
GIBSON DUNN
Compliance Monitors:
Everything You Wanted
to Know But Were
Too Afraid To Ask

MCLE Certificate Information

- Most participants should anticipate receiving their certificate of attendance via email approximately one month following the webcast.
- **Please direct all questions regarding MCLE to CLE@gibsondunn.com.**

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Agenda

1. Overview: What is a Monitorship?
2. Mechanisms of a Monitorship: How does it work in practice?
3. Key Terms and Challenges
4. FCPA and Anti-Corruption Monitors
5. Evolving DOJ Guidance
6. Best Practices and Potential Pitfalls

Part 1: What is a Monitorship?

Why do Companies get a Monitor?

Whether a company gets a monitor will often depend on:

1. The state of the company's compliance program, and
2. The company's demonstrated commitment to compliance

Typical Role of a Compliance Monitor

- **Independent third parties**
- Responsible to assess whether the compliance program is **reasonably designed** and to oversee testing of company's compliance program
- Monitor may be tasked with identifying instances of non-compliance
- The monitor will make **periodic recommendations and reports** of findings
- At the end of the monitorship, the monitor will **certify** that the program is reasonably designed and implemented
- Monitor gives enforcement authorities **security and confidence** to enter into resolution agreement

Compliance Monitors are Used Broadly

FCPA

World Bank

BSA/AML

IEEPA

Drug Misbranding

Export Controls

Anti-Kickback

Accounting

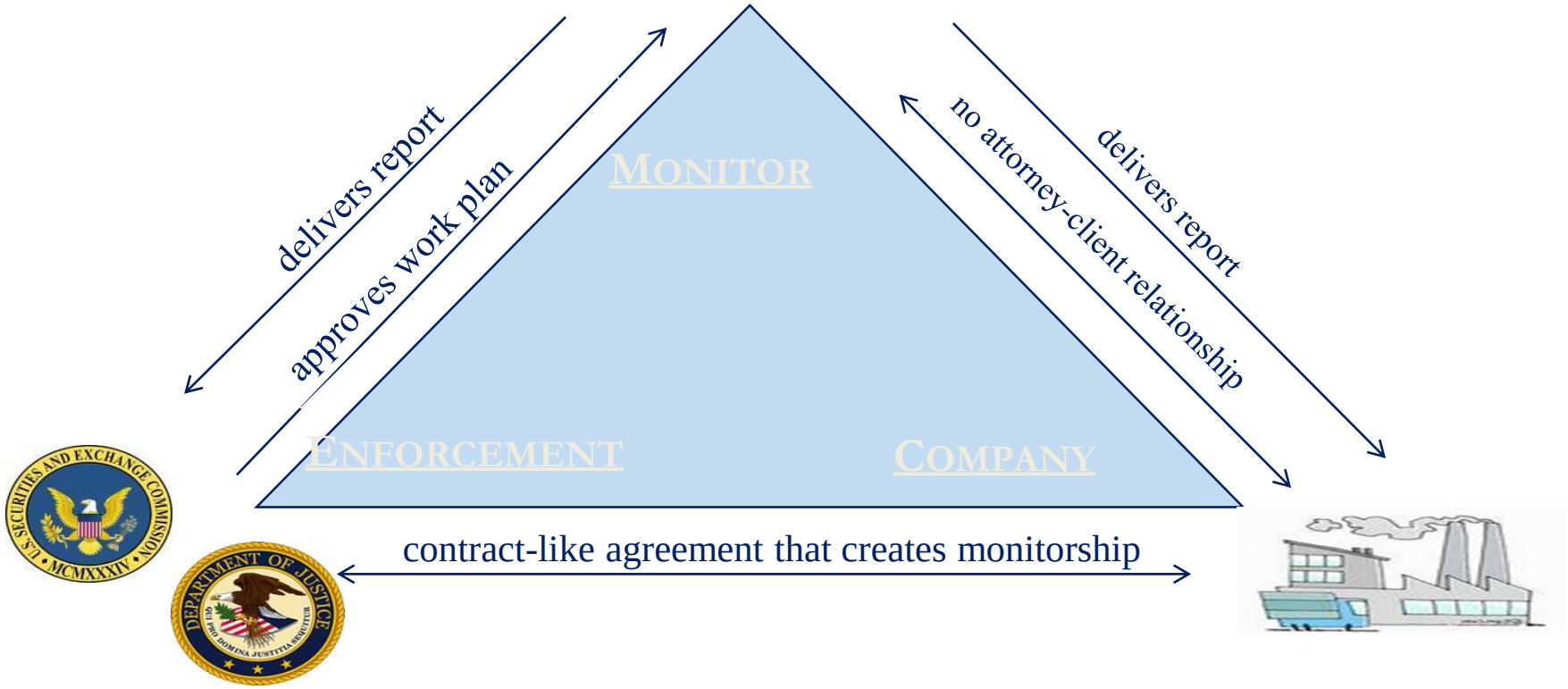
Authorities that Impose Monitors

Many enforcement authorities impose monitors, including:

1. Department of Justice
2. Securities and Exchange Commission
3. Federal Trade Commission
4. Environmental Protection Agency
5. Department of Commerce
6. World Bank
7. New York State Department of Financial Services

WORLD BANK

Relationship Among the Parties



Part 2: Mechanisms of the Monitorship: How does it work in practice?

The Mandate Directs the Monitor

Typical Monitor Mandate

1. Assess and monitor the company's **compliance with the resolution** to address and reduce the risk of recurrence of the conduct at issue in the settlement
2. Assess **risk of non-compliance** with law and the terms of the resolution agreement
3. Evaluate the company's **compliance program** from design to implementation
4. Make **recommendations** to address gaps in compliance policies and procedures
5. Prepare **periodic reports** to be filed with the government
6. **Certify** whether the company's policies and procedures are designed and implemented to minimize the risk of future wrong doing

Tools of the Monitor

- Inspect documents
- Make on-site observations
- Meet with and interview employees
- Analyze, study, and test the company's policies and procedures
- Make recommendations for improvement
- Issues reports to the company and the government
- Conduct several audits over the duration of the monitorship

Example Timeline of a Monitorship

The Monitor's Possible Schedule

6 months

- **Monitorship Begins:** July 20, 2017
- **Submission of Initial Report:** + 180 days

1 year

- **Notice of Impractical Recs.:** + 60 days
- **Consider Adopting Recs.:** + 60 days
- **Second Review Starts: (approx.)** + 185 days
- **Submission of Second Report and First Certification:** + 60 days (1 yr. after 1st review)

1 year

- **Third Review Starts:** + 305 days (approx.)
- **Submission of Third Report and Second Certification:** + 60 days (1 yr. after 2nd review)

This schedule contemplates (1) long periods of Monitor inactivity between reviews and (2) condensed, 60-day follow-up reviews. It also allows for time between the completion of the Monitor's required work and the end of the 3-year term.

