

2016

# Modern-Day Monitorships

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# Modern-Day Monitorships

Veronica Root<sup>†</sup>

*When a sexual abuse scandal rocked Penn State, when Apple was found to have engaged in anticompetitive behavior, and when servicers like Bank of America improperly foreclosed upon hundreds of thousands of homeowners, each organization entered into a “Modern-Day Monitorship.” Modern-day monitorships are utilized in an array of contexts to assist in widely varying remediation efforts. This is because they provide outsiders with a unique source of information about the efficacy of the tarnished organization’s efforts to resolve misconduct. Yet, despite their use in high profile and serious matters of organizational wrongdoing, they are not an outgrowth of careful study and deliberate planning. Instead, modern-day monitorships have been employed in an ad-hoc and reactionary manner, which has resulted in repeated instances of controversy and calls for reform. Underlying these calls for reform has been an implicit assumption that broad-based rules can effectively regulate all monitorships.*

*Yet, when tested, this assumption is found lacking. This Article traces the rise of the modern-day monitorship and, for the first time, analyzes the use of monitorships in five different contexts. The analysis demonstrates that modern-day monitorships have experienced a rapid evolution with important consequences. First, as the Apple monitorship demonstrates, this evolution has changed the manner in which courts and lawyers conceive of the appropriate boundaries and norms for court-ordered monitorships. Second, as the Penn State scandal reveals, private organizations are co-opting the use of monitorships, which may transform the nature of monitorships from a quasi-governmental enforcement mechanism to a privatized reputation remediation tool. Third, monitorships fall into different categories based on the type of remediation effort the monitorship is meant to achieve. Because these different categories necessitate different monitorship structures to achieve the goals of each monitorship, attempts to adopt universal rules governing monitorships may be misguided. In short, differences matter when evaluating monitorships.*

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<sup>†</sup> Associate Professor of Law, Notre Dame Law School. Many thanks to Miriam Baer, Lisa Bernstein, Kevin Davis, Deborah DeMott, Lisa Fairfax, Barbara J. Fick, Gina-Gail S. Fletcher, Bruce Huber, Daniel Kelly, Patricia O’Hara, Jay Tidmarsh, Julian Velasco and to participants of the Duke University School of Law Culp Colloquium, the Notre Dame Junior Faculty Workshop, the Corporate Compliance After the Crisis panel at the 2014 SEALS conference, the University of Chicago Legal Scholarship Workshop, and the University of Illinois College of Law Faculty Workshop for helpful comments and conversations. Thanks to Veronica Meffe, Marissa Wahl, and Quinn Kane for invaluable research assistance.

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Introduction

When hundreds of thousands of families lost their homes as a result of improper bank foreclosures, the Office of the Comptroller of the Currency (“OCC”) and the Federal Reserve entered into agreements with banks initiating what came to be

known as the “Independent Foreclosure Review”—a modern-day monitorship.<sup>1</sup> As part of the Independent Foreclosure Review, the banks retained “independent consultants”—monitors<sup>2</sup>—to ensure that they properly “remediate[d] all financial injury to borrowers caused by any errors, misrepresentations, or other deficiencies.”<sup>3</sup>

Whether the misconduct is an effort to improperly foreclose on homeowners’ mortgages,<sup>4</sup> a bribe in violation of the Foreign Corrupt Practices Act (“FCPA”),<sup>5</sup> an anticompetitive business practice,<sup>6</sup> or a failure to detect and prevent repeated child abuse,<sup>7</sup> modern-day monitorships are important remediation tools. They are used after misconduct is discovered within an organization to address and remedy the harm that the firm’s misconduct has caused and to provide information to interested third parties about the organization’s progress toward reform.<sup>8</sup> As such, the monitor is (i) an independent, private outsider, (ii) employed after an institution is found to have engaged in wrongdoing, (iii) who effectuates remediation of the institution’s misconduct, and (iv) provides information to outside actors about the status of the institution’s remediation efforts.

