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Can Corporate Monitorships Improve Corporate Compliance?

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CAN CORPORATE MONITORSHIPS IMPROVE CORPORATE COMPLIANCE?

Cristie Ford[1] and David Hess[2]

Over the last few years, prosecutors and SEC enforcement attorneys have increasingly relied on settlement agreements (such as deferred prosecution agreements) to combat securities violations and other corporate criminal acts. Many of these agreements require the use of corporate monitors to oversee the corporation's compliance with the settlement and its implementation of a compliance program to prevent future violations of the law. Although these agreements have received significant attention from legislators and scholars, there has been no investigation into the critically important question of whether or not the use of corporate monitors achieves its intended goals. Based primarily on interviews with individuals directly involved in monitorships, we look at the entire monitorship process—including the selection of the monitor, how the monitor conducts his or her work, and what happens after a monitorship—and find that decisions at critical points during this process lead to monitorships that are significantly less ambitious than government pronouncements behind them and seem unlikely to achieve their goals on any consistent basis. After identifying these problems, we suggest measures for reform.

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I. Introduction

The use of corporate monitorships as part of settlement agreements with the Department of Justice (DOJ) and Securities Exchange Commission (SEC) is now a common feature of corporate crime enforcement. [3] These agencies have placed monitors in such well-known corporations as America Online, Bank of New York, Boeing, KPMG, and Monsanto. The monitor's role is to ensure that the corporation meets the terms of its settlement agreement, such as a deferred prosecution agreement (DPA), [4] which typically requires that the corporation end its wrongful practices and develop and implement an improved compliance program to prevent future violations.[5]

Although some argue that settlement agreements with monitorships are a "stroke of genius," since the government can achieve all it wants out of a conviction (e.g., admission of guilt by the company and the implementation of reforms) without the costs of a complete investigation and trial,[6] critics abound. Some argue that the terms of these

[3] For an overview of the use of settlements, see generally Benjamin M. Greenblum, *Note: What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863 (2005); Leonard Orland, *The Transformation of Corporate Criminal Law*, 1 BROOK. J. CORP. FIN. & COM. L. 45 (2006); Jennifer O'Hare, *The Use of the Corporate Monitor in SEC Enforcement Actions*, 1 BROOK. J. CORP. FIN. & COM. L. 89 (2006); Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 856 (2007).

[4] For the purposes of this article, our reference to DPAs refers to both deferred prosecution agreements and non-prosecution agreements.

[5] Orland, *supra* note 3, at 72.

[6] *Interview with Jan Handzlik, Partner, Howrey, Los Angeles, California,* CORP.CRIME REP., Sept. 10, 2007, at 12, 12-13. In SEC settlement agreements, the party typically does not admit guilt. See *SEC v. Baker Hughes Incorporated and Roy Fearnley*, Civil Action No. H-07-1408, Litigation Release No. 20,094 at ¶ 6 (Apr. 26, 2007), *available at* http://www.sec.gov/litigation/litreleases/2007/lr20094.htm (stating that

settlement agreements are too lenient and corporations should be criminally convicted for their actions.[7] Others take the opposite view and argue that these agreements are too punitive and that monitors have the potential to run amok over corporations.[8] Critics also claim conflicts of interest have led to the selection of monitors based on personal or political connections rather than competency.[9] Members of Congress have noted these controversies and have taken action, including a hearing by the House Judiciary Committee[10] and the proposal of two bills to regulate the use of monitors.[11] In response, the DOJ attempted to stave off legislative interference by issuing new guidelines on the use of monitors.[12]

Missing from this debate, however, is research into the critically important question of whether or not monitorships actually achieve their intended goals.[13] This article takes a first step toward addressing that question and focuses on the basic issue of whether settlement agreements with corporate monitors actually work to improve corporate behavior going forward. That is, can monitorships be justified on the basis of improving a corporation's development and implementation of an effective compliance program? Also, if monitorships are falling short of these goals, are there reforms that can be implemented to improve their performance? Thus, the goal of this article is to provide an initial exploration into how monitorships actually work in practice. To do this, our analysis is based in significant part on our interviews with individuals directly involved in the monitorship process, including corporate monitors, regulators, and compliance consultants.[14]

"Without admitting or denying the allegations in the complaint, Baker Hughes has consented to the entry of a final judgment . . .")

[7] *See Crime without Conviction: The Rise of Deferred and Non Prosecution Agreements,* CORP. CRIME REP. *(National Press Club, Washington, D.C.),* Dec. 28, 2005, at 3-10, *available at* http://www.corporatecrimereporter.com/deferredreport.htm.

[8] See O'Hare, supra note 3, at 90.

[9] See *infra* note 149 and accompanying text (noting the controversy resulting from the selection of former US Attorney General John Ashcroft as a corporate monitor).

[10] *Hearing on Deferred Prosecution: Should Corporate Settlement Agreements Be without Guidelines? Hearings before the House Comm. on the Judiciary, Subcomm. on Commercial and Admin. Law*, 110th Cong. (March 11, 2008), *available at* http://judiciary.house.gov/hearings/hear_031108_2.html).

[11] See *infra* note 150.

[12] See *infra* note 153.

[13] Exceptions of academic research focused specifically on corporate monitors include O'Hare, *supra* note 3 and Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar*, 105 MICH. L. REV. 1713 (2007). O'Hare, however, focuses on only on one example---Richard Breeden's monitorship at WorldCom. Khanna and Dickinson focus primarily on a theoretical analysis of when monitorships should be used instead of financial penalties and whether or not monitors should have duties to the corporation. Other research has focused on the issue of whether the government is abusing its power in reaching settlement agreements (e.g., by requiring corporations to waive attorney-client privilege). See Earl J. Silbert and Demme Doufekias Joannou, *Under Pressure to Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System,* 43 AM. CRIM. L. REV. 1225 (2006).

[14] See *infra* Part IV.

This article proceeds by first providing a brief description of monitorships as currently used. This part also provides a discussion of the use of similar monitor-type arrangements in other settings that have influenced the current use of monitorships. Part III then shows the evolution of corporate compliance programs over time, which have gone from a focus on technical compliance with specific issues to broader programs that are integrated into the corporation's culture and business operations. This is an important discussion, since monitorships are intended to ensure that corporations have implemented an effective compliance program. Part IV provides an analysis of monitorships in practice. Based on interviews with those involved in monitorships and on secondary data, we investigate the entire monitorship process including the scope of the monitor's duties under the agreement, the selection of the individual to serve as monitor, how the monitor conducts his work in practice, and finally what occurs after the monitorship ends. In general, we find that the cumulative result of decisions made with respect to each of those issues during the process leads to monitorships that are significantly less ambitious than government pronouncements behind them, and are at risk of not achieving their goals on any consistent basis. Part V then provides recommendations for reforms to help ensure that monitorships are crafted to meet the challenges at hand in any specific case and to create a process to allow them to improve over time based on experience.

II. The Past and Present of Monitorships

A. Current Use of Monitorships

The use of corporate monitorships as currently structured is relatively new. The DOJ has imposed at least 44 monitorships as part of settlement agreements with corporations, almost all of which date from 2003 or later,[15] which is the post-Enron, post-Sarbanes Oxley Act era. The SEC has often participated with the DOJ in its monitorships,[16] along with using them on their own.[17] As discussed further below, the SEC has a longer history with monitorships that has evolved over time. Although different terminology is used to describe the monitorship[18] and there is variation in the details of the monitor's duties, they all have the same basic structure, which is that the corporation is to retain at its own expense a monitor to oversee its compliance with the

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[15] Our count of the number of DOJ monitorships comes from the DOJ's letter to the House Committee on the Judiciary. The letter listed 41 monitorships, with all but three of those occurring in 2003 or later. Letter to John Conyers Jr., Chairman of the House Comm. on the Judiciary, from Brian A. Benczowski, Principal Deputy Assistant General, May 15, 2008, at 5 (copy on file with authors). The DOJ noted in the letter that this may not be a complete list. *Id.* at 2. Since the letter, and as of the time this article was originally drafted, the DOJ has entered three additional monitorships. See *infra* note 168 and accompanying text (discussing the cases of AGA Medical, Faro Technologies, and Willbros).

[16] *See* Schnizter Steel Industries, Deferred Prosecution Agreement (2006), *available at* http://judiciary.house.gov/hearings/pdf/deferredprosecution/Schnitzer061016.pdf; Schnitzer Steel Industries, SEC Admin. Proceeding, (2006), *available at* http://www.sec.gov/litigation/admin/2006/34-54606.pdf.

[17] *See* Delta and Pine Land Company, SEC Admin. Proceeding, (2007), *available at* http://www.sec.gov/litigation/admin/2007/34-56138.pdf

[18] In some cases the monitor is referred to as an "independent consultant" or "independent examiner," for example.

settlement agreement and its implementation of required reforms, such as an improved compliance program.[19] Over a period usually between 18 and 36 months, the monitor will continue to review the corporation's implementation of the reforms and report back to the relevant government agents on the corporation's progress.

In the Parts that follow we will provide more detail on the use of monitorships in theory and in practice. This Part, however, provides a brief history of monitorships and how they have evolved over time in their use in corporations and other organizations. This history helps provide a lens through which to view the current use of monitorships.

B. Forerunners to Corporate Monitorships

1. Mobs, Prisons, and Private Inspector Generals

Corporate monitorships have a direct history in public law litigation and in labor union corruption cases brought under the Racketeer Influenced and Corrupt Organizations Act (RICO).[20] Public law litigation refers to lawsuits filed against such public institutions as schools, prisons, police and fire departments, and mental health facilities, where the plaintiffs seek court involvement in restructuring the organizations involved and ongoing monitoring of the implementation process.[21] To monitor a consent decree, the court appoints an independent third party to oversee the defendant's implementation efforts. The third party—such as a referee, monitor, or special master—could be assigned different powers ranging from simply reporting back to the court on the defendant's performance to making adjudicative decisions.[22] In certain cases, such as with prisons, the court-appointed trustees had experience in other prison trusteeships and were possibly working multiple trusteeships at the same time.[23]

In addition to these public institutions, monitors were imposed in DOJ lawsuits against labor unions under RICO that were resolved with consent decrees. These monitors served as trustees that were charged with attempting to reform unions that were under the control of organized crime. The trusteeships varied considerably in terms of how they operated and the powers granted to the trustees. In some cases, the trustees had powers equivalent to the union's officers, including the power to negotiate contracts and initiate strikes.[24] In other cases, the trustee did not even have the power to remove corrupt

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[19] *See infra* Part IV.A.3

[20] Garrett, *supra* note 3, at 857, 869-74.

[21] For a general review, *see generally* Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1022-53 (2004); *see also* Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355 (1991).

[22] Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Re-form Litigation*, 1986 U. ILL. L. REV. 725, 732-35, 746-49 (1986) (distinguishing between the powers of a monitor and special master).

[23] JAMES B. JACOBS, MOBSTERS, UNIONS, AND FEDS 246 (2006).

[24] James B. Jacobs et al., *The RICO Trusteeship after Twenty Years: A Progress Report,* 19 LAB. LAW. 419, 427-28 (2004).

union members.[25] The duration of the trusteeship could be indefinite or for a fixed term as short as 18 months.[26]

The trustees—who were almost always ex-prosecutors[27]—had to develop their reform strategies on their own, since the trustees did not issue public reports and there was very little, if any, contact between trustees.[28] Thus, they were largely unable to learn from the successes and failures of others.[29] Overall, some of these cases were successful, but others were not.[30] They were influential, however, as many of the monitors we interviewed believed that idea for monitorships came from union trusteeships.

The Independent Private Sector Inspectors General (IPSIG) model is similar. These monitors got their start in New York in the 1990s helping New York City ensure that companies contracting with the city were not engaging in fraud, overbilling, or other violations of law.[31] The individuals were placed in contractors to oversee their billing practices, completion of work claimed to be performed, and other practices. One offshoot has been IAIPSIG, the International Association of Independent Private Sector Inspectors General, which seeks to promote the use, integrity and professionalism of Independent Inspector Generals.[32]

2. *Corporations and Monitors*

The Securities Exchange Commission (SEC). The SEC has used court-ordered receiverships as part of its civil enforcement suits since at least the 1960s.[33] The receiverships initially served a traditional asset preservation role, ensuring that the assets of the corporation were not subject to misappropriation or waste by management.[34] Over time, SEC receiverships evolved to serve the goal of ensuring the corporation would comply with securities laws in the future.[35] Although receiverships were used for solvent, ongoing corporations, as opposed to receiverships in bankruptcy, the receiver was an officer of the court with duties to the receivership estate, which made it difficult for the

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[25] *Id.* at 428, n.49.

[26] *Id.* at 426-27.

[27] *Id.* at 424-25.

[28] *Id*. at 433-34.

[29] *Id.*

[30] *Id.* at 452; *see also* Jacobs, *supra* note 23, at 242-45 (providing a list of the trusteeships and a review of whether or not each was successful).

[31] James B. Jacobs & Ron Goldstock, *Monitors & IPSIGS: Emergence of a New Criminal Justice Role,* CRIM. L. BULL., (2007), at 217.

[32] The Web site of the International Association of Independent Private Sector Inspectors General, *available at* http://www.iaipsig.org.

[33] James R. Farrand, *Ancillary Remedies in SEC Civil Enforcement Suits,* 89 HARV. L. REV. 1779, 1787 (1976).

[34] *Id.* at 1787.

[35] *Id.* at 1787-88. *Comment, Equitable Remedies in SEC Enforcement Actions*, 123 U. PA. L. REV. 1188, 1200-01 (1975) [hereinafter *Equitable Remedies*].

receiver to carry on a business in an entrepreneurial fashion.[36] In addition, the presence of a receiver often gave the company a poor reputation among its various stakeholders.[37] Both factors harmed the ongoing business of the company.

In cases where a receivership was viewed as unnecessary but there were willful violations of securities laws, SEC settlement decrees included the appointment of independent directors (with or without a change in management),[38] a "special counsel," or an "advisor."[39] The appointment of independent directors was a way to have the benefits of a receivership, but limit the drawbacks associated with excessive negative publicity and receivers' obligations to act as officers of the court.[40] Special counsel were typically attorneys and they were given broad investigative and other powers.[41] It was not uncommon for special counsel to be used simultaneously with court-appointed directors.[42] The special counsel typically conducted an investigation and filed a report with the SEC and the court,[43] but in some cases they had the power to bring suits on behalf of the shareholders based on their investigations.[44] Advisors, on the other hand, had no power to act independently of the board and were often experts who only provided advice in specific areas (e.g., auditing). Corporations agreed to "special counsels" or advisors because it was a more attractive option than the alternative of a receivership.[45] Associated with these agreements could be the requirement to adopt certain practices and internal controls designed to prevent the future recurrence of the securities violation at hand.[46]

This approach was popular with the SEC prior to 1984, when the agency had very limited authority to impose civil penalties. Thus, the SEC relied on "remedial undertakings such as procedural reforms and independent monitors, to enforce compliance with the securities laws."[47] Although the SEC continued to use this approach

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[36] *Equitable Remedies*, *supra* note 35, at 1201-2.

[37] *Id.*

[38] *Id.* at 1205. The court-appointed directors typically could not be voted out by the shareholders during a specified time period and would only be liable to the shareholders for gross negligence. *Id.* at 1206.

[39] Farrand, *supra* note 33, at 1793-94.

[40] *Equitable Remedies*, *supra* note 35, at 1206.

[41] Farrand, *supra* note 33, at 1794.

[42] *Equitable Remedies*, *supra* note 35, at 1208.

[43] Arthur F. Mathews, *Recent Trends in SEC Requested Ancillary Relief in SEC Level Injunctive Actions*, 31 BUS. LAW. 1323, 1329-30 (1975-76).

[44] *Equitable Remedies*, *supra* note 35, at 1208-9.

[45] Farrand, *supra* note 33, at 1794-95; Mathews, *supra* note 43, at 1326 (1975-76). In other situations, the SEC would ask the court to appoint an independent director. *Id.* at 1326-28.

[46] *Equitable Remedies*, *supra* note 35, at 1196-99.

[47] Stephen M. Cutler, Director, Division of Enforcement, U.S. Securities and Exchange Comm., Address at the 24th Annual Ray Garrett Jr. Corporate & Securities Law Institute (April 29, 2004), *available at* http://www.sec.gov/news/speech/spch042904smc.htm.

to some degree,[48] after 1984 monitorships received less attention until they enjoyed renewed popularity in the post-Enron era, in parallel with their adoption by the DOJ.[49]

Department of Health and Human Services Office of Inspector General. Starting in the 1990s, the Department of Health and Human Services Office of Inspector General began using Corporate Integrity Agreements (CIAs) as way to resolve claims related to False Claims Act investigations (e.g., over-billing the government's Medicare program). What began as a loose copy of other self-disclosure programs (e.g., the Defense Industry Initiative)[50] is now a formalized process with corporations agreeing to over 500 CIAs in the last few years.[51] A CIA requires the corporation to implement improved internal controls and a compliance program, appoint a compliance officer, conduct employee training, and potentially fulfill other requirements as well.[52] In addition, CIAs typically require an Independent Review Organization (IRO) to evaluate the compliance program. Companies compete for the IRO business. For example, PricewaterhouseCoopers claims to have served as an IRO for more than 50 companies.[53]

Department of Justice (DOJ). In addition to DPAs, corporate monitorships have been used as a term in a court-ordered probation after a criminal conviction or guilty plea. Although the idea of probation for organizations had existed for some time, the 1991 Organizational Sentencing Guidelines were the first governmental approval of probation for rehabilitation purposes (previously, probation was limited to ensuring corporations pay fines or restitution).[54] Under the guidelines, courts were required to order probation if

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[48] For examples of cases where the SEC required an independent consultant to review a company's compliance policies and procedures, *see, e.g., In the Matter of Credit Suisse First Boston Corporation*, Admin. Proceedings File No. 3-9535, 1998 SEC LEXIS 137 (Jan. 29, 1998); *In the Matter of Smith Barney Inc.*, Admin. Proceedings File No. 3-9426, 1997 SEC LEXIS 1973 (Sept. 23, 1997). In addition to the SEC, the Financial Industry Regulatory Association (FINRA) and its predecessor organizations—the National Association of Securities Dealers (NASD) and the New York Stock Exchange (NYSE)—began making more frequent use of monitorships starting in the early 1990s. Examples include settlements involving Nikko Securities (1993 N.Y.S.E. WL 389168) and Nomura Securities (1995 N.Y.S.E. WL 705399).

[49] *See* Cristie L. Ford, *Toward a New Model for Securities Law Enforcement*, 57 ADMIN L. REV. 757, 797 (2005).

[50] See *infra* notes 78 to 81 and accompanying text (describing the Defense Industry Initiative).

[51] *See* Department of Health and Human Services, Office of Inspector General, Corporate Integrity Agreements, *available at* http://www.oig.hhs.gov/fraud/cias.html. For a list of Corporate Integrity Agreements and links to the texts of the agreements, *see* http://www.oig.hhs.gov/fraud/cia/index.html.

[52] *Id.*

[53] PwC Advisory Pharmaceutical and Life Sciences Industry Group, *How Can Pharmaceutical and Life Sciences Companies Effectively Meet the Challenges of Negotiating and Implementing a Corporate Integrity Agreement* (2008), available online at http://www.pwc.com/extweb/industry.nsf/docid/D600B97CB2E4727780257221003B784A/$file/corporate_integrity.pdf.