Conclusion of the Monitorship

Example of the Monitor's Certifications:

The Monitor must "[c]ertify whether the compliance program of the Company, including its policy and procedures, is reasonably designed and implemented to detect and prevent fraud and money laundering and to comply with the Bank Secrecy Act."

"Reasonably designed and implemented" does not necessarily mean that the compliance program prevents and detects all potential violations of the applicable laws

Part 3: Key Terms and Challenges

Common Key Terms of Monitorships Across Federal Agencies

1. Length of the Monitorship
2. Sunsets, Extensions, and Hybrid Monitorships
3. Length of Reviews and Frequency of Reports
4. Goals of Compliance Recommendations
5. Resolution of Disputes
6. Identification of Illegal Conduct
7. No Attorney-Client Privilege

(1) Length of the Monitorship

- Typically, monitorships last for the duration of the resolution agreement that led to the monitorship

- Some monitorships can be as short as one or two years—others can run for as long as a decade (e.g., SNC-Lavalin World Bank monitorship)

Monitorship Length Varies by Agency

1. DOJ monitorships typically last 1.5-5 years
2. The FTC may impose monitorships for longer periods of time
   - In *Coca-Cola* (2010), the FTC imposed a 5-year monitorship term
   - The FTC imposed a monitor on *Endo Pharmaceuticals* (2014) until the divestiture of its product to another company was completed, not to exceed 5 years
3. EPA imposed 3-year monitorships in both *Wood Group* (2017) and *VW* (2017)
4. NY State Department of Financial Services imposed a 2-year monitorship on *Commerzbank AG* (2015) for failing to comply with anti-money laundering laws
5. SEC has imposed periodically shorter term monitorships:
   - In *Apex Fund Services* (2016), the monitor made one round of review that was to conclude no more than 3 months after the monitor was retained
   - In *LAN Airlines* (2016), the SEC imposed a 27-month monitorship term and the DOJ imposed a similar term with the related case in *LATAM Airlines* (2016)

(2) Sunsets, Extensions, and Hybrid Monitorships

- Some monitorships terminate early, often with certain conditions prescribed by the resolution agreement
- The relevant agreement may provide for the enforcement authority to extend the duration of the monitorship
- Some agreements may transition from an external monitor to self-monitoring by the company during the agreement

Extension Terms in FTC, SEC, EPA, and DOJ Resolutions

- The FTC retained the right to extend the monitorship if necessary in the settlement agreements with *Endo Pharmaceuticals*:
  - The interim monitor's service shall not exceed five years unless the "Commission decides to extend or modify this period as may be necessary to accomplish the purposes of the Orders"
- SEC agreements may provide that the monitorship can be extended if the SEC determines that the company has not met its requirements
  - For instance, in *LAN Airlines*, the SEC reserved sole discretion to extend the **monitorship** or **self-reporting requirements** for up to 48 months
- The EPA did not include an extension provision in the 3-year settlement with *Wood Group or VW*
- No extension provision in New York State's agreement with *Commerzbank*
- DOJ often leaves itself discretion to extend the monitorship if needed

DOJ's Early Termination Provision

- The DOJ deferred prosecution agreement with *MoneyGram* (2012) imposed a 5 year monitorship that could terminate early if there was a change in circumstances sufficient to eliminate the need for a monitor:

> Conversely, in the event the Department finds, in its sole discretion, that there exists a change in circumstances sufficient to eliminate the need for the corporate compliance monitor in Attachment D, and that the other provisions of this Agreement have been satisfied, the Term of the Agreement may be terminated early.

Hybrid Monitorships

- The "hybrid" approach involves a company retaining an external monitor for a portion of the post-resolution reporting period and then submitting self-assessments for the balance of the reporting period
- In the typical case, an external monitor is imposed for 18 months and self-reporting requirements are imposed for the remaining 18 months
- For example, see the terms of the Weatherford International DOJ DPA (2013), which were mirrored in its simultaneous SEC settlement:

> 12. The Monitor will be retained by the Company for a period of not less than eighteen (18) months from the date the Monitor is selected, unless the term of the Monitor is

> 13. At the end of the monitorship, provided all requirements set forth in Paragraphs 19 and 20 of Attachment D are met, the Company will report on its compliance to the Department periodically, at no less than nine-month intervals, for the remainder of this Agreement, regarding remediation and implementation of the enhanced compliance measures set

(3) Length of Reviews and Frequency of Reports

- While some obligations of a monitorship may be continuous during the term of the agreement, often agreements provide for prescribed periods of review (e.g., 120-days) during which the monitor assesses the organization's compliance with the agreement and compliance program
- Typically, formal reports to the government follow each review period

Regular Review Periods in DOJ and SEC Monitorships

- The SEC may impose regular reviews that last a set number of days:
  - In *Apex*, *LAN Airlines*, and *Everhart* (2016), the monitor was to undertake one, two, and three reviews which lasted 90, 45, and 150 days
- Similarly, DOJ may limit review periods
  - In *MoneyGram,* the "Monitor shall issue a written report within ninety (90) calendar days of initiating the initial review"

EPA Review Periods

- The EPA and DOJ's Environment and Natural Resources Division take various approaches to reviewing periods in their monitorship agreements
  - ***VW:*** "The Independence Compliance Auditor shall review documents and take such reasonable measures as may be necessary to verify the VW Defendants' compliance with [this Consent Decree]. For three years after the Effective Date, the Independent Compliance Auditor shall audit the VW Defendant's compliance with their obligations under…this Consent Decree."
  - ***Citgo:*** Within 120 days after Citgo files a corrective action report for emissions violations, the "independent third party shall prepare a written report" with recommendations on corrective actions Citgo can take to avoid further emissions violations

Example of FTC Review

In *Coca-Cola*, the FTC mandated that the company provide reports to the Monitor "in accordance with the requirements of the order," but the frequency of reporting was not specified. The monitor also had broad access to the company's records and books:

> Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to TCCC's personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to TCCC's compliance with its obligations under

Example Review Period of Monitorship under New York State Department of Financial Services

