GUIDE TO MONITORSHIPS

THIRD EDITION

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

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Publisher's Note

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

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

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

The guide is a companion to a larger reference work – GIR's *The Practitioner's Guide to Global Investigations* (now in its sixth edition), which walks readers through the issues raised and the risks to consider, at every stage in the life cycle of a corporate investigation, from discovery to resolution. You should have both books in your library: *The Practitioner's Guide* for the whole picture and the *Guide to Monitorships* for the close-up.

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

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

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Preface

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

Part I offers an overview of monitorships. First, Neil M Barofsky – former Assistant US Attorney and Special Inspector General for the Troubled Asset Relief Program, who has served as an independent monitor and runs the monitorship practice at Jenner & Block LLP – and his co-authors Matthew D Cipolla and Erin R Schrantz of Jenner & Block LLP explain how a monitor can approach and remedy a broken corporate culture. They consider several critical questions, such as how a monitor can discover a broken culture; how a monitor can apply 'carrot and stick' and other approaches to address a culture of non-compliance; and the sorts of internal partnership and external pressures that can be brought to bear. Next, former Associate Attorney General Tom Perrelli, independent monitor for Citigroup Inc and the Education Management Corporation, walks through the life cycle of a monitorship, including the process of formulating a monitorship agreement and engagement letter, developing a work plan, building a monitorship team, and creating and publishing first and final reports. Next, Bart M Schwartz of Guidepost Solutions LLC – former chief of the Criminal Division in the Southern District of New York, who later served as independent monitor for General Motors – explores how enforcement agencies decide whether to appoint a monitor and how that monitor is selected. Schwartz provides an overview of different types of monitorships, the various agencies that have appointed monitors in the past, and the various considerations that go into reaching the decisions to use and select a monitor. Finally, Pamela Davis and her co-authors, Suzanne Jaffe Bloom and Mariana Pendás Fernández at Winston & Strawn, explain how

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

Part II contains three chapters that offer experts' perspectives on monitorships. Professor Mihailis E Diamantis of the University of Iowa provides an academic perspective, describing the unique criminal justice advantages and vulnerabilities of monitorships, and the implications that the appointment of a monitor could have for other types of criminal sanctions. Jeffrey A Taylor, a former US Attorney for the District of Columbia and chief compliance officer of General Motors, who is now executive vice president and general counsel of Fox Corporation, provides an in-house perspective, examining what issues a company must confront when faced with a monitor, and suggesting strategies that corporations can follow to navigate a monitorship. Finally, Loren Friedman, Thomas Cooper and Nicole Sliger of BDO USA provide insights as forensic professionals by exploring the testing methodologies and metrics used by monitorship teams.

The five chapters in Part III examine the issues that arise in the context of cross-border monitorships and the unique characteristics of monitorships in different areas of the world. Gil Soffer, former Associate Deputy Attorney General, former federal prosecutor and a principal drafter of the Morford Memorandum, and his co-author Johnjerica Hodge – both at Katten Muchin Rosenman LLP – consider the myriad issues that arise when a US regulator imposes a cross-border monitorship, examining issues of conflicting privacy and banking laws, the potential for culture clashes, and various other diplomatic and policy issues that corporations and monitors must face in an international context. Nicholas Goldin and Joshua Levine, of Simpson Thacher & Bartlett – both former prosecutors with extensive experience in conducting investigations across the globe – examine the unique challenges of monitorships arising under the US Foreign Corrupt Practices Act (FCPA). By their nature, FCPA monitorships involve US laws that regulate conduct carried out abroad, and so Goldin and Levine examine the difficulties that may arise from this situation, including potential cultural differences that may affect the relationship between the monitor and the company. Next, Switzerland-based investigators Simone Nadelhofer, Daniel Bühr and their co-authors, at LALIVE SA, explore the Swiss financial regulatory body's use of monitors. Judith Seddon, an experienced white-collar solicitor in the United Kingdom, and her co-author at explore how UK monitorships differ from those in the United States. And litigator Jason Kang and former federal prosecutors Wade Weems, Daniel Lee and Scott Hulsey, at Kobre & Kim, examine the treatment of monitorships in the East Asia region.

