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The Practitioner's Guide to Global Investigations

Volume I: Global Investigations in the United Kingdom and the United States

SEVENTH EDITION

Editors
Judith Seddon, Eleanor Davison, Christopher J Morvillo, Luke Tolaini, Celeste Koeleveld, F Joseph Warin, Winston Y Chan

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Volume I: Global Investigations in the United Kingdom and the United States

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Publisher's Note

The Practitioner's Guide to Global Investigations is published by Global Investigations Review (www.globalinvestigationsreview.com) – a news and analysis service for lawyers and related professionals who specialise in cross-border white-collar crime investigations.

The Guide was suggested by the editors to fill a gap in the literature – namely, how does one conduct (or conduct oneself) in such an investigation, and what should one have in mind at various times?

It is published annually as a two-volume work and is also available online and in PDF format.

The volumes

This Guide is in two volumes. Volume I takes the reader through the issues and risks faced at every stage in the life cycle of a serious corporate investigation, from the discovery of a potential problem through its exploration (either by the company itself, a law firm or government officials) all the way to final resolution – be that in a regulatory proceeding, a criminal hearing, civil litigation, an employment tribunal, a trial in the court of public opinion, or, just occasionally, inside the company's own four walls. As such it uses the position in the two most active jurisdictions for investigations of corporate misfeasance – the United States and the United Kingdom – to illustrate the practices and thought processes of cutting-edge practitioners, on the basis that others can learn much from their approach, and there is a read-across to the position elsewhere.

Volume II takes a granular look at law, regulation, enforcement and best practice in the jurisdictions around the world with the most active corporate investigations spaces, highlighting, among other things, where they vary from the norm.

Online

The Guide is available at www.globalinvestigationsreview.com. Containing the most up-to-date versions of the chapters in Volume I, the website also allows visitors to quickly compare answers to questions in Volume II across all the jurisdictions covered.

The publisher would like to thank the editors for their exceptional energy, vision and intellectual rigour in devising and maintaining this work. Together we welcome any comments or suggestions from readers on how to improve it. Please write to us at: insight@globalinvestigationsreview.com.

Preface

The history of the global investigation

For over a decade, the number and profile of multi-agency, multi-jurisdictional regulatory and criminal investigations have risen exponentially. Naturally, this global phenomenon exposes companies – and their employees – to greater risk of hostile encounters with foreign law enforcers and regulators than ever. This is partly owing to the continued globalisation of commerce, the increasing enthusiasm of some prosecutors to use expansive theories of corporate criminal liability to exact exorbitant penalties as a deterrent and public pressure to hold individuals accountable for the misconduct. The globalisation of corporate law enforcement has also spawned greater coordination between law enforcement agencies, domestically and across borders. As a result, the pace and complexity of cross-border corporate investigations has markedly increased and created an environment in which the potential consequences, direct and collateral, for individuals and businesses, are unprecedented.

The Guide

To aid practitioners faced with the challenges of steering a course through a cross-border investigation, this Guide brings together the perspectives of leading experts from across the globe.

The chapters in Volume I cover, in depth, the broad spectrum of law, practice and procedure applicable to investigations in the United Kingdom and United States. The volume tracks the development of a serious allegation (originating from an internal or external source) through all its stages, flagging the key risks and challenges at each step; it provides expert insight into the fact-gathering phase, document preservation and collection, witness interviews, and the complexities of cross-border privilege issues; it discusses strategies to resolve international probes successfully and manage government enforcers and corporate reputation throughout; and it covers the major regulatory and compliance issues that investigations invariably raise.

In Volume II, local experts from major jurisdictions across the globe respond to a common and comprehensive set of questions designed to identify the local nuances of law and practice that practitioners may encounter in responding to a cross-border investigation.

In the first edition, we signalled our intention to update and expand both parts of the book as the rules evolve and enforcers' appetites change. The Guide continues to grow in substance and geographical scope. By its third edition, it had outgrown the original

single-book format. The two parts of the Guide now have separate covers, but the hard copy should still be viewed – and used – as a single reference work. All chapters are made available online at www.globalinvestigationsreview.com and in other digital formats.

Volume I, which is bracketed by comprehensive tables of law and a thematic index, has been revised to reflect developments during the past year. These range from the introduction of compliance certifications now being required by the US Department of Justice from chief executive officers and chief compliance officers, at the conclusion of a monitorship, to the effect that the company's compliance programme is, broadly speaking, fit for purpose, to the DOJ's recent statements regarding its interest in corporate compensation systems that incentivise compliance by rewarding good behaviour and clawing back compensation for wrongdoing; to changes being brought about in the United Kingdom by the long-awaited Economic Crime (Transparency and Enforcement) Act 2022, whose introduction was accelerated by Russia's invasion of Ukraine on 24 February 2022. Most notable of the changes introduced was the removal of the requirement for the UK sanctions regulator, the Office for Financial Sanctions Implementation, to show that a person knew, or had reasonable cause to suspect, that they were in breach of sanctions, for a civil monetary penalty to be imposed, bringing the UK legal position into line with the position in the United States. Together with the increase in the sanctions targeting Russia, and a sharpened regulatory focus on sanctions controls, we can expect to see greater enforcement for breaches. Having expanded Volume I for the 2022 edition to incorporate ESG, we decided against commissioning further chapters. Instead we have chosen to consolidate and build on some of the newer chapters featuring rapid developments.

The questionnaire for Volume II continues to allow readers to gauge the developments in each jurisdiction profiled. It carries regional overviews that give insight into cultural issues and regional coordination by authorities. The second volume now covers 25 jurisdictions in Africa, the Americas, the Asia-Pacific region and Europe. As corporate investigations and enforcer co-operation cross more borders, we anticipate Volume II will become increasingly valuable to our readers: external and in-house counsel; compliance and accounting professionals; and prosecutors and regulators operating in this complex environment.

Judith Seddon, Eleanor Davison, Christopher J Morvillo, Luke Tolaini, Celeste Koeleveld, F Joseph Warin and Winston Y Chan

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24

Monitorships

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24.1 Introduction

Since the early 2000s, corporate monitors have been an important tool for US authorities in resolving corporate criminal investigations. This trend has also recently found a statutory foothold in the United Kingdom, after a period of sporadic sampling of the use of corporate monitorships as a tool in the sentencing armoury. Now, in the wake of the United Kingdom's deferred prosecution agreement (DPA) regime, it is safe to assume that the appointment of a monitor will increasingly feature in the settlement and disposal of corporate investigations. Although monitors come in many shapes and sizes, they typically help to create and supervise the implementation of compliance and remediation programmes to address the perceived deficiencies that gave rise to the wrongdoing. It is expected that monitors will reduce recidivism for corporate misconduct, benefiting the corporation, its shareholders and the public.

In the United States, monitors are typically appointed in conjunction with a settlement – either civil or criminal – between the parties.[2] In the civil context,

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2 In 2014, for instance, the Department of Justice (DOJ) entered into a civil settlement with Citigroup that included a monitorship provision to address Citigroup's false representations to investors regarding its residential mortgage-backed securities. See DOJ press release, 'Justice Department, Federal and State Partners Secure Record $7 Billion Global Settlement with Citigroup for Misleading Investors About Securities Containing Toxic Mortgages' (14 July 2014). Monitors may also be used in private cases, especially where there are concerns that misconduct may reoccur or an institution's culture needs to be remodelled to ensure future compliance. See, e.g., Athletics Integrity Agreement between the National Collegiate

monitors have been used as conditions of settlements between business entities and various federal and state agencies,[3] as well as international bodies such as the World Bank.[4] Even private litigants have included monitors in their settlement agreements.[5]

Yet the prevalence of monitors as a condition of high-profile corporate criminal resolutions sets the stage for close scrutiny of the practice in the United States and has led to congressional hearings, several United States Department of Justice (DOJ) policy enactments, legal challenges and the promulgation of bar association standards. This chapter therefore focuses on monitors used in the resolution of federal criminal investigations conducted by the DOJ (including, the various United States Attorney's Offices).[6]

Because the practice of using monitors is relatively new in the United Kingdom, this chapter draws parallels and contrasts in UK law and practice where appropriate from the more developed US practice. After briefly discussing the history of corporate monitors in both countries, this chapter analyses certain key issues surrounding the use of monitors in both jurisdictions, including the appointment, roles, supervision and funding of monitors.

Athletic Association (NCAA) and The BigTen Conference, and the Pennsylvania State University (29 August 2012), https://universityethics.psu.edu/forms/aia; NCAA, 'Former Sen. Mitchell selected as Penn State athletics integrity monitor', NCAA (1 August 2012), www.ncaa.org/about/resources/media-center/news/former-sen-mitchell-selected-penn-state-athletics-integrity.

3 The Environmental Protection Agency and the Securities and Exchange Commission (SEC) (among many others) also use monitors as part of settlements. See, e.g., Environmental Protection Agency news release, 'Duke Energy Subsidiaries Plead Guilty and Sentenced for Clean Water Act Crimes' (14 May 2015) (noting that various Duke Energy subsidiaries would be 'monitored by an independent court[-]appointed monitor'); DOJ press release, 'Taiwan-Based AU Optronics Corporation Sentenced to Pay $500 Million Criminal Fine for Role in LCD Price-Fixing Conspiracy' (20 September 2012) (discussing a court-appointed monitor in the antitrust matter against AU Optronics Corporation); Seth Schiesel and Simon Romero, 'WorldCom Strikes a Deal with SEC', *The New York Time*s (27 November 2002), www.nytimes.com/2002/11/27/business/worldcom-strikes-a-deal-with-sec.html (discussing WorldCom's settlement with the SEC, which included a monitorship).

4 As part of the World Bank Sanctions Procedures, an independent monitor may be required for parties seeking to remain active with the Bank. World Bank Sanctions Procedures § 9.03 (15 April 2012), www.worldbank.org/content/dam/documents/sanctions/other-documents/osd/WBGSanctions_Procedures_April2012_Final.pdf.

5 See, e.g., NCAA Appointed Integrity Monitor, supra note 2, at 1. Additionally, monitors are frequently appointed in lawsuits between private plaintiffs and the government. For example, a monitor was appointed as part of the City of New York's settlement with private plaintiffs regarding the police department's discriminatory enforcement of anti-trespassing rules. Memorandum Opinion and Order at 3 n. 8, *Davis v. City of New York*, No. 10 Civ. 0699 (S.D.N.Y. 28 Apr. 2015).

6 Unless otherwise specified, references herein to 'monitors' or 'monitorships' concern DOJ/United States Attorney's Offices (USAO) corporate monitorships.

24.2 Evolution of the modern monitor

24.2.1 United States

Most monitorships arise as a result of a corporate guilty plea, DPA or non-prosecution agreement (NPA).[7] The DOJ first used DPAs and NPAs in 1993.[8] The first recognised monitorship followed shortly thereafter in 1995.[9] Following Enron's 2001 collapse and other high-profile corporate misconduct in the early 2000s, the US federal government prioritised the investigation and prosecution of corporations. This naturally led to an increase in corporate settlements and a concomitant increase in monitorships.