- In 2015, the New York State Department of Financial Services imposed a 2-year monitorship on *Commerzbank* for failing to maintain sufficient compliance with state anti-money laundering laws
- The monitor was chosen by the Department of Financial Services in its sole discretion and had 90 days from the date of formal engagement to submit its preliminary report and proposed recommendations to the Department and *Commerzbank*
- *Commerzbank* had 30 days to submit a written plan detailing how it would adopt the recommendations
- Thereafter, the monitor would "oversee the implementation of corrective measures" before providing a final report assessing the *Commerzbank*'s compliance

(4) Goals of Compliance Recommendations

- The agreement includes language to guide the monitor in the scope of its recommendations
- For example, in the FCPA context, the monitor in different agreements was tasked to make recommendations that:
  - are "reasonably designed" to achieve;
  - will "ensure";
  - are "reasonably designed to ensure";
  - are "necessary and appropriate" to achieve;
  - are "appropriately designed and implemented to ensure"; or
  - are "appropriately designed to accomplish" FCPA compliance

Compliance Recommendations in FTC and EPA Resolutions

1. FTC language may focus on compliance with the Order:
   - *Coca-Cola* → "The Monitor shall have the power and authority to monitor [the company's] compliance with the requirements of this Order" to ensure that the company does not gain access to a soft-drink competitor's commercially sensitive information after it acquired North America's largest bottling company, which also distributed the competitor's soft drinks
2. The EPA likewise tasks monitors with ensuring compliance with the resolution:
   - *Wood Group* → the monitor shall "perform an annual review of Wood Group's compliance with the Agreement" and "make recommendations, confirm implementation of immediate improvements, review future improvements, suggest enhancements, and assess [Wood Group's] safety and ethics culture"
   - *Citgo* → "the independent third party shall prepare a written report …which may include recommendations for additional corrective actions and/or modifications" to the continuous emission monitoring protocols outlined in the Consent Decree

Compliance Recommendations in DOJ and SEC Resolutions

1. DOJ agreements may be tailored toward compliance with laws that were violated
   - *MoneyGram* → the monitor was tasked with evaluating the "effectiveness of internal controls, policies and procedures of the Company's anti-fraud and anti-money laundering programs" and "the Company's overall compliance with the Bank Secrecy Act"
   - *MoneyGram* → the Monitor's **recommendations** were to be "reasonably designed"
2. Similarly, the SEC also tasks monitors with ensuring compliance with the law underlying the violation
   - *Apex Fund Services* → the Monitor was to "conduct a comprehensive review of, and recommend corrective measures concerning, Apex's compliance and other policies and procedures" and make **recommendations** "for changes in or improvements to Apex's policies and procedures"
   - *LAN Airlines* → **recommendations** were to be "reasonably designed"

Special Case: The UAW Resolution

- In 2020, United Auto Workers agreed to a 6-year monitorship in its settlement with DOJ over anti-fraud and anti-corruption claims
- The terms of the agreement granted the monitor broad authority to address fraud and corruption:

"The Monitor has the authority and duty to remove fraud, corruption, illegal behavior, dishonesty, and unethical practices from the UAW."

- To fulfill its mandate, the monitor can bring charges "seeking to discipline, remove, suspend, expel, (or) fine" any UAW officer, representative, agent, or employee engaged in actions that violate the agreement or labor laws

(5) Resolution of Disputes

- Tension is almost inherent in any monitorship, as the independent review of the company and its activities involves risk for the organization and will entail differences of opinion. Agreements typically prescribe a mechanism for resolving disputes between the company and monitor

Dispute Resolution in the SEC and EPA Resolutions

1. The SEC may take a mixed approach to dispute resolution:
   - *Apex Fund Services* → "Apex and the Consultant are unable to agree on an alternative proposal, Apex will abide by the recommendations of the Consultant"
   - *LAN Airlines* → "Any disputes between the Company and the Monitor with respect to the recommendations shall be decided by the Commission staff in its sole discretion"
   - *Everhart Financial Group* → in disputes "EFG shall abide by the determinations of the Independent Consultant"
2. EPA may structure the agreement such that it is the final arbiter of disputes
   - *Citgo* → The United States has final authority to resolve all informal disputes unless Citgo invokes formal dispute resolution in court

Dispute Resolution in DOJ, FTC, and New York State Department of Financial Services Resolutions

1. DOJ will likely be the final arbiter of disputes between the monitor and the company. In *MoneyGram,* any disputes:

between the Company and the Monitor with respect to the work plan shall be decided by the Department in its sole discretion.

2. Where the monitor is a fiduciary of the government, as in the FTC context, dispute resolution is likely not an issue

Endo: The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.

3. In *Commerzbank*, the NY State Dept. of Financial Services could resolve any dispute "over the scope of the monitor's authority" in its sole discretion

(6) Identification of Illegal Conduct

- Even if the monitor's mandate does not specifically call for ferreting out illegal conduct, some agreements provide for what the monitor should do if he or she identifies misconduct

Identification of Misconduct During EPA and DOJ Monitorships

***MoneyGram* (DOJ):**

8. Should the Monitor, during the course of his engagement, discover that questionable or corrupt activity involving fraud-induced money transfers, money laundering or the Company's anti-money laundering program either (a) after the date on which this Agreement or (b) that have not been adequately dealt with by the Company (collectively "improper activities"), the Monitor shall promptly report such improper activities to the Company's General Counsel or Compliance and Ethics Committee for further action. If the Monitor believes that any improper activity or activities may constitute a significant violation of law, the Monitor should also report such improper activity to the Department. The Monitor should disclose

***Wood Group* (EPA):**

Wood Group and WGPSN shall notify the EPA Authorized Representative of any violation of the terms or conditions of an agreement to resolve a state, local, or federal civil or administrative matter related to the facts and circumstances of the West Delta 32

Identification of Misconduct During SEC, FTC, and New York State Monitorships

1. The SEC's agreements may be narrowly focused on monitoring compliance with an underlying securities statute and silent on who the monitor should notify in the event the monitor identifies other illegal conduct

2. Similarly, monitorships imposed by the FTC may be more tailored toward ensuring compliance with the FTC's order and silent on other wrongdoing:
   - For example, in its agreement with *Endo Pharmaceuticals*, the FTC tasked the monitor with ensuring that Endo divested a product line as part of its merger with Boca Life Science Holdings

3. New York's agreement with *Commerzbank* did not include a provision for identifying misconduct. Instead the monitor was to engage in "a comprehensive review of the BSA/AML and OFAC compliance programs"