[54] William S. Lofquist, *Organizational Probation and the U.S. Sentencing Commission,* 525 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 157, 161 (1993); *see also* William S. Lofquist, *Legislating Organizational Probation: State Capacity, Business Power, and Corporate Crime Control,* 27 LAW. & SOC'Y. REV. 741, 749 (1993) (noting that the legislative history behind the Sentencing Reform Act of 1984 (which provided for corporate probation) indicated that Congress rejected probation terms that were invasive and only approved noninvasive terms (e.g., fine collection and community service)).

the organization had more than 50 employees and did not have a compliance program in place.[55] As part of a probation order, courts were allowed to require corporations to report on the implementation of the program, and to have a special probation officer monitor compliance based on a records review or employee interviews.[56] After the 2004 amendments, the guidelines state that even if a corporation has a compliance program, a court "shall" order a term of probation "if such sentence is necessary to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct . . . ."[57]

Commentators' early criticisms and endorsements of corporate probation mirror the current debate about corporate monitorships. Critics questioned the ability of judges to effectively implement and monitor the requirements in a probation order.[58] With respect to an early draft of the original sentencing guidelines, one commentator suggested that Senate confirmation hearings on federal judges must now assess those judges' abilities to run major corporations, since that was what the guidelines would now require.[59] Gruner, for example, argued instead for a probation system under which a corporation proposed a compliance program to the court, which upon approval became part of the probation terms, to be monitored by some form of probation officer.[60] Gruner argued that this approach had several advantages, including shifting the burden to corporations, the ability to tailor the program to the corporation's specific needs, greater legitimacy of the program within the corporation because it was internally developed and not externally imposed, encouraging innovation in compliance programs due to involvement of corporation personnel, and general buy-in by executives.[61] Gruner's arguments can easily be used to support the current use of corporate monitorships.

One example of a probation order that employed a monitor involved Consolidated Edison ("Con Ed"). In 1994, Con Ed pled guilty to environmental law violations related to the failure to disclose a potential asbestos leak to the public, and the judge sentenced the company to the maximum fine and three years' probation with a corporate monitor.[62]

[55] Lofquist, *Organizational Probation*, *supra* note 54, at 162; Christopher A. Wray, Note: *Corporate Probation under the New Organizational Sentencing Guidelines*, 101 YALE L.J. 2017, 2028 (1992).

[56] Lofquist, *Organizational Probation*, *supra* note 54, at 162.

[57] U.S. SENTENCING GUIDELINES MANUAL § 8D1.1(a) (6). In addition, the company may be required to develop an effective compliance and ethics program (§ 8D1.4(c)). The commentary states: "To assess the efficacy of a compliance and ethics program submitted by the organization, the court may employ appropriate experts who shall be afforded access to all material possessed by the organization that is necessary for a comprehensive assessment of the proposed program." If the organization repeatedly violates the terms of probation, the sentencing guidelines specifically grant the court power to appoint a special master or trustee to ensure compliance with the court orders (§ 8F1.1 (application note 1)).

[58] Richard Gruner, *To Let the Punishment Fit the Organization: Sanctioning Corporate Offenders through Corporate Probation, 16* AM. J. CRIM. L. 1, 73-74 (1988).

[59] Wray, *supra* note 55, at 2018.

[60] Gruner, *supra* note 58, at 83-84.

[61] *Id.*

[62] Michael B. Gerrard & Deborah Goldberg, *Corporate Probation: The Con Edison Sentence*, N.Y. L.J. (May 26, 1995), at 3. Con Ed pled guilty to violating the Emergency Planning and Community Right-to-Know Act of 1986 and the Comprehensive Environmental Response, Compensation and Liability Act by

In sentencing the corporation, the judge specifically stated that Con Ed had a culture that discouraged reporting bad news, and that culture intimidated people who otherwise would have reported the presence of asbestos from making such a report.[63] The monitor was charged with ensuring that Con Ed was adopting and implementing an effective compliance program.[64] An initial report by the monitor stated that several months into the monitorship, Con Ed continued to use intimidation to prevent employees from reporting violations.[65] The monitor also stated that even if the corporation sincerely attempted to implement its new proposed control system, it would have no effect unless the corporation also worked to reform its "insular" and "destructive" corporate culture.[66] At the end of the three-year probation, however, the Judge stated that Con Ed had made significant improvements in implementing a compliance program and the company credited the change to the guidance of the monitor.[67] The monitor, however, had expressed some reservations just a few months before the probation ended, stating in a report that "[m]anagers a rung or two below the officer level have expressed a fear of speaking up. Many employees said their fears will intensify once the probation ends."[68] He turned out to be correct since, just a few months after the monitorship ended, the company again failed to notify the public in a timely manner of potential harm due to toxic chemicals,[69] and was later placed under the supervision of another monitor.[70]

III. History & Evolution of Corporate Ethics and Compliance Programs

This brief historical overview suggests that ultimately, monitorships are attempts to ensure that the organization has policies and procedures in place that will help prevent future misconduct. For corporations, those policies and procedures make up the

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failing to notify the public of the release of asbestos in a steam pipe explosion. *Id.* The Sentencing Guidelines' did not apply to this case because the incidents occurred in 1989, which was before the effective date of the 1991 Sentencing Guidelines.

[63] *Id.* The judge stated "One of the things I found disturbing here was the sense that there were people at Con Edison, who testified at the trial, who clearly knew and who should have been jumping up and down saying, there is asbestos here, we know it. It was obvious they didn't say it because they were intimidated from saying it, because they didn't think that was the corporate culture. . .I do think there was a sense here, at certain levels within this company, that you had better not tell the bad news."

[64] *Id.*

[65] Don van Natta Jr., *Con Ed Cited in Intimidation of Employees*, N.Y. TIMES, Dec. 19, 1995, at B1.

[66] *Id.*

[67] David W. Dunlap, *Memories of the '89 Blast Linger in Gramercy Park*, N.Y. TIMES, July 21, 2007, at B4.

[68] Russell Mokhiber, *Reddy Kilowatt: On Probation*, MULTINATIONAL MONITOR, Oct. 1997, at 7, 8.

[69] David M. Herszenhorn, *Con Edison Taken to Task Over PCBs*, N.Y. TIMES, Sept. 20, 1998, at 45 (noting the company delayed for over a week in notifying the fire department of possible exposure to toxic chemicals at a fire in one of its buildings); Kevin Flynn, *Con Ed to Pay $2 Million to Rescuers Exposed to PCBs at Fire*, N.Y. TIMES, Nov. 20, 1999, at B2 (stating the company agreed to pay approximately $2 million to firefighters and emergency workers exposed to toxic chemicals at the company's plant and that due to the company's delay in reporting the presence of the chemicals, more people came into exposure to them).

[70] *Metro News Briefs: Con Edison Accepts U.S. Safety Monitor*, N.Y. TIMES, April 19, 2000, at B8.

organization's ethics and compliance programs. The formalization of compliance programs and the development of compliance professionals evolved over a period of several decades, and today's programs are characterized by an integrated and multi-factorial approach to corporate compliance. This evolution is important because, as discussed in Parts IV and V below, corporate monitorships often seem to be operating on an older view of compliance—one that is focused on technical compliance as opposed to a more holistic, organizational culture-based approach.

A. A Brief History of Compliance Programs: From Controls to Corporate Culture

An early influence in the development and adoption of compliance programs were the antitrust criminal prosecutions in the heavy electrical equipment industry in the 1960s.[71] During one prosecution, General Electric attempted to use its compliance program as a defense against the criminal charges.[72] Although General Electric was unsuccessful, that attempt spurred widespread adoption of antitrust compliance programs. Eventually, regulators indicated they would take adoption of such programs into account when attempting to determine if a violation was "inadvertent" as opposed to intentional.[73]

A second major catalyst for the development and adoption of compliance programs was the Foreign Corrupt Practices Act of 1977 (FCPA).[74] In addition to prohibiting corporations from making corrupt payments to government officials,[75] the FCPA requires corporations to implement accounting practices and internal controls that are designed to ensure that the company is not making corrupt payments.[76] This spurred widespread adoption of codes of conduct and compliance programs by multinational corporations.[77]

Third, in the 1980s,[78] due to concerns about corruption in the defense industry, and based on the recommendations of a commission appointed by the President, the Defense Industry Initiative (DII) was created.[79] The DII was an attempt at self-regulation that encouraged defense contractors to adopt a code of ethics, provide training on the

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[71] Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559, 1578 (1990).

[72] *Id.* at 1580-81.

[73] *Id.* at 1581-82.

[74] *Id.* at 1582.

[75] Marika Maris & Erika Singer, *Foreign Corrupt Practices Act*, 43 AM. CRIM. L. REV. 575, 578, 582-90 (2006).

[76] *Id.* at 579-81.

[77] Pitt and Groskaufmanis, *supra* note 71, at 1585-86.

[78] Also in the 1980s, Congress passed the Insider Trading and Securities Fraud Enforcement Act of 1988, which required broker-dealers and investment advisors to adopt policies and procedures to prevent the misuse of material, non-public information. Pitt and Groskaufmanis, *supra* note 71, at 1590-91.

[79] Nancy B. Kurland, *The Defense Industry Initiative: Ethics, Self-Regulation, and Accountability,* 12 J. BUS. ETHICS. 137-145 (1993); *see also* Defense Industry Initiative Web site, *available at* http://www.dii.org.

code to all employees, and to create a "free and open atmosphere" within the organization for employees to report instances of fraud.[80] Participation in the DII was voluntary, but the Department of Defense encouraged participation by indicating that it would consider a corporation's compliance program as a mitigating factor in any debarment decisions.[81] To receive preferential treatment, corporations were expected to self-disclose the violation and cooperate with the Department of Defense in its investigation.[82]

Finally, the most important influence occurred in 1991 when the United States Sentencing Commission followed the lead of the DII and amended the Federal Sentencing Guidelines to provide a mitigated sentence for corporations convicted of a crime if they were able to demonstrate that they had attempted to prevent the misconduct by having an "effective" compliance program in place.[83] The Organizational Sentencing Guidelines established seven basic requirements for an effective program, including the adoption of standards and procedures to prevent criminal conduct, appropriate oversight of the program by high-level personnel, communication of the requirements to all employees, and monitoring and updating the program as needed.[84]

The Guidelines pushed compliance programs out of the defense industry, beyond limited issues such as antitrust and the FCPA, and into the mainstream.[85] This spurred the significantly increased use of Ethics and Compliance Officers, industry associations to support the work of compliance professionals, and education programs put on by such groups as the Practicing Law Institute.[86] The adoption of compliance programs consistent with the Guidelines continued to grow when in 1996, in the case of *In re Caremark*, the Delaware Supreme Court indicated that directors' fiduciary duties may require the board to take advantage of the potential for a mitigated sentence under the Guidelines by adopting a compliance program.[87] Further incentives to adopt and improve compliance programs came in 1999, when the DOJ officially stated that it would take into account the adequacy of a corporation's compliance program when deciding whether to prosecute a corporation, as opposed to just prosecuting any individuals involved in the criminal

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80 Kurland, *supra* note 74, at 138.

81 Pitt and Groskaufmanis, *supra* note 71, at 1595.

82 Christopher A. Wray & Robert K. Hur. *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1115-16 (2006).

83 Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics,* 87 IOWA L. REV. 697, 702-3 (2002).

84 *Id.* at 703-704.

85 *See* David Hess et al., *The 2004 Amendments to the Federal Sentencing Guidelines and Their Implicit Call for a Symbiotic Integration of Business Ethics*, 11 FORDHAM J. CORP. & FIN. L. 725, 733 (2006).

86 U.S. Sentencing Comm., *Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines* 29-30 (Oct. 7, 2003), *available at* http://www.ussc.gov/corp/advgrprpt/advgrprpt.htm.

87 *In re Caremark Int'l Inc. Derivative Litigation*, 698 A.2d 959, 961 (Del. Ct. Chan. 1996). The holding in *Caremark* was supported by the Delaware Supreme Court in *Stone v. Ritter*, 911 A.2d 362 (Del. 2006). For a discussion of *Stone*'s impact on *Caremark*, *see* Hillary A. Sale, *Monitoring Caremark's Good Faith*, 32 DEL. J. CORP. L. 719, 730-33 (2007) (stating "Stone makes clear that when a board fails to implement compliance and monitoring systems or fails to respond to red flags, it fails to act as a faithful and loyal monitor").

activity.[88] Likewise, in 2001, the SEC issued what is commonly known as the Seaboard Report, which indicated that it would be more lenient in its enforcement response for corporations that had effective compliance programs in place and cooperated with the SEC in its investigation.[89]

During this time, academics and industry professionals worked at developing a better understanding of what makes a compliance program effective. One of the most influential insights was Harvard Business School Professor Lynn Sharp Paine's distinction between compliance-based programs and integrity-based programs.[90] Both applied to compliance programs, but Paine referred to a compliance-based approach as focusing primarily on deterrence through punishment for rule violations, while an integrity-based program focused on developing appropriate organizational values and empowering employees to act upon those values.[91] Empirical studies show that the most

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[88] Murphy, *supra* note 83, at 712. This policy was found in the Memorandum from Eric H. Holder, Jr., Deputy Attorney Gen., U.S. Dep't of Justice, to All Component Heads and U.S. Attorneys, *Federal Prosecution of Corporations* (June 16, 1999), *available at* http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html [hereinafter Holder Memo]. The Holder Memo was updated by Memorandum from Larry D. Thompson, Deputy Attorney Gen, U.S. Dep't of Justice, to All Component Heads and U.S. Attorneys, *Federal Prosecution of Business Organizations* (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm [hereinafter the Thompson Memo] and then by Memorandum from Paul J. McNulty, Deputy Attorney Gen., U.S. Dep't of Justice, to All Component Heads and U.S. Attorneys, *Principles of Federal Prosecution of Business Organizations* (Dec. 12, 2006), *available at* http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf [hereinafter McNulty Memo]. Most recently, and occurring after the original drafting of this article, the McNulty Memo was revised and committed to the United States Attorney's Manual. Department of Justice, *Press Release, Justice Department Revises Charging Guidelines for Prosecuting Corporate Fraud*, August 28, 2008, available at http://www.usdoj.gov/opa/pr/2008/August/08-odag-757.html. The major revisions relate mostly to changes in the consideration of waiver of attorney-client privilege, but also provide that "that prosecutors may not consider whether a corporation has sanctioned or retained culpable employees in evaluating whether to assign cooperation credit to the corporation." *Id.* For purposes of this paper, we retain our original language of referring to these charging guidelines as the McNulty Memo, as the DOJ monitorships we discuss in this paper almost all occurred under the Thompson or McNulty Memos.

[89] Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Divisions, Exchange Act Release No. 44969 76, SEC Docket 220 (October 23, 2001), *available at* http://www.sec.gov/litigation/investreport/34-44969.htm; see also Barry W. Rashkover, *Reforming Corporations through Prosecution: Perspectives from an SEC Enforcement Lawyer,* 89 CORNELL L. REV. 535, 539-40 (2004) (discussing the Seaboard Report from the perspective of SEC enforcement). Other government agencies also promote the use of compliance programs. For example, the Department of Health and Human Services provides guidance on the requirements of a compliance program in the healthcare industry. Dep't of Health and Human Services, Office of Inspector General, *Compliance Guidance*, *available at* http://www.oig.hhs.gov/fraud/complianceguidance.html (providing a variety of documents on compliance guidance for different types of healthcare organizations). Most recently, as of December 2007, companies that have contracts with the federal government that are over $5 million in value and have a duration of over 120 days are required to have a code of ethics and a compliance program. *Federal Acquisition Regulation; FAR Case 2006-007, Contractor Code of Business Ethics and Conduct*, 72 Fed. Reg. 65,873 (Nov. 23, 2007).

[90] Lynn Sharp Paine, *Managing for Organizational Integrity,* HARV. BUS. REV. 106, 110-11 (1994).

[91] *Id.* For an overview and a discussion of empirical studies showing the greater effectiveness of integrity-based approaches, *see* David Hess, *A Business Ethics Perspective on Sarbanes-Oxley and the Organizational Sentencing Guidelines*, 105 MICH. L. REV. 1781, 1791-94 (2007) (stating that "whereas a

effective compliance programs have elements of each approach, but that the integrity-based aspects must dominate.[92]

Implementing an integrity-based program requires understanding the organization's culture.[93] The importance of managing an organization's culture to ensure the effectiveness of a compliance program gained significant traction when the Sentencing Commission formalized it as part of the Organizational Sentencing Guidelines in 2004. The amended Guidelines refer to a corporation's "compliance and ethics program" and describe an effective program as one designed to "prevent and detect criminal conduct" and to "promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law."[94]

B. The Development of Compliance Professionals

The increased importance of compliance programs is leading to the development of compliance professionals. This development is supported by several nonprofit organizations and networks devoted to compliance professionals.[95] The Society of Corporate Compliance and Ethics has recently started offering a one-day exam (and associated training programs) that allow an individual to become a certified compliance and ethics professional.[96] Some universities are also starting to offer certificate programs in compliance.[97]

Despite the development of a compliance profession, there remains wide variation in corporations' general approach to their compliance programs. For example, there is no uniformity when it comes to whom the organization selects to be in charge of the compliance program. A recent survey found that the person with responsibility for the compliance program had the word "compliance" in their title (e.g., Chief Compliance Officer) in only forty percent of the companies that responded. [98] Others executives in

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compliance-based program focuses on teaching employees the laws and rules they must comply with, an integrity-based program focuses on integrating ethics into employees' decision making and inspiring them to live up to the company's ethical ideals.").

[92] Hess, *supra* note 91, at 1792-94.

[93] *Id.* at 1792; Paine, *supra* note 90, at 112.

[94] U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a) (2004).

[95] These include the Ethics and Compliance Officers Association (www.theecoa.org), the Ethics Resource Center (www.ethics.org), the Open Compliance and Ethics Group (www.oceg.org), the Society of Corporate Compliance and Ethics (www.corporatecompliance.org), and the Health Care Compliance Association ((http://www.hcca-info.org).

[96] *See* Society of Corporate Compliance and Ethics, *supra* note 95.

[97] These programs include: George Washington University's Graduate Certificate in Healthcare Corporate Compliance (*available at* http://nearyou.gwu.edu/hcc/), Florida Gulf Coast University's Compliance Specialist Graduate Certificate (*available at* http://cps.fgcu.edu/JS/CS/index.html), Hamline University School of Law's Health Care Compliance Certification Program (*available at* http://law.hamline.edu/health/corporate_compliance_certificate_program.html).

[98] Melissa Klein Aguilar, *CW Survey Shows Lack of CCO Standards,* COMPLIANCE WEEK 1, 18-19 (June 2008). Larger companies are more likely to have a Chief Compliance Officer. This survey was an online survey of the readership of Compliance Week conducted during March 2008 with 284 usable respondents.

charge of the compliance program include someone in the General Counsel's office, the controller, or a vice president of internal audit.[99] Accordingly, the background of the person in charge of the compliance program can also vary. A 2000 survey found that only twenty-nine percent of compliance officers in the United States had a law degree.[100] This reflects the evolution of the role, which seems to be moving away from being viewed as a field for simply "legal technicians."[101] The approach to managing a compliance program can vary significantly between CECOs who are lawyers by training and CECOs who come from a management background. For example, one survey found that legally trained CECOs believed that the most important root causes of misconduct were employee ignorance of legal requirements and corporate policies.[102] Those from a management background, however, listed the most important causes as factors related to a corporation's culture, such as lack of leadership on ethics and management pressure to meet goals and performance expectations.[103]

The individuals in charge of compliance programs typically report directly to the CEO or general counsel, but a smaller percentage report to the Chief Financial Officer or the audit committee of the board of directors.[104] Even though the individual in charge of the compliance program does not report directly to the board, under the Sentencing Guidelines, they should have access to the board if needed,[105] and it appears that most do.[106] Some, however, argue that this is not sufficient and that the board should have direct control over the compliance officer (e.g., hiring, compensating, terminating).[107]

The respondents were from corporations of a wide range of sizes and industries. The raw data is on file with the authors.