Part IV has 10 chapters that provide subject-matter and sector-specific analyses of different kinds of monitorships. Frances McLeod and her co-authors at Forensic Risk Alliance explore the role of forensic firms in monitorships, examining how these firms can use data analytics and transaction testing to identify relevant issues and risk in a monitored financial institution. Additionally, Rachel Wolkinson and Blair Rinne, at Brown Rudnick LLP, explore how monitorships are used in resolutions with the SEC. Next, with their co-authors at Wilmer Cutler Pickering Hale and Dorr LLP, former Deputy Attorney General David Ogden and former US Attorney for the District of Columbia Ron Machen, co-monitors in a healthcare fraud monitorship led by the US Department of Justice (US DOJ), explore the appointment of monitors in cases alleging violations of healthcare law. Günter Degitz and Richard Kando of AlixPartners, both former monitors in the financial services industry, examine the use of monitorships in that field. Michael J Bresnick of Venable LLP, who served as independent monitor of the residential mortgage-backed securities consumer relief settlement with Deutsche Bank AG, examines consumer-relief fund monitorships. With his co-authors at Kirkland & Ellis LLP, former US District Court Judge, Deputy Attorney General and Acting Attorney General Mark Filip, who returned to private practice and represented BP in the aftermath of the Deepwater Horizon explosion and the company's subsequent monitorship, explores issues unique to environmental and energy monitorships. Glen McGorty, a former federal prosecutor who now serves as the monitor of the New York City District Council of Carpenters and related Taft-Hartley benefit funds, and Lisa Umans of Crowell & Moring LLP lend their perspectives to an examination of union monitorships. Ellen S Zimiles, Patrick J McArdle and their co-authors at Guidehouse explore the legal and historical context of sanctions monitorships. Jodi Avergun, a former chief of the Narcotic and Dangerous Drug Section of the US DOJ and former Chief of Staff for the US Drug Enforcement Administration, former federal prosecutor Todd Blanche and Christian Larson, of Cadwalader, Wickersham & Taft LLP, discuss the complexities of monitorships within the pharmaceutical industry. And Kevin Abikoff, Laura Perkins, Michael DeBernardis and Christine Kang at Hughes Hubbard & Reed explain the phenomenon of monitorships being imposed as part of the sanctions systems at the World Bank and other multilateral development banks.

Finally, Part V contains three chapters discussing key issues that arise in connection with monitorships. McKool Smith's Daniel W Levy, a former federal prosecutor who has been appointed to monitor an international financial institution, and Doreen Klein, a former New York County District Attorney, consider the complex issues of privilege and confidentiality surrounding monitorships.

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

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

Anthony S Barkow, Neil M Barofsky and Thomas J Perrelli
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Part I

An Overview of Monitorships

CHAPTER 4

Succeeding across a Monitor's Audiences

Pamela Davis, Suzanne Jaffe Bloom and Mariana Pendás Fernández[1]

Introduction

It is a unique model: an unrelated, independent, private person, overseen by and responsible for issuing reports to a government agency or regulator, though paid for by the organisation, is tasked with reducing the risk of recurrence of an organisation's misconduct. Although the monitorship is imposed at the same time as the entity is being punished for its prior misconduct, the role of the monitor is not to further punitive goals.[2] Rather, it is to assess and recommend improvements to the organisation's compliance programme.

One of the most common challenges faced in monitorships comes from the need for the monitor to fulfil these responsibilities at a time when hostilities may be elevated and trust is lacking among all parties. By their very nature, monitorships are imposed when the government does not trust the organisation to address or reduce the risk of future misconduct without direct oversight, and after what was likely years of costly, protracted investigations or litigation. The organisation has almost certainly spent years distracted from its core business and is unlikely to view the imposition of a monitor as a positive event. To add to this general feeling of mistrust, frustration and exhaustion, the organisation is reminded that this government-appointed monitor is independent, no privilege will attach to

1 Pamela Davis and Suzanne Jaffe Bloom are partners and Mariana Pendás Fernández is an associate at Winston & Strawn LLP.

2 See Memorandum from Craig S Morford, Acting Deputy Att'y General, 'Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations' (Morford Memorandum) (Mar. 7, 2008), available at www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf (last accessed 15 Feb. 2022).

his or her work, the organisation's cooperation must be full and forthcoming, and the multi-year costs associated with the monitor's oversight must be borne by the organisation.

It is with this backdrop that the monitor must begin the task.

We define success in this challenging context as guiding the organisation to improve its compliance programme, assisting the organisation's development and reinforcement of practical solutions and practices that reduce future risks, and ensuring the organisation's compliance measures meet government expectations. One of the keys to success is creating an environment that enables these improvements to occur. Ultimately, we gauge success by whether the organisation, on completion of the monitorship, is in a better position to understand and control its own unique compliance risks and be a better corporate citizen, while also having avoided undue financial burdens and disruptions to operations.

This chapter provides insights regarding navigating the complex and delicate nature of the sensitive relationships among the parties to a monitorship, and the steps that can be taken to minimise and overcome the related challenges to increase the likelihood of a successful monitorship – one that will achieve the stated monitorship goals to each party's satisfaction.

Laying the groundwork for success

In recent years, monitorships have been utilised in a variety of actions, including those involving alleged wrongdoing concerning (1) anti-bribery and anti-corruption,[3] (2) anti-money laundering and economic sanctions,[4] (3) export

3 See, e.g. US Department of Justice (DOJ) press release, 'Ericsson Agrees to Pay Over $1 Billion to Resolve FCPA Case' (Dec. 6, 2019), available at https://www.justice.gov/opa/pr/ericsson-agrees-pay-over-1-billion-resolve-fcpa-case (last accessed 15 Feb. 2022).