Ericsson Breach of DPA Obligations

- In December 2019, Ericsson entered into a deferred prosecution agreement with DOJ and a settlement agreement with the SEC for violating the FCPA
- Ericsson agreed to retain an independent compliance monitor for 3 years
- In October 2021, DOJ informed Ericsson that the company breached its obligations under the DPA by failing to provide certain documents and factual information
- Ericsson will have the opportunity to explain the nature and circumstances of the breach and actions taken to address the situation

(7) Attorney-Client Privilege

- Although they engage the monitor directly, companies do not enter into an attorney-client relationship with the monitor. Because monitors are inherently independent, they cannot have an attorney-client relationship with the organizations they are monitoring
- The lack of an attorney-client relationship means that the attorney-client privilege does not attach to the monitorship. It also means that the monitor's work may operate as a waiver if the monitor access information that is protected by the attorney-client privilege

No Attorney-Client Privilege

1. The terms will often specifically establish that no attorney-client privilege exists between the monitor and the subject of the monitorship
   - In *Wood Group* (EPA) for example, the agreement stated: "Wood Group shall ensure that the Independent Monitor is not an agent of Wood Group…and his or her work pursuant to this Agreement is not subject to Wood Group's…assertion of the attorney-client privilege or work product doctrines"
   - Similarly, in *LAN Airlines* (SEC), again an attorney-client privilege is that: "The parties agree that no attorney-client relationship shall be formed between the Company and the Monitor"
2. Monitorship agreement will often prohibit monitors from being employed by the subject of the monitorship for some period of time
   - In *MoneyGram* (DOJ), for example, "[t]he Company agree[d] that it [would] not employ or be affiliated with the Monitor for a period of not less than one year from the date on which the Monitor's term expire[d]"

Confidentiality Concerns

- Corporate monitors are traditionally given broad access to all facilities, personnel, documents, and records required to complete their work
  - In 2014, Avon settled FCPA violations with the DOJ and SEC. The DPA with the DOJ included an 18-month monitor and the agreement with the SEC included an 18-month monitor
  - The DPA gave the monitor broad access to Avon's personnel and records

> To that end, the Company shall: facilitate the Monitor's access to the Company's documents and resources; not limit such access, except as provided in Paragraphs 5-6; and provide guidance on applicable local law (such as relevant data protection and labor laws). The Company shall provide the Monitor with access to all information, documents, records, facilities, and employees, as reasonably requested by the Monitor, that fall within the scope of the Mandate of the Monitor under the Agreement. The Company shall use its best efforts to provide the Monitor with access to the Company's former employees and its third-party vendors, agents, and consultants.

AVON
the company for women

Confidentiality Concerns

As a result of the competing pressures to provide expansive access to company materials without forming a protected attorney-client relationship, all entities involved—the monitor, the company, and the enforcement authority—attach a high degree of confidentiality to all of the monitor's work product and communications among the monitor, the company, and the regulator

5. The parties agree that no attorney-client relationship shall be formed between the Company and the Monitor. In the event that the Company seeks to withhold from the Monitor access to information, documents, records, facilities, or current or former employees of the Company that may be subject to a claim of attorney-client privilege or to the attorney work-product doctrine, or where the Company reasonably believes production would otherwise be inconsistent with applicable law, the Company shall work cooperatively with the Monitor to resolve the matter to the satisfaction of the Monitor.

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the company for women

Asserting Attorney-Client Privilege

1. When a Company asserts attorney-client privilege in DOJ agreements, often the Company and the Monitor are to resolve the matter "to the satisfaction" of the Monitor
   - As DOJ guidance counsels, the monitor "is an independent third party, not an employee or agent of the corporation or of the Government"

2. Agreements under the FTC are often more respectful of privilege:

***Endo* (FTC):** Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to TCCC's personnel, books, documents,

100Reporters Litigation

- In 2013, 100Reporters filed a FOIA request for documents from the Siemens' monitorship
- The FOIA request spanned the Monitor's evaluations of Siemens' anticorruption program, the Monitor's **work plans**, **reviews**, and **reports**, and disclosures that Siemens made to the Monitor concerning corruption payments
- DOJ produced approximately 500 pages of information, but notably withheld approximately 4,300 pages, including **work plans**, **annual reports**, and exhibits

100Reporters Litigation

- In two important rulings, the District Court for the District of Columbia held that:
  1. Deliberative process privilege can apply to some work generated over the course of the monitorship
  2. The consultancy corollary applies to monitors
- The court in 100Reporters II held that work plan-related preliminary materials, such as drafts of work plans, as well as annual reports, communications, and presentations, were protected under the deliberative process privilege
- The court also held that final agency decision was outside of the deliberative process privilege and that final work plans were therefore not exempt under the deliberative process privilege

Part 4: FCPA and Anti-Corruption Monitors

The Siemens Monitorship

Background

- Siemens made thousands of corrupt payments to third parties in violation of FCPA
- 4,283 of those payments, totaling approximately $1.4 billion, were used to bribe government officials in return for business to Siemens
- Multiple corporate segments at Siemens, including Communications, Industrial Solutions, Medical Solutions, Power Generation, Power Transmission, and Transportation Systems, allegedly engaged in bribery
- Resolution with the government resulted in a four year monitorship

Timeline of Siemens Monitorship

- **Dec. 15, 2008:** Siemens settles with DOJ/SEC. Appointment of Dr. Theo Waigel and F. Joseph Warin

Year One Review

- **Mar. 13, 2009:** Submission of work plan to DOJ/SEC
- **Apr. – July 2009:** Fieldwork
- **Oct. 5, 2009:** Submission of report to DOJ/SEC
- **Nov. 19, 2009:** Meeting with DOJ/SEC regarding review and report

Year Two Review

- **Feb. 12, 2010:** Submission of work plan to DOJ/SEC
- **Mar. – July 2010:** Fieldwork
- **Oct. 13, 2010:** Submission of report to DOJ/SEC
- **Dec. 9, 2010:** Meeting with DOJ/SEC regarding review and report

Year Three Review

- **Feb. 8, 2011:** Submission of work plan to DOJ/SEC
- **Mar. – Aug. 2011:** Fieldwork
- **Oct. 7, 2011:** Submission of report to DOJ/SEC
- **Nov. 7, 2011:** Meeting with DOJ/SEC regarding review and report

Year Four Review

- **Dec. 19, 2011:** Submission of work plan to DOJ/SEC
- **Jan. – Aug. 2012:** Fieldwork
- **Oct. 12, 2012:** Submission of report to DOJ/SEC
- **Oct. 22, 2012:** Meeting with DOJ/SEC regarding review and report