See Chapters 15 and 16 on co-operating with authorities; and 20 and 21 on negotiating global settlements

As the frequency of monitorships has increased, so too has the scrutiny. Controversy over monitors has occurred in the courtroom as companies and monitors battle over, *inter alia*, the legality of court-appointed monitors and the

7 Deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs), while similar in that they are both pretrial settlement options available to the DOJ/USAO, have different collateral consequences for corporate defendants. With a DPA, the DOJ files a criminal information, which under the DPA the DOJ agrees to dismiss after a term of months or years if the corporate defendant complies with all other terms of the settlement. DPAs are, by virtue of being filed with a court, publicly available and, therefore, subject corporate defendants to adverse public relations and scrutiny. By contrast, with an NPA, the government agrees not to bring charges against the corporate defendant if it complies with the terms of the settlement; NPAs are not required to be disclosed, although they often are by the corporate defendant and the DOJ. Because NPAs do not involve the courts, they tend to be far more flexible and desirable for corporate defendants than DPAs.

8 US Gov't Accountability Off., GAO-10-260T, Prosecutors Adhered to Guidance in Selecting Monitors for Deferred Prosecution and Non-Prosecution Agreements, But DOJ Could Better Communicate Its Role in Resolving Conflicts (2009).

9 James C McKinley, 'Con Ed Fined and Sentenced to Monitoring for Asbestos Cover-Up', *The New York Times* (22 April 1995), www.nytimes.com/1995/04/22/nyregion/con-ed-fined-and-sentenced-to-monitoring-for-asbestos-cover-up.html. Note, the DOJ was not the first government agency to use monitors. Monitors were used as early as 1978 by the Securities and Exchange Commission (SEC). SEC News Digest, Issue 80–71 at 3 (10 April 1980), www.sec.gov/news/digest/1980/dig041080.pdf (noting that in *SEC v. Page Airways, Inc.*, the defendant agreed to 'retain a Review Person to evaluate the methods and procedures followed in this investigation').

scope of the monitor's powers,[10] the monitor selection process and the confidentiality of monitor reports,[11] and the costs monitors impose on the company.

One of the most significant controversies over monitorships addressed the appointment process. In that case, the controversy related to the US Attorney for the District of New Jersey's decision to appoint – without a bidding process – a consulting firm founded by former Attorney General John Ashcroft to serve as the monitor for medical device company Zimmer Holdings. The monitor fees in this contract were reportedly between US$28 million and US$52 million.[12] Concerns of cronyism, transparency and conflicts of interest led the US Congress to hold an investigative hearing to better understand the appointment.

Following this controversy, the DOJ took steps to try to formalise the monitorship process and minimise similar scrutiny in the future. As a result, in 2008, it issued the 2008 Morford Memorandum by then acting Deputy Attorney General Craig Morford, which addressed the selection and use of monitors in corporate criminal settlements.

Following the Morford Memorandum, deputy attorneys general have periodically updated the guidance to reflect their own views on the appointment and roles of the monitor. Because each administration has its own views on corporate criminal prosecutions, the guidance has varied significantly. Under President Trump, the operative memorandum was the Benczkowski Memorandum, which directed prosecutors to recommend monitorships only when there is a 'demonstrable need' for them.[13] This was read by defence attorneys to mean that corporate monitorships should be the exception, not the rule.

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10 For example, after a district court in the Southern District of New York found that Apple violated the Sherman Antitrust Act, the court ordered that Apple be subject to a compliance monitor. Apple challenged the appointment both before the district court and, thereafter, the Second Circuit Court of Appeals, alleging, *inter alia*, that the appointment violated the constitutional separation of powers. See *United States v. Apple Inc.*, 787 F.3d 131, 136 (2d Cir. 2015). As but one example of the alleged constitutional violation, Apple highlighted that after it had moved the district court for a stay of the injunction appointing the monitor, the monitor 'coordinated with the plaintiffs . . . and submitted an affidavit as an integral part of the opposition papers.' Id. at 134, 138. The district court found that the monitor's actions did not evidence the monitor's prejudice against Apple, and although the Second Circuit concurred, it was far more critical of the monitor's conduct: 'It is certainly remarkable that an arm of the court would litigate on the side of a party in connection with an application to the court he serves.' Id. at 138. The Second Circuit also noted that the monitor's submission on behalf of the plaintiffs 'was the opposite of best practice for a court-appointed monitor'. Id.

11 Marieke Breijer, 'ABA London: Keep monitor reports private', Global Investigations Review (13 October 2015).

12 Philip Shenon, 'Ashcroft Deal Brings Scrutiny in Justice Department', *The New York Times* (10 January 2008), www.nytimes.com/2008/01/10/washington/10justice.html.

13 Brian A Benczkowski, Assistant Att'y Gen., Remarks at Global Investigations Review Live New York (8 October 2019), www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-global-investigations.

However, this approach was quickly reversed by the Biden administration when Deputy Attorney General Lisa O Monaco announced in a speech in October 2021 that she was 'rescinding' any 'guidance' that 'suggested that monitorships are disfavored or are the exception'.[14] Subsequently, in September 2022, Deputy Attorney General Monaco released a memorandum discussing the DOJ's policies for prosecuting and resolving corporate criminal cases, which provided further guidance for prosecutors regarding the selection of monitors (the Monaco Memorandum).[15] The Monaco Memorandum outlined 12 factors that prosecutors should consider in analysing whether a monitorship is necessary. These factors include whether the corporation voluntarily disclosed the misconduct at issue, the pervasiveness of the conduct and whether there has been any change in the corporation's risk profile. We can expect the DOJ to expand the use of corporate monitorships in the future.[16]

Controversy over monitorships has also led to actions by the American Bar Association, which adopted standards for monitorships in 2015 (the ABA Standards).[17] The ABA Standards address a variety of issues, ranging from the selection and evaluation of monitors to the establishment of monitor work plans, and are 'the culmination of three years of work by an ABA task force in consultation with judges, prosecutors, defence counsel, court personnel, and academics'.[18]

As a result of these memoranda and the ABA Standards, the DOJ's monitor process is arguably the most formalised and transparent of any agency.

24.2.2 United Kingdom

As the use of corporate monitors grew in the United States after the collapse of Enron, so have UK authorities increasingly recognised the possibility of deploying similar monitorships as part of the resolution of their own corporate criminal investigations.[19] At the outset, this was done *ad hoc* and at the instigation of the relevant investigating authority. By way of example, in 2008, the

14 Lisa O Monaco, Deputy Att'y Gen., Keynote Address on White-Collar Crime (28 October 2021), www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute.

15 Lisa O Monaco, Deputy Att'y Gen., Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group (15 September 2022) (Monaco Memorandum), www.justice.gov/opa/speech/file/1535301/download.

16 Id. at 12.

17 American Bar Association (ABA) Standards for Monitors (standards adopted in August 2015).

18 Amy Walsh, 'Is the Opaque World of Corporate Monitorships Becoming More Transparent?', *Bus. L. Today* (December 2015), www.americanbar.org/groups/business_law/publications/blt/2015/12/08_walsh. The ABA Standards provide a much more detailed discussion of best practices and considerations for the principles articulated in the DOJ guidance.

19 See further Jo Rickards and Johanna Walsh, 'DPA corporate monitorships in the UK', Global Investigations Review (21 September 2015), http://globalinvestigationsreview.com/article/1018143/dpa-corporate-monitorships-uk.

Serious Fraud Office (SFO) settled civil proceedings against Balfour Beatty arising out of a construction project in Alexandria, Egypt. As part of that settlement, the SFO required the company to accede to 'a form of external monitoring for an agreed period'. This was an early example of the SFO fashioning new tools to remedy perceived corporate governance failings.

Another example was the SFO's successful prosecution of a construction firm, Mabey & Johnson Ltd, in 2009. This was the first-ever successful prosecution of a British company on charges of overseas corruption and breaching United Nations sanctions. As part of its guilty plea, Mabey & Johnson agreed to the appointment of an independent monitor for three years to oversee future conduct. Although this monitorship was approved by the court, Judge Geoffrey Rivlin KC[20] noted that it was likely to prove an expensive exercise and ordered that the costs of the monitor for the first year be capped at £250,000.

Nonetheless, the use of monitorships remained a novelty in the United Kingdom in the absence of a formal statutory footing. Indeed, it even drew notable judicial criticism on occasion. In the case of *Innospec Ltd*,[21] in which a manufacturer was found to have paid substantial bribes to Indonesian and Iraqi officials, the English courts expressly criticised the three-year monitorship regime that had been jointly agreed by the SFO and DOJ as part of a 'global settlement' with the company. This was to be the first-ever US–UK joint monitorship and illustrated the extent to which the UK investigating authorities were attracted by the US regime in adopting monitorships in the determination of corporate criminal investigations.

However, although the English court was prepared to approve this aspect of the settlement, the case – and in particular the terms of the cross-border determination reached between the parties – was controversial. Most unusually, a senior appellate judge, namely Lord Justice Thomas,[22] was brought in to sit on the case at first instance. He made clear that the court's approval for the appointment of a joint monitorship 'should be no precedent for the future'. In particular, he stated that the dual monitorship risked incurring unnecessary costs and noted that 'imposing an expensive form of "probation order" seems to me unnecessary for a company which will also be audited by auditors well aware of the past conduct and whose directors will be well aware of the penal consequences of any similar criminal conduct'. In his view, the sums used on such monitoring might have been better allocated to paying fines or compensation. Either way, he made clear that in future 'the request for such an order will have to be fully explained in terms of its cost effectiveness'.[23]

Innospec was widely seen as a setback for bilateral appointment of monitorships and signalled substantial judicial resistance to the US approach to presenting the court with a sentencing or settlement package to be approved

20 Later and on his retirement as a judge, he became a senior adviser to the Director of the SFO.

21 See *R v. Innospec Limited* [2010] Crim LR 665.

22 Lord Chief Justice of England and Wales 2013–2017.

23 *R v. Innospec Limited* [2010] Crim LR 665 at ss.48–49.

(even if it did not criticise the use of monitorships *per se*). But, in spite of Thomas LJ's reservations, UK investigating authorities continued to seek and obtain orders for corporate monitorships, and these were included in civil recovery orders agreed between the SFO and both Macmillan Publishers (in 2011) and Oxford Publishing[24] (in 2012).