[99] *Id.*

[100] James Weber & Dana Fortun, *Ethics and Compliance Officer Profile: Survey, Comparison and Recommendations*, 110 BUS. & SOC. REV. 97, 99 & 105 (2005).

[101] Caron Carlson, *The Evolution of the Modern CCO*, COMPLIANCE WEEK, March 2008, at 1, 40 (quoting the comments of Scott Mitchell, the CEO of a nonprofit organization for compliance professionals).

[102] Gary E. Edwards & Robert Reid, *Challenges Facing Corporate Ethics and Compliance Programs: A Research Report from Ethos International*, at 10-11 (Sept. 2007), *available at* http://www.ethosinternational.net/files/689_file_PDF_EthosResearchReport2007.pdf.

[103] *Id*.

[104] Aguilar, supra note 98, at 19. The Compliance Week Survey found that 35% report to the CEO, 21% to the general counsel, and 13% to the board (or more likely, the audit committee of the board). *Id.* A 2007 survey by the Ethics and Compliance Officers Association found that 32% report to the CEO, 41% to the general counsel and 7% to the board. *Id.* at 18. A third study, conducted by the Conference Board in 2005 with 225 respondents, found similar results, with 31% of executives in charge of compliance reporting to the CEO, and 37% to the general counsel. Ronald E. Berenbeim, Conference Board Research Report: Universal Conduct: An Ethics and Compliance Benchmarking survey, at 10-11 (2006).

[105] U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(2) (2004).

[106] Berenbeim, *supra* note 104, at 11-12 (finding that for publicly traded US corporations only 5% of executives in charge of compliance had no contact with the board, and that 46% communicate with the board in some manner on a quarterly basis).

[107] *See* W. Michael Hoffman & Mark Rowe, *The Ethics Officer as Agent of the Board: Leveraging Ethical Governance Capability in the Post-Enron Corporation*, 112 BUS. & SOC. REV. 553 (2007); W. Michael Hoffman et al., *An Investigation of Ethics Officer Independence*, 78 J. BUS. ETHICS 87 (2008); *see also*

These commentators argue that this is necessary because ethics and compliance officers "do not have sufficient power, status [or] authority"[108] to do their jobs appropriately, which is further harmed by an inherent conflict of interest resulting from the compliance officer being accountable only to top management.[109] For example, one former chief compliance officer stated, "[a]s a chief compliance officer, the stances you have to take are sometimes in opposition to the direction the company may otherwise be inclined to go. That requires lots of intestinal fortitude."[110] Others in the field claim that compliance officers have been forced out of their jobs when they refused orders from top management to stop an investigation, for example.[111] Complaints that compliance officers face pressures to not start an investigation or to close it before completion appear to be fairly common.[112]

C. Summary of Monitorships and Compliance Programs

Over the last few decades there has been tremendous growth in the importance of corporate compliance and ethics programs in criminal and civil liability. Although compliance programs started out focused on specific issues, best practices now suggest that a single program should encompass the near entirety of a firm's efforts at compliance with laws and regulations.[113] This development has not been without controversy, however. Critics argue that corporations use compliance programs as "window dressing" to create merely the appearance of a commitment to compliance, which may still provide the corporation the benefits of a mitigated sentence if the need arises.[114] These are "paper

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Scott A Roney et al., *Leading Corporate Integrity: Defining the Role of the Chief Ethics and Compliance Officer (CECO)* at 20-21 (2007), *available at*: http://www.ethics.org/ceco (stating that it is appropriate to have the CECO report to either the Board of Directors or the CEO, but that the Board should have authority over hiring and firing decisions).

[108] Hoffman and Rowe, *supra* note 107, at 560.

[109] *Id.* at 556-57.

[110] Carlson, *supra* note 101, at 1, 40.

[111] *Id.* at 41.

[112] In a published interview, a well-known compliance consultant stated, "Unfortunately and sadly, I'm aware of a number of cases where compliance officers seek to become the diligent, independent professionals they are supposed to be to protect the company from misconduct, and are told by senior management to cool it." Swenson interview with Corporate CORP. CRIME REP. (2006), at 13. This anecdotal evidence is starting to be supported by evidence from surveys. One survey of compliance and ethics officers—with 127 respondents—found that thirty-three percent of Compliance and Ethics Officers had received pressure from corporate officers to not investigate alleged misconduct, and over half (51%) had received such pressure from other managers. Edwards and Reid, *supra* note 102. One in ten CECOs reported that they received such pressure from other managers frequently. *Id.* These compliance ethics officers also felt that their quality of investigations into wrongdoing suffered due to a general pressure to achieve the objective of closing cases quickly. *Id.* at 7-8.

[113] See OPEN COMPLIANCE AND ETHICS GROUP, FOUNDATION GUIDELINES: RED BOOK (2008);

[114] *See generally*, Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003); William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 54 VAND. L. REV. 1343 (1999); William S. Laufer, *Corporate Prosecution, Cooperation, and the Trading of Favors*, 87 IOWA L. REV. 643, 648-49, 657-63 (2002).

programs," where corporations adopt policies and procedures on paper but do not embed them into their actual operations.[115] In response, and in recognition of the value of an integrity-based approach,[116] current thinking now expects compliance programs to consider an organization's culture as well, and enforcement agents look for evidence of a "compliance attitude" in corporations.[117]

During the same time period, monitorships appeared in a variety of corporate and non-corporate settings. The overarching goal of a monitorship is to ensure that the organization in question has been "reformed," so that it would exhibit better legal compliance in the future. Thus, whether the monitor takes significant control over the organization or simply audits the changes management made, the goal is to improve the compliance program (using the term broadly) of the organization. However, as fully described in the next Part, monitorships in practice do not seem to be keeping up with the evolution of the compliance profession. This is in large part explained by the background of the monitor selected. Perhaps drawing from the experience of trustees in the union RICO suits, monitors are primarily former prosecutors and attorneys with similar training, who may not have the right skills and approach for the task at hand.[118] Exacerbating the problem are additional factors, which were also behind the inconsistent success rate of trustees in union RICO suits,[119] such as lack of information sharing between monitors and the failure of the government to conduct systematic performance evaluations for the purpose of improving future monitorships.[120] The SEC, which started on a different monitorship trajectory, now appears to be developing practices consistent with the DOJ, and in fact often conducts joint monitorships with the DOJ. The next Part explains the path down which the DOJ and SEC monitorships now seem to be going. Following this path was not necessarily a conscious choice, but a result of various decisions along the way that create a significant gap between the potential of monitorships in theory and monitorships in practice.

IV. Understanding Corporate Monitorships

Breaking monitorships down into a process involving a series of discrete decision stages helps us to think about how they function in practice. The first stage in the process is negotiating the terms of the monitorship, which also includes the decision by the government to agree to a settlement. During this process, the parties determine whether or not a monitor is required and, if so, the duties and powers of the monitor. Second, the parties select the monitor through the process defined in the agreement. Third, the monitor begins his work, including developing a work plan, analyzing the needs of the organization, overseeing the implementation of a compliance program, and evaluating the

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[115] *Interview with Win Swenson, Partner, Compliance Systems Legal Group, Warwick, Rhode Island,* CORP. CRIME REP. (April 26, 2004), at 10, 16.

[116] *See supra* note 91 and accompanying text (describing an integrity-based approach).

[117] Rashkover, *supra* note 89, at 539.

[118] *See infra* Part IV.B.2.

[119] JACOBS, *supra* note 23, at 246-47.

[120] *See infra* Part IV.D.

effectiveness of that program. Finally, the monitorship comes to an end with a determination by the monitor and the government that the company has satisfactorily completed the terms of the agreement.

Decisions by the parties at each stage in this process have a significant impact on the subsequent stages and ultimately determine whether or not the monitorship is successful in terms of improving corporate compliance and preventing future violations of law. In order to better see these relationships, this Part presents our analysis of the interview data through the stages of this process. This analysis is based principally on interviews with individuals directly involved in the monitorship process. To collect our primary data, we conducted 20 telephone interviews in the summer of 2008. Almost half of our interviews were with individuals who have served as corporate monitors for the DOJ and/or the SEC. The rest of the interviews were with monitors in some of the non-corporate contexts described above, compliance consultants, and regulators in both the United States and Canada. We spoke with interviewees not only about their direct experience, but also their broader views on monitorships, and those broader views are also reflected here. Our secondary data includes public statements made by monitors, compliance officers at companies that underwent a monitorship, public officials, and attorneys involved in the negotiation of settlement agreements.[121] Our analysis also includes a review of the settlement agreements and the few cases in which monitorship reports were made publicly available.[122]

Our study is limited by the fact that we were only able to speak to a subset of monitors and regulators, and not to any corporate officials directly involved in a monitorship. [123] Although these monitors and regulators described a range of different experiences in many ways, our findings could still be unrepresentative if those choosing to participate in our study had significantly different experiences from those that chose not to participate. We have also put aside some important differences between the civil and criminal contexts in order to keep the scope of this paper focused on monitorships as a whole. While this limits the specificity of our findings, it allows us to focus on significant and otherwise underappreciated commonalities between these models. Even with these limitations, however, we believe our insights and points of caution are instructive for the use of corporate monitorships in all situations. These findings point to potential problems that should be monitored by any government agency that uses monitorships, and should be further investigated and tested by future researchers.

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[121] These public statements include articles these individuals have written, their public presentations at conferences and in "webinars," and interviews with them conducted by others that were published.

[122] As discussed below, monitor reports are typically not made public. Multiple Freedom of Information Act requests, to the U.S. SEC in 2006 and 2008, to obtain copies of monitorship reports and other relevant documents were declined, generally on the basis that disclosure would interfere with ongoing enforcement activities.

[123] Our sample was selected by contacting all individuals who have served as monitors of whom we were aware, as well as corporations involved in monitorships, representatives of nonprofit organizations dedicated to corporate compliance, and representatives of several US and Canadian civil and criminal regulators. In addition, although we were able to interview a number of regulators, officials from certain key government bodies were unwilling to contribute to our study. Our observations about the policies and motivations of these specific organizations had to be drawn from publicly available policy documents and interviews with external individuals.

A. Negotiating the Terms of the Settlement Agreement

The settlement agreement establishes the terms of the monitorship. The monitors we interviewed all placed great importance on conducting their monitorships within the bounds of the agreement. Thus, clearly defining the goals of the monitorship and establishing the duties of the monitor are highly important for ensuring that the monitorship is successful and that success can ultimately be determined by some objective standard. Although flexibility in the implementation of monitorships is one of their virtues as a policy tool, there is a difference between flexibility—which can be carefully designed—and vagueness, which is a failure to specify key components or terms. If the terms of the monitorship are too vague, different monitors may interpret similar terms quite differently based on their background and approach to monitorships. In this section, we first look at the foundational issue of why the government might enter into settlement agreements. The policy goals behind that decision should be reflected in the stated goals of the monitorship agreement. In this section we also discuss the factors that go into decisions about the duties and independence of the monitor.

1. Settle or Prosecute? Policy Debates Behind Settlement Agreements

In the criminal context, the first decision a prosecutor must make is whether to indict the corporation, agree to a settlement (with or without a monitor), or prosecute only individuals and not seek punishment for the corporation. Of course, there will be times when imposing sanctions on genuinely "bad apple" individuals is all that is needed. The SEC's Framework for Cooperation and the McNulty Memo factors also suggest that there may be times when a corporation's cooperation is so complete that no enforcement action needs to be taken, even where a violation existed. The recent increase in the use of settlement agreements has not been without controversy, and also has reinvigorated the familiar debate about whether a corporation should be held criminally liable for the actions of its employees in any circumstance.[124]

This paper's specific concern is whether, assuming that some action against a corporation is called for, settlement agreements with monitorships provide sufficient benefits to justify their use. As stated earlier, some view these settlement agreements as a "stroke of genius," as the "government is able to get everything out of a deferred prosecution agreement that it can get out of an actual trial."[125] The government can save the costs of an investigation and trial by having the corporation admit wrongdoing (for DOJ settlements, but usually not for SEC settlements). In addition, the corporation agrees to terms that are equivalent to corporate probation.[126] While some celebrate this trend, some of our interviewees worried about the "sword of Damocles" that hangs over the corporation's head in the criminal context, even when the company enters into a DPA.

[124] For those using the rise of settlement agreements to argue against broad corporate criminal liability standards, see, e.g., John S. Baker Jr., *Reforming Corporations through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310, 337 (2004); Richard A. Epstein, *The Deferred Prosecution Racket*, WALL ST. J., Nov. 28, 2006, at A14; Preet Bharara, *Corporations Cry Uncle And Their Employees Cry Foul: Rethinking Prosecutorial Pressure On Corporate Defendants*, 44 AM. CRIM. L. REV. 53 (2007).

[125] *Interview with Jan Handzlik, supra* note 6, at 12-13.

[126] *Id.*

On the other side of the debate, some argue that these settlements are letting corporations escape accountability[127] and perhaps even encouraging corporations to engage in riskier behavior and push the limits of the law.[128]

Not all cases are appropriate for settlement agreements with monitorships.[129] One civil-side regulator interviewee told us that only a small portion of the enforcement cases it pursues every year result in monitorships. Trying to determine the cases that are appropriate is the challenge faced by prosecutors and other government regulators. On the criminal side, the McNulty Memo provides guidance on the factors prosecutors should consider when conducting an investigation and deciding whether to charge a corporation.[130] With respect to non-prosecution agreements, the Memo only specifically mentions the factor of voluntary cooperation.[131] However, the factors related to the prosecution decision clearly impact the settlement decision as well. On that front, the Memo identifies key factors such as "the pervasiveness of the wrongdoing" and the "corporation's history of similar conduct."[132] The Memo does not tell the prosecutor how to weigh those different factors against each other, though it does state that in some cases one factor, such as the nature and seriousness of the offense, may "warrant prosecution regardless of the other factors."[133]

For some of the regulators we interviewed, the presence of these factors related to widespread wrongdoing within the organization were what made a case appropriate for a monitorship. For example, one regulator stated that monitorships were most appropriate where:

> *[An organization] has engaged in violative conduct. That violative conduct has not been corrected, or we don't have enough assurance that it's been corrected, so the conduct or the problem might be ongoing. . . . The source of the problem is at the firm level, it's not just an isolated bad apple.*

Thus, although many monitorships involve cases of intentional wrongdoing for which individuals, including senior corporate officers, are often sanctioned, it is important to recognize that individual wrongdoing is often difficult to separate from organizational wrongdoing. Likewise, it is difficult to conceive of many situations that call for a monitorship, but for no individual responsibility. At some point, however, the

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[127] *Crime Without Conviction: The Rise of Deferred and Non Prosecution Agreements*, CORP. CRIME REP., Dec. 28, 2005, at 3-10, *available at* http://www.corporatecrimereporter.com/deferredreport.htm (referring to DPAs as resulting in "crime without conviction").

[128] Eric Lichtblau, *In Justice Shift, Corporate Deals Replace Trials*, N.Y. TIMES, April 9, 2008, at 1.

[129] In this section, we consider settlement agreements with and without monitorships together. Below, we consider the issue of whether or not a monitor is needed as part of a settlement agreement.

[130] McNulty Memo, *supra* note 88, at 4 (stating that the factors listed in the memo should be used by prosecutors when "conducting an investigation, determining whether to bring charges, and negotiating plea agreements").

[131] McNulty Memo, *supra* note 88, at 7-8.

[132] *Id.* at 4.

[133] *Id.* at 5. (In addition, the Memo cautions that the nine factors it lists are "not a complete or exhaustive list.")

organization must be deemed *too* rotten to be entitled to a DPA monitorship and must face prosecution. As one regulator interviewee suggested:

> *If we came to the conclusion that they were rotten to the core, you need to indict. That's still the correct result for the worst of the worst. Monitors for those middle cases persuade prosecutors that there have been lapses but that they are committed to rectifying these wrongs, including terminating responsible people and instituting new control mechanisms.*

These comments are basically consistent with our prior arguments that "worst actor" (but not utterly corrupt) corporations are those whose conduct was most appropriate for a monitorship.[134] For those who would argue that corporations with widespread wrongdoing cannot be reformed and therefore indictment is necessary, some of the union trusteeships may suggest that even deeply corrupt organizations can be reformed through monitorships (bearing in mind that the scope of the successful union trusteeships seems to be beyond the intended scope of most current corporate monitorships).[135] The challenge facing prosecutors is identifying appropriate cases for monitorships. The prosecutor must be able to distinguish between truly egregious conduct that calls for prosecution; those "middle cases" where the conduct was sufficiently wrongful and pervasive to justify the costs and intrusions of a monitor; and the lesser cases where such costs are not justified.

Another factor from the McNulty Memo that may outweigh the others and tip the scales in favor of a settlement relates to "collateral consequences," or harm to the stakeholders of the corporation.[136] The fall of Arthur Andersen is regularly cited as a spectacularly bad outcome that demonstrates the need for settlement agreements to protect innocent employees and shareholders and to keep viable business entities functioning.[137] Siemens is a corporation that could potentially benefit from this reasoning.[138] Siemens, a German company that is also listed on the New York Stock

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[134] Cristie L. Ford, *supra* note 49, at 764 (defining "worst actors" as firms/corporations facing serious allegations of intentional wrongdoing, where the degree of harm is significant; firms/corporations that are potentially recidivists and for whom there is reason to believe that pervasive cultural or ethical problems persist, but not firms/corporations that are utterly criminal enterprises); David Hess & Cristie Ford, *Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem*, 41 CORNELL INT'L. L.J. 307, 333-335 (providing examples of companies that may classify as worst actors) (2008); *see also* Christopher Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 Yale L.J. 1, 28 (1980) (describing "that group of firms, impossible to identify in advance, whose behavior in the face of realistically achievable penalty levels will remain inadequately modified").

[135] *See supra* note 30 and accompanying text.

[136] McNulty Memo, *supra* note 88, at 4.

[137] Lichtblau, *supra* note 128.

[138] Since the original drafting of this article, Siemens reached a plea agreement with the DOJ in which it admitted to violating the FCPA and agreed to pay the largest fines recorded for FCPA violations. Eric Lichtblau and Carter Dougherty, *Bribery Case Will Siemens $1.6 Billion*, N.Y. TIMES, Dec., 16, 2008, at B8. Under the agreement, Siemens was allowed to continue to bid for US government contracts, *id.*, and accepted a monitor for a period of four years. Department of Justice, Press Release*, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in*

Exchange,[139] appears to have engaged in egregious violations of the FCPA; and such corrupt payments seem to have been deeply ingrained into that organization's business practices.[140] One compliance consultant we interviewed suggested that Siemens would be the "perfect case" for a monitorship on the basis that, even though this was clearly an organization that needed significant help in reforming itself, an indictment that forced it out of business would have a tremendous and negative impact. In spite of the importance of this factor, however, it is clear that concerns about collateral consequences are not the only rationale behind monitorships.[141] Indeed, monitorships are regularly imposed on midsize corporations and firms, and there is precedent for imposing a monitorship on small, family owned businesses as well.[142] The government's reasons for imposing a monitorship on a small firm – including one with a tight relationship between ownership and control – could be many: the cost of litigation and the possibility that litigation might fail, the hope that more concentrated oversight and education could help the firm become compliant, or simply the desire not to destroy the firm if other options are still available.[143]

If any overarching generalization is possible about what cases are appropriate for settlement agreements involving monitorships, it would be that some sort of balancing test is called for. The misconduct in question should have a systemic, organization-wide component, but the misconduct cannot be so pervasive that the corporation or firm is an

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Combined Criminal Fines, Dec. 15, 2008, available at http://www.usdoj.gov/opa/pr/2008/December/08-crm-1105.html

[139] William J. Holstein, *A Few Bad Apples, and Everybody's Sauce*, N.Y. TIMES, May 1, 2006, at s. 3, p.10.