Summary Statistics from the Siemens Monitorship

The Monitorship Team's cumulative efforts over the four years included the following:

~ 51,000 Documents collected, reviewed, and analyzed, in 11 languages (Arabic, Bahasa Indonesia, Chinese, English, French, German, Greek, Italian, Portuguese, Russian, and Spanish)

1,527 Informational meetings conducted

168 Roundtable meetings conducted

190 Process, tool, and project walkthroughs conducted

2,344 Individual employees with whom the Monitorship Team met (0.83% of Siemens' non-manufacturing workforce)

20 Country operations of which the Monitorship Team conducted standard on-site or remote reviews (Argentina, Austria (multiple), Brazil (multiple), China (multiple), Colombia, Egypt (multiple), Germany (each year), Greece, India, Indonesia, Italy, Mexico (multiple), Nigeria (multiple), Pakistan, Russia (each year), South Africa, Turkey, the UAE, the United States, and Venezuela)

19 Country operations of which the Monitorship Team conducted targeted or limited issue-specific reviews (Algeria, Bahrain, Bangladesh, Belgium, Croatia, the Dominican Republic, Finland, Hungary, Iraq, Israel, Kenya, Latvia, Lithuania, Libya (multiple), Oman, Portugal, Qatar, Thailand, and Vietnam)

3,135 Approximate auditor days spent by 35 to 40 CFA auditors, working on behalf of the Monitor, conducting studies and tests, which included 1,026 meetings

Biomet Monitorship

Monitorship Extended Due to Revelation of Additional Pre-Settlement Misconduct

- Biomet settled with the SEC and DOJ on March 26, 2012, agreeing to pay approx. $22.8 million in penalties and disgorgement, and to the imposition of an 18-month monitorship, in connection with charges of paying bribes in Latin America and China
- In October 2013, during the monitorship, Biomet became aware of potential pre-settlement misconduct in Brazil and Mexico (as reported in a July 2, 2014 8-K)
- Biomet conducted an internal investigation and disclosed these matters to the monitor, DOJ, and the SEC in April 2014
- On July 2, 2014, the SEC issued a subpoena requiring the production of certain documents relating to these matters

Biomet Monitorship Cont.

- On March 13, 2015—well after the projected 18-month term of the monitorship, and near the scheduled expiration of the three-year DPA—Biomet reported in an 8-K that DOJ had informed the company that both the DPA and the monitorship would be extended for an additional year
- Biomet clarified that the Mexico and Brazil conduct disclosed in 2014 "includ[ed] alleged improprieties that predated the entry of the DPA"
- According to the 8-K, DOJ also informed Biomet that it would retain its rights under the DPA to bring further action against Biomet
- The announcement of the extension monitorship received substantial press coverage, including in blogs maintained by the Wall Street Journal and New York Times

DealB%k WITH FOUNDER ANDREW ROSS SORKIN

New Bribery Evidence Adds a Year to Biomet's Probation

By BEN PROTESS MARCH 17, 2015

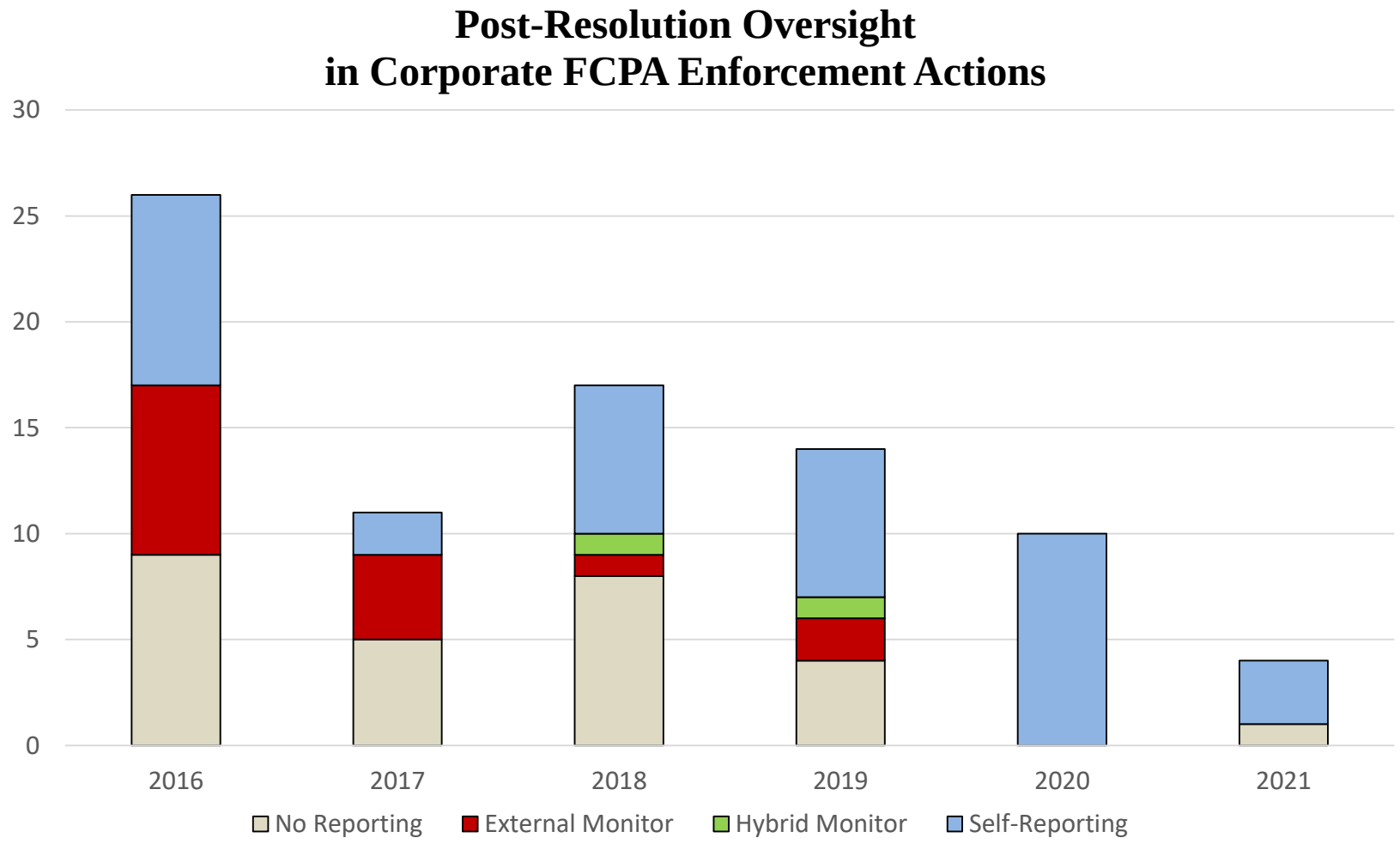
Risk & Compliance Journal.