During the Independent Foreclosure Review, the independent consultants were charged specifically with “conduct[ing] an independent review of certain residential foreclosure actions regarding individual borrowers with respect to the Bank’s mortgage servicing portfolio.”<sup>9</sup> This is a relatively common task in modern-day monitorships. A limited investigation ensues in an effort to oversee remediation efforts. The goal, however, is not to conduct a full-out internal investigation, as evidenced by the monitor’s ability to rely on previously conducted investigations by the monitored

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1. See, e.g., *What You Need to Know: Independent Foreclosure Review*, BD. OF GOVERNORS OF THE FED. RES. SYS. (May 12, 2014), <http://www.federalreserve.gov/consumerinfo/independent-foreclosure-review.htm>.

2. This Article uses the term monitor because that word has become a term of art for this kind of independent, private outsider. This term is used in scholarship, the news media, and Department of Justice (“DOJ”) guidance and settlement agreements. It appears to be the term of consensus. Agreements will, however, often use terms other than monitor, like the term “independent consultant.”

3. Press Release, Office of the Comptroller of the Currency, OCC Takes Enforcement Action Against Eight Servicers for Unsafe and Unsound Foreclosure Practices (Apr. 13, 2011), <http://www.occ.treas.gov/news-issuances/news-releases/2011/nr-occ-2011-47.html>.

4. See *About the Settlement*, JOINT ST.-FED. NAT’L MORTG. SERVICING SETTLEMENTS, <http://www.nationalmortgagesettlement.com/about> (last visited Oct. 1, 2015) [hereinafter *Nat’l Mortgage Settlement*].

5. Total, S.A., Exchange Act Release No. 69,654, [2013 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,307, at 85,532 (May 29, 2013).

6. Exhibit C: Monitor Agreement, *In re Johnson & Johnson*, No. C-4363, 2012 WL 3518630 (F.T.C. Aug. 7, 2012).

7. Ben Kercheval, *NCAA Tabs ‘Mitchell Report’ Leader as Penn State Integrity Monitor*, NBCSPORTS.COM (Aug. 1, 2012, 7:36 PM), <http://collegefootball-talk.nbcsports.com/2012/08/01/ncaa-tabs-mitchell-report-leader-as-penn-state-integrity-monitor> (“As Athletics Integrity Monitor, Mitchell will evaluate Penn State’s compliance with NCAA sanctions and the Athletics Integrity Agreement it will execute with the NCAA and the Big Ten Conference.”).

8. See, e.g., Veronica Root, *The Monitor-“Client” Relationship*, 100 VA. L. REV. 523 (2014); F. Joseph Warin, Michael S. Diamant & Veronica S. Root, *Somebody’s Watching Me: FCPA Monitorships and How They Can Work Better*, 13 U. PA. J. BUS. L. 321, 347-48 (2011).

9. See, e.g., Consent Order at 14, *In re Bank of America, N.A.*, 2011 WL 6941540 (U.S. Dep’t of Treasury Apr. 13, 2011).

firm.<sup>10</sup> This is because the monitorship's goal is not to discover wrongdoing—that is already a given—but rather the monitorship is a remediation tool charged with overseeing the firm's attempts to remedy the harm caused by the organizational misconduct.<sup>11</sup> For an organization that has lost credibility and trust that it will engage in effective self-policing, the monitorship serves as a powerful mechanism for supplying information to interested outsiders, including courts, regulators, prosecutors, or the public.

Yet modern-day monitorships have often been the subject of scandal and criticism. The Independent Foreclosure Review is a prime example. After the independent consultants generated approximately \$2 billion in fees for the foreclosure reviews,<sup>12</sup> a congressional investigation ensued,<sup>13</sup> a damning Government Accountability Office (“GAO”) report was issued,<sup>14</sup> and the review was abruptly terminated.<sup>15</sup> The independent consultants blamed the regulators' review structure, as did the GAO,<sup>16</sup> while the regulators requested statutory authority to sanction the independent consultants.<sup>17</sup> This debacle is only the latest of a myriad of monitorship

10. For example, the independent consultants retained in the Independent Foreclosure Review were permitted to “consider any work already done by the Bank or other third-parties on behalf of the Bank.” *Id.* at 15.