[140] Carter Dougherty, *Ex-Manager Tells of Bribery at Siemens*, N.Y. TIMES, May 27, 2008, at C4 (reporting the testimony of a former manager describing the "intricate system of slush funds and bribery" at the company and noting that internal investigators have identified over $2 billion in suspicious payments).

[141] In fact, in announcing the settlement agreement with Siemens, the DOJ did not mention collateral consequences as a reason for not seeking an indictment that would bar the company from bidding for government contracts, but only Siemens' extensive cooperation in bringing to light the FCPA violations and efforts to reform itself. Department of Justice, *Transcript of Press Conference Announcing Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations*, Dec. 15, 2008, available at http://www.usdoj.gov/opa/pr/2008/December/08-opa-1112.html.

[142] *See, e.g., Union Securities Ltd.*, 2006 BCSECCOM 220, *available at* http://www.bcsc.bc.ca/comdoc.nsf/65de6f2d8e4d9b50872568ac0070c25c/4190e073ef51088388257154006 7da1e/$FILE/2006%20BCSECCOM%20220.pdf.

[143] For these organizations, the line between individual and corporation starts to blur. Several monitors we spoke with believed that a monitorship would not be successful in that situation, because the individual wrongdoers could not be extricated from their positions without effectively destroying the firm as well, and reform was not possible with the wrongdoers still in leadership positions. In contrast, we posit that these small firms may be especially good forums for monitorships. In another context, Darren Sinclair and Neil Gunningham have pointed out that many small and medium-sized enterprises operate at the margins of profitability and cannot afford to devote many resources to such issues as compliance. Also, they often lack expertise and awareness, and in the absence of an acute enforcement event they may not integrate compliance priorities into their business processes. NEIL GUNNINGHAM & DARREN SINCLAIR, LEADERS & LAGGARDS: NEXT-GENERATION ENVIRONMENTAL REGULATION 13-40 (2002). These may in fact be exactly the right candidates for some form of monitorship (perhaps modified to accommodate their humbler resources), because these may be the firms that can benefit the most from some assistance and education at a crucial moment.

utterly criminal organization. Problems should be serious enough to justify the cost of a monitorship, but the corporation or firm cannot be irredeemable. The subject firm or corporation can be "too big to fail," or small enough to learn and reform itself, or somewhere in between. Because monitorships can be a viable option in such a range of situations, they can become a convenient middle-of-the-road choice (or non-choice) for a prosecutor. In fact, one monitor we interviewed thought that monitorships were becoming a "fall back position" for prosecutors. That is, monitorships are being imposed on corporations without clear thought by the prosecutor as to whether or not they are appropriate for the case at hand. The perception that monitorships are being used in a "one size fits all" manner may adversely affect their perceived legitimacy and therefore their chances of long-term success.

2. Power and Participation in the Negotiation Process

Once the government has decided to enter a settlement agreement, the parties must negotiate the exact terms of the agreement.[144] Many have noted that prosecutors have significant power over corporations in this context. The government has a bargaining advantage because it has the option of pursuing criminal charges, and a criminal conviction can have a significant negative effect on a company (some even refer to it as a "death sentence").[145] In addition, if an executive has already pled guilty, then the corporation knows it has little to no defense.[146] Some argue that prosecutors have abused this power. Professor Epstein goes so far as to argue that "DPAs no longer serve the public interest. The agreements often read like the confessions of a Stalinist purge trial, as battered corporations recant their past sins and submit to punishments wildly in excess of any underlying offense."[147] Complaints receiving significant media attention include settlement terms not directly related to the underlying offense[148] and conflicts of interest within the DOJ relating to the monitor selection process.[149] In response, there have been calls for greater legislative and court control over monitorships.[150]

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[144] In general, there is room to negotiate the terms of the settlement agreement. However, at least one regulator we interviewed periodically imposes monitorship terms, using a boilerplate agreement, for smaller matters in lieu of conducting a formal investigation. The regulator also uses monitorships, the terms of which can be negotiated, in settlement of formal investigations.

[145] Lynnley Browning, *Justice Department Is Reviewing Corporate Prosecution Guidelines*, N.Y. Times, Sept. 13, 2006, at 3.

[146] *Interview with David Pitofsky, Partner, Goodwin Proctor LLP, New York, New York*, CORP. CRIME REP., Nov. 28, 2005.

[147] Epstein, *supra* note 124, at A14.

[148] For example, included within the Bristol-Myers Squibb agreement was the requirement that the company endow a chair in ethics at the Seton Hall Law School. Joan McPhee, *Deferred Prosecution Agreements: Ray of Hope or Guilty Plea by Another Name?*, 30 THE CHAMPION 12, 14 (2006) (providing additional examples as well).

[149] Lichtblau, *supra* note 128, at 1 (describing the controversy surrounding a US attorney's selection of former Attorney General John Ashcroft to serve as a monitor in case that could earn Ashcroft's law firm over $50 million).

[150] There have been two bills proposed in the 110th Congress to regulate deferred prosecution agreements and corporate monitors: *The Accountability in Deferred Prosecution Act of 2008*, H.R. 6492, 110th Cong.

This public criticism has created some changes that attempt to restrict US Attorneys' discretion. In May 2008, the DOJ issued guidelines that prohibit a settlement agreement from requiring a corporation to make payments to any organization that was not a victim of the criminal activity.[151] In March 2008, the DOJ issued guidelines for the selection of monitors.[152] To reduce the potential for conflicts of interest in the selection of the monitor, the guidelines require the use of committees to make selection decisions, and require final approval by the Office of the Deputy Attorney General.[153]

Although public criticism has affected some aspects of monitorship negotiations, what has not changed are the parties at the negotiating table. Noticeably absent are any parties other than the government and the corporation, including investors, employees, or community representatives.[154] Khanna and Dickinson observe that corporate monitorships share features with proposals by others that would require corporations to include on their boards professional, independent directors elected by institutional investors.[155] This suggests that the shareholders of the corporation may have an interest in having a say in the terms of the agreement or the selection of the monitor.[156] One corporate defense attorney and former prosecutor stated, "I think part of the frustration of people who question the government's use of deferred prosecution agreements is that the process does not include parties that may take a contrary view."[157] Also frustrating to these other parties is the fact that an unknown number of deferred and non-prosecution agreements are not made public. This prevents these stakeholders from having a more complete understanding of how the DOJ is handling corporate crime.

Only one of our interviewees told us that the prosecutors negotiating the terms of the monitorship had considered involving a major shareholder in the process. The decision was ultimately made not to involve that shareholder, apparently out of concerns that the shareholder was more interested in finding fault than reforming the corporation.

(2008) *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d110:h6492; and H.R. 5086, 110th Cong. (2008), *available at* http://thomas.loc.gov/cgi-bin/query/D?c110:1:./temp/~c110fksIK0::.

[151] Memorandum from Mark Filip, Deputy Attorney General, Memorandum for Holders of the United States Attorney's Manual (May 18, 2008) (copy on file with authors); United States Attorney's Manual, § 9-16.325 Plea Agreements, Deferred Prosecution Agreements, Non-Prosecution Agreements and "Extraordinary Restitution," *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/16mcrm.htm#9-16.320.

[152] Memorandum from Craig S. Morford, Acting Deputy Attorney Gen., U.S. Dep't of Justice, to All Component Heads and U.S. Attorneys, Acting Deputy Attorney General, Memorandum for Heads of Department Components United States *Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations* (March 7, 2008), *available at* http://www.usdoj.gov/dag/morford-useofmonitorsmemo-03072008.pdf [hereinafter Morford Memo].

[153] *Id.* at 3.

[154] *Interview with David Pitofsky*, *supra* note 146.

[155] Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar*, 105 MICH. L. REV. 1713, 1741 (2007).

[156] *See id.* at 1742 (stating that, "Perhaps institutional investors could have some greater, explicit voice in this process by, for example, being consulted by the government agency before appointing a monitor").

[157] *Interview with David Pitofsky*, *supra* note 146.

The concern mirrors a parallel concern discussed further below[158] about making monitors' final reports to the US Attorney available to the public. In both situations, the advantages of opening the process to a wider group of stakeholders may be outweighed by the potential chilling effect on the corporation's complete participation in the negotiations and the monitorship process.

Overall, there is considerable inequality of bargaining power at the negotiating table. Not only do corporations not have a better alternative to settlement that would give them a credible threat of leaving the negotiation table, but corporations may even be afraid to push back against government demands for fear of being perceived as not genuinely contrite or willing to correct their problems. While many corporations surely enter into monitorships with a sincere desire to fix problems and regain their ethical footing, their immediate goal is to mitigate: to resolve the matter without a criminal indictment and at the least possible cost.

3. Corporate Rehabilitation & the Duties of Corporate Monitors

By contrast to the corporation's immediate goal, the government's priorities may be wide-ranging, and can include providing appropriate restitution where necessary, administering a level of deterrence that is deemed appropriate in the circumstances, and putting the corporation on the path to reform. The 2006 McNulty Memo states that the decision of whether to prosecute a company or settle should ensure that the goals of criminal law—including punishment, deterrence, and rehabilitation—are sufficiently satisfied.[159] The 2008 Morford Memo states that monitorships should not be used "to further punitive goals."[160] Taken together, this means that monitorships can serve as a reform measure and as a deterrent. As discussed earlier, several commentators challenge the idea that monitorships are effective specific or general deterrents. One compliance consultant we interviewed, however, suggested that monitorships could be a truly "scary deterrent" because, although shareholders may not be too concerned with fines, the presence of a monitor can create a troubling level of uncertainty that lasts throughout the monitorship. Many of our interviewees also observed that "nobody wants a monitor," effectively because of the disruption they represent to business operations.

In this paper, our primary concern is with the potential for corporate rehabilitation under a monitorship. The desire to spur meaningful reform is implicated at every stage of the settlement process. The factors behind a prosecutor's decision to enter into a settlement agreement reflect the same concerns, and also should have an impact on the terms of the settlement agreement and the scope of the monitorship.

A key factor in the settlement determination under the McNulty Memo is the "the existence and adequacy of the corporation's compliance program."[161] In at least one case, the government has turned to compliance consultants to help evaluate this factor. The US Attorney in Western Pennsylvania hired Compliance Systems Legal Group to investigate Mellon Bank's compliance program as part of the US Attorney's consideration of the

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[158] *See infra* Part IV.C.4.

[159] McNulty Memo, *supra* note 88, at 5.

[160] Morford Memo, *supra* note 152, at 2

[161] McNulty Memo, *supra* note 88, at 4.

McNulty Memo factors.[162] Although Mellon Bank avoided criminal prosecution for the destruction of tax documents, its compliance program was found to be deficient, and its settlement agreement required the company to improve its compliance and ethics program and pay for a monitor to oversee the implementation of the program.[163] In a different case, prosecutors found a clearly inadequate compliance program. Faro Technologies, which admitted in its settlement agreement to violating the FCPA, did not even address issues related to the FCPA in its compliance program or training even though it regularly conducted business in China, which put it at high risk for making corrupt payments.[164] In both cases, the settlement agreement addressed these compliance program inadequacies and required improvement.

In addition to the compliance program, prosecutors are also instructed to consider a "company's compliance attitude"[165] or, in other words, the corporation's culture. The McNulty Memo requires prosecutors to look for a "corporate culture that encouraged, or at least condoned, such conduct, regardless of any compliance programs." Likewise, in securities enforcement, the Seaboard Report tells enforcement lawyers to ask, "How did the misconduct arise? Is it the result of pressure placed on employees to achieve specific results, or a tone of lawlessness set by those in control of the company?"[166] Through these enquiries, the government is trying to determine if the wrongful acts were committed by a small group of rogue employees ("bad apples") who went against the grain of the rest of the corporation, or if corporate leadership had created a culture that rewarded and encouraged the wrongful acts in spite of having a compliance program that purported to prohibit such behavior (a "bad barrel"). If the investigation shows that a root cause of the problem is a "bad barrel," then any settlement agreement sought by prosecutors should seek to address that problem. Accordingly, a monitor's duties should typically serve those ends.

Focusing specifically on the DOJ, according to the recent Morford Memo, monitorships are typically used to ensure the company has "effectively implemented ethics and compliance programs to address and reduce the risk of recurrence of the corporation's misconduct."[167] Most monitorships in place as of the publication of the Morford Memo in March 2008 are consistent with the guidelines set out in that memo.

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[162] At the time, the Thompson Memo was in effect. *See* Settlement Agreement with Mellon Bank, Non-Prosecution Agreement, (Aug. 14, 2006), *available at* http://judiciary.house.gov/hearings/pdf/deferredprosecution/Mellon060817.pdf (requiring Mellon Bank to reimburse the government for costs related to hiring Compliance Systems Legal Group); *Interview with Win Swenson, Partner, Compliance Systems Legal Group, Warwick, Rhode Island*, CORP. CRIME REP., April 26, 2004, at 10, 15.

[163] Mellon Bank, *supra* note 162.

[164] Faro Technologies, Non-Prosecution Agreement (June 3, 2008), at Appendix A, pp. 6-7.

[165] Rashkover, *supra* note 89 at 539.

[166] Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Divisions, Exchange Act Release No. 44969 76, SEC Docket 220 (October 23, 2001), *available at* http://www.sec.gov/litigation/investreport/34-44969.htm. *supra* note 89.

[167] Morford Memo, *supra* note 152, at 5.

The large majority of the monitors are charged with ensuring compliance with the settlement agreement, reviewing the compliance program related to the offence, recommending changes to existing compliance processes, and then reviewing the effectiveness of the implementation of those changes. In addition, in slightly under half the agreements, the monitor is charged with monitoring the company's compliance with applicable federal laws. Interestingly, however, almost without exception, McNulty Memo-style language about a corporation's compliance "attitude" or "culture" does not appear in the agreements.

In the nine months since the Morford Memo, as of this writing, three additional monitorships have been imposed on companies through settlement agreements with the DOJ for violations of the FCPA. All three cases were handled by the DOJ's Fraud Section and they use almost identical language for establishing the procedure for the selecting the monitor and the duties of the monitor. With respect to compliance programs, the monitors are required to oversee the implementation of a compliance program, ensure that the program is "appropriately designed," and conduct annual follow-up reviews of the program.[168] The agreements also state that the monitor should take "such steps as are necessary to develop an understanding of the facts and circumstances surrounding any violation that may have occurred."[169] That broad language allows for significant interpretation, which may or may not include matters related to a corporation's culture. However, two of these agreements qualify that language in that they specifically state that the monitors should not conduct their own investigations into past FCPA violations at these companies (and therefore may have to rely only on information provided to them by the corporation).[170] There is no indication why these monitorships, (all agreed to within a few weeks of each other) were treated differently. [171]

[168] Faro Technologies, *supra* note 164, at Appendix C, ¶ 5; AGA Medical, Deferred Prosecution Agreement (June 3, 2008), at Attachment D, ¶ 6; and Willbros Group Inc., Deferred Prosecution Agreement (May 14, 2008), at Attachment D, ¶ 7. In addition, in all three cases, before the monitor conducts a review, the Monitor is required to develop a written work plan and make that plan available to the company and the US Attorney's office for comment.

[169] *See* Faro Technologies, *supra* note 164, at Appendix C, ¶ 5(e)(i).

[170] The agreements state that "the parties do not intend that the monitor will conduct his or her own inquiry into those historical events." Willbros, *supra* note 168, at Attachment D, ¶ 7(e)(i); AGA Medical, *supra* note 168, at Attachment D, ¶ 6(e)(i). This language apparently comes from the Morford Memo, where it states that the "monitor's mandate is not to investigate historical misconduct." Morford Memo, *supra* note 152, at 6. However, the memo goes on to state that such knowledge may be necessary to "inform a monitor's evaluation of the effectiveness of the corporation's compliance with the agreement."

[171] Clearly, the monitor's role is to ensure the company has an effective compliance program going forward and not to attempt to discover undisclosed wrongdoing that had occurred. However, gaining an understanding of why and how the wrongdoing occurred would in most cases seem to be essential information in diagnosing what went wrong and then ensuring that the corporation implements an appropriate compliance program. It is unclear how (if at all) the qualifying language would impact a monitor's ability to conduct those activities or the monitor's perceptions of his or her powers. As discussed below, there is a need for collecting data on how such terms impact the monitorship, and a need for greater explanation of the expected role of the monitor, which would also help explain the inclusion or exclusion of such terms in the agreement.

Although the agreements (either pre- or post-Morford) do not address the issue of corporate culture in so many words, in some cases the government appears to view certain negotiated terms as addressing those issues. For example, in Bristol-Myers Squibb's DPA, the US Attorney who negotiated the agreement specifically stated that Bristol-Myers Squibb's culture "greatly contributed to the criminal conduct."[172] Employees in the company regularly used fraudulent means to hit aggressive sales and earnings targets between 2000 and 2001.[173] The company engaged in similar conduct in the early 1990s and implemented controls to reduce that behavior, but corporate culture overrode those controls and the wrongful behavior reached new heights.[174] In an attempt to correct these cultural problems, the US Attorney did not specifically charge the monitor with investigating the culture issues and making recommendations—though the monitor did have the power to "to take any steps he believes are necessary to comply with the terms of this Agreement" – but included certain structural reforms in the DPA. For example, the DPA required quarterly meetings between senior managers and the independent auditors, to help foster a culture of disclosure.[175] In addition, the DPA required the CEO and CFO to make certain reports on transactions to the board, the monitor, and the company's Chief Compliance Officer.[176] Finally, the DPA required the company to implement a training program.[177] In explaining the need for these requirements, the US Attorney who negotiated the DPA stated: "Many of the remedial measures in the deferred prosecution agreement—the top-level structural and governance changes, the reporting by senior management, and the training and education programs for key financial and legal personnel—are designed to spread knowledge and responsibility for doing the right thing throughout the Bristol-Myers organization."[178]

These kinds of comments demonstrate a desire on the part of the US Attorney to change the organization's culture. Leaving aside, for now, questions about whether these negotiated terms are sufficient on their own to effect positive change to corporate ethical culture, the initial problem is that although the monitor is charged with overseeing the implementation and effectiveness of required compliance measures, the monitor's exact role in this process is unclear.[179] The terms of the agreement could allow the monitor to

[172] Christopher J. Christie & Robert M. Hanna, *A Push Down the Road of Good Corporate Citizenship: The Deferred Prosecution Agreement Between the U.S. Attorney for the District of New Jersey and Bristol-Myers Squibb Co.*, 43 AM. CRIM. L. REV. 1043, 1051, 1056 (2006) (stating that the company had a "disturbing corporate culture that favored secrecy over openness").

[173] *Id.*

[174] *Id.* at 1057-58.

[175] *Id.* at 1050-51.

[176] *Id.* at 1057-58.

[177] *Id.*

[178] *Id.* at 1058. ("A top-down commitment to honor and integrity, coupled with an educated and empowered workforce, undoubtedly will help Bristol-Myers demonstrate its commitment to exemplary corporate conduct during and after the two-year term of the deferred prosecution agreement.")

[179] It may be that the retention contract between the corporation and the monitor, or some other documents that are not publicly available, contain more specific expectations than that contained in the settlement agreement. We are not aware of any case in which a contract has been entered into between the monitor

take on only an auditor role and simply check what the company has done, or the monitor could become a team member pushing and assisting with cultural change.[180]

4. The Scope of the Monitorship

Along with variation in the duties of the monitor, there has been variation in the scope of monitorships. These issues are clearly intertwined with the duties of the monitor discussed in the previous section, but in this section we try to add some clarity to the variations—both intentional and unintentional—around what role the monitor is expected to play.