Insights on corporate risk and how companies are tackling it.

Mar 19, 2015 BRIBERY

The Morning Risk Report: Biomet Hit by Recidivism

FCPA Monitors



World Bank Group's Integrity Vice Presidency (INT)

1. An **independent** unit within the World Bank Group
2. **Investigates** and **pursues sanctions** primarily for **collusion**, **fraud**, and **corruption** in World Bank Group-financed projects
3. In FY21, INT received **4,311** complaints, opened **347** new external preliminary investigations, and started **40** new and closed **28** existing external investigations
4. Settlement agreements can require monitors (e.g., Alstom, SNC-Lavalin, MacMillan)—11 new or outstanding settlement agreements as of FY20

Part 5: Evolving DOJ Guidance

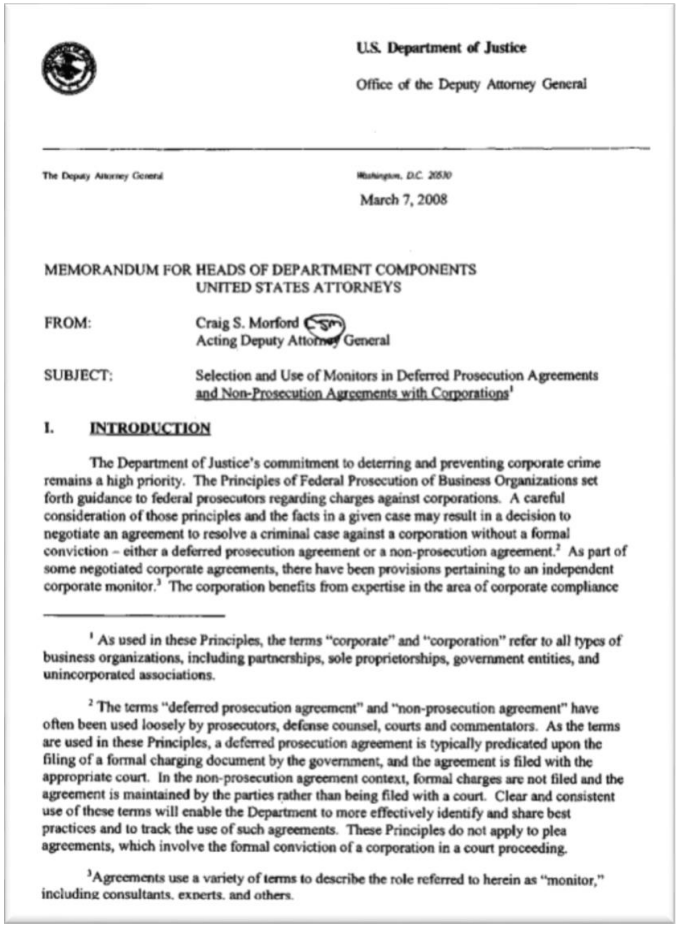
DOJ Guidance – The "DAG Memo" (2008)

In addition to providing guidance on selection, the DAG memo discusses the scope of a monitor's duties and several principles:

1. A monitor is an **independent third party**;

2. A monitor's primary responsibility is to **assess and monitor compliance with the terms of the agreement** specifically designed to address and reduce the risk of recurrence of misconduct, including, in most cases, evaluating internal controls and compliance programs;

3. A monitor often needs to understand the misconduct covered by the agreement, but the **monitor's responsibilities should be no broader than necessary to address and reduce the risk of recurrence….**



U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

March 7, 2008

MEMORANDUM FOR HEADS OF DEPARTMENT COMPONENTS
UNITED STATES ATTORNEYS

FROM: Craig S. Morford
Acting Deputy Attorney General

SUBJECT: Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations[1]

I. INTRODUCTION

The Department of Justice's commitment to deterring and preventing corporate crime remains a high priority. The Principles of Federal Prosecution of Business Organizations set forth guidance to federal prosecutors regarding charges against corporations. A careful consideration of those principles and the facts in a given case may result in a decision to negotiate an agreement to resolve a criminal case against a corporation without a formal conviction – either a deferred prosecution agreement or a non-prosecution agreement.[2] As part of some negotiated corporate agreements, there have been provisions pertaining to an independent corporate monitor.[3] The corporation benefits from expertise in the area of corporate compliance

[1] As used in these Principles, the terms "corporate" and "corporation" refer to all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations.

[2] The terms "deferred prosecution agreement" and "non-prosecution agreement" have often been used loosely by prosecutors, defense counsel, courts and commentators. As the terms are used in these Principles, a deferred prosecution agreement is typically predicated upon the filing of a formal charging document by the government, and the agreement is filed with the appropriate court. In the non-prosecution agreement context, formal charges are not filed and the agreement is maintained by the parties rather than being filed with a court. Clear and consistent use of these terms will enable the Department to more effectively identify and share best practices and to track the use of such agreements. These Principles do not apply to plea agreements, which involve the formal conviction of a corporation in a court proceeding.

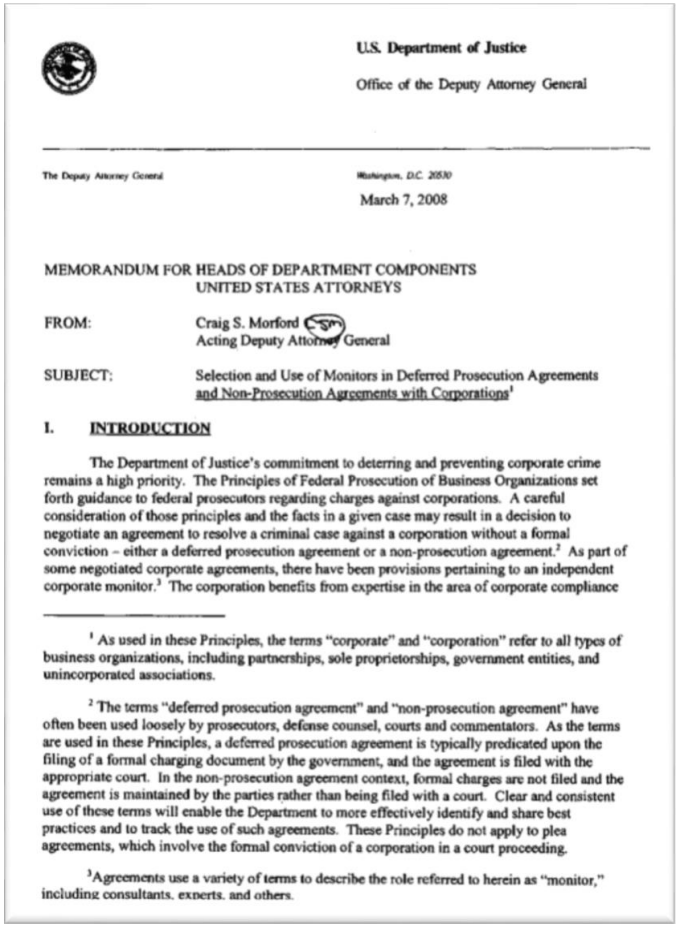
[3] Agreements use a variety of terms to describe the role referred to herein as "monitor," including consultants, experts, and others.