However, the actual and prospective role of monitorships as a tool of corporate compliance has increased substantially since the creation of the DPA regime in the United Kingdom, introduced by the Crime and Courts Act 2013. In light of that legislation, it is now clear that corporate monitorships have an express and permanent statutory place in the UK criminal law calendar of powers and remedies for holding a corporation to account.[25]

Following the passing of that Act, the SFO launched a consultation process in June 2013 to finalise a Code of Practice for the new DPA regime (the Code). The Code was issued on 14 February 2014 and gives close attention to the role and duties of corporate monitors. Although such monitorships are not a mandatory feature of the new regime, the focus on monitoring in the Code is a powerful indication of the role that UK authorities expect them to play in the future. The Code also sets out a detailed framework for the appointment of monitors, the costs and terms of the monitorship, and the areas that the monitor may be expected to supervise or restructure.[26]

The SFO's first application for a DPA was approved by a senior appellate judge, Sir Brian Leveson, then President of the Queen's Bench Division, on 30 November 2015.[27] The DPA involved Standard Bank Plc, which was the subject of bribery charges relating to multimillion-dollar payments made by a former sister company in Tanzania. As part of the agreed DPA, Standard Bank agreed to submit, at its own expense, to an 'independent review of its existing internal anti-bribery and corruption controls, policies and procedures regarding compliance with the Bribery Act 2010 and other applicable anti-corruption laws'.[28] The independent reviewer appointed was PricewaterhouseCoopers LLP.

In his judgment approving the DPA, Leveson P made a number of observations about the difference between the DPA regimes in the United Kingdom and the United States, noting that '[i]n contra-distinction to the United States, a critical feature of the statutory scheme in the UK is the requirement that the court examine the proposed agreement in detail, decide whether the statutory conditions are satisfied and, if appropriate, approve the DPA'. In particular, he

24 See the SFO's press release describing the circumstances of this settlement, which arose because of the publisher's unlawful practices in Kenya and Tanzania, www.sfo.gov.uk/2012/07/03/oxford-publishing-ltd-pay-almost-1-9-million-settlement-admitting-unlawful-conduct-east-african-operations.

25 Crime and Courts Act 2013, Schedule 17, Part I, s.5(3)(e).

26 See, in particular, Deferred Prosecution Agreements Code of Practice (Code), para. 7 (Terms).

27 SFO press release, 'SFO agrees first UK DPA with Standard Bank' (30 November 2015), www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank.

28 Id.

observed that the court will only approve a DPA if it is fair, reasonable and proportionate in all the circumstances, but that it will typically consider this question in private so as not to prejudice any potential prosecution in the event of an adverse decision.[29] In the case of Standard Bank, he declared himself fully satisfied that the DPA was in the interests of justice.[30]

Following the high-profile *Standard Bank* case, the SFO soon made a second successful application for a DPA, approved by Leveson P on 6 July 2016.[31] The company, Sarclad Limited, pleaded guilty to charges of conspiracy to corrupt. The DPA provided that Sarclad would undertake a review of its internal compliance controls, and that its chief compliance officer (CCO) would prepare a report for submission to the SFO on its anti-corruption policies and their implementation, to be submitted within 12 months of the DPA and then annually for the DPA's duration.[32] Although it is not known why this approach was taken by the SFO, it seems likely that it was because the company in question was relatively small and the appointment of a full-time monitor would have been unduly financially onerous. Again, this would appear to demonstrate the flexibility with which UK authorities are now prepared to apply monitoring tools to fashion bespoke remedies for corporate wrongdoing.

Another example is the DPA agreed between the SFO and Tesco Stores Ltd, the supermarket conglomerate, on 28 March 2017 in respect of accounting irregularities. Deloitte was appointed to a monitoring role to review and report on Tesco's controls and governance in respect of the recognition of commercial income.[33] This suggests an ever-wider role for corporate monitorships in the United Kingdom, which may be imposed in contexts beyond international bribery and corruption.

However, the touchstone for the appropriateness of a monitorship is always likely to be how the corporate has responded to allegations of wrongdoing: in the DPA agreed between the SFO and Serco Geografix Ltd,[34] dated 2 July 2019 and judicially approved on 4 July 2019, the SFO was satisfied that an undertaking of ongoing co-operation by its parent and a far-reaching corporate renewal programme were sufficient to make a monitorship unnecessary.

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29 *SFO v. Standard Bank Plc* [2016] Lloyd's Rep FC 102 at para. 2.

30 Id. at para. 22.

31 SFO press release, 'SFO secures second DPA' (8 July 2016), www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa.

32 *SFO v. XYZ Ltd*, unreported, 24 June 2016, at para. 64.

33 FCA Final Notice to Tesco Stores Ltd dated 28 March 2017, at s. 4.10. The DPA was later approved by Leveson P at a hearing on 10 April 2017 and reporting restrictions were lifted in January 2019 following the acquittal of three individuals, www.sfo.gov.uk/2019/01/23/deferred-prosecution-agreement-between-the-sfo-and-tesco-published/.

34 DPA between Serco Geografix Ltd and the Serious Fraud Office, 2 July 2019, www.sfo.gov.uk/download/deferred-prosecution-agreement-serco-geografix-ltd-sfo, at paras. 5(ii)(b)(i) and 5(ii)(b)(iii) and *Serious Fraud Office v. Serco Geografix Ltd* [2019] Lloyd's Rep FC 518.

The SFO adopted a similar approach in its recent DPA with Airbus SE, judicially approved on 31 January 2020, and agreed that a monitorship was not required in the light of what the reviewing judge described as 'significant changes to [the company's] internal processes'[35] and also because the French Anti-Corruption Agency (AFA) was appointed to oversee improvements to Airbus's compliance arrangements in any event.

By contrast, in the still more recent DPA agreed between the SFO and G4S Care and Justice Services, approved by the courts on 17 July 2020, the SFO adopted an intermediate position: while it agreed not to impose a formal monitorship on the respondent company in light of internal governance changes, it nonetheless insisted on the appointment of an external reviewer 'to review and report on the compliance measures being taken' by the company and its subsidiaries.[36] The new regime was described by Mr Justice William Davis in the following terms:

> *The intensity of the external scrutiny as set out in the DPA is greater than in any previous DPA. This is necessary and appropriate given the exposure of both G4S C&J and the parent company to government contracts. Equally, it is an important factor in providing reassurance to the SFO, to relevant government departments and to the wider public that both companies have proper controls in place to ensure the integrity of their accounting and governance processes. The DPA will last for three years during which period the compliance measures will continue and will be reviewed.*[37]

This is an indication of the flexible way in which the SFO approaches ensuring compliance.

In light of these developments, where the circumstances and interests of justice require it, the use of corporate monitorships looks set to increase in the United Kingdom, and a greater convergence with US practice can be expected. This is all the more so given the appointment of Lisa Osofsky, a former deputy general counsel of the US Federal Bureau of Investigation and a monitor in private practice, as Director of the SFO in 2018.

In a keynote speech on 17 October 2018, Ms Osofsky highlighted the differences between the UK and US regimes in respect of corporate prosecutions and DPAs but indicated that the SFO may take a more interventionist approach in future. Above all, she stressed that the SFO 'will want assurance

35 *SFO v. Airbus SE*, unreported, 31 January 2020 at para. 79, *per* Dame Victoria Sharp P.

36 *SFO v. G4S Care and Justice Services (UK) Ltd*, unreported, 17 July 2020 at para. 43, *per* Davis J.

37 See also the words of the Director of the SFO in a press release dated 17 July 2020: 'G4S C&J and its parent company, G4S plc – a significant government supplier – will be subjected to unprecedented, multi-year scrutiny and assurance', www.sfo.gov.uk/2020/07/17/sfo-receives-final-approval-for-dpa-with-g4s-care-justice-services-uk-ltd.

that companies are doing everything they can to ensure the crimes of the past won't be repeated'.[38]

In that context, and subject to the terms of the Code, the UK authorities' approach to the appointment and conduct of corporate monitors is ever more likely to follow the lead of the United States in the coming years. However, in the recent DPAs reached with Amec Foster Wheeler Energy Limited (AFWEL) in June 2021[39] and two yet to be identified UK-based companies in July 2021,[40] the SFO agreed to corporate undertakings providing it with annual reports on corporate remedial works and compliance enhancements during the term of the DPAs instead of monitors (the court in *AFWEL* noting that the undertaking extended beyond AFWEL to the whole Wood Group and wider than other orders the court could impose, and was tailored to the facts of the case).[41]

See Chapter 20 on negotiating global settlements

Circumstances requiring a monitor 24.3

In general, the DOJ considers whether there is a need for a monitor by assessing whether DOJ attorneys believe that the corporation is capable of remediating, or has already remediated, its past wrongdoings without the assistance of a monitor, and whether the DOJ believes there is a risk of recidivism. That, in turn, often translates into an enquiry of 'tone at the top' – whether, *inter alia*, management was involved in the criminal conduct, was negligent in failing to implement a proper compliance programme, fostered a culture that bred non-compliance with ethical and legal duties and, critically, self-reported the misconduct to the DOJ.[42]

See Chapter 4 on self-reporting to authorities

Among the most important factors in this evaluation is whether the corporation self-reported the wrongdoing. Deputy Attorney General Monaco identified 'whether the corporation voluntarily self-disclosed the underlying misconduct in a manner that satisfies the particular DOJ component's self-disclosure policy' as one of the key factors that prosecutors should consider in deciding whether to appoint a monitor.[43] This is also reflected in the Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy, announced

38 Keynote speech on Future SFO Enforcement at New York University School of Law (17 October 2018), https://wp.nyu.edu/compliance_enforcement/2018/10/16/director-of-the-serious-fraud-office-lisa-osofsky-keynote-on-future-sfo-enforcement.

39 *Director of the Serious Fraud Office v. Amec Foster Wheeler Energy Limited* [2021] Lloyd's Rep. FC Plus 27.

40 SFO press release, 'SFO secures two DPAs with companies for Bribery Act offences' (20 July 2021), www.sfo.gov.uk/2021/07/20/sfo-secures-two-dpas-with-companies-for-bribery-act-offences.

41 *Director of the Serious Fraud Office v. Amec Foster Wheeler Energy Limited* [2021] Lloyd's Rep. FC Plus 27.

42 'Is a Corporate Monitor Necessary?', *Corp. Crime Rep.* (8 May 2013), www.corporatecrimereporter.com/news/200/isamonitornecessary05082013.

43 Monaco Memorandum, at 12.

on 29 November 2017[44] and most recently updated in November 2019.[45] The Corporate Enforcement Policy states: 'When a company has voluntarily self-disclosed misconduct in an FCPA matter, fully cooperated, and timely and appropriately remediated . . . there will be a presumption that the company will receive a declination absent aggravating circumstances involving the seriousness of the offense or the nature of the offender.'[46]

See Chapters 3 and 4 on self-reporting to authorities

Significantly, the DOJ has recently signalled its intent to apply the Corporate Enforcement Policy's principles to other white-collar matters,[47] further emphasising the value it places on self-disclosure;[48] therefore, with increased self-reporting, it is reasonable to expect that monitorships will decline.[49]

In addition to self-reporting, the DOJ considers the effectiveness of a company's compliance programme. According to Deputy Attorney General Monaco, this too is an important factor for prosecutors to consider.[50] The Monaco Memorandum directs prosecutors to consider 'whether, at the time of the resolution and after a thorough risk assessment, the corporation has implemented an effective compliance programme and sufficient internal controls to detect and prevent similar misconduct in the future' and 'whether, at the time of the resolution, the corporation has adequately tested its compliance program and internal controls to demonstrate that they would likely detect and prevent similar misconduct in the future' in deciding whether to appoint a monitor.[51]

In addition to these factors, the Monaco Memorandum identifies seven other non-exhaustive factors that prosecutors should consider in determining whether to appoint a corporate monitor. These factors similarly are all driven at determining:

> *whether the corporation took adequate investigative or remedial measures to address the underlying criminal conduct, including, where appropriate,*

44 Rod Rosenstein, Deputy Attorney General, Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (29 November 2017).

45 Justice Manual, DOJ, § 9-47.120 (last updated November 2019).

46 Id.

47 Kelly Swanson, 'DOJ expanding use of FCPA declination policy principles', Global Investigations Review (2 March 2018), https://globalinvestigationsreview.com/article/1166274/doj-expanding-use-of-fcpa-declination-policy-principles.