4 See, e.g., *United States v. HSBC USA*, Deferred Prosecution Agreement, Attachment B, Corporate Compliance Monitor (Dec. 10, 2012), available at https://www.justice.gov/sites/default/files/opa/legacy/2012/12/11/dpa-executed.pdf (last accessed 15 Feb. 2022).

controls,[5] (4) healthcare fraud,[6] (5) environmental violations[7] and (6) consumer-relief settlements,[8] to name a few. Although 2021 was unique with respect to the absence of monitorships imposed by the US Department of Justice (DOJ) Fraud Section relating to the Foreign Corrupt Practices Act (FCPA),[9] the DOJ recently reconfirmed its intention to impose monitorships as a compliance mechanism in all types of cases. As part of Deputy Attorney General Lisa Monaco's revised DOJ monitorship guidance announcement on 28 October 2021, the DOJ reinforced its view that monitorships 'can be an effective resource in assessing a corporation's compliance with the terms of a corporate criminal resolution, whether a DPA [deferred prosecution agreement], NPA [non-prosecution agreement] or plea agreement'.[10]

Regardless of the organisation, industry, sector, type of violation or government agency involved, it is essential that appropriate time and attention be given to laying the groundwork in any monitorship. Successful monitorships begin with identifying and selecting the best monitor for the job – an individual with a keen understanding of the goals of the monitorship, and the skills and experience necessary for achieving those goals. At the outset, and before jumping into the daily work of the monitorship, a successful monitor will work to establish trust

5 See e.g., *United States v. ZTE Corp.*, Plea Agreement (Mar. 2, 2017), available at https://www.justice.gov/opa/press-release/file/946276/download (last accessed 15 Feb. 2022).

6 See, e.g., DOJ press release, 'Hospital Chain Will Pay over $513 Million for Defrauding the United States and Making Illegal Payments in Exchange for Patient Referrals; Two Subsidiaries Agree to Plead Guilty' (Oct. 3, 2016), available at https://www.justice.gov/opa/pr/hospital-chain-will-pay-over-513-million-defrauding-united-states-and-making-illegal-payments (last accessed 15 Feb. 2022).

7 See, e.g., DOJ press release, 'PG&E Ordered To Develop Compliance And Ethics Program As Part Of Its Sentence For Engaging In Criminal Conduct' (Jan. 26, 2017), available at https://www.justice.gov/usao-ndca/pr/pge-ordered-develop-compliance-and-ethics-program-part-its-sentence-engaging-criminal (last accessed 15 Feb. 2022).

8 See, e.g., DOJ press release, 'Federal Government and State Attorneys General Reach $25 Billion Agreement with Five Largest Mortgage Servicers to Address Mortgage Loan Servicing and Foreclosure Abuses' (Feb. 9, 2012), available at https://www.justice.gov/opa/pr/federal-government-and-state-attorneys-general-reach-25-billion-agreement-five-largest (last accessed 15 Feb. 2022).

9 See 'List of Independent Compliance Monitors for Active Fraud Section Monitorships', available at https://www.justice.gov/criminal-fraud/monitorships (last accessed 15 Feb. 2022).

10 See Memorandum from Deputy Att'y General, 'Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies' (Memorandum on Corporate Crime Advisory Group) (Oct. 28, 2021), available at https://www.justice.gov/dag/page/file/1445106/download (last accessed 15 Feb. 2022).

and promote cooperation, set appropriate expectations regarding confidentiality and other sensitive issues, work hard to gain a thorough understanding of the organisation's operations and concerns, and create a carefully tailored work plan with appropriate input from the organisation.

Identifying and selecting the monitor

Once the likelihood of a monitorship becomes clear, one of the most important steps is monitor selection. The need to choose a competent monitor seems obvious; however, selecting the right monitor is not without challenge. Since 2008, the DOJ has issued monitor selection guidance.[11] The first published guidance, the Memorandum from Acting Deputy Attorney General Craig S Morford of 7 March 2008, specified that both the entity to be monitored and the government should first focus on selecting (1) highly qualified individuals (2) with no conflicts of interests (3) who 'instill public confidence'.[12] Although these criteria are critical, the monitor's capacity to establish and facilitate ongoing, fluid, trusted communications among the parties, which we discuss in detail below, may be paramount.

It is axiomatic that every monitorship differs because of the individual circumstances involved. Those circumstances may relate to a variety of factors, including industry, subject matter, geographical scope, historical compliance backdrop, period of wrongdoing, individuals involved, complexity of the wrongdoing and current management, among other things. However, no matter the degree of individualised circumstances, a successful monitorship typically begins with the identification of a monitor who instils confidence. Frequently, initial confidence begins with identification of a monitor with a thorough understanding of, and practical experience in, the specific sector or industry involved. Understanding how business is conducted in a particular industry provides the basic groundwork needed to assess the functionality and effectiveness of the entity's existing compliance programme and structure.

