiently

15 See *Citi* Monitorship, Ninth Report (Nov. 2018), at 7–16, http://www.citigroupmonitorship.com/wp-content/uploads/2018/11/citigroupmonitor_9threport_final.pdf (last accessed 15 Mar. 2022).

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. However, 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 and 6 (DDC, 30 Apr. 2018) (allowing company to assert privilege, but referring disputes to the US Department of Justice) (*Panasonics Aviation* DPA) with *EDMC* Consent Judgment, Paragraph 40 (prohibiting the settlement administrator from obtaining privileged material).

(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 achieved with reasonable investments that can be made on a continuing 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 during a monitorship.[19]

Interviews

Interviews can be a source of contention in a monitorship. Some agreements specify clearly the monitor's access to all personnel.[20] However, even those agreements may not specify whether the monitor may compel any employee to be

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 that require 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.

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

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 may be perceived as government overreach, particularly if potential consequences are severe (i.e., revocation of a deferred prosecution agreement 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 with 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 when an interview is compelled or when senior officials are the subject of the interview. Finally, monitors may want to sit in on regular meetings of company personnel (such as compliance meetings); although that can be perceived as intimidating, it can build trust over time and give the monitor a clear sense of how the company is operating.

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 company 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 a monitor's team and the monitored party (as well as the 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, or if otherwise required by the agreement, a monitor should identify issues of material non-compliance to the monitored party prior to publishing a report of that non-compliance; in many cases, the monitor will share a draft report himself or herself. 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. Although not always possible, this approach is most consistent with the goals of a monitorship, namely sustained compliance.

Some agreements have explicit provisions for how material non-compliance will be addressed: identification, validation, formation of a corrective action plan and evaluation of the completion of a plan.[21] Even if not specifically addressed, that approach will often be the best way to deal with these 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.

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) and Paragraph 116(b) (directing settlement administrator to report to state Attorneys General on corrective action plan).

Findings and new obligations

Although an agreement defines a monitored party's obligations, new obligations may be imposed during the course of a monitorship; these may be 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 will 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 the parties have not agreed in writing about obligations additional to the agreement, however, 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 a 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.

In most circumstances, a 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 during 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 it 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

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

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 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 to the government immediately any apparent violations of law that threaten public health or safety.

Reporting

As the product of most monitorships, reports are the primary way in which (1) a government evaluates whether the monitor was effective, (2) the monitored party assesses whether the monitor has been fair and (3) 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 probably request fewer. For the company, the more reports that are produced, the greater the 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 continuing compliance. Rather, it 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 work. For example, if the monitor intends to focus on specific issues in the first year and move on 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.

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; in fact, monitored parties have been known to try to 'wait out' the monitor. In that final year, the monitor must ensure that there is no backsliding.

The final report provides an opportunity to look both backwards and forwards – how far the company has come during 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. It can provide a road map for the company to follow once the monitor leaves. The final report is also an opportunity to look at the agreement itself and note what worked. Although an argument can be made that this type of 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.

APPENDIX 1

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Thomas Perrelli is a partner at and chair of Jenner & Block LLP. He co-chairs 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 US Department of Justice (US DOJ) and state attorneys general. He has served as monitor over three companies – Citibank, Bridgepoint Education and Education Management Corp. Prior to rejoining Jenner & Block in 2012, Mr Perrelli served as the Associate Attorney General of the United States, the third highest-ranking official at the US DOJ. 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 US$25 billion settlement to resolve claims against financial institutions for servicing of mortgages, and negotiated the creation of a US$20 billion fund to compensate victims of the Deepwater Horizon oil spill.

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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 implement monitorships regularly 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 use worldwide in so many areas, monitorships are here to stay. It is critical, therefore, that companies, legal practitioners and regulators understand how monitorships operate, what the best practices are and the potential they have to effect lasting cultural change.

This guide provides an important road map to understanding these best practices for making monitorships effective. When performed correctly, and with 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. As a compilation of 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.

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1 Anthony S Barkow, Neil M Barofsky and Thomas J Perrelli are partners at Jenner & Block LLP.

APPENDIX 1

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Anthony S Barkow, co-chair of Jenner & Block's investigations, compliance and defence practice, and managing partner of the firm's New York office, 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 US Department of Justice (US DOJ).

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 US$715 million settlement with the New York Department of Financial Services, part of a broader US$2.6 billion settlement that involved the US DOJ and federal regulators.

Neil M Barofsky
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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 on his experience as a former federal prosecutor and as the presidentially appointed first special inspector general of the historic US$700 billion Troubled Asset Relief Program (TARP), Mr Barofsky assists companies seeking to improve their corporate culture through compliance counselling and monitorships. He served as the monitor of Credit Suisse AG, following the bank's US$715 million settlement with the New York Department of Financial Services, part of a broader US$2.6 billion settlement that involved the US DOJ and the Federal Reserve. He currently is the independent Monitor of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW). 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 recognised as one of the National Law Journal's `winning' litigators. He was also recognised by the New York Law Journal as a 'trailblazer' in the field of monitorships and received similar recognition from the National Law Journal for his work in regulation and compliance.

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to negotiate a US$25 billion settlement to resolve claims against financial institutions for servicing of mortgages, and negotiated the creation of a US$20 billion fund to compensate victims of the Deepwater Horizon oil spill.

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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 used 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 *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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