The Morford Memo recognizes that the monitor's role must be appropriately designed and states:

> Neither the corporation nor the public benefits from employing a monitor whose role is too narrowly defined (and, therefore, prevents the monitor from effectively evaluating the reforms intended by the parties) or too broadly defined (and, therefore, results in the monitor engaging in activities that fail to facilitate the corporation's implementation of the reforms intended by the parties).[181]

The monitor's role should vary based on the circumstances and should be designed to allow the monitor to carry out her duties appropriately, without being overly intrusive. Based on the settlement agreements (including SEC agreements), we place the monitorships along a spectrum using four general categories, which from smallest scope to largest scope are: Advisor, Auditor, Associate, and Autocrat.

In its most modest version, the monitor may simply serve an Advisor role. For example, although the DOJ listed Aaron Marcu as a monitor for Aurora Foods in its letter to the House Judiciary Committee,[182] the settlement agreement appears to give the monitor very limited powers. According to the agreement, the monitor is referred to as an "outside consultant" that is to be hired "to advise Aurora regarding an appropriate compliance program."[183] The company is also required to "implement the recommendations made by that outside consultant."[184] The agreement further specifies that certain individuals must oversee the implementation of the compliance program,

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and the government, or of any other particular documents that might govern the situation, so the corporation-monitor contract would be the logical place for any additional detail. The monitor contract in the University of Medicine and Dentistry of New Jersey was made publicly available. If this contract is representative of other corporation-monitor contracts, then these contracts do not provide additional clarification on these expectations as the document simply refers back to the DPA for the scope and terms of the monitor's duties and powers. Also, the monitors we interviewed mentioned their settlement agreements for setting out their duties and not their contract with the company, which suggests that it is not important and it is the work plan that matters.

[180] *See infra* notes 182-195 and accompanying text (setting out different possible roles for the monitor).

[181] Morford Memo, *supra* note 152.

[182] Letter to John Conyers Jr., Chairman of the House Comm. on the Judiciary from Brian A. Benczowski, Principal Deputy Assistant General, May 15, 2008 (copy on file with authors).

[183] Aurora Foods, Non-Prosecution Agreement, at p. 3 (Jan. 22, 2001), *available at* http://judiciary.house.gov/hearings/pdf/deferredprosecution/Aurora010122.pdf.

[184] *Id.*

including an individual appointed as a compliance officer and a newly appointed independent director to serve on the audit committee.[185]

At the other extreme—the Autocrat—monitors are given significant powers. The primary example is the appointment of Richard Breeden as the monitor for WorldCom following an SEC request for ancillary relief from the court. Initially, Mr. Breeden was appointed to ensure that the company did not destroy evidence, and to review compensation payments to ensure the company was not using excessive officer compensation as a form of "looting."[186] In a later consent decree, the monitor's powers were expanded to include reviewing and making recommendations on the company's entire corporate governance structure, including its compliance program.[187] This resulted in Mr. Breeden issuing a 147-page report that included far-reaching recommendations on such controversial matters as shareholder nomination of directors, and a ban on the use of stock options for compensating corporate officers.[188] Mr. Breeden also played a role in selecting and removing certain members of the board of directors, and determining to which potential acquirer the company should be sold.[189]

Another example is the DPA for the University of Medicine and Dentistry of New Jersey (UMDNJ). In that agreement, the monitor had full access to all documents and information held by UMDNJ and at the monitor's "discretion" could investigate any allegation of wrongdoing.[190] In addition to reviewing and making recommendations on UMDNJ's compliance program, the monitor had the "authority to require UMDNJ to take any steps he or she believes are necessary for UMDNJ to comply with the terms of this agreement" and was required to "ensure UMDNJ's compliance with applicable federal and state laws."[191] During the course of the monitorship, the monitor, Herbert J. Stern, a former federal prosecutor and judge, filed reports alleging wrongdoing by various doctors and a dean, which led to employment terminations.[192] The monitor employed various law and auditing firms to assist in his work, and after six months on the job submitted a bill for $5.8 million, which drew criticism because that figure was higher than the amount that UMDNJ had allegedly overbilled Medicaid.[193]

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[185] *Id.*

[186] Jennifer O'Hare, *The Use of the Corporate Monitor in SEC Enforcement Actions*, 1 BROOK. J. CORP. FIN. & COM. L. 89, 94-96 (2006).

[187] *Id.* at 98.

[188] *Id.* at 99.

[189] *Id.* at 101-102.

[190] University of Medicine and Dentistry of New Jersey, Deferred Prosecution Agreement, at 2 (Dec. 29, 2005), *available at* http://judiciary.house.gov/hearings/pdf/deferredprosecution/UMDNJ051229.pdf.

[191] *Id.* at 3. In addition, the monitor was required to select the candidates for the board to consider for the positions of General Counsel and Chief Compliance Officer. *Id.* at 4.

[192] David Kocieniewski, *Medical School Fires 2 Doctors in Wake of a Monitor Report*, N.Y. TIMES, Nov. 17, 2006; Tina Kelley, *Dismissed Dean Accused of Breaching Ethics*, N.Y. TIMES, June 6, 2006.

[193] David Kocieniewski, *In New Jersey, Mounting Costs for Medical Inquiry Draw Criticism*, N.Y. TIMES, Aug. 9, 2006.

In the middle are the Auditor and Associate roles. The Auditor assumes a role of assuring the DOJ that the corporation is doing what it says it is doing in terms of implementing internal controls and a new compliance program. The Auditor also may make recommendations for improvements where necessary. The Associate, on the other hand, conducts the work of an Auditor, but also functions more fully as a partner with the compliance officer, board of directors, or other relevant corporate officials. For each of these roles, the settlement agreement typically states that the monitor will evaluate the company's compliance with the settlement agreement, review the company's compliance program and make recommendations for improvement, oversee implementation of the recommended changes, conduct follow-up evaluations of the compliance program (e.g., annually for the next two years), and file reports with the company and the DOJ on the company's progress.[194] As discussed below, the monitor's adoption of either the Auditor or Associate role has less to do with the written terms of the agreement, and more with the monitor's chosen approach.[195]

5. Monitor Independence

Although the Morford Memo states that a monitor is "by definition" independent of the company and the government,[196] sometimes the decision is made that a fully independent monitor is not necessary. Our research indicates that both civil and criminal-side regulators are willing to consider monitorship structures of varying degrees of independence, depending on the perceived needs of the case,[197] with less independent monitors typically serving an "advising" role.[198] One civil-side regulator we spoke with described a spectrum, with certification by a firm's in-house counsel or internal audit department on one end, review by a firm's outside counsel in the middle of the spectrum, and a fully independent review by a third party at the far end. According to this regulator, certifications or internal compliance audits are generally considered to be adequate where the conduct in question is less serious and/or the review can be fairly easily verified on objective bases.

Where the conduct is especially serious, the judgments required are subjective, and the regulator is not satisfied with the steps the firm has taken so far, the regulator is more likely to insist on retaining a wholly independent monitor.[199] This regulatory staffer

[194] *See* Willbros, *supra* note 168; *See also* Computer Associates Int'l. Inc., Deferred Prosecution Agreement (Sept. 22, 2004), *available at* http://judiciary.house.gov/hearings/pdf/deferredprosecution/ComputerAssoc.pdf.

[195] *See infra* Part V.A.

[196] Morford Memo, *supra* note 152, at 4-5.

[197] On the Criminal Side, *see* Ingersoll Rand Ltd., Deferred Prosecution Agreement, para. 9 (Oct. 31, 2007), *available at* http://judiciary.house.gov/hearings/pdf/deferredprosecution/Ingersoll071114.pdf (stating that the company has hired an outside consultant and not listing any independence requirements for that consultant).

[198] *See supra* notes 182-185 and accompanying text (describing the Advisor role).

[199] This regulator stated, in part:

> It depends on the seriousness of the conduct and the scope of harm. So, sometimes you might have what I'd call an "easy fix," and in this case we might just require the firm's

pointed out that the first thing a firm often does, when it gets into trouble with a regulator, is to retain outside counsel or an accountant to conduct an internal review. Where credible outside counsel has already done substantial work on the problem, it can be burdensome and largely pointless to require the firm, as a term of a settlement, to bring another party in to redo the same work. For example, as soon as the DOJ started investigating Bristol-Myers Squibb, the company hired Frederick Lacey, a former US Attorney and federal judge, to review the company's compliance program and internal controls as an independent advisor.[200] A year later, in a settlement agreement with the SEC, the company agreed to retain Lacey as an independent advisor.[201] The following year Lacey became an independent monitor for the company under the DPA with the DOJ.[202] Although Lacey had earlier been retained by the company, this apparently did not affect his independence since he later recommended that the company terminate the employment of the CEO that had hired him.[203]

A civil-side regulator interviewee also told us that staffers recognize that a multi-year ban on subsequent business relationships between monitor and firm can be a burdensome requirement for all involved – the consultant as well as the firm. As a result, that regulator no longer automatically requires this as a condition of every monitorship. There may be other factors that constrain independence – for example, if the decision is made that the monitor must have extensive experience in the industry, or must have specialized expertise, there may be a limited number of potential monitors that are qualified and willing to take on the engagement. In those situations, a monitor's prior business relationships with a subject firm may not necessarily be a disqualifier. The appropriate question is whether the level of independence is sufficient, not whether it is complete. As one regulator described it,

> *There were enough questions about the management and the firm that we weren't just going to rely on their representations. We wanted somebody independent of the firm to verify. So we wanted a more formal auditor relationship and the sufficient independence of that was satisfied. Basically if you're independent enough to be their financial auditor then that was sufficient for this engagement. It didn't have to be somebody*

> in-house compliance department to conduct a review or audit, and then to certify that changes have been made. … Maybe we would have the firm's outside counsel do it instead sometimes. At the other end of the spectrum is the "big fix," where we might require the firm to hire an independent consultant. As a term of the settlement, that independent consultant would be precluded from working with the firm after this engagement, maybe for a period of two years. Maybe we'd put an independent person on their Board of Directors that they'd have to report to.

[200] Christie and Hanna, *supra* note 172, at 1054. Lacey had previously served as an independent administrator in DOJ consent decree with the Teamsters union in the late 1980s and early 1990s. Jacobs, *supra* note 23, at 205-207.

[201] Bristol Myers Squibb, News Release, *Bristol-Myers Squibb Statement on SEC Settlement*, Aug. 4, 2004, *available at* http://investor.bms.com/phoenix.zhtml?c=106664&p=irol-newsArticle&ID=600607&highlight=.

[202] Christie and Hanna, *supra* note 172, at 1054.

[203] Stephanie Saul, *A Corporate Nanny Turns Assertive*, N.Y. TIMES, Sept. 19, 2006.

brand new. And that it was - the context with their industry experience was an important factor for us.

For those involved in the process, the degree of independence was not a central concern. Both regulators and monitors told us that, ultimately, the monitors' own professional reputation and integrity were what made them behave responsibly in the role and avoid being captured.[204]

B. Selecting the Monitor

1. Selection Process

Monitors are selected through a variety of methods. In most cases the DOJ selects the monitor, often after "consultation" with the company,[205] or the DOJ and the company select a monitor who is "mutually agreed upon."[206] In other situations, the company selects a monitor and the government retains a veto right.[207] In at least one case the court has selected the monitor from a selection of three candidates agreed to by the corporation and the government.[208] The monitors we spoke to were selected through several of these options.

The Morford Memo approves of the use of any of these methods, though – reflecting the memo's origins in the scandal surrounding John Ashcroft's appointment as a monitor by a US Attorney's office – the government's final selection cannot be made solely by the US Attorney but must be through an ad hoc committee, and final approval must be given by the Deputy Attorney General.[209] In the three cases since that memo, however, the DOJ has used the veto method of selection.[210] The debate about monitor selection methods has even reached Congress, as one proposed bill seeks to require the DOJ to use an open competition for monitorships.[211]

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[204] We discuss independence farther below, s*ee infra* notes 209-211 and accompanying text.

[205] *See* Stryker Orthopedics, Non-Prosecution Agreement (Oct. 25, 2005), *available at* http://judiciary.house.gov/hearings/pdf/deferredprosecution/Stryker051025.pdf.

[206] *See* America Online Inc., Deferred Prosecution Agreement (Dec. 14, 2004), *available at* http://judiciary.house.gov/hearings/pdf/deferredprosecution/AOL041214.pdf; *See also* Aurora Foods, *supra* note 183, Baker Hughes Inc., Deferred Prosecution Agreement (Apr. 26, 2007), *available at* http://judiciary.house.gov/hearings/pdf/deferredprosecution/BHughes070411.pdf (both requiring a "mutually acceptable" monitor).

[207] Faro Technologies, supra note 164, at Appendix C, ¶ 2 ("Department retains the right, in its sole discretion, to accept or reject any Monitor proposed by FARO pursuant to the Agreement.")

[208] Computer Associates, *supra* note 194.

[209] Morford Memo, *supra* note 152, at 3.

[210] Faro Technologies, *supra* note 164, at Appendix C, ¶ 2; AGA Medical, *supra* note 168, at Attachment D, ¶ 2; and Willbros, *supra* note 168, at Attachment D, ¶ 3.One of our interviewees suggested that the Department of Justice had been moving away from the veto approach toward language that requires a "mutually acceptable" monitor, because the "mutually acceptable" language gives the Department more control over the selection. These three cases go against the trend that interviewee had identified, but they are all from the Fraud Section. Thus, it is difficult to say if future DPAs from outside the Fraud Section will follow the lead of the Fraud Section or the trend our interviewee identified.

[211] *The Accountability in Deferred Prosecution Act of 2008*, H.R. 6492, 110th Cong. § 5 (2008). This Bill would require the Attorney General to establish a national list of potential monitors and establish rules for

Significantly, the monitor is typically selected after the settlement agreement has been negotiated and signed. This takes the identity of the monitor out of the initial settlement negotiations. It puts the company in the interesting position of agreeing to a contract, one essential element of which remains undetermined.

During a selection process where the company is afforded some significant voice in the process, it is not uncommon for potential monitors to make a presentation to the company. This interview process gives the company the opportunity to determine whether a particular monitor has the personality, skills, and experience, necessary to provide value to the company, as well as achieving the government's objectives. Our research does not answer the question of whether the DOJ also interviews potential candidates, although none of our interviewees told us that they had been so interviewed. However, at least one monitor we spoke with was aware of instances in which the government had exercised its "veto" power and rejected a company's choice of monitor, either because of a perceived conflict of interest or because the proposed monitor was not thought to have the necessary qualifications. The next section turns to the qualifications of those monitors.

2. Monitors' Background and Experience

There are several common traits among monitors. One common trait, especially on the criminal side, is the lack of experience in conducting a monitorship. Many monitors seem to have been retained for only a single engagement. If the government continues its use of monitorships, then experienced monitors may become more common. For example, Timothy Dickinson served as the monitor in Monsanto and was recently selected as the "independent consultant" for Delta & Pine in a settlement with the SEC. George Stamboulidis served as the monitor for Merrill Lynch and Bank of New York. In addition, he serves as a "private monitor" for other companies, which presumably also gives him valuable experience as a monitor. He estimates that he spends seventy percent of his day as a monitor in some form.[212] On the civil side, for a fairly small community of lawyers, SEC or FINRA monitorships and corporate internal investigations more generally form a substantial part of their practice.

On the other hand, some fear that the selection process will often not favor experienced monitors. For example, one observer had the following perception of the selection process (though others we spoke to disagreed):

> *Typically an Assistant US Attorney or an Assistant District Attorney will leave to go into private practice; a case will come up in the office where they'll decide to do a deferred prosecution agreement. Somebody will call the guy who's left and say "Hey Charlie would you like to do this?" And he says "Sure." Looking for business, it's sort of like being a prosecutor again, sounds interesting and so he does it. That's how he gets appointed; somebody knows him, he's a friend. And that may be the only one he does for his entire life…*

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their selection that further the goal of creating "an open, public, and competitive process for the selection of such monitors." *Id.* at §5(c).

[212] *Interview with George A. Stamboulidis, Partner, Baker Hostetler, New York, New York*, CORP. CRIME REP., (Sept. 18, 2006), at 11.

A second common trait is that monitors are typically former prosecutors or other government employees. From the list of forty monitors submitted by the DOJ to the House Judiciary Committee on May 15, 2008, thirty were former government employees, including 23 former prosecutors.[213] A separate review of 25 monitorships found that at least 17 were ex-prosecutors, and others included former federal judges, an SEC Chairman, and an SEC General Counsel.[214] The monitors we interviewed viewed their backgrounds as a positive and highlighted their prosecutorial experience and their presumed professional judgment as the most likely reasons for their selection. A number of them also thought that their experience on "both sides" – i.e., as prosecutors and also representing companies on white collar crime matters – equipped them to be monitors. One monitor stated, "I used my professional experience and training as a prosecutor and also as a defense attorney. You have to wear both hats, see things from different perspectives." Another described key skills as "[l]earning how to investigate and quote-unquote prosecute, tempering that with an understanding gained as a defense lawyer about the mitigating and absolute defenses against certain conduct, and overlaying that, appreciating that you have competing interests."

Several people we interviewed raised concerns about the government selecting ex-prosecutors as monitors. However, the typical case may not be the selection of a former superior, as in the selection of John Ashcroft, or some other conflict of interest, but the DOJ selecting someone they know, trust, and are comfortable working with. This may result in a prosecutor selecting a former colleague to be a monitor, as suggested in quote above. In addition, the company itself may select an ex-prosecutor in an attempt to win the trust of the government and signal their willingness to comply with the settlement agreement. One monitor stated,

> *I think the reason that you see so many people who do this who have recently been in the government is really because they have a credibility component and an independence component from the perspective of the regulator who has to approve them. ... [I]f you are the company looking to retain somebody, you want to have somebody the regulator is going to view as a credible force. ... [Y]ou sort of only have one shot at it and you want a household name about whose integrity no one is going to call in to question . . . .*

Another monitor said,

> *I think the comfort level that the government might have in the monitor is important not only to the government but the more credibility the monitor has with the government the better off the company can be too because if the company has a monitor who has done an effective job and has made recommendations that are going to be received and accepted by the government, that's good for all concerned.*

In addition to their prosecutorial or regulatory experience, monitors commonly assumed that they were selected for their knowledge of the substantive law related to the

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[213] Eric Lichtblau & Kitty Bennett, *30 Former Officials Become Corporate Monitors*, N.Y. TIMES, May 23, 2008.

[214] Sue Reisinger, *Someone to Watch Over Me*, CORP. COUNS. (Oct. 2007), at 100, 103-104.

wrongdoing in question, and their experience in that industry or with similar corporations. When asked whether compliance program professionals[215] could be effective monitors, many of the monitors we interviewed were skeptical. The primary basis of that skepticism was the view that compliance management professionals do not have the necessary "legal expertise." In general, the monitors were not concerned that they themselves did not have experience in corporate compliance or similar managerial positions. As one monitor pointed out,

> *[l]awyers do this type of work all the time, they're used to bringing in the necessary experts to assist their role, so if the monitor needs a compensation specialist they can always bring one in. Lawyers know how to bring in people to augment their work.*

Not surprisingly, compliance consultants we interviewed raised concerns about the heavy use of ex-prosecutors and similar attorneys as monitors. Their primary concerns related to these monitors' lack of experience in implementing and evaluating compliance programs in a way that takes into account how those programs are embedded in the corporation's culture. Although a lawyer experienced with the FCPA, for example, can provide necessary expertise on policies the company needs to adopt to avoid violating the law (e.g., what risks to be aware of, what types of payments are not defensible), that expertise may be insufficient to ensure that the corporation's employees actually comply with those policies. This is where issues related to a corporation's culture (e.g., incentives, social norms) are important for understanding future compliance. Thus, the changes implemented may not be sufficient to have a long-term impact on the corporation.