48 See Monaco Memorandum, supra note 15, at 12 (listing whether a corporation 'voluntarily self-disclosed the underlying misconduct in a manner that satisfies the particular DOJ component's self-disclosure policy' as a factor to consider when deciding whether a corporate monitor is needed).

49 Deputy Attorney General Sally Quillian Yates's September 2015 memorandum, 'Individual Accountability for Corporate Wrongdoing' (the Yates Memorandum), which reinforces the importance of internal risk assessment and compliance monitoring. As promulgated, the Yates Memorandum requires early and complete self-reporting if a corporation wishes to obtain co-operation credit. Corporations are therefore highly incentivised to self-report.

50 Monaco Memorandum, at 12.

51 Id.

> *the termination of business relationships and practices that contributed to the criminal conduct, and discipline or termination of personnel involved, including with respect to those with supervisory, management, or oversight responsibilities for the misconduct.*[52]

However, while the Monaco Memorandum states that 'decisions about the imposition of a monitor will continue to be made on a case-by-case basis' and at DOJ's 'sole discretion', it suggests that prosecutors will not require a monitor for companies that voluntarily disclose misconduct, fully co-operate and, at the time of resolution, have implemented and tested an effective compliance programme.[53]

Similar tests are applied in the United Kingdom.[54] The Code sets out some important considerations for the appointment of a monitor, including whether the company already has a 'genuinely proactive and effective corporate compliance programme' and whether the appointment would be fair, reasonable and proportionate in all the circumstances.[55]

As in the United States, there is likely to be a particular focus on the degree of culpability of the management, especially if that management is still in place. Where the management has been entirely replaced, or where misconduct has been self-reported, there may be less need for an extended monitorship (see, for example, the observations made by the court in *Innospec*).[56] Moreover, and again in light of the comments in *Innospec*, the United Kingdom is likely to apply a special focus to matters of cost-effectiveness. Much is likely to turn on an analysis of what is fair, reasonable and proportionate in the circumstances of the specific proposed monitorship.

Selecting a monitor 24.4

The ABA Standards suggest that both parties 'have a significant role in the selection process', enumerate multiple selection criteria and outline mandatory and potential exclusions.[57] Nonetheless, the selection of monitorships in line with this guidance has often generated controversy.

Since the Morford Memorandum, the government has taken the view that the monitor must be highly qualified, not have any conflicts of interest (either with the government or the corporation) and instil public confidence in the

52 Id. at 12–13.

53 Id. at 7–8; see also Speech from the Deputy Attorney General Lisa O Monaco, supra note 14.

54 SFO Operational Handbook, Evaluating a Compliance Programme, www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/evaluating-a-compliance-programme (especially Principle 6 and accompanying guidance).

55 See, in particular, Code, para. 7.11.

56 *R v. Innospec Limited* [2010] Crim LR 665 at ss.48–49.

57 ABA Standards for Monitors, §§ 24-2.1; 24-2.4.; 24-2.4(3)–(4).

monitorship process.[58] The Benczkowski Memorandum attempted to standardise the selection process by creating a Standing Committee on the Selection of Monitors (the Standing Committee).[59] The Standing Committee comprises:

- the Deputy Assistant Attorney General with supervisory responsibility for the Fraud Section, who also serves as the chair of the Standing Committee;
- the Chief of the Fraud Section (or other relevant Section); and
- the Deputy Designated Agency Ethics Official for the Criminal Division.[60]

The Monaco Memorandum continues the practice of having a standing or *ad hoc* committee decide whether a monitor is required, while also providing additional guidance about the selection of monitors. It instructs every component that is part of corporate criminal resolutions to either adopt or develop a documented selection process that is readily available to the public. It also creates a new mandate, requiring each monitorship selection committee to have an ethics professional, to ensure that members of the committee have no conflicts of interest in the selection of the monitor. Because of the new requirements outlined in the Monaco Memorandum, DOJ offices are likely still developing their monitor selection processes.

Additionally, the Monaco Memorandum requires that any selection process incorporate elements that promote consistency, predictability and transparency, such as conducting monitor selection processes in line with the DOJ's commitment to diversity and inclusion, and having prosecutors notify the appropriate US Attorney or Department Component Head regarding whether they have decided to impose an independent compliance monitor on a corporation.[61]

Perhaps the most notable element of this guidance is the importance that is placed on selecting monitors in line with the DOJ's commitment to diversity and inclusion. This too has been an area of controversy for the DOJ in the past: the selection methods used have not resulted in a diverse monitor pool.[62] For example, between 2004 and 2018, only three women and three non-white attorneys (all male) were chosen by the DOJ to serve as FCPA monitors, even though there were more than 45 settlements involving FCPA monitors during

58 Memorandum from Craig S Morford, Deputy Att'y Gen., to All Component Heads and US Att'ys, Selection and Use of Monitors in Deferred Prosecution Agreements (7 March 2008) (Morford Memorandum), at 3.

59 Benczkowski Memorandum, supra note 13, at 5.

60 Id. at 3–4.

61 Monaco Memorandum, supra note 15, at 13.

62 Dylan Tokar, 'Women and minorities lose out in FCPA monitor selection process', Global Investigations Review (1 February 2018), https://globalinvestigationsreview.com/article/jac/1153265/women-and-minorities-lose-out-in-fcpa-monitor-selection-process.

the same period.[63] To date, no woman of colour has been chosen as a corporate monitor.[64]

The DOJ has tried to address this issue in the past. On 30 April 2018, the DOJ and a US-based subsidiary of Panasonic entered into a DPA to resolve FCPA violations, under which the company agreed to a two-year monitorship.[65] The DOJ included a provision in the DPA that stated: 'Monitor selections shall be made in keeping with the Department's commitment to diversity and inclusion.'[66] The DPA also includes various provisions that enable the DOJ to broaden the group of candidates from which it will select the monitor.[67]

While the DOJ cannot consider non-merit-based factors such as race and gender when choosing the most-qualified candidate, these provisions help ensure that the pool from which the DOJ makes its selection is more diverse. A DOJ spokesperson indicated that the above-quoted language was added

63 Id. These statistics were made available after a court battle fought by a Global Investigations Review reporter. The reporter filed a lawsuit in December 2016, seeking the names of monitor candidates considered for 15 companies involved in compliance investigations, and the names of the DOJ attorneys involved in the selection process. In March 2018, he prevailed, when the District Court for the District of Columbia ruled that the public's interest in learning the candidates' identities outweighed the government's privacy interest. See *Tokar v. U.S. Dep't of Justice*, No. 16-2410, 2018 WL 1542320 (D.D.C. 29 Mar. 2018); Jody Godoy, 'DOJ Sued by Reporter Seeking FCPA Monitor Records', *Law360* (9 December 2016), www.law360.com/articles/871052/doj-sued-by-reporter-seeking-fcpa-monitor -records. Recently, that reporter also secured a settlement for attorneys' fees from the DOJ, bringing the nearly five-year public records battle to a close. Courtney Douglas, 'Reporters Committee reaches settlement with Justice Department after 5-year FOIA battle', Reporters Committee (17 July 2020), www.rcfp.org/tokar-doj-foia-settlement.

64 Diversity in Monitorship Selection, Jones Day (Sep. 2021), https://www.jonesday.com/en/insights/2021/09/diversity-in-monitorship-selection?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration.

65 DOJ Deferred Prosecution Agreement with Panasonic Avionics Corp. (30 April 2018), www.justice.gov/opa/press-release/file/1058466/download.

66 Id. at 12. About half of the DOJ Fraud Section's agreements establishing corporate monitorships between 2018 and late 2021 included this language. The other half included language drafted by the Trump administration DOJ that changed the standard language to: '[A]ny submission or selection of a monitor candidate by either the company or the criminal division should be made without unlawful discrimination against any person or persons.' Diversity in Monitorship Selection, Jones Day (Sept. 2021), https://www.jonesday.com/en/insights/2021/09/diversity-in-monitorship-selection?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration.

67 DOJ Deferred Prosecution Agreement with Panasonic Avionics Corp. (30 April 2018), www.justice.gov/opa/press-release/file/1058466/download. ('If the Fraud Section determines, in its sole discretion, that any of the candidates are not, in fact, qualified to serve as the Monitor, or if the Fraud Section, in its sole discretion, is not satisfied with the candidates proposed, the Fraud Section reserves the right to request that the company nominate additional candidates. In the event the Fraud Section rejects any proposed monitors, the Company shall propose additional candidates . . . so that three qualified candidates are proposed.').

to the Criminal Division's standard agreements in January 2017.[68] The DOJ's selections of corporate monitors in recent years has sparked optimism – of the four corporate monitors appointed by the DOJ in the past two years, three are women.[69]

There is also an open question as to judicial oversight of the selection process. In March 2017, the DOJ reached a plea agreement with ZTE for conspiring to violate export control laws, under which ZTE would plead guilty to three criminal charges and, as part of the sentence, be subject to a three-year monitorship, with the monitor selected by the DOJ 'in its sole discretion' from a pool of candidates proposed by ZTE.[70] In an unprecedented move, the court overseeing the matter – the District Court for the Northern District of Texas – required the parties to amend the terms of the plea agreement to impose a monitor of the court's own selection and to increase judicial oversight over the monitorship.[71]

Specifically, the plea agreement was amended to state that James M Stanton would be appointed as ZTE's monitor,[72] that 'the Monitor is a *judicial adjunct* pursuant to Federal Rule of Civil Procedure 53'[73] and that '[a]ll reports, submissions, or other materials encompassed by this agreement will be filed [with the

68 Clara Hudson, 'Lawyers laud criminal division's diversity provision for monitors', Global Investigations Review (3 May 2018), https://globalinvestigationsreview.com/article/jac/1168991/lawyers-laud-criminal-divisions-diversity-provision-for-monitors.

69 List of Independent Compliance Monitors for Active Fraud Section Monitorship, DOJ, www.justice.gov/criminal-fraud/strategy-policy-and-training-unit/monitorships (updated 21 Nov. 2022) (listing the corporate monitors established in 2021 and 2022 as William Stellmach and Rita Molesworth (Bank of Nova Scotia, 2021), Frances McLeod (Balfour Beatty Communities LLC, 2022), and Kathryn Atkinson (Stericycle Inc, 2022).