11. If the monitor were to find additional misconduct or wrongdoing at the monitored organization, then it is often required to report the misconduct. See Root, *supra* note 8, at 536 n.52.

12. Jesse Hamilton & Cheyenne Hopkins, *OCC Asks for Enforcement Powers Against Banks' Consultants*, BLOOMBERG BUS. (Apr. 11, 2013), <http://www.bloomberg.com/news/articles/2013-04-10/occ-asks-for-enforcement-powers-against-outside-consultant-firms>.

13. Danielle Douglas, *Lawmakers Question Use of Consultants in Foreclosure Review*, WASH. POST (Apr. 11, 2013), [http://www.washingtonpost.com/business/economy/lawmakers-question-use-of-consultants-in-foreclosure-review/2013/04/11/3395de64-a141-11e2-be47-b44febada3a8\\_story.html](http://www.washingtonpost.com/business/economy/lawmakers-question-use-of-consultants-in-foreclosure-review/2013/04/11/3395de64-a141-11e2-be47-b44febada3a8_story.html).

14. Ben Prottess & Jessica Silver-Greenberg, *U.S. Efforts to Regulate Consultants Face Big Obstacles*, N.Y. TIMES DEALBOOK (Apr. 10, 2013, 6:00 PM), <http://dealbook.nytimes.com/2013/04/10/despise-pressure-to-police-consultants-regulators-face-obstacles>.

15. Michael Corkery, *G.A.O. Report Sees Deeper Bank Flaws in Foreclosure*, N.Y. TIMES DEALBOOK (Apr. 28, 2014, 9:04 PM), <http://dealbook.nytimes.com/2014/04/28/g-a-o-report-sees-deeper-bank-flaws-in-foreclosures>.

16. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-277, LESSONS LEARNED COULD ENHANCE CONTINUING REVIEWS AND ACTIVITIES UNDER AMENDED CONSENT ORDERS (2013); see Francine McKenna, *GAO Blames Regulators for Faulty Foreclosure Reviews But That's Not the Whole Story*, FORBES (Apr. 4, 2013, 8:13 AM), <http://www.forbes.com/sites/francinemckenna/2013/04/04/gao-blames-regulators-for-faulty-foreclosure-reviews-but-thats-not-the-whole-story>; Douglas, *supra* note 13 (“Broad guidance and limited monitoring’ from regulators ‘reduced the potential usefulness of data from consultants and increased risks of inconsistency,’ the report said.”).

17. Hamilton & Hopkins, *supra* note 12. It is worth noting that, if this legislation were passed, it would cover consultant wrongdoing whether the consultants were employed as monitors to assist in remediation or as gatekeepers charged with preventing and detecting misconduct in the first instance.

scandals. Controversies have arisen related to monitorship costs,<sup>18</sup> allegations of cronyism in the selection of monitors,<sup>19</sup> and concerns regarding the appropriate legal authority of courts when imposing monitorships.<sup>20</sup>

These scandals often spur calls for reform. As a result, concerns regarding monitorships are recounted in academic articles,<sup>21</sup> proposed legislation,<sup>22</sup> and the news.<sup>23</sup>

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18. See *Transparency and Integrity in Corporate Monitoring: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 46–48 (2009) (statement of Eileen R. Larence, Director, Homeland Security and Justice, Government Accountability Office) (detailing corporations' concerns with "the overall cost of . . . monitorship").

19. See, e.g., Philip Shenon, *Ashcroft Deal Brings Scrutiny in Justice Dept.*, N.Y. TIMES (Jan. 10, 2008), <http://www.nytimes.com/2008/01/10/washington/10justice.html> (highlighting concerns with multimillion dollar monitorship contract involving John Ashcroft, the former boss of the federal prosecutor handling the case).