DOJ Guidance – The "DAG Memo" (2008)

4. Communication among the government, the corporation, and the monitor is in the interest of all the parties;

5. If the company chooses not to adopt recommendations, the monitor or the company, or both, should report the reasons to the government; and

6. The agreement should identify any types of **previously undisclosed or new misconduct** the monitor is required to report to the government



U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

March 7, 2008

MEMORANDUM FOR HEADS OF DEPARTMENT COMPONENTS
UNITED STATES ATTORNEYS

FROM: Craig S. Morford
Acting Deputy Attorney General

SUBJECT: Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations[1]

I. INTRODUCTION

The Department of Justice's commitment to deterring and preventing corporate crime remains a high priority. The Principles of Federal Prosecution of Business Organizations set forth guidance to federal prosecutors regarding charges against corporations. A careful consideration of those principles and the facts in a given case may result in a decision to negotiate an agreement to resolve a criminal case against a corporation without a formal conviction – either a deferred prosecution agreement or a non-prosecution agreement.[2] As part of some negotiated corporate agreements, there have been provisions pertaining to an independent corporate monitor.[3] The corporation benefits from expertise in the area of corporate compliance

[1] As used in these Principles, the terms "corporate" and "corporation" refer to all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations.

[2] The terms "deferred prosecution agreement" and "non-prosecution agreement" have often been used loosely by prosecutors, defense counsel, courts and commentators. As the terms are used in these Principles, a deferred prosecution agreement is typically predicated upon the filing of a formal charging document by the government, and the agreement is filed with the appropriate court. In the non-prosecution agreement context, formal charges are not filed and the agreement is maintained by the parties rather than being filed with a court. Clear and consistent use of these terms will enable the Department to more effectively identify and share best practices and to track the use of such agreements. These Principles do not apply to plea agreements, which involve the formal conviction of a corporation in a court proceeding.

[3] Agreements use a variety of terms to describe the role referred to herein as "monitor," including consultants, experts, and others.

DOJ Guidance – The "Criminal Division Memo" (2018)

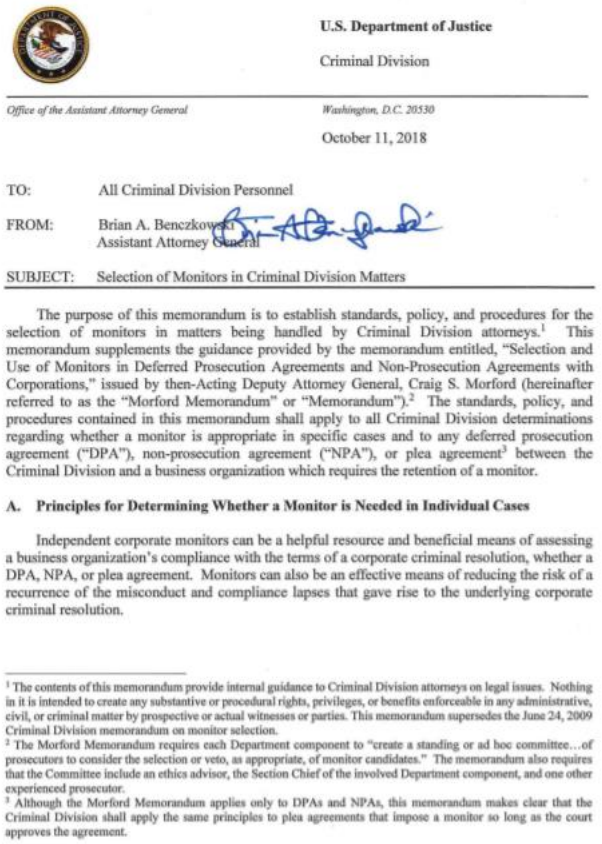
Purpose is to establish standards, policy, and procedure for selecting monitors

1. When is a monitor **required**? Consider:
   - (1) **Benefits** to the corporation/public and (2) **cost** of the monitor and impact on the corporation
   - "Where a corporations compliance program and controls are demonstrated to be effective and appropriately resources at the time of resolution, a monitor likely will not be necessary"
2. **Terms** of the monitorship are to be set forth in the resolution
   - **Terms** include a description of the monitor's required qualifications, a description of the selection process, a description of the process for replacing the monitor if necessary; explanation of the responsibilities of the monitor; and the length of the monitorship
3. Memo creates a **standing committee** to select monitors

DOJ Guidance – The "Criminal Division Memo" (2018)

4. Monitor **selected** to (i) **instill** public confidence and (ii) **elect** a highly qualified person or entity free of any conflicts of interest

5. Outlines the selection process
   - Company recommends three candidates → the government interviews the candidates and makes a recommendation → the standing committee approves the recommendation → the Assistant AG and the Office of the Deputy Attorney General approve the candidate



U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

October 11, 2018

TO: All Criminal Division Personnel

FROM: Brian A. Benczkowski
Assistant Attorney General

SUBJECT: Selection of Monitors in Criminal Division Matters

The purpose of this memorandum is to establish standards, policy, and procedures for the selection of monitors in matters being handled by Criminal Division attorneys.[1] This memorandum supplements the guidance provided by the memorandum entitled, "Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations," issued by then-Acting Deputy Attorney General, Craig S. Morford (hereinafter referred to as the "Morford Memorandum" or "Memorandum").[2] The standards, policy, and procedures contained in this memorandum shall apply to all Criminal Division determinations regarding whether a monitor is appropriate in specific cases and to any deferred prosecution agreement ("DPA"), non-prosecution agreement ("NPA"), or plea agreement[3] between the Criminal Division and a business organization which requires the retention of a monitor.