Beyond industry knowledge, it is helpful for monitor candidates to have a legal background so that they can successfully navigate the many legal issues that may arise during a monitorship, such as those surrounding privilege. To ensure seamless interactions with both the forensic accountants who will assist the monitor team

11 See Morford Memorandum.

12 See Morford Memorandum, p. 3. See also Memorandum from Stuart F Delery, Acting Associate Att'y General, 'Statement of Principles for Selection of Corporate Monitors in Civil Settlements and Resolutions' (13 Apr. 2016), available at https://www.justice.gov/oip/foia-library/asg_memo_statement_of_principles_corporate_monitors_civil_settlements/download (last accessed 15 Feb. 2022).

and personnel from the entity's various financial control functions, it is equally important to identify candidates with not just a compliance background but also a good understanding of accounting principles and effective financial controls. This is especially true where the subject matter of the monitorship will require substantial financial forensic analysis. To the extent that monitor candidates lack either the necessary legal or accounting background, at a minimum, it is essential that individuals with such experience be included on the monitor team.

Establishing trust at the outset

A successful monitorship does not just happen. At a time when trust is in short supply, success across all constituencies requires a significant amount of understanding and work. A monitor who possesses a good understanding of the sector or industry in which the entity is operating may be positioned to garner the initial confidence of the organisation but building and keeping lasting trust, by all parties to the monitorship, requires far more than basic industry knowledge.

At the inception of every relationship, including one that involves a monitor, an organisation and the government, expectations are being set. Although this process may involve unspoken messaging in some of our personal relationships, expectations in the three-way monitorship relationship should not be left to chance or potential misinterpretation. Proactively setting expectations and fostering open communication enables monitors to secure needed buy-in, trust and cooperation from the organisation, while clearly establishing that the monitor will not set his or her independence aside.

Setting expectations and navigating confidentiality concerns

A monitor must be independent of both the government and the entity being monitored. 'A monitor is an independent third party, not an employee or agent of the corporation or of the Government.'[13] Moreover, independence precludes an attorney–client relationship, or any form of an advocacy relationship, between the monitor and the organisation prior to, throughout and for a designated period following completion of the monitorship.[14] Accordingly, there should be no expectation that communications between the monitor and the organisation will be protected by the attorney–client privilege.

13 See Morford Memorandum.

14 See American Bar Association (ABA), 'Standards for Criminal Justice Monitors and Monitoring', issued by Criminal Justice Standards Committee on Monitors.

Despite the absence of any attorney–client protection, the interests of the government and the monitor – that the organisation will meet its obligation to fully cooperate, produce requested materials and information, and engage with the monitor – remain. Conversely, in the absence of any attorney–client protection, the monitored entity's concerns regarding protecting any privileged, commercial, business or proprietary information subject to the monitor's work is likely heightened. Accordingly, albeit for disparate reasons, all parties share an interest in maintaining and protecting confidentiality throughout the monitorship. For that reason, frequently government agreements or court orders are drafted to provide some level of protection to the organisation, such as requiring that reports and other information provided or generated as part of a monitorship be kept confidential.[15]

Building confidence in the monitor's abilities and approach, and thereby laying the proper groundwork for success, requires ensuring that expectations regarding confidentiality and privilege issues are clear among all parties from the start. As such, it is critical to gain a thorough understanding of the organisation's legal obligations with respect to maintaining confidentiality of various information, including obligations stemming from data protection regulations, blocking statutes, privacy laws and even certain employment or labour laws, and for the monitor and the government to be mindful of those obligations. Working with the organisation to find mechanisms that maintain confidentiality, comply with the numerous laws and regulations to which the organisation is subject, and also meet the expectations of the government agreement or court order, to the extent possible, can lead to immeasurable value in promoting cooperation.

Although honouring the need for confidentiality and compliance with laws and regulations is vital, it is equally important to ensure that the subject of the monitorship understands that communications to and from the monitor, documents and information provided to the monitor, as well as reports generated by the monitor, while afforded some confidentiality protections, are not protected

15 See ABA, Criminal Justice Standards on Monitors, 'Standard 24-4.3 Scheduled Reports and Other Reports and Communications', available at https://www.americanbar.org/groups/criminal_justice/standards/MonitorsStandards/ (last accessed 15 Feb. 2022).

by the attorney–client privilege or the work-product doctrine.[16] To that end, a monitor focused on success across all constituencies will thoughtfully develop data collection requests and information gathering processes that ensure the monitor is given access to all information reasonably necessary to fulfil his or her duties without unnecessarily causing the company to risk the loss of existing privilege protections or placing the monitor in the position of potentially being compelled to produce the entity's privileged materials.[17]

The parties to the monitorship are far more likely to view a monitor as a success if he or she is always mindful that the goal is not to create unnecessary risks for the organisation or to put the organisation in a worse position, or to create litigation hurdles that the government will potentially have to address, but to reduce organisational risk, specifically to reduce the risk of future misconduct and compliance shortcomings.