To illustrate these concerns, one consultant brought up the old joke of a person dropping her keys in the middle of the street but looking for the lost keys at the side of the road by a street lamp. When asked why she was looking there, she responds "because that's where the light is." As applied here, it means that monitors without experience in establishing compliance programs will rely on what they do know[216] or, as discussed further below,[217] will rely on indicators that are easy to measure but may be misleading.

Although monitors may bring in teams of professionals with the skills and experience that the monitor lacks, this may not reassure all compliance consultants. First, the monitor may not understand the relevant professional experience they lack. In a published interview, a member of the original commission that worked on the 1991 Organizational Sentencing Guidelines criticized high-profile monitors, stating they "lack background or, frankly, interest in understanding the substantial body of compliance best practices."[218] Second, as one compliance consultant pointed out, the corporation must pay the bill to bring in these other parties even though it has little or no control over who the

[215] *See supra* Part III.B (describing compliance professionals).

[216] *See supra* notes 102 to 103 and accompanying text (describing the difference between compliance officers with management backgrounds and legal backgrounds in their beliefs on the root cause of organizational misconduct)

[217] *See infra* note 225 and accompanying text.

[218] *Interview with Win Swenson, Partner, Compliance Systems Legal Group, Warwick, Rhode Island*, CORP. CRIME REP., April 26, 2004, at 10, 16.

monitor hires and how many billable hours they can charge. To the extent that the monitor must learn on the job and bring in outsiders as part of this learning process, corporate officers may come to resent the process. This can impact the monitorship's legitimacy and its chances for long-term success. This is perhaps especially true if a monitor is selected simply for his or her name recognition, which is done presumably to add credibility.

If, as the Morford Memo states, one of the key roles of the monitor is to ensure that the company adopts an effective compliance program,[219] then experience with compliance programs from a managerial perspective would seem to be an essential qualification for most monitorships. As a former prosecutor stated:

> *One of the reasons why the deferred prosecution agreements require a monitor to be put in place is that the prosecutor's office has no experience or skills to analyze whether a company is reforming its internal governance practices. That's just not something that prosecutors do. Instead, they need to find someone who does understand corporate forms and operations, and has the time and resources to monitor the company's progress.*

This statement, which is uncontroversial, seems inconsistent with the decision to consistently choose individuals with only prosecutorial or technical legal expertise with respect to compliance programs.

C. Conducting the Monitorship

In the course of a monitorship, the monitor develops a work plan, conducts his investigation, advises the organization as to what changes are required, evaluates the implementation and effectiveness of those changes, and produces a report containing his evaluation and recommendations. Over the next two years or so, the monitor is often required to conduct annual follow-up evaluations with formal written reports. In this section, we take a closer look out how monitors conduct these activities.

1. Developing and Implementing a Work Plan

A monitorship typically begins with the development of a work plan. The work plan sets out who the monitor will interview, what documents she will review, and the other work of the monitor and her team. Significantly, in many cases the work plan is developed after the settlement agreement has been finalized and the monitor appointed, often by the monitor herself on a rolling basis. In other cases the work plan is negotiated with the company and the government. One interviewee had the impression that negotiated work plans, developed in advance of the start of the monitorship, were becoming more commonplace.

The negotiation of a work plan has occurred both formally and informally. The settlement agreement itself can require the joint development of the plan. For example, in the Baker Hughes DPA, the agreement specified a process under which the monitor submitted a work plan to both the company and the DOJ for their comments before the project began.[220] All three of the monitorships entered into since the Morford Memo have

[219] Morford Memo, *supra* note 152, at 5.

[220] Baker Hughes, *supra* note 206, at p. 14-15, ¶ 10.

required that the monitor submit a work plan to both the company and the DOJ for comment.[221] In other cases, monitors reported taking the initiative and calling a meeting with the company and DOJ to ensure everyone had a clear understanding of expectations. Finally, the company may take the initiative. One monitor stated that as part of his presentation to the company during the company's selection process, he described the work plan he would implement.

In developing a work plan, the monitors we spoke to told us they generally used the settlement agreement to establish the bounds of their investigation, and stated they would not take on tasks that would go outside their duties as stated in the agreement. The terms of the agreement, however, may contain substantial room for interpretation by the monitor.

One area open to interpretation is whether and how to investigate the corporation's culture. As stated earlier, settlement agreements do not contain language explicitly charging the monitor to provide recommendations on managing a corporation's culture, but some monitors recognize the importance of corporate culture and assume responsibility for making recommendations on those issues. For example, the monitor in the AOL case, James Robinson, and two colleagues who worked on the monitorship with him, published an article describing their views on how a monitor should conduct his work.[222] In the article, they state that the AOL DPA tasked the monitor with a "mandate to review and monitor a compliance culture as it relates to business practices and revenue recognition."[223] The paragraph cited by Robinson as giving the monitor this mandate states that the monitor shall review "the effectiveness" of AOL's "internal control measures," "training related to these internal control measures," AOL's "sign-off and approval procedures," and the "corporate code of conduct."[224] One of our interviewees (a monitor operating under a comparable mandate) expressed a similar view, and perceived a similar link between compliance program policies and procedures and the corporation's culture:

> *I wasn't appointed to change the corporate culture at [company]. That said, the broad topics that I was there to examine and report on went deeply into the culture and required me to sort of make observations about the culture and about how it influenced the compliance of the company, and as a consequence, at least, my perception was dealing on almost a daily basis with questions of corporate culture.*

Although it is unclear from Robinson's article what these monitors did to examine or review their company's "compliance culture," their direct discussion of culture suggests a distinctly different approach from some other monitors. For example, when one monitor we interviewed was asked about reviewing the company's culture, the

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[221] Faro Technologies, *supra* note 164, at Appendix C, ¶ 5(e); AGA Medical, *supra* note 168, at Attachment D, ¶ 6(e); and Willbros, *supra* note 168, at Attachment D, ¶ 7(e)

[222] James K. Robinson et al., *Deferred Prosecutions and the Independent Monitor*, 2 INT'L J. DISCLOSURE & GOV. 325 (2005).

[223] *Id.* at 337. The authors contrast the America Online DPA mandate with that of Monsanto, DPA, which was focused on a compliance program related to the Foreign Corrupt Practices Act.

[224] America Online, *supra* note 206, at p. 6, ¶ 13.

monitor told us, in effect, that it was hard to even know what the term meant. The monitor observed that he could objectively look at processes and procedures, but that if he wanted to be able to measure results it would be difficult to even determine how to measure corporate culture. That monitor speculated that some other monitorships might be concerned with corporate culture, but that his monitorship was intended to be limited. Interestingly, the settlement agreement that monitor was working under charged the monitor with essentially the same duties as the AOL monitor, focused around reviewing new internal controls.

Even among those monitors who consider themselves to be engaging with issues of corporate culture, it is unclear whether their use of the term matches the use of the term by compliance professionals. In his article, the AOL monitor used the phrase "compliance culture" but he did not specifically discuss how, if at all, his team attempted to measure the corporation's culture. That monitor's approach may or may not be consistent with current best practices from the perspective of compliance professionals. For example, a common term in settlement agreements requires the company to implement some form of anonymous hotline to allow employees to report wrongdoing. If the monitor views her task very narrowly, then she will simply ensure that the hotline has been implemented, that it is being monitored (perhaps by someone who reports to the audit committee), and that employees are made aware of the hotline through training. Although reviewing policies and procedures can ensure the hotline has been implemented, it tells the company very little about its effectiveness. For example, many employees refuse to report significant wrongdoing to hotlines due to a belief that the organization will do nothing to correct the problem and a fear of retaliation, even if the hotline is anonymous.[225] Unless the monitor has a sense of the organization's culture and the pressures and social norms related to reporting wrongdoing, the monitor will not know whether the hotline is an effective tool.

Likewise, reflecting the comment made earlier about looking for keys under the lamp post because that is where the light is, a monitor who is not a compliance professional may misconstrue information coming in about the corporation's culture. For example, in a published interview, one attorney who later served as a monitor stated that the fact that a company's hotline was rarely used by employees—and when it was used it was for minor, personal matters— provided evidence of a positive corporate culture.[226] Compliance consultants we interviewed, however, seem universally to agree that the use or non-use of a hotline is not a good indicator of a corporation's compliance culture or measure of the level of wrongdoing within the organization. Instead, to get a sense of the corporation's culture, they would recommend using surveys, focus groups, and other similar measures.[227]

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[225] Hess, *supra* note 91, at 1795-96.

[226] *Interview with F. Joseph Warin, Partner, Gibson, Dunn & Crutcher, Washington, D.C.,* CORP. CRIME REP., (March 6, 2006), at 11, 14.

[227] Emily Layzer Sherwood, *Measuring the Effectiveness of Ethics/Compliance Programs*, ETHIKOS & CORP. CONDUCT Q. (January/February 2007), at 7, 8. Sherwood states, "The tools most commonly used to measure ethics and compliance programs include: document reviews; surveys; one-on-one interviews; focus groups; and 'deep dives.'" A "deep dive" "does not include compliance audits which tend to be

Overall, we found significant variation in how monitors conducted their work. All seemed to review documents related to policies and procedures. All monitors also conducted interviews, but some stated that it was unnecessary to talk to employees below upper management. Those latter monitors focused solely on the "tone at the top," which can create a biased view of the organization.[228] With respect to lower level employees, those monitors seemed to focus simply on removing the wrongdoers. Other monitors, however, conducted one-on-one interviews with employees at various levels of the company on the view that people were more likely to be candid in that environment, and even engaged in "surprise" visits to branch offices to interview employees before management had a chance to prepare for them. In addition, some did not rely solely on interviews to understand the company, but sat in on meetings where decisions were made. Some intervened in corporate decisions early, while others tried to remain more in the background, on the belief that:

> *... what you want to do ... is to allow the business and compliance and legal people to tackle it and to observe how they tackle it. And then to intervene if and only if they're not handling it properly, and then, finally, report to the government on it, how it all went, rather than run to the government when an issue first arises and seek government intervention or seek yourself to impose the solution, because then you're not teaching the company anything.*

In sum, how monitors view their obligations under the terms of the settlement agreement will influence how they establish a work plan, which will influence the information they collect, who they interview, and what aspects of the organization's operations they investigate. This shapes the entire nature of the monitorship (and in some cases the choice between what we identified earlier as the Auditor and Associate roles), and ultimately what recommendations they make and how they report their findings. These decisions seem to be based more on the background and experience of the monitor than on the terms of the settlement agreement or the negotiations leading up to the settlement agreement.

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prescribed, fill-in-the-box procedures," but is a flexible process using the tools listed above to get a complete picture of the organization. *Id.* at 8, 10.

[228] "Tone at the top" is a phrased used to describe the CEO and other senior officers roles in setting the right tone for the corporation's culture. Linda Klebe Treviño, *Out of Touch: The CEO's Role in Corporate Misbehavior,* 70 BROOK. L. REV. 1195, 1208-09 (2005). Treviño's comments based on her empirical research show why focusing only on senior managers will likely lead to misunderstandings about the effectiveness of a compliance program in practice. She states:

> Because of their inclination to identify closely with the organization and its image, top managers have a "rosier" view of their organization's ethical climate than do lower-level employees. Further, due to fear and futility concerns, employees are unlikely to report ethical problems up the chain. As a result, CEOs are unlikely to know about ethical problems in their organizations. Finally, because most CEOs interact primarily with others of high status, they are likely to be out of touch with the daily realities of their own organizations and employees, including the ethical climate.

Id. at 1208.

In making these decisions, monitors learn by trial and error (at the company's expense) and without the benefit of other monitors' experience. The monitors we interviewed typically were not able to supplement their knowledge by consulting with other monitors, except rarely and on an ad hoc or informal basis, before developing work plans and starting monitorships of their own. Nor could they rely on other monitor reports as guidelines, as most were non-public. Several monitors expressed a strong desire for a forum in which to share their insights and learn from the experiences of other monitors. Without efforts by the government to attempt to capture the lessons of monitorships, however, it seems unlikely to occur on its own. Government intervention may be needed because some monitors may only conduct one monitorship and have little incentive to participate, while others that may seek additional monitorships in the future may view such information as proprietary.[229] For example, one monitor stated:

> *I think there's also the dynamic that people are competing with one another …. It's kind of like in your world, you know the other people who are in your space. Sometimes you collaborate with them, sometimes you don't.*

2. Impacting the Organization

The mere presence of a monitor has the potential to create significant change in how the corporation approaches its internal controls and compliance and ethics program. First, it forces the company to direct attention and resources to compliance and ethics.[230] For some corporations, compliance programs are simply a cost that that they try to minimize. The company seeks to "buy" just enough of a compliance program that it has some protection in the event that internal wrongdoing comes to light.[231] The settlement agreement and presence of a monitor forces such corporations to direct more resources to this function and in some cases even to hire an officer for a new position of Chief Ethics and Compliance Officer (CECO), or develop a compliance committee on the board of directors.[232] Second, the monitor can grant legitimacy and power to the CECO. As noted earlier, the CECO may sometimes be pressured to end investigations or otherwise not live up to the job's requirements.[233] The monitor gives the CECO more clout to resist that pressure. For example, one CECO reported using the monitor to ensure that management and the board would support what the CECO wanted to do. By putting the CECO's recommendations in the monitor's report, the monitor essentially forced management and

[229] *See also* Jacobs et al., *supra* note 24, at 433-34 (making the same observation in the union trustee context).

[230] For example, the US Attorney in the Bristol-Myers Squibb case stated "Independent monitors are visible, on-site reminders that compliance with the terms of a deferred prosecution agreement is mandatory, not optional." Christie and Hanna, *supra* note 172, at 1055.

[231] Laufer, *Corporate Liability*, *supra* note 114, at 1382-1402.

[232] For a settlement agreement with these requirements, see Computer Associates, *supra* note 194, at ¶ 12-14.

[233] *See supra* notes 111-112 and accompanying text.

the board to agree to a plan they might have otherwise resisted.[234] Likewise, one interviewee stated:

> *There will be competing views within the corporation. The lawyers in the corporation may not have the standing that they ought to, and they may take one position, the business people may take another, and the [monitor] is in a position where he can, forgive the whole phrase, speak softly, but carry a big stick.*

Third, the presence of a monitor can be a sufficiently disruptive force to cause the company to conduct a meaningful re-evaluation of its practices. One monitor noted that because there was a "cop on the beat" at the corporation, employees started to act as they ought to under the compliance program. Eventually, the monitor hoped, appropriate social norms would develop and, due also to the other reforms, officers and employees within the corporation would continue to act that way after the monitor was gone.[235]

Although the presence of the monitor can have an immediate impact, to sustain this impact over the long-term the corporation must be committed to the underlying reform goals behind the monitorship process, or at least the idea of adopting a meaningful compliance program. To do this, the monitors agreed that there must be some degree of buy-in from the corporation and trust between the monitor and corporation. As mentioned earlier, there is always the potential for corporate resentment to the monitor's presence and the costs they are imposing on the corporation. To get the necessary buy-in, some monitors commented on the need to have a meaningful dialogue with the company, as opposed to simply lecturing the company.[236] Some monitors believe (and many compliance professionals agree) that if reforms are to have a lasting impact, they need to be the product of an endogenous learning process at the company, and not imposed in a top-down manner.[237] This approach appears to be in significant contrast with the approach used by Richard Breeden at WorldCom. Mr. Breeden's *Restoring Trust* report seemed to consist of his own views as to what that corporation needed to do, as opposed to working with the management team to develop solutions with them that made the most sense for that company. Of course, one could argue that WorldCom was so pervasively corrupt that a monitor's only hope for success would be to adopt an Autocrat role. Yet, at least one monitor we spoke with described a decision to define the assignment in direct distinction to the Breeden model:

> *Well, I don't know that much about how Mr. Breeden went about his job, but reading his report led me to think that he may have a different view of how you handle this than I did. That is to say, I think, and maybe it was a function of the company he was in, or the circumstances, I don't mean to second guess him, but my impression was that he was much more*

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[234] *DPA Fulfilled and Case Dismissed: A CA Case Study*, Webinar (Oct. 10, 2007), *available at* http://www.lrn.com/component/option,com_lrnwebinar/Itemid,267/id,66/task,view/.

[235] *DPA Fulfilled*, *supra* note 234.

[236] *See, e.g., DPA Fulfilled*, *supra* note 234. These comments echo those made by Richard Gruner twenty years ago with respect to the potential benefits of corporate probation. *See supra* notes 60-61 and accompanying text.

[237] *DPA Fulfilled*, *supra* note 234.

coming up with solutions and imposing them on management than doing the sort of advocacy that I advocate .... I would say that I set that paradigm, if you will, and worked against it. Whether it's a fair description of Mr. Breeden or not, I sort of created that image of how one might do the monitorship and then I worked against it, because I didn't think it was - as I got into my job - I didn't think it was the right way to handle things. ... But I hasten to add ...that there are times when you've got to say, this is the way it's going to be. When there's a serious problem, or something that really requires immediate attention, or raises very clear ethical issues. Plainly, under those circumstances, you don't wait around or allow the company to take anything less than the completely ethical position on a given issue.

3. Accountability and Role Conflict

In addition to advising the corporation on its compliance program, the monitor is also charged with monitoring the corporation's compliance with the settlement agreement, and may be under an obligation to disclose or investigate other relevant instances of wrongdoing.[238] Thus, the role contains inherent tensions.[239]

The majority of our monitor interviewees agreed that there was some tension built into their role, but they thought it had a minimal impact on their work. Some monitors pointed out that their role did not contain any more conflicts than the kinds of roles they were accustomed to as lawyers and prosecutors. Others told us that the conflict was minimal, either because everyone understood the monitor's position as an independent and credible third party, or because all parties ultimately wanted the same thing: for the company to adopt an effective compliance program and for the monitor to be able to verify that the evidence shows that such a program was in fact adopted. As discussed further below, this smoothing over of the inherent tensions in the role may create other problems.

In terms of accountability, the Morford Memo's second principle states, "A monitor is an independent third party, not an employee or agent of the corporation or of the government."[240] The monitors we spoke with generally endorsed that position. While DPAs are filed with the court, the monitors we spoke with did not report having a significant relationship with the court. Some monitors suggested that they were generally accountable to the relevant regulator or prosecutor, in the sense of writing their report for that audience. Among the monitors we spoke to, however, many had concluded that in their final analysis they were answerable only to themselves, and that their actions were constrained by the desire to maintain their own professional reputation. This raised concerns for others:

[238] *See supra* Part IV.A.3.

[239] The same observation was made three decades ago in the context of special masters in prisons. *See Note, "Mastering" Intervention in Prisons,* 88 YALE L. J. 1062 (1979).

[240] Morford Memo, *supra* note 152.

monitors aren't infallible, they can run amok, they can miss things, they can overcharge, they can create more problems than they solve, and they've got to be answerable to somebody.

4. Reports and Follow-Up

At the completion of the initial investigation and during various other stages of the monitorship, the monitor is required to draft a written report and present it to the company and the government. Some monitors sought input from the company in drafting the report. One monitor stated:

> *Sure, the monitor wants to write a good report that makes useful recommendations; so if they show a draft to the company, the company can say maybe you just got this one wrong, and we can show you information that you made the wrong decision, and they will be able to persuade the monitor or not. Not letting them talk is like a doctor giving a pain reliever and not asking if it's working.*

In another case, the settlement agreement prohibited the monitor from sharing the report with the company until a preliminary version had been submitted to the government.[241] Any concerns the company had with the report were to be submitted in writing to the government and the monitor, and the monitor could then respond to the comments as he saw fit.[242]

During their investigation and drafting of the report, the monitors had a variety of experiences with respect to their interactions with the government. Although some monitors indicated an ongoing dialogue with the government independent of the company, others reached out to the government only if they reached an impasse within the company. Still others indicated that their only contact with the government was the submission of reports. In general, structured input from the government during the monitor's investigation and development of the report did not seem to be the norm. Instead, the government simply reviewed the report as submitted. The general impression was that these reports were read closely and the government would have questions for the monitor. However, as discussed below, no structured institutional mechanism existed for deploying or leveraging the learning beyond that reading for that particular case. In one case—Bristol-Myers Squibb—the settlement agreement required that the company, including the CEO and general counsel, meet each quarter with the US Attorney's Office and the monitor in conjunction with the filing of the monitor's reports.[243] Such a formal meeting process seemed to be unique, however.