70 Plea Agreement at Attachment A ¶¶ 1–2, *United States v. ZTE Corp.*, No. 17-0120-K (N.D. Tex. 7 Mar. 2017) ('[T]he Company will propose to the Department three candidates to serve as the Monitor. . . . The Department retains the right, in its sole discretion, to accept or reject the Monitor candidates proposed by the Company.').

71 The process for selecting the monitor and the terms of the monitorship were outlined in Attachment A to the Plea Agreement. The court subsequently amended Attachment A but left the remainder of the Plea Agreement intact. See Attachment A (Modified) Independent Corporate Compliance Monitor, *United States v. ZTE Corp.*, No. 17-0120-K (N.D. Tex. 22 Mar. 2017). See also Rearraignment Hearing, *United States v. ZTE Corp.*, No. 17-0120-K (N.D. Tex. 22 Mar. 2017) ('Here's what the agreement is as I understand it: It would be a sentence of three years' probation on each count, to run concurrently, with an independent corporate compliance monitor appointed by me, by the Court, which is – I have chosen Mr. James Stanton; or if something happens to him or if I choose to change, that would be who it would be, as set out in Attachment A as modified today.').

72 Attachment A (Modified) Independent Corporate Compliance Monitor ¶ 1, *United States v. ZTE Corp.*, No. 17-0120-K (N.D. Tex. 22 Mar. 2017) ('ZTE Corporation . . . agrees to engage James M. Stanton as an independent corporate monitor').

73 Id. ¶ 6 (emphasis added). Fed. R. Civ. Pro. Rule 53 gives US district courts the broad authority to appoint masters. However, this is not a common manner by which to appoint a corporate monitor.

Court]'.[74] The appointment of Mr Stanton, a lawyer in private practice and a former Texas state judge, was seen by some as particularly unusual given his lack of monitorship experience.[75] Notably, ZTE's monitorship was imposed as part of a plea agreement subject to court review and approval. Accordingly, the court had the opportunity to amend the terms of the agreement before approving the plea. It remains to be seen whether courts will take as active a role in crafting the terms of monitorships imposed as part of DPAs and NPAs, which do not require the court's approval.[76]

In the United Kingdom, a slightly different appointment procedure has been laid down by the Code. As part of the negotiations surrounding a DPA in the United Kingdom, the company must provide the prosecuting authority and the court with details of three potential monitors, including their qualifications, their estimated costs and any links with the relevant company. The company should then indicate their preferred monitor of the three, stating the reasons for their preference. This choice will ordinarily be accepted by the prosecuting authority and court, except where a conflict of interest or a lack of relevant experience has been identified.[77]

In terms of eligibility in the United States, the monitor must be independent from the company; therefore, former employees, clients and close acquaintances are likely ineligible. Additionally, as the requirements of the monitorship will differ case by case, the monitor should be selected based on how well his or her qualifications pair with the requirements of the relevant monitorship.[78] For example, the DPA between the DOJ and Panasonic lists the minimum contemplated qualifications of a monitor as follows:

- 'sufficient independence' from Panasonic;
- 'demonstrated expertise with respect to the FCPA and other applicable anti-corruption laws, including experience counseling on FCPA issues';
- 'experience designing and/or reviewing corporate compliance policies, procedures and internal controls, including FCPA and anti-corruption policies, procedures, and internal controls'; and
- 'ability to access and deploy resources necessary to discharge the Monitor's duties' under the agreement.[79]

74 Id. ¶¶ 6, 13.

75 Sue Reisinger, 'In Rare Move, Judge Imposes Own Monitor in ZTE Plea Deal', *The American Lawyer* (29 March 2017), www.americanlawyer.com/id=1202782436926/In-Rare-Move-Judge-Imposes-Own-Monitor-in-ZTE-Plea-Deal?mcode=0&curindex=0&curpage=ALL (noting that James Stanton is a civil and personal injury lawyer with no prior experience of acting as a monitor and no significant criminal experience, albeit, per his resume, he has served as a special master and arbitrator in six civil cases).

76 See *United States v. Fokker Services BV*, 818 F.3d 733, 741 (D.C. Cir. 2016).

77 See, in particular, Code, paras. 7.15–7.17.

78 See Benczkowski Memorandum, supra note 13, at 2.

79 DOJ Deferred Prosecution Agreement with Panasonic Avionics Corp., supra note 67, at 11–12.

In global settlements, both US and UK authorities increasingly see the value of appointing a monitor experienced in the laws of the relevant jurisdiction.[80] Although the Morford Memorandum suggests that non-attorney experts 'such as accountants, technical or scientific experts, and compliance experts' may be better qualified for certain monitorships, in practice, monitors in the United States are predominantly lawyers, and often have prosecutorial experience.[81]

The requirements of the monitorship can evolve over its duration, and the appointed monitor may prove incompatible with the corporation. In that case, the government may replace the monitor, who is also free to resign. As one example of a rather tumultuous monitorship, Western Union went through four monitors as part of a 2010 settlement for failing to comply with anti-money laundering laws.[82]

To avoid such situations, third-party organisations have devoted themselves to promoting the use, quality and efficiency of monitors.[83] For example, the International Association of Independent Corporate Monitors – whose board is itself composed of many former monitors – offers resources and training to professionals and has established a Code of Professional Conduct to serve as a template for best standards and practices.[84]

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80 See infra notes 106 to 108 and accompanying text discussing Rolls-Royce's monitor, British lawyer Lord Gold.

81 One study found that half of all monitors appointed in connection with DPAs and NPAs since 2001 have been former prosecutors, leading some critics to describe the monitoring industry as a 'full employment act for former federal prosecutors'. See Alison Frankel, 'DOJ should end secret selection process for corporate watchdogs', Reuters (14 July 2014), www.reuters.com/article/idUS103460541020140714; Steven Davidoff Solomon, 'In Corporate Monitor, a Well-Paying Job But Unknown Results', *The New York Times: Dealbook* (15 April 2014), http://dealbook.nytimes.com/2014/04/15/in-corporate-monitor-a-well-paying-job-but-unknown-results. As but one recent example, the former Deputy Chief in the Fraud Section of the Criminal Division of the DOJ was appointed to serve as a monitor for Odebrecht as part of its guilty plea for FCPA violations. See Jody Godoy, 'DOJ Taking $24M Haircut On Odebrecht's $2.6B FCPA Fine', *Law360* (12 April 2017), www.law360.com/articles/912549/doj-taking-24m-haircut-on-odebrecht-s-2-6b-fcpa-fine; biography of Charles E Duross, Morrison Foerster, www.mofo.com/people/charles-duross.html.

82 Rachel Louise Ensign and Max Colchester, 'Meet the Private Watchdogs Who Police Financial Institutions', *The Wall Street Journal* (30 August 2015), www.wsj.com/articles/meet-the-private-watchdogs-who-police-financial-institutions-1440983917. On 9 June 2017, a court accepted the monitor's final report, thereby ending Western Union's monitorship. See The Western Union Company, Form 8-K, filed 9 June 2017.

83 International Association of Independent Corporate Monitors, 'About Us', http://iaicm.org/about-independent-corporate-monitors (describing the mission/purpose of the organisation and discussing the Code of Professional Conduct) (last accessed 24 August 2021).

84 Id. (touting its members as having the 'breadth and depth of relevant skills, knowledge, and experience, together with reputation of character, to effectively serve as [monitors]'). See also Thomas Fox, 'IAICM Shine a Light on Corporate Monitors', JD Supra, 8 March 2017, www.jdsupra.com/legalnews/iaicm-shine-a-light-on-corporate-85994. Membership is

The role of the monitor 24.5

Scope of the monitorship 24.5.1

The scope of the monitorship should be tailored to the circumstances of each case, with the ultimate goal of reducing the risk of recurrence of the corporation's misconduct.[85] The Monaco Memorandum instructs prosecutors to clearly define the monitor's responsibilities and scope of authority in writing. It also requires corporations to agree upon a clear and appropriately targeted work plan for the monitorship.

The monitor's role should therefore normally include a mandate for oversight, review and proposed modification of a company's compliance programme to facilitate rehabilitation of existing misconduct and deterrence of future wrongdoing.[86] Accordingly, the monitor may be required to assist with structural changes, as well as help alter corporate culture and normative expectations.[87] In the United Kingdom, a list of items and procedures that the monitor may wish to consider as part of its monitoring programme is set out in the Code.[88]

The monitor is an independent third party and does not serve as an employee or agent of either the corporation or the government.[89] Likewise, the monitor does not have an attorney–client relationship with either the corporation or the government. Nonetheless, it is critical for the monitor to have an open dialogue with, and co-operation from, the corporation and the government throughout the duration of the monitorship, which may include 'iterative work plans, planning meetings prior to any substantive work, and mid-review

comprised of a 'distinguished panel of current and former corporate monitors, retired judges, and one former FBI agent'.

85 Morford Memorandum, supra note 58 at 5.

86 See, e.g., DOJ Deferred Prosecution Agreement with Avon Products, Inc., 15 December 2014, www.sec.gov/Archives/edgar/data/8868/000000886814000073/exhibit992dpa.htm ('the Monitor will evaluate, in the manner set forth below, the effectiveness of the internal accounting controls, record-keeping, and financial reporting policies and procedures of the Company as they relate to the Company's current and ongoing compliance with the FCPA').

87 Critics complain that '[l]ittle is publicly disclosed about what specifically they are supposed to accomplish [and] what they discover in their examinations'. Ensign and Colchester, supra note 82.

88 See, in particular, Code, para. 7.21.

89 Notably, some corporations have taken to hiring their own internal monitors following the government's implementation of a monitor. For example, as part of Western Union's 2010 settlement, Western Union received a monitor. Independently, Western Union also hired a consultant, leading to what in effect was a 'dual system of internal monitors – one stipulated by the settlement and the other hired by the money-transfer firm'. Ensign and Colchester, supra note 82.

meetings'.[90] The parties should also stipulate what, if any, role the government or court should play in resolving disputes that may arise between the monitor and the corporation.[91]

Although the monitor does not take on a prosecutorial function, he or she may nonetheless uncover continuing or undisclosed misconduct. The monitorship agreement 'should clearly identify any types of previously undisclosed or new misconduct that the monitor will be required to report directly to the [government]'. On the other hand, the agreement should identify any misconduct that the monitor can, in its discretion, report to the government, the corporation or both.[92]

24.5.2 Duration of the monitorship

Monitorships can range from months to several years. The duration of the monitorship will in large part depend on the scope of the monitorship and, in particular, the extent of the problems found and the necessary remedial measures.[93] When negotiating duration, the parties should be mindful of, *inter alia*, the 'nature and seriousness of the underlying misconduct', the 'pervasiveness and duration of the misconduct', the complicity of senior management, the 'corporation's history of similar misconduct', the corporate culture, the 'scale and complexity of any remedial measures contemplated by the agreement, including the size of the entity or business unit at issue', and the current 'stage of design and implementation of remedial measures'.[94]

Another issue to consider is the terms under which the monitorship may be extended. Some monitorship agreements, particularly those that are supervised by the courts, provide for extensions where certain milestones have not yet been met. Where judging the achievement of those milestones is within the monitor's purview, the monitor may have an incentive to declare the milestones incomplete so that the term may be extended. In other cases, the monitorship

90 F Joseph Warin, Michael S Diamant and Veronica S Root, 'Somebody's Watching Me: FCPA Monitorships and How They Can Work Better', 13 *U. Pa. J. Bus. L.* 321, 364 (2011), http://scholarship.law.upenn.edu/jbl/vol13/iss2/1.