20. See *infra* Part II.C.

21. Even with the widespread use of monitorships and their extensive coverage in the news media, legal scholarship discussing monitorships and the role of monitors is still in its early stages. E.g., Root, *supra* note 8 (discussing Corporate Compliance Monitorships and arguing that they could benefit from a set of clear, enforceable, predictable rules regarding confidentiality, which would facilitate the corporate compliance monitor's function as a legal counselor); Christie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 732–34 (2009) [hereinafter Ford & Hess, *Monitorships Improve*]; Christie Ford & David Hess, *Corporate Monitorships and New Governance Regulation: In Theory, In Practice, and In Context*, 33 L. & POL'Y 509 (2011) (recommending a new governance approach to monitorships) [hereinafter Ford & Hess, *Corporate Monitorships*]; Vikramaditya Khanna, *Reforming the Corporate Monitor?*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 226, 236 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) (discussing possible reforms for corporate monitors); Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713 (2007) (providing "descriptive [and] normative analyses of the role and scope of corporate monitors" that includes an examination of "when it is desirable to appoint monitors and what powers and obligations they should have"); Caelah E. Nelson, *Corporate Compliance Monitors Are Not Superheroes with Unrestrained Power: A Call for Increased Oversight and Ethical Reform*, 27 GEO. J. LEGAL ETHICS 723 (2014); Jennifer O'Hare, *The Use of the Corporate Monitor in SEC Enforcement Actions*, 1 BROOK. J. CORP. FIN. & COM. L. 89 (2006) (discussing the WorldCom monitorship); Warin, Diamant & Root, *supra* note 8. Other scholarship discusses monitors within the context of other issues related to corporate governance, crime, or compliance. See, e.g., BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 172–95 (2014) (discussing mechanisms for improving corporate law enforcement); Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice's Corporate Charging Policies*, 51 ST. LOUIS U. L.J. 1 (2006) (explaining the use of monitors under the Organizational Sentencing Guidelines, which led to monitors in pre-trial agreements); Thomas F. O'Neil, III & T. Brendan Kennedy, *Answering to a Higher Authority: Sovereign-Mandated Oversight in the Board Room and the C-Suite*, 17 FORDHAM J. CORP. & FIN. L. 299, 300 (2012) (discussing the "evolution of private sector oversight and its implementation domestically" and offering "refinements and solutions to all constituencies related to the selection, retention and deployment of independent consultants and monitor"); Elizabeth R. Sheyn, *The Humanization of the Corporate Entity: Changing Views of Corporate Criminal Liability in the Wake of Citizens United*, 65 U. MIAMI L. REV. 1 (2010) (discussing monitors within a broader discussion regarding the effect of *Citizens United* on corporate criminal liability); D. Daniel Sokol, *Policing the Firm*, 89 NOTRE DAME L. REV. 785, 788–90 (2013) (suggesting mechanisms for improving criminal antitrust enforcement, including the use of monitors in the criminal antitrust context).

22. Accountability in Deferred Prosecution Act of 2009, H.R. 1947, 111th Cong. (2009); Accountability in Deferred Prosecution Act of 2008, H.R. 6492, 110th Cong. (2008).

23. See Douglas, *supra* note 13 (discussing congressional investigation of monitorship in Independent Foreclosure Review).

Implicit in what has become a predictable and repeated backlash to monitorships is an underlying belief that monitorships can be regulated wholesale.<sup>24</sup>

For example, scholarly calls for reform have addressed monitorships in a comprehensive manner.<sup>25</sup> Additionally, proposed congressional legislation attempted to regulate monitorships as if they were a homogenous phenomenon.<sup>26</sup> Moreover, advice to practitioners regarding the use of monitorships has addressed the topic as if it were a uniform remediation tool.<sup>27</sup> Furthermore, the imposition of monitorships by certain regulators has revealed a lack of understanding regarding the inherent complexities of monitorships.<sup>28</sup> Finally, even when the heterogeneity of monitorships is acknowledged, as it was in guidance to prosecutors regarding the use of monitorships,<sup>29</sup> the full breadth and scope of responsibilities delegated to monitorships is not fully acknowledged.<sup>30</sup>