With few exceptions,[244] the monitor's report was not made public. There are several arguments in favor of making the reports public. First, the reports would allow monitors to learn from each others' experience. Second, it would

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[241] Bristol–Myers Squibb, *supra* note 243, at ¶ 14.

[242] *Id.* It should be noted that that agreement also provided for significant direct interaction between the monitor, the corporation, and the US Attorney's office. See *supra* note 243.

[243] Bristol–Myers Squibb Company, Deferred Prosecution Agreement, (June 15, 2005), at ¶ 13.

[244] *See* University of Medicine and Dentistry of New Jersey Medical, *supra* note 190.

provide the greater compliance community with additional information on what the government is looking for with respect to being able to demonstrate that a compliance program is effective. Third, it provides greater accountability to the public, since interested parties would be able to determine if corporations were in fact rehabilitated, or if they "got off easy" for their wrongful behavior.

On the other hand, most monitors thought that a non-public report provided significant benefits to the monitorship process. The primary benefit was providing an environment for open communication, as stated by one monitor:

> *[T]the chances of identifying and observing . . . important issues and corporate behavior go way up if your report isn't going to be on the front page of the business section of The New York Times. You know, people are going to be much more willing to even seek you out, or at least answer your questions. I've found that there were people hungry to talk to me when I did my job.*

5. *Cause for Concern in Conducting the Monitorship*

The combination of settlement agreement language that is open to interpretation and the selection of monitors without a background in compliance and ethics programs can lead to a monitorship that follows a simple Advisor or Auditor model regardless of what the situation calls for. Under this model, the monitor looks for technical compliance and the presence of the appropriate policies and procedures, but does not go deeper into the workings of the organization to determine if those policies and procedures are supported by an organizational culture that will ensure they are effective over the long term. Although the Auditor model may be appropriate in some situations,[245] for organizations with a history of significant wrongdoing it does not ensure against the possibility that the corporation only adopts a "paper program."

This problem can be somewhat alleviated through a work plan, developed jointly and in advance, which clarifies all parties' expectations of the monitorship. It is unclear if the joint, ex ante development of work plans is becoming standard practice. The work plan, however, may still not force a monitor from an Auditor role to an Associate role. The DOJ hires the monitor for its expertise in these areas. The prosecutors involved may not know the right questions to ask or what is required for a successful work plan that ensures the monitor adequately studies the organization's culture. The corporation, which wants to ensure it receives positive reports from the monitor and completes the monitorship with minimal disruption and cost, may push for an Auditor role. In addition, the selection of the monitor may not be providing the type of expertise needed, and therefore the monitor is also not pushing for a deeper investigation. Thus, although the settlement agreement may be drafted to ensure the corporation adopts an effective compliance and ethics program, no one present during a work plan negotiation may be pushing for what it would actually take to develop, implement, and test a compliance program, based on best practices from compliance experts. This is not to say that something akin to the Auditor model is never appropriate, but in situations where there is widespread wrongdoing and significant reform is needed, the current choices seem to

[245] *See infra* Part V.A.

work against the more comprehensive Associate model being adopted when it would be the most valuable model to use.

Furthermore, a corporation may argue that an expensive and lengthy monitorship potentially required by the Associate model harms current shareholders.[246] This would mirror the criticisms of Sarbanes Oxley section 404 to the effect that the mandatory procedures are expensive and provide little benefit.[247] Instead of an expensive monitorship, corporations can argue that they will agree to adopt and improve their compliance programs, but that a monitor will not add much value beyond what they would get from hiring a compliance consultant, for example. If a monitor is imposed, the company will use those arguments to push for a more limited Auditor or Advisor role. Multiplying these effects is the possibility that financial industry regulators will share these concerns, along with a desire to move the case forward, close the file, and return the corporation "to the fold." This may partially explain the difference between the corporate regulatory monitorships and those in the non-corporate (and especially RICO) context. Corporations, unlike mob-ridden unions, attract a certain presumptive support from professional regulators. They are not utterly "broken," there is no public appetite for government to "run" public corporations, and they serve important public and private functions, so one should tread lightly.

D. Termination and Post-Monitorship

Although settlement agreements commonly allow for the monitorship period to be extended if needed or for the agreement to be terminated upon breach by the corporation, thereby releasing the government from its obligations, monitorships seem to end when the originally stated time expires. As one example, Bristol-Myers Squibb's monitorship ended at the expiration of its term, even though additional wrongdoing had been discovered and the CEO was forced out due to involvement in that wrongdoing.[248] The monitor's report, however, praised the company for its "reformation of the company's corporate culture into one that embraces and endorses a commitment to compliance, ethics, integrity and excellence, and encourages open and participatory communication throughout the organization."[249] The monitor also praised the company's "outstanding global compliance program whose policies, processes and procedures are designed to ensure a culture of integrity and ethics that enables BMS to conduct its business worldwide in compliance with all applicable laws, regulations and other governing policies."[250] Strikingly, only a few months later, the company reached another settlement

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[246] Of course, part of the monitor's job should be to show the corporation how an effective compliance program adds value to the corporation and reduces liability risks.

[247] *See generally* Robert Prentice, *Sarbanes Oxley: The Evidence Regarding the Impact of SOX 404*, 29 CARDOZO L. REV. 703 (2007) (reviewing the criticisms related to the costs SOX 404 imposes on corporations and then reviewing empirical evidence that Prentice argues shows that those criticisms are overblown).

[248] Stephanie Saul, *Drug Maker Fires Chief of 5 Years*, N.Y. TIMES, Sept. 13, 2006.

[249] Executive Summary of Bristol-Myers Squibb, Monitor's Report, *Executive Summary* 2 (2007), *available at* http://www.usdoj.gov/usao/nj/press/files/pdffiles/ExecutiveSummaryofFinalReportofMonitor.pdf.

[250] *Id.*

with the DOJ and paid over $500 million for wrongdoing related to fraudulent pricing and marketing practices.[251] As part of the new agreement, Bristol-Myers Squibb entered a Corporate Integrity Agreement (CIA) with the Office of Inspector General of the Department of Health and Human Services, which required the company to adopt numerous compliance program features.[252] Although some of the wrongful conduct giving rise to this settlement occurred during the time the monitorship was in effect, the US Attorney agreed to the settlement based in part on the monitor's account of how the company had improved its compliance program.[253]

Once a monitorship ends, ideally, as indicated by Jacobs in relation to union trusteeships, a debriefing process should take place.[254] This is a necessary process to build a foundation of knowledge on what practices have worked and what have not, and how the process can be improved. This is not being done, however, either through a community of monitors or by the government.

The absence of meaningful follow-up means it is difficult to vouch for the accountability or success of monitorships. As one of our interviewees memorably put it,

> *Maybe it turned out okay, maybe it didn't, maybe nobody knows, because there's nobody out there evaluating these things. And unless a company gets caught doing something improper again nobody may find out whether the deferred prosecution agreement worked or didn't work.*

Although our analysis has generally discussed criminal-side and civil-side monitorships together, there are significant differences in the contexts in which the monitorships are enacted that should be taken into account. Most important, unlike a regulator, a criminal prosecutor does not have the institutional structure for following up on a monitor's report. Several of the civil side regulators we spoke to told us that their organizations' practice was to pass monitors' reports onto their compliance/examinations departments, which would use the reports as blueprints for subsequent compliance examinations and audits. This means that individuals with expertise in at least auditing firms for compliance have regular opportunities to evaluate the firm's or company's progress past the end of the monitorship. Prosecutors' offices have no such structure built into them.

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[251] Press Release, Dep't of Justice, Bristol-Myers Squibb to Pay More Than $515 Million to Resolve Allegations of Illegal Drug Marketing and Pricing (Sept. 28, 2007), *available at* http://www.usdoj.gov/opa/pr/2007/September/07_civ_782.html. Bristol-Myers Squibb settled with the DOJ in September 2007, while its prior DPA with the DOJ ended in June 2007. *See* Press Release, Dep't of Justice, Statement from U.S. Attorney Christopher J. Christie on Expiration of Deferred Prosecution Agreement with Bristol-Myers Squibb (June 14, 2007), *available at* http://www.usdoj.gov/usao/nj/press/files/pdffiles/dpaexpires0614rel.pdf.

[252] Corporate Integrity Agreement between the Office of Inspector General of the Department of Health and Human Services and Bristol-Myers Squibb Company (Sept. 26, 2007), *available at* http://www.oig.hhs.gov/fraud/cia/agreements/BMS_CIA.pdf.

[253] Department of Justice (District of Massachusetts), *Press Release, Bristol-Myers Squibb to Pay More than $515 Million to Resolve Illegal Drug Marketing and Pricing Allegations*, Sept. 28, 2007, at 3 (copy on file with authors).

[254] Jacobs, *supra* note 23, at 246-47.

That said, even within the regulatory context, there is a clear distinction between regulated entities and public companies, in terms of the kind of follow-up and oversight they can expect. Broker dealer firms and other regulated entities operate in a highly regulated environment and are required to be in contact with their regulators through a number of prescribed mechanisms. Nothing similar is required of public companies as a condition of listing – and most people would probably agree that nothing similar should be required.[255] Given that public companies are not going to be closely regulated, monitorships may need to provide more explicitly for meaningful follow up, including perhaps longer terms for the monitorships themselves. Without such follow up, it is difficult to determine if a monitorship had any long-term impact short of evidence to the contrary from a similar compliance problem emerging at the same company.

V. Toward More Meaningful Monitorships

A. Monitorships in Theory and in Practice

Earlier we placed monitorships on a continuum with four general categories—Advisor, Auditor, Associate, and Autocrat—showing the range of possibilities from the least ambitious monitorship to the most ambitious.[256] Typically, it appears that the government does not intend for the monitor to serve an Autocrat role, and with a few exceptions monitors have not taken on such a role. At the other extreme, an Advisor role may be appropriate where the government is comfortable that the wrongdoing is not widespread throughout the organization or being intentionally (or unintentionally) encouraged by the organization's culture. Thus, an investigation may show that the wrongdoing was in fact due to just a few rogue employees, and an Advisor is necessary to help the corporation modify its compliance program and internal controls appropriately, as well as to ensure that appropriate resources are directed to the compliance program. In such a case, only technical adjustments to a company's policies or procedures are deemed necessary. Perhaps such a case should not even be termed a "monitorship," as independence may not be necessary.[257]

The Auditor role is one step above the Advisor, and may be called for in substantially similar situations but where the government (1) has less confidence in the corporation's ability or desire to make the needed changes; or (2) has been impressed by observed compliance program changes made by the corporation during the course of the investigation leading up to the settlement.[258] In cases where the wrongdoing spreads

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[255] As an exception, *see* James Fanto, *Paternalistic Regulation of Public Company Management*: *Lessons from Bank Regulation*, 58 FLA. L. REV. 859, 862-63 (2006) (arguing for the SEC to "appoint a corporate governance monitor for certain public firms who would have a role like that of an examiner of a large bank or financial holding company," but also recognizing that his proposal is unlikely to be adopted).

[256] *See supra* Part IV.A.4.

[257] *See supra* Part IV.A.5.

[258] During the course of an investigation—which can last many months—the corporation will terminate wrongdoers and improve its compliance program in the hopes of obtaining credit for cooperation. One monitor raised the issue of whether there are cases where the government should end its investigation early and start a monitorship as soon as possible, thereby having the monitor directly involved in the changes the company is undertaking (as well as potentially saving the corporation significant costs related to defense attorneys and duplicated efforts). In some ways this occurred at Bristol Myers Squibb, when the

beyond a small number of individuals or there is evidence that organizational pressures or social norms were key contributing factors to the wrongdoing, then the Associate model may be needed. Under this model, the monitor investigates the root causes of wrongdoing – including all facets of the organizational culture – and collaborates with the corporation in a discursive, open-ended investigative project. There appear to be some cases where this is occurring.[259]

In the appropriate situations, the Associate model is the kind of monitorship that, in theory, [260] offers the greatest possibility of long-term, meaningful reform of corporate operations, as compared to the other models and the simple use of sanctions and other deterrence-based fines. Unlike financial sanctions, monitorships cannot be dismissed as just a "cost of doing business." Instead, monitorships should work toward institutionalizing a self-reflective process within corporations that will address underlying causes of misconduct in the organization and implement, and then continually revise, an effective compliance program that is embedded within the organization's culture. What makes them so promising in theory is that they are an institutionalized, structured mechanism for disrupting other, problematic institutions and structures. Disrupting existing ways of doing things also can help to reform a corporation, because sweeping away or rejecting the status quo can open up a space for reconsidering fundamental assumptions.[261] Without the monitorships, this process of change is unlikely to occur in many corporations.[262] For example, as one of our interviewees stated,

> *The greatest problem to effect change is the inevitable loss of momentum that occurs inside an entity once the crisis has passed. Just the everyday pressures that exist to do whatever business it is, to deal with whatever crisis there is, gets in the way of actually completing whatever it is people agree is the right thing to do. So having an independent consultant involved in the process puts a framework around it, just like program management does to cause ordinary change to take place. You need the discipline of someone outside the organization who's got a timeline, who's got to report to somebody. You have to have an end date.*

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independent advisor the company hired to review their compliance program during the investigation stage was later hired as their monitor. *See supra* notes 200to 203 and accompanying text. A full consideration of the issues raised by this proposal is beyond the scope of this paper.

[259] The public statements of the CECO and monitor in the Computer Associates case seem to suggest that this was a successful monitorship based on what we term the Associate model. *DPA Fulfilled*, *supra* note 234. However, virtually all top management at CA was replaced as part of the process. A much harder case is one in which top management stays.

[260] The following discussion of the potential advantages of monitorships in theory builds on an earlier discussion of reform undertakings (which focused on civil-side monitorships) as a form of New Governance regulation, by one of the authors of this paper. Ford, *supra* note 49.

[261] This is one of the key points made by Sabel and Simon, *supra* note 21, at 1073-82. *See also* Ford, *supra* note 49, at 805.

[262] *See* Vikas Anand et al., *Business as Usual: The Acceptance and Perpetuation of Corruption in Organizations*, 19 ACAD. MGMT. EXEC. 9, 20-21 (2005) (arguing that an external change agent is often needed to reverse corrupt organizational cultures); see also *supra* notes 230-235 and accompanying text (describing the potential benefits from simply a monitor's presence in an organization).

When you have those things, then you've managed to meet all the milestones and get it done.

Monitorships require the corporation to pay direct attention to the reasons for its past compliance failures and, with the prodding of a capable monitor, rehabilitate itself. This process should separate the reform effort from the enforcement action and allow a deep and demanding, but flexible and open-ended reform process to evolve as needed over a period of time.[263] By separating enforcement and reform, corporations are expected to take a less adversarial stance and engage in less calculated cooperation,[264] and instead engage in a more open and discursive process that has a better chance of gaining company buy-in to the process. In the background, the "big stick" of enforcement should help ensure the corporation is taking the process seriously.[265]

In practice, however, monitorships that have the goal of reforming corporations are at risk of falling short. They rarely appear to be doing what compliance consultants would say is necessary to ensure the corporation's compliance program is effective and will result in reforming a corporation's culture over the long term. They also seem to be failing at generating the necessary self-reflective process. Even in cases where there is widespread wrongdoing within the organization, it seems the monitor is typically assuming the narrower Auditor role over the more in-depth Associate role. In this section, based on the evidence we have,[266] we explain why this may be occurring. This is not to say that successful monitorships do not and cannot happen where the Associate model is required, but that those successes seem to be due to self-motivated individual efforts and not due to an effective system that produces consistent results.

A key potential cause is that the incentives and motivations of the three actors involved in the monitorships (the company, the government, and the monitor) can come together in such a way that the monitorship process settles for a significantly lower level of operation and ambition than we would hope for. Although the parties' interests may be aligned in the ways described above,[267] they may not be aligned with the long-term best interests of shareholders or the public.[268] Specifically, the corporation wants a

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[263] Ford, *supra* note 49, at 822.

[264] Hess and Ford, *supra* note 134, at 330 (using the term calculated cooperation to describe how the government granting corporations benefits for cooperation with the investigation creates incentives for "corporations to scapegoat certain employees to end the governmental inquiry without adequate examination of the organizational causes of the wrongful act").

[265] Ford, *supra* note 49, at 823-24.

[266] The limitations of this study are identified above *supra* note 123 and accompanying text. As stated earlier, we hope that this report will be a springboard for additional study into the actual operation of monitorships, including more in-depth studies undertaken not only by academics housed in business and law schools, but also by other organizations with an interest and stake in corporate governance, ethics, and regulation.

[267] *See* Part IV.C.5.

[268] As one observer told us:

> *You put the rabbit in the hat. I mean you started with the assumption that everybody wants the same thing and if that's true then it makes your job very easy because what you need to do is to provide guidance and to document the cultural changes that have taken place in the organization, so it makes it very easy if that's the case. But it's not*

monitorship that is just rigorous enough to allow the monitor to write a report that can satisfy the government; it does not want a monitorship that is broader in scope or more expensive than it has to be. The monitor wants to conduct an investigation that will enhance or at least not adversely affect her professional reputation and oversee a compliance program implementation that allows her to write a credible report for the government. Interestingly, if the use of monitorships continues to increase, some monitors seek to obtain future monitorship appointments, and the company has some meaningful say in the selection of the monitor,[269] then monitors may actually come to operate in a more company-friendly manner. According to compliance consultants we interviewed, because the monitor has an eye to her next appointment, she may be careful about implementing too onerous a monitorship. Even if a monitor is not seeking additional monitorships, she may still conduct a company-friendly monitorship because of the natural tendency to view the corporation as a client, and the desire to "add value" for that client.[270]

The government also may not push the monitor and the company to go beyond a basic Advisor or Auditor model of monitorships. The prosecutor wants to close his file in a way that is reasonably calculated to ensure that the subject corporation has at least decent, industry-standard compliance processes in place (at least on paper), and then move on to the next case. The prosecutor does not want similar problems to recur at the same firm in short order, but separate fines and sanctions against individuals can go some distance here too. On the other hand, mindful of criticisms about monitors running amok, the prosecutor does not want to be unreasonable or to force the company, or more specifically its shareholders, to incur costs that are more burdensome than they have to be.

The end results of these factors can be relatively conservative monitorships focused on technical compliance with policy and procedure requirements. There is little interest in a drawn-out, discursive process and no one seems to have an incentive to attempt a "deep dive" into issues of corporate culture. Even if the corporation itself may be motivated to do so, it may rationally choose not to deal with such issues with a corporate monitor that is not in an attorney-client privileged relationship with the corporation. Thus, despite any initial aspirations, the pressure on the monitorship structure is downward – toward the Advisor or Auditor model.

> *necessarily true. A deferred prosecution agreement may be put in place because that's the easiest way to bring a criminal case to a conclusion and the people who are running the company feel that they are getting off lightly. ... it's the culture that determines how people are going to behave in the organization, not any particular individual. Unless you bring about cultural reform you're probably destined to repeat some form of misconduct at some point in the future as soon as the pressure is off.*

[269] The three monitorships since the Morford Memo have all allowed the corporation to pick the monitor with the government retaining a veto power.