91 Memorandum from Gary G Grindler, Deputy Att'y Gen., Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations, § II (25 May 2010) (Grindler Memorandum).

92 Morford Memorandum, supra note 58 at 7. Critically, undisclosed or continuing misconduct may invalidate the terms of the settlement and lead to an extension of the term and scope of the monitorship.

93 Id., at 7–8.

94 Id. at 7. See Assistant Att'y Gen. Brian A Benczkowski Keynote Address at the Ethics and Compliance Initiative 2019 Annual Impact Conference, Dallas, Texas (30 April 2019), www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-keynote-address-ethics-and (noting that a monitorship limited to two years was appropriate as part of Fresenius Medical Care's FCPA settlement, because the company 'had made a number of improvements to its compliance program but had not yet fully tested that program').

agreement will permit the government to extend the monitorship at its discretion if the corporation has not satisfied its obligations under the settlement, and provide for early termination if the corporation can demonstrate 'a change in circumstances sufficient to eliminate the need for a monitor'.[95]

For example, in 2016, Odebrecht entered into a plea agreement with the DOJ to resolve FCPA violations, which included the largest corruption fine ever at that time.[96] Part of the plea deal required Odebrecht to retain a monitor for three years and to adopt and implement an effective compliance and ethics programme.[97] The agreement scheduled the monitorship to expire on 20 February 2020; however, the DOJ determined that Odebrecht failed to fulfil its terms.[98] First, Odebrecht failed to adopt and implement the monitor's recommendations and to allow the monitor to complete the monitorship.[99] Second, Odebrecht failed to implement and maintain a compliance and ethics programme.[100] As a result, the DOJ extended the monitorship to 16 November 2020 – an additional 270 days.[101]

In the United Kingdom, this ability to extend monitorships has been formally recognised in the Code, subject to the extended term of the monitorship not exceeding the length of the DPA itself.[102] The Monaco Memorandum encourages ongoing communication between the DOJ, the monitor and the corpora-

95 Morford Memorandum, supra note 58 at 8 ('For example, if a corporation ceased operations in the area that was the subject of the agreement, a monitor may no longer be necessary. Similarly, if a corporation is purchased by or merges with another entity that has an effective ethics and compliance program, it may be prudent to terminate a monitorship.').

96 Letter advising the Court of the parties' agreement to extend the term of the plea agreement, *United States v. Odebrecht S.A.*, No. 16-cr-643 (RJD) (E.D.N.Y. 29 Jan. 2020), ECF 170; Clara Hudson, 'Odebrecht "failed to fulfil" monitorship obligations, DOJ says', Global Investigations Review (3 February 2020), https://globalinvestigationsreview.com/article/jac/1213971/odebrecht-%E2%80%9Cfailed-to-fulfil%E2%80%9D-monitorship-obligations-doj-says.

97 Letter advising the Court of the parties' agreement to extend the term of the plea agreement, *Odebrecht S.A.*, No. 16-cr-643 (RJD).

98 Id.

99 Id.

100 Id.

101 Id. Similarly, after Credit Suisse admitted to aiding US tax evasion, the New York State Department of Financial Services appointed a monitor for what was anticipated to be a two-year monitorship. However, shortly after the monitorship began in October 2014, a tolling period was triggered because Credit Suisse could not produce information at the pace and volume required by the monitor. After more than three years of monitorship, the Department of Financial Services entered a consent order requiring Credit Suisse to engage an independent consultant for an additional year. John Letzing, 'Credit Suisse's Tardiness Likely to Extend Monitor's Sojourn', *Wall Street J.* (6 January 2016), www.wsj.com/articles/credit-suisses-tardiness-likely-to-extend-monitors-sojourn-1452084986; N.Y. Dep't of Fin. Services Consent Order, *In the Matter of Credit Suisse AG* (13 November 2017), available at www.dfs.ny.gov/system/files/documents/2020/03/ea171113_credit_suisse.pdf.

102 Code, para. 7.19.

tion to ensure that the monitor's work is properly tailored to the agreed-upon workplan and that the monitor has appropriate access to company information, resources and employees. It also instructs prosecutors to ensure that the DOJ is entitled to either lengthen or shorten the term of the monitorship, depending on the monitor's progress with the corporation and the work plan.[103]

Hybrid monitorships – in which the monitor serves for approximately 18 months and the corporation self-reports for the following 18 months – have also been increasingly common, especially in the context of FCPA investigations.[104] As a further nuance, the DOJ has, in some instances, agreed to defer to a pre-existing monitorship in lieu of establishing its own monitorship. As one example, the December 2015 settlement between Alstom and the DOJ for various FCPA violations, required that Alstom be subject to an independent monitor. However, Alstom was already subject to a monitor in connection with a 2012 settlement with the World Bank. Rather than implement a second monitor, the DOJ agreed to defer to the existing World Bank-appointed monitor, provided that, *inter alia*, Alstom self-report to the DOJ 'at no less than twelve-month intervals during a three-year term'.[105]

Rolls-Royce reached a similar resolution in its January 2017 settlement with US, UK and Brazilian authorities over bribery and corruption charges (and, in the United States, FCPA charges). At the time, Rolls-Royce already had an independent monitor – Lord Gold – who was appointed to review the company's anti-bribery and corruption compliance in connection with a 2013 settlement with the SFO. Although the company's 2017 DPA with the SFO did not impose a second monitor, it did require Rolls-Royce, *inter alia*, to procure a further report from Lord Gold outlining recommendations for change and produce a written plan of how it would implement these recommendations.[106] Likewise, the company's DPA with the DOJ did not implement a further monitor but did require the company to report to the DOJ at least once a year for the next three years and to produce a series of reports.[107]

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103 Monaco Memorandum at 14.

104 FCPA Digest, 'Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practices Act' at 2, 6, Shearman & Sterling (6 Jan. 2014), available at www.shearman.com/~/media/Files/Services/FCPA/2014/FCPADigestTPFCPA010614.pdf. For example, the DOJ's DPA with Panasonic required a two-year monitorship, after which Panasonic was required to undertake follow-up reviews for the remainder of the agreement. DOJ Deferred Prosecution Agreement with Panasonic Avionics Corp. at 12–13 (30 April 2018), www.justice.gov/opa/press-release/file/1058466/download.

105 Dylan Tokar, 'With Alstom Monitor Agreement, DOJ Tries Something New', Global Investigations Review (4 February 2015), https://globalinvestigationsreview.com/just-anti-corruption/article/alstom-monitor-agreement-doj-tries-something-new.

106 Deferred Prosecution Agreement between the SFO and Rolls-Royce, paras. 25–34, http://iaicm.org/wp-content/uploads/formidable/9/Rolls-Royce-SFO-DPA-17Jan2017.pdf.

107 Deferred Prosecution Agreement at 4–5, D-1, *United States v. Rolls-Royce plc*, No. 16-0247 (S) (S.D. Ohio, 20 Dec. 2016) ('Based on the Company's remediation and the state of its compliance program, and the Company's agreement to report to the Fraud Section and

When the SFO applied to the English court for approval of the DPA, the senior judge who heard that application, Sir Brian Leveson, then President of the Queen's Bench Division, expressly referred to the appointment of Lord Gold and the ongoing monitoring process as important factors indicating that Rolls-Royce had properly addressed issues of corporate compliance; this made the DPA (as opposed to criminal prosecution) an appropriate outcome.[108]

The 2019 *Serco Geografix* DPA took into consideration the fact that the parent company, Serco Group, had adopted an ongoing corporate renewal programme in 2013, which had been approved by the UK government, to improve assurance mechanisms and working practices within all companies in the group. In the approved judgment, Mr Justice William Davis said that this amounted to a significant remedial measure.[109]

Creating a work plan 24.5.3

Under the ABA Standards, the monitor should draft a detailed work plan at the outset of the monitorship, with input from the corporation and the government.[110] This is also a requirement of the UK regime under the Code, which stipulates that a work plan should be prepared even before the monitor's appointment is finally approved.[111]

The work plan will ordinarily include an overview of the monitor's role and objectives, a description of the corporation's policies and procedures to be evaluated, a list of documents the monitor seeks to review and a list of persons the monitor seeks to interview. The work plan should also include a proposed timeline for reaching certain milestones, such as a review of documents concerning the corporation's compliance programme; interviews with senior management, the board of directors and audit committee; and periodic reports of the monitor's findings.[112] In the United Kingdom, the work plan is required to set out provisions for costs and even to state with what frequency the monitor intends to report to the prosecutor.[113]

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the Office as set forth in Attachment D to this Agreement, the Fraud Section and the Office determined that an independent compliance monitor was unnecessary[.]').

108 *Serious Fraud Office v. Rolls-Royce plc* [2017] Lloyd's Rep FC 249 at paras. 43–47 and 61–64.

109 *Serious Fraud Office v. Serco Geografix Limited* [2019] Lloyd's Rep FC 518 at para. 25.

110 If disclosing the work plan to the company would limit the monitor's effectiveness, however, the parties should consider an alternative arrangement. See ABA Standards for Monitors, § 24-3.3(3).

111 Code, para. 7.18.

112 Jason T Wright, 'The Corporate Compliance Monitor's Role in Regulatory Settlement Agreements', Stout (1 March 2014), www.stout.com/en/insights/article/corporate-compliance-monitors-role-regulatory-settlement-agreements.

113 Code, para. 7.18.

Not only does a detailed work plan help control costs and increase transparency, but it also helps prepare all parties for the monitorship.[114] Accordingly, the corporation will have a better understanding of what can be expected, and the act of preparing the work plan helps the monitor become familiar with the company's culture and risk tolerance. Further, a detailed work plan helps ensure that the monitor's expectations for the corporation are reasonable and that the government is comfortable with the monitor's approach.[115]

24.5.4 Reviewing documents and interviewing witnesses

Cross-border monitorships may present specific challenges, as privacy, labour and privilege laws vary widely between countries. Companies must abide by the privacy laws of the countries in which they operate. A monitor for a European company must comply with the GDPR, meaning they might have to enter into agreements with the monitored entity to confirm the steps the monitor will take to protect personal data. The monitor may have to enter into agreements with third-party vendors to similarly ensure that personal data is protected.[116]

To serve as an effective monitor and issue tailored recommendations to the corporation, the monitor must understand the corporation and its business. To develop this understanding, the monitor must have wide access to the documents and information deemed reasonably necessary to carry out the monitorship.[117]

A recurring problem, however, is that given the monitor's independence, corporations are hesitant to disclose sensitive information. Under the ABA Standards, the corporation is not required to provide documents covered by the attorney–client or work-product privilege, or documents for which disclosure would be 'inconsistent with applicable law'.[118] A similar approach is adopted under the UK Code, which requires the company to grant the monitor 'complete access to all relevant aspects of its business during the course of the monitoring period', but does not affect the company's right to assert legal

See Chapters 18 and 19 on privilege

114 Warin, supra note 90, at 360 (noting that the work plan also serves as a 'gloss on the settlement agreement to be applied in subsequent years of the monitorship').