Effectively using the work plan

Monitors are provided with guidance by the government on their remit, which will almost certainly require submission of periodic work plans. In this context, work plans are frequently like the initial steps in a compliance risk assessment conducted in the normal course of business (i.e., assessments that do not originate from an investigation or enforcement action). Beyond creating expectations for the stakeholders involved in the process – both at the entity and at the government – work plans have the ability to either instil or diminish confidence, as they evidence the monitor's understanding of the scope. Though seldom discussed in this way, they can also be useful in avoiding the creation, or perception, of moving targets, and can be instrumental in preventing the creation of that most feared being – the

16 See, e.g., *Tokar v. DOJ*, No. 16-2410, 2019 WL 6910142 (D.D.C. Dec. 19, 2019) (Contreras, J) and DOJ press release, 'Tokar v. DOJ, No. 16-2410, 2019 Wl 6910142 (D.D.C. Dec. 19, 2019) (Contreras, J)' (19 Dec. 2019) available at https://www.justice.gov/oip/tokar-v-doj-no-16-2410-2019-wl-6910142-ddc-dec-19-2019-contreras-j (last accessed 15 Feb. 2022); see also *100Reporters LLC v. U.S. Dep't of Justice*, 2018 WL 2976007 (D.D.C. Jun. 13, 2018) and DOJ press release, '100Reporters LLC v. DOJ, No. 14-1264, 2018 WL 2976007 (D.D.C. Jun. 13, 2018) (Contreras, J)' (13 Jun. 2018), available at https://www.justice.gov/oip/100reporters-llc-v-doj-no-14-1264-2018-wl-2976007-ddc-june-13-2018-contreras-j (last accessed 15 Feb. 2022).

17 See ABA, Criminal Justice Standards on Monitors, 'Standard 24-4.2 Access to Records, Persons and Information', available at https://www.americanbar.org/groups/criminal_justice/standards/MonitorsStandards/ (last accessed 15 Feb. 2022).

runaway monitor. If handled wisely, the work plan, and the processes used to create it, offer unique opportunities to address some of the underlying mistrust between the parties and reduce potential resistance to the monitor's efforts.

Most understand, and agree, that as part of laying the groundwork for a successful monitorship, the priority is investing time to understand the organisation's business, customer base, compliance structure, governance model, management committees and relevant compliance personnel, in addition to understanding the underlying compliance deficiencies that resulted in the misconduct triggering the government action in the first place.

The process employed by the monitor to gather information regarding the prior wrongdoing is often what sets monitors apart. In most monitorships, efforts to gather background about the organisation and compliance structure do not prompt resistance or pushback. Requests targeted at this type of general information are expected. However, the moment the monitor informs the organisation of the need to understand the prior wrongdoing and underlying compliance deficiencies that triggered the government action in the first place, and the underlying compliance deficiencies that led to that wrongdoing, or the need to understand existing compliance-focused whistleblower allegations or investigations, concerns and resistance by the organisation frequently arise. Planning for these moments, and handling these concerns thoughtfully, can be the difference between success or utter disaster.

As a first step, identifying the basis for the resistance is critical. It is important to remember that the organisation has just been through years of costly investigations or litigation (or both), followed by what is likely to be years of costly disclosures and negotiations. Accordingly, assessing whether the company's resistance is due to the fear that the monitor is seeking to reopen or reinvestigate resolved matters or, without any privilege protections, may be invading currently privileged space, rather than an unwillingness to cooperate, should be part of the monitor's process.

Thorough and detailed work plans can assist in alleviating fears of moving targets or uncontrolled expansion of the monitor's scope and potentially reduce resistance to the monitor's efforts. In addition, it is helpful to establish the motivation for requesting information about the prior wrongdoing or current compliance-focused whistleblower allegations, including that the monitor is not inappropriately reinvestigating historical conduct or acting as a prosecutor, but rather seeking information that is necessary for developing improvements and achieving compliance going forward. Beyond alleviating certain fears, the inclusion of as many specifics as appropriate under the monitorship, such as projected work streams, projected data collection, timelines for critical events such as site or market visits, report drafting and review, and opportunities for the government and the organisation

to provide feedback at critical junctures, will work to promote cooperation and trust from the beginning. Although it may seem challenging at first, building these types of processes and specifics into the work plan can prove invaluable.