[270] Clearly, an effective compliance program can and should add value to a company, and even compliance consultants market themselves as claiming to add value to the company. There will be situations, however – especially here, in the enforcement context – where appropriate implementation of a compliance program requires some tradeoffs between at least short-term value and accountability. Monitors must ensure that they are considering not just company value and company concerns, but ensuring accountability to the government and the public more generally.

A second major cause of low-ambition monitorships—which also impacts the motivation of monitors discussed above—is the type of monitor that is being selected. As indicated earlier, the corporation wants to pick a monitor that has credibility with the government, and the government wants a monitor it can trust. The end result is the selection of a monitor that closely resembles a prosecutor's profile (and commonly is an ex-prosecutor), which deeply affects the subsequent path the monitorship takes. The monitorship becomes a process designed by prosecutors, run by former prosecutors, and for ultimate consumption by prosecutors. As one monitor pointed out to us, the corporation only has "one shot at it," and the stakes are high. It is not a time to take risks when a consensus is emerging about what constitutes an acceptable monitorship. The risk of a future problem emerging because underlying cultural issues have not been addressed feels remote in the middle of an acute incident, and people tend to discount future risks in favor of present needs in any event.[271] In addition, without a system for tracking, aggregating, and sharing experiential and outcome data between companies or between US Attorney's offices, the actors create the features of each monitorship in an environment of uncertainty and are likely to simply follow the lead of those who came before. In the end, with each subsequent monitorship, the conservative, technical compliance-oriented model is reproduced through a process similar to what organizational sociologists call mimetic isomorphism.[272]

B. Reform Recommendations

The shift toward the Advisor and Auditor end of the spectrum is not necessarily an intentional choice, but the result of choices along the way in a process that is influenced by the various motivations and incentives of the actors involved. Returning to our simplified four-stage monitorship model, we can identify decisions at each stage that affect the subsequent possibilities and generally push toward a less ambitious monitorship. These problems suggest various reforms to better structure a monitorship to meet the needs of the case at hand and to develop systems to help ensure monitorships improve over time.

At the negotiation stage, the terms of the agreement are drafted in a way that leaves significant interpretation to the monitor. Although flexibility is one of the key virtues of monitorships, their effectiveness calls for more careful and context-specific thought upfront about the monitor's exact role and the scope of monitorship. Second, parties are selecting monitors with a prosecutor's mindset and skill set, as opposed to someone more closely identified as a compliance professional. Third, during the course of the monitorship and as a function of the two choices made above, monitorships tend to focus on technical compliance and easily measurable outcomes. Although we have been unable to review monitor reports in the for-profit corporation setting, our estimation

[271] See David M. Messick and Max H. Bazerman, *Ethical Leadership and the Psychology of Decision Making*, 37 SLOAN MGMT. REV. 9 (1996) (discussing decision-making biases including the problem of discounting future events and related biases that exacerbate that problem).

[272] See Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 151-52 (1983) (developing the idea of mimetic isomorphism, which involves organizations copying each other in the face of uncertainty due simply to the legitimacy established by the prior actor and not due to their fitness for the environment).

based on our interviews is that "corporate culture" is used more as a buzzword than as a meaningful construct. Finally, at the post-monitorship stage, efforts to capture learning from monitorships and apply it to other ones are virtually nonexistent. Instead, patterns are reproduced from one monitorship to the next based on precedent, rather than clear thought as to whether they are appropriate to the new situation.

In the remainder of this article we provide recommendations for reform at each of these stages. We should note that our conclusions are limited in that we have had virtually no access to monitor reports and we have only had contact with a small sample of actors involved in monitorships.[273] That said, even if more monitorships have been deeper and more consistent with compliance industry knowledge than we surmised, the systematic problems we identify are real in some number of cases and could easily become the norm if they are not monitored and managed appropriately. In addition, these reforms will not lessen the effectiveness of monitorship models that have been effective, but will only work to strengthen them and improve the chances for success for all monitorships.

1. Crafting Monitorships for the Case at Hand

Once the government decides to agree to a monitorship, it needs to clearly articulate the reasons that it came to that conclusion. In addition, and flowing from that original rationale for the monitorship, the agreement should be more specific on what role the monitor is expected to adopt. The challenge in many situations, however, is determining the corporation's reform needs before the monitor has started her work.

Currently, the government relies on its own investigation, which in turn relies heavily on the company's internal investigation. Many corporations conduct proactive internal reviews when internal wrongdoing comes to light. An important policy reason for granting corporations "credit for cooperation" is that it allows the government to essentially outsource its investigations. As one interviewee stated, "[t]he good thing about it is that it leverages the government's resources. I mean, with a handful of prosecutors you can be running many huge investigations of big companies, which if you had to staff it with your own people you'd never be able to do."[274] These investigations can be a valuable source of information. For example, they may demonstrate that a corporation's compliance program is clearly inadequate.[275] However, internal investigations are not equivalent to a monitor's investigation and their context must be taken into account. For our purposes, a central concern is that internal investigators are motivated to identify individual "bad apples," and away from identifying deep problems of corporate culture.[276] Thus, the government should not automatically assume, based on

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[273] *See supra* note 123 and accompanying text.

[274] Of course this outsourcing has been controversial, especially with respect to the perception that the government routinely requires corporations to waive attorney-client privilege in order to be considered cooperating – a concern that the revised charging guidelines for corporations addresses. *See supra* note 88.

[275] *See, e.g.,* Faro Technologies, *supra* note 164, whose compliance program did not even discuss the Foreign Corrupt Practices Act.

[276] Ford, *supra* note 49, at 792-96; *see also* Laufer, *Corporate Prosecution*, *supra* note 114, at 648 (describing a problem he calls Reverse Whistle Blowing, which "occurs when an organization, typically

an internal investigation, that there is no need for a more ambitious, Associate-style monitorship.

One possible solution is to follow the lead of the US Attorney in the Mellon Bank case, who hired compliance consultants to investigate the company before she agreed to a DPA.[277] Although there are of course significant limits on the ability of such consultants to determine the state of compliance at the time of the offense (which typically includes acts that have occurred months or years ago), the consultants can investigate the current state of compliance to make a recommendation as to whether they believe the company is at risk of engaging in similar activity in the future. This recommendation can then be used by the parties as they negotiate the terms of the settlement, including the role of the monitor.

Next, to ensure the monitor conducts an appropriate investigation and follows the desired monitorship model, the basic structure of a work plan should be incorporated into the settlement agreement. This ensures that, where a complete and thorough investigation of the company's ethics and compliance program and organizational culture is called for, this is actually what the monitor does. It also should help weed out potential monitors who do not have skills and experience to conduct this type of investigation. In addition, it may be useful to have some form of the final work plan made available to the public (in a redacted form if necessary to protect any legitimate privacy concerns of the corporation) for purposes of accountability and information sharing for future monitorships. This more direct guidance upfront still allows the monitorship to develop and evolve in a manner that meets the needs of the situation, but (along with other necessary reforms) helps ensure that the monitor does not move to a lower ambition monitorship, such as an Advisor or Auditor role, where the needs of the situation do not justify that move.

2. Selecting the Monitor: Competency versus Credibility

One thing we heard from several monitors is that, ultimately, the success of the monitorship comes down to the personal qualities of the monitor chosen. Several monitors emphasized the importance of professional judgment. At its starkest, we heard that it may be "impossible for monitorships to be institutionalized" because "[t]he kind of self-restraint, the kind of self-critical analysis, the kind of self-discipline that you need to be a monitor is very, very, very unusual and there's nothing that really prepares you for it." This observer told us about the "intellectual and emotional discipline" required to do the job:

> *You got to be prepared to pull the plug and quit, or you've got to be prepared to turn on the people that you've come to like and feel are supportive, or you've got to be prepared to defend people that you don't like depending on the circumstances that you find yourself in. And you've got to do it in a way where every time you make a judgment, every time you express yourself you can back up your conclusions with overwhelming*

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through the acts of senior management, identifies culpable employees and offers evidence against them in a trade with prosecutors for corporate leniency or possible amnesty.")

[277] *See supra* notes 162-163 and accompanying text.

evidence that you're correct and you can't afford to make a mistake, it's a zero defect kind of a role.

Accepting the difficulties of the job and the inherent tensions in it, there are still steps that can be taken to increase the possibility of an effective monitorship. Of primary importance is finding the monitor with the right skills for the monitorship at hand. The Morford Memo is correct in stating that the corporation should maintain responsibility for designing its compliance and ethics program because only corporate managers, and not the monitor, have duties to shareholders.[278] The point is not to have monitors take over corporations and their compliance programs, because there can be more than one way to implement a compliance program and each can be equally correct and effective. It should be the corporation's choice on which approach to take, as long as its choice is reasonable and it can convince the monitor of the likely effectiveness of the proposed approach.

To determine this effectiveness, the monitor must have sufficient experience with the workings of ethics and compliance programs in practice. This does not mean simply technical compliance with legal requirements, but an understanding of how matters that affect a corporation's culture, such as rewards systems, impact the effectiveness of a compliance program that looks complete on paper. These issues go to the heart of the monitor's effectiveness. Overall, as one compliance consultant told us, there is a reason why the compliance profession has developed, and it is that lawyers focused on technical compliance were not getting the job done.[279] Because the monitor's primary duty is to ensure the corporation has an effective compliance program, then those with the experience and skills to serve as a chief ethics and compliance officer should be the first people to be considered for the position.

The current dominant use of ex-prosecutors and similar attorneys as monitors was not a conscious choice resulting from a consensus that corporate compliance problems will be addressed most effectively by using such monitors. The terms of the monitorship agreements we reviewed do not specify this preference, and, indeed, the Morford Memo explicitly states that non-lawyers can do this work.[280] To address the ossification around this model, the government must be involved in the selection process and implement policies on the skills and experience a monitor should have, related to the growing body of knowledge from compliance professionals.

In selecting the monitor, there also must be some balance between the government selecting the monitor and the corporation selecting the monitor with the government only retaining a veto power. If the corporation has too much control over the

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[278] Morford Memo, *supra* note 152, Principle 3, which states: "A monitor is not responsible to the corporation's shareholders. Therefore, from a corporate governance standpoint, responsibility for designing an ethics and compliance program that will prevent misconduct should remain with the corporation, subject to the monitor's input, evaluation and recommendations."

[279] We are not saying that monitors whose primary experience is having been a prosecutor or white collar defense attorney cannot get the job done (and there seems to be evidence that they can). What we are saying is that the prosecutorial model of lawyering seems to be under-equipped to do this job in many cases, especially those we have deemed appropriate for an Associate model of monitorship (*See supra* note 134 and accompanying text), and should not on its own be considered either a necessary or a sufficient requirement for selection as a monitor.

[280] Morford Memo, *supra* note 152.

process, then it may attempt to select monitors that are company-friendly. In addition, there is the potential for the monitor to begin to view the company as her client, especially if the monitor underwent an interview in which she had to convince the corporation to hire her. If the government has too much control, then it may select monitors through a process that raises legitimacy concerns (i.e., selected based on personal connections rather than merit) or that will not work well with the company, and as stated earlier, corporate buy-in and trust of the monitor are key factors for a successful monitorship. Monitors should be selected through a process in which the parties select a mutually acceptable monitor. In addition, during the post-monitorship review (we suggest reforms in this area below), the government should collect data on the performance of the monitors and ensure that information is available to those government officials involved in the selection process.

Government involvement in the selection process—and greater contact with the monitor throughout the monitorship—also should help ensure monitor accountability and independence. The Morford Memo and most (but not all) DPAs place great importance on structural independence (meaning a monitor who has no prior business relationship with a firm, and who is precluded from taking one for a period of years after the monitorship). This does not, however, ensure independence of mind. At a subconscious level if not a conscious one, the fact that the company is paying the monitor may motivate the monitor to try to convince the company that he or she is "adding value," in much the same way that in the rest of their practice these same attorneys want their clients to see the value of the services they provide. Especially where the monitor is working on a close and daily basis at the company, with little contact with the government, the (conscious or subconscious) desire to have positive interpersonal interactions with key players can become significant. Thus, structural independence must be supplemented with other aspects of the monitor process, such as greater contact and involvement with the government during the process. The government should be in regular contact with the monitor and provide written feedback with its assessment of the strengths and weaknesses of the monitor's investigations and reports.[281]

3. *Compliance for the Long Term*

The goal of a monitorship is to ensure that the corporation implements an effective ethics and compliance program. Although monitorships are typically 24 to 36 months in duration, they are expected to have an impact that lasts significantly longer. The first step in accomplishing this is designing a monitorship that can assist the corporation in uncovering root causes of misconduct, identifying persistent organizational culture hurdles standing in the way of adopting an effective ethics and compliance program, and assist in identifying and implementing effective measures in light of these factors.[282]

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[281] *See* Christine Parker, *Regulator-Required Corporate Compliance Program Audits*, 25 LAW & POL'Y 221, 237 (2003) (making similar recommendations in the context of auditor reports for enforceable undertakings in Australia).

[282] On root cause analysis, *see* William H. Simon, *Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes*, *in* LAW AND NEW GOVERNANCE IN THE EU AND THE US (Gráinne De Búrca et al., 2006).

To ensure lasting change, the next step must be to entrench the changes made during the monitorship into the operations and structure of the corporation. Susan Sturm has described, in a different context, how the "architecture" of an organization needs to be reconfigured to prevent backsliding at the end of an acute intervention like a monitorship.[283] Con Ed's monitorship appears to be an example of exactly that problem.[284] In the context of forcing compliance reform on a corporation, a leading example is the use of Corporate Integrity Agreements that require certain structural changes.[285] DPAs often require similar changes, such as the appointment of a Chief Ethics and Compliance Officer or the selection of independent directors to serve on the board committee with supervision duties over the compliance program.[286]

Thus, to help ensure that changes remain once the pressure is off,[287] settlement agreements where the Associate monitorship model is required should likely include the following requirements. First, if the position does not already exist, the corporation should appoint a Chief Ethics and Compliance Officer and make that person part of the company's high-level management. Second, the CECO should be an agent of the board of directors, at least as far as incentive compensation and termination decisions are concerned.[288] Third, the corporation's board should be required to adopt a compliance committee, and the CECO should have reporting responsibilities to that committee.[289] During the course of the monitorship, the monitor should ensure that the CECO and compliance committee are performing their duties competently. In addition, and as discussed further below, information should be systematically collected on when and why such requirements are used, and this information should be combined with data collected by the monitor on how well these structural changes have worked.

4. Post-Monitorship: Institutionalize Learning

One of the regulators we spoke with indicated that, with respect to the degree of independence they required of the monitor, their organization had developed an informal policy to help ensure that burdensome independence requirements were not imposed where they were not necessary. This policy was apparently based, at least in part, on a review of its past monitorships. However, this same regulator did not see a reason to analyze the content of the monitors' recommendations in the same overarching manner to

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[283] *See* Susan Sturm, *The Architecture of Inclusion: Interdisciplinary Insights on Pursuing Institutional Citizenship*, 30 HARV. J.L. & GENDER 409 (2006).

[284] *See supra* notes 62-63, and accompanying text (describing the Con Ed story).

[285] *See supra* note 51-52 and accompanying text (describing the use of corporate integrity agreements).

[286] *See* Aurora Foods, supra note 183, at 4 (requiring both the appointment of a compliance officer and two independent directors to serve on the audit committee); Baker Hughes, supra note 206, at paragraph 7.b.iii (requiring the assignment of a corporate official to be in charge of the compliance program and requiring that person to report directly to the board's Audit/Ethic Committee).

[287] *See* quote *supra* note 268.

[288] *See supra* notes 107-112 accompanying text (describing arguments for making the CECO an agent of the board of directors).

[289] *See also* Hess, *supra* note 91, at 1809 (arguing in favor of a compliance committee with authority over the CECO).

see, for example, if insights could be generated for handling the most common compliance failures, or if best practices in resolving common problems were starting to emerge. Many of our interviewees had not contemplated that much valuable information would come from this kind of exercise, especially considering the amount of work involved.

We believe that the absence of systematic methods for capturing the lessons of past monitorships is a major failing. As indicated above, the government must play some role in this process. [290] Although monitors seek to have this information, they are reluctant to provide it to others either because they view it as proprietary information or they appropriately do not want to disclose confidential information about the corporation.

There are several reasons why there is a need to develop mechanisms to capture the learning from monitorships.[291] First, costs are reduced by new monitors not having to reinvent the wheel for their monitorship. Monitors reported having no models to rely upon for developing a work plan or even drafting their report, and corporations are therefore required to pay the bill for their learning on the job. Second, to improve the effectiveness of monitorships, an effort must be made to capture best practices and review their evolution over time due to increased experience. Third, capturing these lessons also allows the government (including US Attorneys without any experience with monitorships) to become more knowledgeable and therefore more productive participants in the monitorships along the lines suggested above, including negotiating the settlement agreements, selecting monitors based on their skills and experience, and reviewing the monitor's work during the monitorship. This allows the four stages of a monitorship we identified above to function as a cycle, where the lessons from past monitorships feed into the next round of monitorships.

The lessons the government should attempt to capture include not just best practices on the monitorship process, but also indicators on the final performance of monitorships over time. This is vital information for determining if monitorships are even working as a policy alternative. Overall, without an effort to analyze the experiences of monitorships and attempting to distill the lessons to be learned, then certain ineffective practices may become the standard without appropriate thought and evaluation.

VI. Conclusion

Like others, we are concerned with the development of corporate monitorships. Our concerns, however, have less to do with fears of unaccountable monitors running roughshod over corporations and more to do with monitors not conducting deep dives into the corporation's culture. As stated by the Ethics Resource Center—a leading

[290] *See supra* note 229 and accompanying text.

[291] More generally, a number of New Governance scholars have emphasized the need for a "central data clearinghouse" or other similar structure to permit collective learning and disseminate best practices. *See, e.g.,* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 345-56 (1998) (calling for agencies to engage in benchmarking, or "comparative evaluations" of one another, in order to ultimately achieve best practices); Susan P. Sturm, *supra* note 283, at 327-31 (describing institutional intermediaries). *See also* MALCOLM SPARROW, THE REGULATORY CRAFT: CONTROLLING RISKS, SOLVING PROBLEMS, AND MANAGING COMPLIANCE 167-68 (2000) (expressing a desire for agencies to "organize the lessons they learn and to make the accumulated knowledge readily available").

nonprofit conducting research on organizational ethics—"Ethical culture is the single biggest factor determining the amount of misconduct in [an] organization."[292] Likewise, to obtain the benefits of a mitigated sentence under the Organizational Sentencing Guidelines a corporation must "promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law."[293] In some cases, monitors are dealing with these issues to at least some degree, but in others they are not. Not delving into these issues may be the right decision in certain limited situations. In practice, however, this determination has less to do with a well-thought-out strategy to match the monitorship to the case at hand, and more to do with flaws in the monitorship process. In cases where wrongdoing is widespread within the organization and social pressures toward corruption are great, the monitor must investigate a corporation's culture and force the corporation to address these issues if monitorships are expected to have a reliable impact on corporate behavior over the long term. We are not saying that technical, compliance-based monitorships are never useful. Having in place appropriate processes and procedures is important to corporate compliance and is the foundation of an ethical corporate culture. Thus, all monitors serve an important function in making sure that firms are structurally equipped to prevent and detect internal wrongdoing. What we advocate, though, is a monitorship process that incorporates some of the learning that has emerged from compliance professionals about the importance of organizational culture. The reforms suggested here—including rethinking who is qualified to serve as a monitor and capturing the lessons from experience—are simple steps toward creating more ambitious and more consistently successful monitorships.

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[292] Ethics Res. Ctr., *National Business Ethics Survey: An Inside View of Private Sector Ethics* 26 (2007).

[293] U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a) (2004).