115 Wright, supra note 112.

116 See Gil M Soffer, Nicola Bunick and Johnjerica Hodge, 'US-Ordered Cross-Border Monitorships', *The Guide to Monitorships*, Global Investigations Review (2019).

117 Ensign and Colchester, supra note 82 (noting that the monitorship involved more than 3,500 meetings with HSBC staffers, 11,500 document requests and over 2 million pages of documents).

118 ABA Standards for Monitors, § 24-4.2(1)(a)–(2)(a). Despite the monitor's independence, the monitor still has a duty to the corporation by nature of the appointment; therefore, the monitor cannot use proprietary or confidential information obtained during the monitorship for any purpose other than in furtherance of the monitorship. Where proprietary information is disclosed, the monitor and corporation should work together to ensure this information remains confidential. The parties should also stipulate how the monitor is to return any confidential or proprietary documents upon completion of the monitorship.

professional privilege over relevant documents.[119] However, companies should consult counsel before withholding relevant privileged information from a corporate monitor, as it may be viewed negatively by the monitor and affect the overall perception of the company's compliance.

See Chapters 7 and 8 on beginning an internal investigation; 12 and 13 on witness interviews; and 36 and 37 on employee rights

It may also be necessary for the monitor to interview personnel, from low-level employees to senior management. The monitorship agreement should ordinarily address issues of employee rights that could arise during the monitorship, including privacy rights and the right to counsel – issues that take on added complexity where the monitor's review is cross-border. Ordinarily, the monitor should inform interviewees of his or her identity and explain why information is being collected. The monitor should also inform interviewees whether they are the target of the monitor's investigation and of their right to have counsel present during the interview. Where an employee chooses to exercise the right to counsel, the monitor must respect that decision.[120]

The monitor may find it advisable to inform interviewees of the degree to which the information being provided will remain confidential and what, if anything, the monitor is required to do with that information. In some circumstances, such as when information would otherwise be hard to extract, it may be appropriate for the monitor to have the authority to collect information confidentially to protect its sources.[121]

Issuing recommendations and reports 24.5.5

During the course of the monitorship, the corporation and monitor should work together to develop recommendations for improvement of the corporation's compliance programme and to prevent repeated corporate misconduct. Underscoring the importance of effective compliance programmes, the DOJ is now requiring, in certain circumstances, that chief executive officers (CEOs) and CCOs 'certify at the end of the term of the agreement that the company's compliance program is reasonably designed and implemented to detect and prevent violations of the law (based on the nature of the legal violation that gave rise to the resolution, as relevant), and is functioning effectively'.[122]

While a false certification could expose a CEO or CCO to criminal prosecution, the compliance certification is not meant to be punitive; rather, it is designed to 'empower . . . compliance professionals to have the data, access, and voice within the organization to ensure [the company] has an ethical and compliance focused environment'.[123] The ultimate goal is to improve corporate culture and reduce corporate recidivism. The compliance certification

119 Code, s.7.14.

120 Except in limited circumstances, a company is not required to provide counsel or pay for counsel for employees being interviewed.

121 ABA Standards for Monitors, § 24-4.2(4)(d).

122 Kenneth A Polite Jr, Assistant Att'y Gen., U.S. Dep't of Just., Remarks at NYU Law's Program on Corp. Compliance and Enf't (PCCE) (25 March 2022).

123 Id.

requirement played a prominent role in the DOJ's May 2022 resolution with Glencore Ltd of bribery and market manipulation charges.[124]

The monitor recommendations should be mindful of local laws concerning, for example, data privacy and privilege. Depending on the scope and duration of the monitorship, the monitor may summarise his or her findings and recommendations in periodic reports to the government or court, or issue a single report at the end of the monitorship.[125] As negative findings in the report have the potential to significantly harm the corporation, in some circumstances the monitor may provide the corporation with a preliminary draft and invite comments.[126] Ultimately, however, the report is issued by the monitor alone and must reflect the monitor's honest conclusions and recommendations.

Where the corporation disagrees with one of the monitor's recommendations, the corporation may reject it within a reasonable time, provided the government is informed. The government may consider this rejection when evaluating whether the corporation has fulfilled its obligations under the settlement.[127] Under the Grindler Memorandum, where a corporation rejects a monitor's recommendation on the basis of cost, it should provide a written proposal of 'an alternative policy, procedure, or system designed to achieve the same objective or purpose'.[128]

In the United Kingdom, the confidentiality of a monitor's reports and correspondence is expressly recognised in the Code, and its disclosure is restricted to the company, the prosecuting authority and the court (except as otherwise permitted by law).[129] Similarly in the United States, the government routinely denies Freedom of Information Act (FOIA) requests filed by news outlets for the production of monitor reports.[130] However, the public's right of access to such reports has been litigated in relation to the DPA between the DOJ and HSBC.[131]

By way of background, in 2012, HSBC reached a US$1.9 billion settlement with the government and secured a five-year DPA for HSBC's failure to

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124 *United States v. Glencore International AG*, plea agreement (24 May 2022), www.justice.gov/criminal/file/1508266/download.

125 Morford Memorandum, supra note 58, at 6.

126 ABA Standards for Monitors, § 24-4.3(1)(d). Giving the corporation the opportunity to review a draft report may improve the quality of the report, as the corporation can correct any errors and, where applicable, provide evidence to rebut the monitor's negative findings.

127 Morford Memorandum, supra note 58, at 6. For example, after Standard Chartered settled charges that it disguised transactions that could have violated US sanctions, two monitors were appointed as well as one 'independent consultant'. The monitors' findings that inadequate controls were used led to an additional US$300 million fine. Ensign and Colchester, supra note 82.

128 Grindler Memorandum, supra note 91, at § II.

129 Code, para. 7.20.

130 Ensign and Colchester, supra note 82.

131 The HSBC matter represents the most public instance of a party seeking access to a monitor's report; however, it is not the only such example. See *In re Depuy Orthopaedics, Inc. Pinnacle Hip Implant Prod. Liab. Litig.*, No. 11 MD 2244, 2013 WL 2091715 (N.D. Tex. 15 May 2013) (ordering disclosure of monitor's report in a product liability matter).

comply with anti-money laundering laws and US sanctions.[132] In an unusual turn of events, the court approved the DPA on the condition that the court could continue to exercise 'supervisory' control over the case.[133] A monitor was appointed as part of the settlement and issued a 1,000-page report in January 2015, a copy of which was filed under seal with the court. Thereafter, an HSBC mortgage customer asked the court to unseal the report so he could determine whether HSBC continued to engage in 'unsafe and unsound business practices'.[134]

The lower court held that the report qualified as a 'judicial record' that should be filed publicly and that 'the public has a First Amendment right to see the Report', although HSBC and the government could suggest redactions and parts to remain under seal.[135] HSBC and the government opposed the unsealing, claiming it 'could provide a "road map" for criminals seeking to launder money'.[136] HSBC's lawyer said the court's order also called into question assurances given to foreign regulators who had provided information to the monitor on condition the report be kept secret.[137]

On 12 July 2017, the United States Court of Appeals for the Second Circuit reversed the lower court's decision, noting that 'a district court's role vis-à-vis a DPA is limited to arraigning the defendant, granting a speedy trial waiver if the DPA does not represent an improper attempt to circumvent the speedy trial clock, and adjudicating motions or disputes as they arise'.[138] Given the limited supervisory role of courts in the DPA context, the Second Circuit held that a monitor's report is not a judicial record because it is not 'relevant to the performance of the judicial function'.[139] The holding, which relies upon and

132 In December 2017, the DOJ found that HSBC had successfully addressed the issues related to its case and sought to dismiss. Evan Weinberger, 'DOJ Seeks Dismissal of HSBC Money Laundering Case', *Law360* (12 December 2017), www.law360.com/articles/993914/doj-seeks-dismissal-of-hsbc-money-laundering-case.

133 See Christie Smythe, 'Judge Lets Sun Shine on Secret HSBC Money Laundering Report', Bloomberg (29 January 2016), www.bloomberg.com/news/articles/2016-01-29/judge-lets-sun-shine-on-secret-hsbc-report-on-money-laundering.

134 Nate Raymond, 'HSBC money laundering report's release likely delayed: U.S. judge', Reuters (10 February 2016), www.reuters.com/article/us-hsbc-moneylaundering-idUSKCN0VI28H. See *United States v. HSBC Bank USA NA*, No. 12 CR 763 (JG), 2016 WL 347670, at *1, *6 (E.D.N.Y. 28 Jan. 2016), motion to certify appeal denied, No. 12-0763, 2016 WL 2593925 (E.D.N.Y. 4 May 2016) (inviting the parties to suggest further redactions to the report).

135 *HSBC Bank USA NA*, 2016 WL 34760, at *1, *6. ZTE's monitor reports may be particularly susceptible to this type of argument, given that the plea agreement as amended by Judge Kinkeade refers to the monitor as a 'judicial adjunct' and provides that all monitor reports be filed with the court, albeit under seal and subject to in-camera review. See supra notes 70–75 and accompanying text.

136 Raymond, supra note 134.

137 Id.

138 *United States v. HSBC Bank USA, N.A.*, 863 F.3d 125, 129 (2d Cir. 2017).

139 Id. at 137.

is consistent with the DC Circuit Court of Appeals' decision in *United States v. Fokker Services BV*, limits both a district court's initial judicial review of a DPA and its subsequent oversight of the DPA's execution.[140]

The District Court for the District of Columbia made a similar ruling in *100Reporters LLC v. United States Department of Justice*, concerning monitor reports issued in the wake of Siemens' 2008 settlement with the United States and Germany. There, reporters sued to obtain the reports under the FOIA. In a March 2017 decision, the court acknowledged that significant portions of the report may be exempt from production under the FOIA, for example, because they contain 'classic attorney work-product' and 'information [that] cuts to the core of Siemens' business', on which a competitor could rely to Siemens' detriment, but the court was not prepared to find that all information should be so shielded.[141]

Given the remaining uncertainty over the confidentiality of the monitor's report, it has become best practice – as confirmed by ABA Standard 24-4.3(4) – for the government and the corporation to determine whether reports will be made public when negotiating the settlement agreement:

> *To perform its duties, the monitor needs access to the unprivileged, confidential and proprietary business information of the corporation, and communications among the corporation, the monitor and the government need to be candid and complete over an extended period. . . . Recognizing that corporate information included in monitor reports may be used unfairly by competitors and others to disadvantage the corporation, DPAs and NPAs typically reflect the parties' intentions to maintain the confidentiality of monitor reports.*[142]

Where a proposed settlement agreement instituting a monitorship lacks such explicit proviso for confidentiality, counsel should seek to revise and include it.