Beyond the actual work plan, the process by which it is created, and the numerous interactions between the parties to the monitorship during that process, presents additional opportunities to build trust and reduce resistance. Expressing appreciation of the fact that the organisation may perceive the obligation to pay for the monitor's work and oversight as an additional punishment, while suggesting it should also consider that this sunken cost, and the requirement to improve its compliance structure, also conversely presents a cost reduction opportunity. In other words, the work plan process can be utilised to encourage the organisation to find the value in the cost of a monitorship – an independent resource with significant experience and insights that can help improve compliance and serve as a mechanism for reducing future costs of non-compliance.

The work plan process further presents the opportunity to make clear that although the monitor's task is to address and reduce the risk of future misconduct, this task is not to the exclusion of the organisation's own insights. Although the monitor must ultimately determine the areas that should be included in the review, and understanding that the work plan is simply a guide and not a binding agreement with the entity, seeking input from the entity to be monitored during creation of the work plan can provide significant value to all parties to the monitorship. First, it focuses the monitor on issues with which the organisation is already struggling, without wasting valuable time or resources. Second, it allows the monitor to observe whether the organisation is developing the skills necessary to assess its own unique risks. Third, it enables the monitor to provide the government with information regarding high-risk areas without having to wait for completion of review cycles. In addition, seeking and respecting the organisation's input helps the organisation see instant value relating to the costs of the monitorship, while also laying the foundation for trust and cooperation without compromising the monitor's independence.

The need for ongoing commitment at all levels

Engagement by compliance personnel in the monitorship process typically occurs without request. It is expected that a monitor's review of the effectiveness of the organisation's compliance programme will necessarily involve personnel within the compliance or legal organisation. Continual engagement, including regularly scheduled meetings, with the organisation's compliance or legal personnel provides critical efficiencies in the monitor's review process, including assistance in tracking and gathering requested documents, scheduling market visits and

interviews, and providing regular status updates. In addition, this direct interaction provides opportunities for internal personnel to observe, in real time, effectiveness testing of the organisation's existing processes and controls, as well as a chance to gain an understanding of the root causes associated with compliance deficiencies and how best to develop effective remediation measures.

However, a successful monitorship requires engagement beyond the compliance or legal departments. Although compliance-related rules or controls may frequently be set by compliance or legal departments, culture is set from the top. An organisation with all the necessary and appropriate rules and controls will still fail if leadership is absolved from abiding by those rules and controls. Accordingly, setting expectations for commitment by board and senior management, from the beginning, is key to meeting compliance and monitorship requirements.[18] Ensuring an organisation's leadership is not only setting appropriate rules but is faithful to the rules that have been set, is essential to the monitor's remit.

Balancing transparency and surprise

Although transparent processes that promote an organisation's involvement in the path to compliance effectiveness, such as open communications with the board and senior management and opportunities for the organisation to provide input at various stages of the monitorship, lay a solid foundation for trust and cooperation, this transparency should not be without limits. Direct engagement must never be at the cost of independence. Effective monitor assessment also requires a certain degree of testing and observation of the compliance processes without advance warning to the organisation, so as to mitigate the possibility of results being skewed by efforts to prepare for assessments. Alerting the organisation that a certain amount of testing without warning may occur can prove helpful.

Handling disagreements

It should not be surprising that disagreements between the monitor and the organisation arise to varying degrees during the life of the monitorship. Some of the more common disagreements concern (1) the perception that the monitor is

18 See, e.g., Department of the Treasury, 'A Framework for OFAC Compliance Commitments' (2 May 2019), available at https://home.treasury.gov/system/files/126/framework_ofac_cc.pdf (last accessed 15 Feb. 2022).

inappropriately reinvestigating historical conduct,[19] (2) the organisation's resistance to employee interviews, (3) the organisation's view that the monitor's recommendations are unduly burdensome, impracticable or expensive, and (4) the costs of the monitorship. From a practical perspective, assuming the data requests or proposed interviews are focused on understanding the existing compliance culture, implementation of controls, areas for improvement and overall compliance issues at hand, the monitor should not be deterred by the organisation's resistance. However, as previously stated, establishing the motivation for requesting this information, including that the monitor is not inappropriately reinvestigating historical conduct or acting as a prosecutor, but that this information is necessary for developing improvements and achieving compliance going forward, is not inappropriate. The risk of disagreements, although not eliminated, can be reduced significantly by ensuring that clear expectations, such as those regarding scope, timeline and costs, are established at the outset. Preparing everyone for potential disagreements before they occur, and agreeing in advance on how disagreements will be resolved, will help to build a relationship of transparency and trust. It will also increase the likelihood that disagreements will be managed and resolved in a timely and cost-efficient manner and, perhaps most importantly, will not require escalation to the government.

In most circumstances, the monitor should try every avenue for resolving disagreements with the organisation before reporting or escalating issues to the government. Not surprisingly, there may be situations where despite best efforts, government involvement in the dispute cannot be avoided. Even in these circumstances, the monitor's willingness to work with the organisation to attempt to find a solution before involving the government will go a long way to continuing to build trust between all parties.