A. Principles for Determining Whether a Monitor is Needed in Individual Cases

Independent corporate monitors can be a helpful resource and beneficial means of assessing a business organization's compliance with the terms of a corporate criminal resolution, whether a DPA, NPA, or plea agreement. Monitors can also be an effective means of reducing the risk of a recurrence of the misconduct and compliance lapses that gave rise to the underlying corporate criminal resolution.

[1] The contents of this memorandum provide internal guidance to Criminal Division attorneys on legal issues. Nothing in it is intended to create any substantive or procedural rights, privileges, or benefits enforceable in any administrative, civil, or criminal matter by prospective or actual witnesses or parties. This memorandum supersedes the June 24, 2009 Criminal Division memorandum on monitor selection.

[2] The Morford Memorandum requires each Department component to "create a standing or ad hoc committee…of prosecutors to consider the selection or veto, as appropriate, of monitor candidates." The memorandum also requires that the Committee include an ethics advisor, the Section Chief of the involved Department component, and one other experienced prosecutor.

[3] Although the Morford Memorandum applies only to DPAs and NPAs, this memorandum makes clear that the Criminal Division shall apply the same principles to plea agreements that impose a monitor so long as the court approves the agreement.

Upcoming Changes Under Attorney General Garland

On October 28, 2021, **Deputy Attorney General Lisa Monaco** delivered an address to the ABA's National Institute on White Collar Crime which outlined several new priorities around white collar enforcement, including on the topic of corporate compliance monitors:

1. She stated that any past guidance that suggested to prosecutors that monitors were disfavored was no longer in force and that monitors would be used wherever deemed appropriate as a term of negotiated resolution with a corporation
   - "In recent years, some have suggested that monitors would be the exception and not the rule. To the extent that prior Justice Department guidance suggested that monitorships are disfavored or are the exception, **I am rescinding that guidance**"
   - "[A]ny resolution with a company involves a significant amount of trust on the part of the government. Trust that a corporation will commit itself to improvement, change its corporate culture, and self-police its activities. But where the **basis for that trust is limited** or called into question, we have other options. **Independent monitors** have long been a tool to encourage and verify compliance"
2. She also announced the formation of the Corporate Crime Advisory Group, which will consider, among other thing, how monitors are selected

Part 6: Best Practices and Potential Pitfalls

Best Practices for Companies Facing a Monitorship

- Carefully negotiate the terms of the settlement agreement
- Select an experienced monitor
- Minimize risk that third parties exploit information developed during the monitorship

Best Practices for Companies Once a Monitor is Appointed

1. Consider establishing **monitor liaison office(s)** with dedicated resources to manage and support day-to-day activities
2. Detailed **tracking of information requests and responses**
3. Ensure consistency in **disclosures**
4. Use **outside counsel** for uncomfortable / adversarial discussions and advocacy, and **ensure consistency** in who is interfacing with the Monitor
5. Push (respectfully) for **interim findings**, so that the Company can respond
6. Provide **meaningful feedback** on work plans, potential recommendations, and reports (as appropriate); understand risks (legal and commercial) that reports may become public
7. Push (respectfully) for **detailed timelines**
8. Educate (but do not coach) interviewees about the Monitor and need to **support** their work

Best Practices for Companies: What Will the Monitor Expect from You?

- Full cooperation
- Access to materials and employees within the scope of the monitorship
- Feedback on work plans
- Feedback on recommendations
- No retaliation
- Payment of fees

Best Practices for Monitors: Guiding Principles

1. Collaborative, not adversarial
2. Transparency and cooperation
3. Ongoing and open discussions of findings and potential recommendations
4. Constructive and coordinated (as appropriate) interactions with and regular updates to enforcement agencies about progress
5. As appropriate, reliance on internal resources to perform testing and analyses
6. Promote a risk-based, tailored approach to reviews
7. Abide by the terms of the settlement agreements and mandates
8. As possible, non-intrusive, forward-looking approach that considers remedial actions

Potential Pitfalls of the Corporate Monitor Relationship and How to Avoid Them

Certain tensions are inherent in the company-monitor relationship

- Adversarial vs. Cooperative Relationship
  - Monitorships, by their very nature, are prone to disagreements. To avoid intervention by enforcement authorities, both parties should work toward respectful cooperation, feasible recommendations calibrated to the nature (size, geographic location, corporate culture, etc.) of the monitored entity, constant feedback and communication, and transparency
- How to Minimize Costs
  - Both the company and the monitor should seek to minimize costly disruption of business, ancillary follow-up work, and unnecessary drains on corporate resources
  - Monitorship fees can reach into the tens (and sometimes hundreds) of millions of dollars. The monitored company can minimize this by dedicating liaison resources, meeting requests quickly and providing feedback on work plans, thinking creatively to leverage internal resources where possible, and requesting detailed invoices

Potential Pitfalls of the Corporate Monitor Relationship and How to Avoid Them

- Avoid Unnecessary Re-Investigation of Pre-Settlement Misconduct
  - Unless expressly mandated by the organizing agreement, the Monitor should endeavor not to re-investigate past conduct, instead relying on pre-settlement factual findings and adopting a forward-looking view of compliance

The Monitor's Report(s):

- Ultimately, the Monitor's report(s) should provide visibility into the company's compliance program and include the following:
  - a record of the work performed by the Monitor and methodologies used
  - specific conclusions and recommendations
  - evidence supporting those conclusions and recommendations
  - the company's acknowledgement of the issues identified in the report
  - a timeline for implementing proposed recommendations identified in the report

Hallmarks of Successful Monitorships

1. Ending **on time** – and minimizing the **uncertainty** that this will occur
2. Avoiding **a complete distraction from business**
3. Avoiding a **non-stop review**
4. Helpful, achievable **recommendations**
5. Ensuring that government regulators have **confidence** in the process
6. Reasonable **costs**

Upcoming Webcasts

2021 - Managing Internal Audit and Investigations

- **Date:** Tuesday, November 09, 2021
- **Time:** 12:00 PM Eastern Standard Time
- **Duration:** 1 hour

What's Next: Spoofing and Manipulation in Commodities and Derivatives Markets

- **Date:** Thursday, December 09, 2021
- **Time:** 12:00 PM Eastern Standard Time
- **Duration:** 1 hour, 15 minutes