24.6 Costs and other considerations

Monitorships can be extremely expensive, with monitors collecting multimillion-dollar fees, to be paid for by the corporation (and ultimately its shareholders).[143] For example, Ericsson recently disclosed that it had set aside

140 *United States v. Fokker Services B.V.*, 818 F.3d 733 (D.D.C. 2016).

141 *100Reporters LLC v. U.S. Dep't of Justice*, No. 14-1264-RC, at 3, 32, 58 (D.D.C. 31 Mar. 2017) (finding that the DOJ had justified withholding portions of the report under certain exemptions to FOIA but had not justified the withholding of all portions of the report or demonstrated that the report could not be segregated for purposes of partial production).

142 Karen F Green and Timothy D Saunders, 'Minding the Monitor: Disclosure of Corporate Monitor Reports to Third Parties', Bloomberg BNA (25 March 2014).

143 Both the Morford Memorandum and the Grindler Memorandum counsel the need for prosecutors to be mindful of the costs of monitors and their potential impact on the corporation when negotiating settlements. Grindler Memorandum, supra note 91, § II (noting that the government 'should help to instill public confidence in the Department's use of monitors,

US$58 million to cover the costs of its impending monitorship.[144] Critics note that the rise in monitorships has created 'a lucrative cottage industry made up of former prosecutors and small consulting firms', some of which even offer expertise in assisting corporations monitor their monitors.[145] Others argue that the cost of the monitorship will be offset against the fines levied on the corporation and that the imposition of a monitor may help sway the government in favour of reduced fines.[146]

The ultimate cost of the monitorship will largely depend on the scope and duration of the monitorship. Cost will also be influenced by the complexity of the settlement agreement, the state of the corporation's existing compliance programme, and the geographic markets and industries in which the corporation operates. The monitor should take these various factors into consideration when providing the corporation with a projected budget. The monitor and the corporation should also consider and agree on an hourly rate or a fixed rate, any applicable rate adjustments and a potential fee cap. Further, to increase transparency and mitigate the risk of conflicts, the monitor should provide regular updates on the costs being incurred and expected to be incurred.[147]

As one example of the issues that can arise because of costs, in 2014, Apple moved to disqualify its antitrust monitor for what it viewed as excessive billing and unprofessional conduct where the monitor, *inter alia*, had charged a rate of US$1,000 per hour in fees.[148] The motion was denied by the Southern District of New York in an order affirmed by the Second Circuit, but the Second Circuit noted that the issues raised had 'considerable resonance because the fairness and integrity of the courts can be compromised by inadequate constraint on a monitor's aggressive use of judicial power'.[149]

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including the Department's mindfulness of the costs of a monitor and their impact on a corporation's operations'); Morford Memorandum, supra note 58, at 2 (noting that prosecutors must be mindful of 'the cost of a monitor and impact on the operations of a corporation').

144 Adam Dobrik, 'DOJ picks Ericsson monitor', Global Investigations Review (11 May 2020), https://globalinvestigationsreview.com/article/jac/1226647/doj-picks-ericsson-monitor.

145 Rachel Louise Ensign, 'Judge Rules HSBC's Outside Monitor's Secret Report Should Be Made Public', *The Wall Street Journal* (29 January 2016), www.wsj.com/articles/judge-rules-hsbcs-outside-monitors-secret-report-should-be-made-public-1454086003; see also Ensign and Colchester, supra note 82.

146 Whereas fines are usually due in one lump sum, payments for monitors are commonly billed monthly. See Wright, supra note 112 ('More often than not, however, this cost is far less than what the company would otherwise pay in fines, possible debarment, or legal fees in defending an enforcement action through trial.'); Patricia M Sulzbach, 'Independent Corporate Monitors: A Company's Friend or Foe?', ABA White Collar Crime Comm. Newsletter (18 April 2013).

147 See also ABA Standards for Monitors, § 24-3.4.

148 *United States v. Apple, Inc.*, 992 F. Supp. 2d 263 (S.D.N.Y. 2014).

149 *United States v. Apple, Inc.*, 787 F.3d 131, 133–34 (2d Cir. 2015).

24.7 Conclusion

Since their first applications during the 1990s, the use of monitors has rapidly expanded across industries and offences: banks, energy companies, unions, car manufacturers and fire departments have all been (or currently are) subject to oversight by monitors. Implemented to address a myriad of wrongs ranging from fraud and racketeering to discriminatory hiring practices, monitorships were in many ways viewed as panaceas.

Rising costs and increasing concerns about their efficacy have resulted in far greater scrutiny of all proposed monitorships. Where the past two decades represent an expansion in the breadth of cases where monitors were contemplated, the next two are likely to focus on and refine that scope. The ongoing debates over whether monitors' reports should be public, the degree to which monitors are truly independent and how monitors should be selected will result not only in additional litigation but will force an evolution in how monitorships are used as settlement tools. The issues identified throughout this chapter are live controversies, each likely to distil and develop the body of case law governing monitorships, ultimately resulting in a body of jurisprudence that imposes default standards of disclosure, transparency, control and authority on monitors, the government and defendants alike.

Appendix 1

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Robin Barclay KC is a member of Fountain Court Chambers, London. He is currently and has been repeatedly recognised by all the directories and his peers as a leading practitioner in international commercial civil and criminal fraud, bribery, money laundering, sanctions, market abuse and insider trading and a wide range of banking, financial services and regulatory and disciplinary investigations.

He was called to the Bar in 1999 and became a Queen's Counsel in 2020.

His practice comprises mainly high-profile complex litigation and is heavily weighted towards points at which commercial conduct straddles the line between civil, regulatory and criminal law – and in particular cross-border work involving banking and the financial markets. As well as trials and investigations, Robin's practice covers a range of interim applications and other matters, including civil and criminal search orders, freezing injunctions and restraint orders, directors' duties and liabilities, shareholder and derivative actions, disclosure orders and document production notices, internal investigations, company announcements, corporate self-reports and deferred prosecution agreements, unexplained wealth orders, immunity agreements, extradition, legal privilege, privacy and confidentiality, sanctions and criminal confiscation.

Robin is co-author of the leading book on the UK Bribery Act 2010 published by LexisNexis.

Nico Leslie

Fountain Court Chambers

Nico Leslie is a member of Fountain Court Chambers, London. He was called to the Bar in 2010 and has since developed a practice involving both national and international disputes. In particular, he has done significant work in Singapore, both in arbitration and before the newly formed Singapore International Civil Court.

Nico's practice comprises mainly complex financial and civil fraud litigation, having acted in some of the largest UK disputes of recent years, including the *Sebastian Holdings*, *Algosaibi*, *Gemini* and *Republic of Djibouti* cases. In light of this experience, Nico was recently identified as one of 10 junior 'Stars at the Bar' by the UK legal press.

Nico is the co-author (with Marcus Smith KC) of *The Law of Assignment* (published by OUP), one of the leading texts on the creation and transfer of intangible property. He has also been commissioned by OUP (with Marcus Smith KC) to write a further book: *Private International Law and Intangible Property*. Nico speaks fluent French, Italian and Serbo-Croat and is comfortable working in those languages.

Christopher J Morvillo

Clifford Chance US LLP

Christopher J Morvillo has extensive experience representing corporate and individual clients in criminal investigations and proceedings, internal investigations, and related regulatory and civil matters. With a particular focus on cross-border government and internal investigations, his many representations have involved allegations of accounting fraud, public and foreign corruption, securities fraud, insider trading, economic sanctions violations, trade secret theft and computer fraud. Mr Morvillo also advises corporations and businesses on related compliance and policy matters.

From 1999 to 2005, Mr Morvillo served as an Assistant US Attorney for the Southern District of New York, where he investigated, tried and handled appeals in a wide variety of criminal cases, including in the area of healthcare fraud, insurance fraud, money laundering, obstruction of justice, counterterrorism and narcotics. In 2005, he received the US Attorney General's Award for Exceptional Service – the Department of Justice's highest award for prosecutors – in recognition of his role in the investigation and successful prosecution of a large international terrorism case.

Mr Morvillo was named one of the top five most highly regarded lawyers in the United States for business crime corporate defence in the 2016 edition of *Who's Who Legal*. Mr Morvillo's expertise has also been recognised by numerous other publications, including *Chambers*, *Best Lawyers in America* and *Super Lawyers New York*. Mr Morvillo speaks and writes frequently on government investigations.

Celeste Koeleveld
Clifford Chance US LLP

Celeste Koeleveld has more than 25 years of experience in government enforcement, regulatory and civil litigation matters that span federal, state and local government in the United States. During her career, she has held senior positions in the US Attorney's Office for the Southern District of New York (SDNY), the New York State Department of Financial Services (DFS) and the New York City Law Department. Ms Koeleveld represents clients, both corporates and individuals, with regulatory compliance, internal investigations and all phases of civil, criminal and regulatory litigation, from inception through the appellate process. Her significant government experience imparts a particularly insightful perspective to her advice and counsel in enforcement and regulatory matters.

Prior to joining Clifford Chance, Ms Koeleveld served as General Counsel at DFS, where she handled a broad spectrum of regulatory and enforcement actions, including disciplinary and enforcement proceedings. In addition, Ms Koeleveld served for 17 years in SDNY, rising to Chief of the Criminal Division, where she led a team of more than 160 Assistant US Attorneys and oversaw all criminal investigations and prosecutions. Ms Koeleveld also served for eight years as Executive Assistant Corporation Counsel at the New York City Law Department, providing legal advice to city agencies responding to government investigations from a variety of federal, state and local prosecutors and investigative bodies.

Meredith George
Clifford Chance US LLP

Meredith George is an associate in the litigation and dispute resolution practice of Clifford Chance, specialising in government enforcement and litigation focusing on investigations, including investigations involving issues of antitrust violations and market manipulation. Her relevant experience includes defending a major financial institution in class action litigation alleging a conspiracy to manipulate platinum and palladium benchmarks and related derivatives prices, and representing a multinational oil and gas company in a US CFTC investigation into certain transactions in the European physical market with downstream effects in the US futures market. She is a graduate of Rice University and Duke University School of Law and is admitted to practise in New York.

Benjamin A Berringer
Clifford Chance US LLP

Benjamin Berringer is an associate at Clifford Chance US LLP, where he focuses on cross-border investigations and complex commercial litigation. Ben represents both corporations and individuals in connection with regulatory investigations before the Commodity Futures Trading Commission, the Department of Justice and the Securities and Exchange Commission. Ben also advises on matters arising under cybersecurity, privacy and data protection laws. Ben received his BA from Williams College, his MSc in economics from SOAS and his JD from New York University School of Law.

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