Of course, attempting to resolve issues prior to government escalation is not always feasible or appropriate. In certain circumstances, the monitor is obliged to report to the government directly, without informing the organisation. For example, a monitor typically must disclose issues that put public health or the environment at risk, or involve senior management, obstruction of justice,

19 Although most (nearly all) monitorships are forward-looking and compliance-focused, some are backward-looking and investigative. See, e.g., DOJ press release, 'Credit Suisse Agrees to Pay $5.28 Billion in Connection with Its Sale of Residential Mortgage-Backed Securities' (18 Jan. 2017), available at https://www.justice.gov/opa/pr/credit-suisse-agrees-pay-528-billion-connection-its-sale-residential-mortgage-backed; and Credit Swiss Settlement Agreement (18 Jan. 2017), available at https://www.justice.gov/opa/press-release/file/928521/download (websites last accessed 18 Feb. 2022).

criminal activities or otherwise pose substantial harm.[20] In these circumstances, as with disagreements that cannot be resolved without government involvement, a monitorship agreement that lays out the role of the government in resolving a dispute, or reporting an issue, will prove invaluable.[21]

Managing the monitor's written recommendations

Because one of the most common disagreements between the monitor and the organisation concerns the monitor's written recommendations, discussing this risk with the organisation at the outset and creating a process that minimises the disruptive nature of this type of disagreement is constructive.

While reinforcing the importance of independence and the monitor's ultimate responsibility – to ensure that the organisation has an effective compliance programme – creating a process that allows the organisation an opportunity to provide feedback on the monitor's draft written report and recommendations prior to submission to the government serves many purposes, including fostering continued trust and cooperation, reducing the risk of protracted disagreement and advancing the interests of all stakeholders. First, the process provides the organisation with an opportunity to correct misconceptions or potential factual errors on the part of the monitor and gives perspective to whether the monitor's recommendations are feasible. The organisation may be able to present more practical alternatives that do not impose undue burden on the organisation or a needless drain on resources, though still achieve the monitor's desired results. Second, the process provides the monitor with additional information for consideration in assessing the organisation's progress, including assessing the organisation's ideas for improvements – ideas that the monitor may not have considered. Third, and perhaps most importantly, this process is in keeping with the DOJ's guidance[22] and helps to ensure the government will receive a final report and recommendations that have been fully vetted and contain the most accurate and

20 See Morford Memorandum, p. 7.

21 See Memorandum from Acting Deputy Att'y General Gary G Grindler, 'Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations 1–2' (Grindler Memorandum) (25 May 2010), available at https://www.justice.gov/sites/default/files/dag/legacy/2010/06/01/dag-memo-guidance-monitors.pdf (last accessed 15 Feb. 2022).

22 See Grindler Memorandum; see also Criminal Justice Resource Manual at 166, 'Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations' (25 May 2010), available at https://www.justice.gov/archives/jm/criminal-resource-manual-166-additional-guidance-use-monitors-dpas-and-npas (last accessed 15 Feb. 2022).

complete information. A process that offers the organisation an opportunity to provide input on the report and recommendations and obliges the monitor to give fair consideration to that input reduces the likelihood that the government will have to step in and resolve disputes or disagreements, which can also impede the progress and success of the monitorship.

Never losing sight of the monitor's remit

The goal of a monitorship is not to control every potential issue that arises but rather to ensure that the organisation develops and implements the tools necessary to identify, appropriately investigate and promptly remediate compliance deficiencies, both during the monitorship and long after the monitorship is over. Regulatory breaches, challenges, mistakes, wrongdoing or operational failures may be identified during the monitorship that do not fit squarely within the scope of the monitorship. In such cases, while it may be tempting for the monitor to conduct a full-blown investigation, especially since the monitor will want to understand the root cause of the compliance deficiency, it is more in keeping with the goal of a monitorship to allow the organisation an opportunity to conduct and manage the investigation itself and apply the processes in place to address the deficiency. Assessing the effectiveness of the organisation's compliance programme includes reviewing its response and the degree to which that response meets compliance expectations. Indeed, in certain circumstances where a brief delay is acceptable and in accordance with the terms of the government agreement, it may be appropriate for the monitor to give the organisation a reasonable amount of time to conduct the investigation in advance of disclosing it. This brief delay allows the monitor to focus on his or her true remit – to determine whether the organisation's compliance processes were implemented in an effective manner for the purposes of adequately detecting, addressing and remediating deficiencies.

Avoiding a runaway monitor

A runaway monitor is one who causes the subject of a monitorship to incur unnecessary and excessive fees that do not further the goal of improving the organisation's compliance programme. Mindful of the historical issues and need to reduce the future risk of runaway monitors, the DOJ has published various guidance on the topic. The DOJ's Memorandum on Corporate Crime Advisory Group cautions that the need for a monitor should be assessed case by case and that an important consideration is 'the cost of a monitor and its impact on the

operations of a corporation'.[23] Similarly, DOJ guidance regarding monitorships of state and local entities stresses the importance of being mindful of the costs associated with monitorships, noting that 'every dollar spent on a monitorship is a dollar that cannot be spent [by the monitored state or local entity] on other policy priorities'.[24]

Because no two monitorships are the same, the moment at which monitorship expenses become unnecessary or excessive cannot be easily defined. It is no surprise that the longer the monitorship, the higher the costs associated with it. For that reason, it is critical that the government determines what it believes represents a reasonable amount of time to put in place an adequate, sustainable compliance system and works those time limitations into the monitorship agreement. Indeed, including provisions allowing for early termination of the monitorship if the organisation meets certain benchmarks may be an effective tool for aligning interests and containing monitorship costs by appropriately limiting the duration of the monitorship.[25] Once the monitorship is up and running, it is imperative that the monitor carefully considers cost issues at every stage and takes all appropriate measures to avoid requiring the organisation to spend resources that are not necessary to achieve the ultimate goal. A successful monitor is mindful of the fact that the role is not inappropriately to investigate historical misconduct nor to take a scorched earth approach in trying to identify any possible compliance vulnerability in all aspects of the organisation's operations. Such an approach is well beyond what is needed to carry out the monitor's mission and would impose tremendous burdens on the organisation in terms of time, money and disruption to its operations. Rather, the monitor should be focused on reducing the risk of recurrence of the misconduct that gave rise to the need for the monitorship in the first instance.

Conclusion

As the theme of this chapter suggests, a big part of setting the right expectations is to define at the outset what 'success' means in any particular case. Laying the groundwork for success encompasses a series of logical steps, such as identifying the monitor, setting the tone at the beginning, addressing confidentiality, building an efficient work plan and preparing the parties for inevitable disagreements. As

23 See Memorandum on Corporate Crime Advisory Group, p. 4.

24 See, e.g., Memorandum from the Att'y General, 'Review of the Use of Monitors in Civil Settlement Agreements and Consent Decrees Involving State and Local Governmental Entities' (13 Sep. 2021), p. 4, available at https://www.justice.gov/ag/page/file/1432236/download (last accessed 17 Feb. 2022).

25 See Morford Memorandum, p. 8.

explained in the chapter, the fact that the steps are obvious does not mean they are without challenge. A good monitor is constantly working to build confidence, across all constituencies, that he or she is up to the task – to guide the organisation to improve its compliance programme, to ensure that compliance measures meet government expectations, and to reinforce practical solutions and practices that reduce future risks. With the confidence of the government and the organisation, the monitor can build trust among the parties.

The monitor's role is not to appease the organisation or abide by its desires, nor, conversely, to serve as an adversary to the organisation. The monitor's role is to make the organisation better from a compliance perspective: simply stated, to assist the organisation in becoming a better corporate citizen.

Although there is no guaranteed process to prevent potential pitfalls in a monitorship, nor can any chapter address all the potential pitfalls the parties may confront during the pendency of a monitorship, the recommendations set forth in this chapter may help create a path to a successful monitorship – one that achieves success across all constituencies.

APPENDIX 1

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Pamela Davis, chair of Winston & Strawn's Foreign Corrupt Practices Act (FCPA) and anti-corruption practice, is a seasoned white-collar and regulatory defence attorney, with a particular focus on FCPA, compliance and global investigations. In recent years, she has led more than 100 internal investigations for multinational organisations throughout Asia, Europe, South Africa and the Americas. She has a deep understanding of compliance structures and supporting internal controls and has assisted clients with developing or enhancing corporate compliance plans, creating and revising FCPA policies and global codes, and designing and implementing highly successful compliance training sessions and investigative technique programmes. Ms Davis has the unique distinction of serving on three FCPA-related monitorships for companies subject to deferred prosecution agreements with the US Securities and Exchange Commission and the US Department of Justice as Independent FCPA Compliance Monitor, Legal Counsel to the Monitor and Independent Compliance Consultant. She regularly speaks at FCPA conferences and compliance forums and has received numerous honours, including recognition by *The Legal 500 US* as a leading lawyer in corporate investigations and white-collar criminal defence and a Lifetime Achievement Award from *Who's Who Legal*. In addition, *Global Investigations Review* has named her as the Top FCPA Practitioner in the world and as one of the Top 100 Women in Investigations globally.

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Since *WorldCom*, the United States Department of Justice and other agencies have imposed more than 80 monitorships on a variety of companies, including some of the world's best-known names. The terms of these monitorships and the industries in which they have been used vary widely. Yet many of the legal issues they raise are the same. To date, there has been no in-depth work that examines them.

GIR's *Guide to Monitorships* fills that gap. Written by contributors with first-hand experience of working with or as monitors, it discusses all the key issues, from every stakeholder's perspective, making it an invaluable resource for anyone interested in understanding or practising in the area.

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