This Article challenges the implicit assumption that modern-day monitorships are a uniform phenomenon. It conducts a systematic, in-depth review of monitorships, revealing that (i) monitorships can be classified into separate categories based upon the type of remediation effort that the monitored organization is engaged in to redress misconduct and (ii) these categories continue to evolve, suggesting that many previous attempts at monitorship reform may be inadequate or incomplete. Specifically, monitorships were traditionally employed by courts to ensure specific performance with courts' orders. But modern-day monitorships are often used outside the purview of the court, and even when a court is involved, the monitor is often delegated authority that goes beyond ensuring a party's specific performance with a court's order. The Article then demonstrates that common priorities of monitorship reform—court oversight, transparency and confidentiality concerns, and duties within the monitorship relationship—result in differing analyses and conclusions de-

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24. For example, the consent orders governing the Independent Foreclosure Review suggested that the OCC believed it had sufficient experience with monitorships to craft an effective, external remediation process *ex ante*. But during congressional testimony, it was readily conceded that “[d]espite the detail in the consent orders and in the engagement letters, the scale and complexity of the [Independent Foreclosure Review] engagements were unprecedented and had not been entirely anticipated before the engagements began.” Hamilton & Hopkins, *supra* note 12.

25. See, e.g., Ford & Hess, *Corporate Monitorships*, *supra* note 21; Ford & Hess, *Monitorships Improve*, *supra* note 21; Khanna, *supra* note 21; Khanna & Dickinson, *supra* note 21; Nelson, *supra* note 21.

26. Accountability in Deferred Prosecution Act of 2009, H.R. 1947, 111th Cong. (2009); Accountability in Deferred Prosecution Act of 2008, H.R. 6492, 110th Cong. (2008).

27. See, e.g., Warin, Diamant & Root, *supra* note 8.

28. For example, the consent orders governing the Independent Foreclosure Review suggested that the OCC believed it had sufficient experience with monitorships to craft an effective, external remediation process *ex ante*. But during congressional testimony, it was readily conceded that “[d]espite the detail in the consent orders and in the engagement letters, the scale and complexity of the [Independent Foreclosure Review] engagements were unprecedented and had not been entirely anticipated before the engagements began.” Hamilton & Hopkins, *supra* note 12.

29. Memorandum from Craig S. Morford, Acting Deputy Att’y Gen., to Heads of Department Components and United States Attorneys (Mar. 7, 2008), <http://www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf> (outlining principles to consider when selecting and using a corporate monitor).

30. The Morford Memo fails to acknowledge that monitors sometimes provide activities above and beyond assessing compliance with the terms of a specific agreement with the government. See *id.*



pending upon the type of monitorship examined. Thus, the Article argues that uniform rules governing all modern-day monitorships are, at best, likely to be less effective than previously believed, or, at worst, misguided. In short, the differences amongst monitorships matter when analyzing proposed reforms aimed at regulating monitorships.

The Article proceeds in four parts. Part I documents the rise of the modern-day monitorship. Part II analyzes monitorships in different contexts, demonstrating that monitorships are evolving and take a variety of forms. These forms are an outgrowth of the types of remediation efforts necessary to address the underlying organizational misconduct. Using the findings from Part II, Part III demonstrates that monitorships are difficult to regulate in a uniform manner on account of their differing structures and remediation efforts. Finally, Part IV discusses how the Article's analysis could influence considerations regarding the use of monitorships for scholars, courts, practitioners, and lawmakers.

## I. The Rise of the Modern-Day Monitorship.

The need for and rise of the modern-day monitorship is an outgrowth of three related phenomena: (i) the evolution of the use of traditional, court-appointed agents, (ii) an increase in the complexity of regulatory and legal requirements facing organizations, and (iii) the use of external gatekeepers to assist organizations in their efforts to comply with a more challenging and demanding regulatory environment. This Part begins with a description of traditional, court-appointed agents, which are sometimes referred to as monitors, and explains how, over time, these agents contributed to the rise of the modern-day monitorship. The Part goes on to explain how complicated regulatory and legal systems created the need to rely upon external gatekeepers to detect and prevent organizational misconduct. The reliance on external gatekeepers became commonly accepted and grew in scope during a time of increasing regulatory and legal complexity.<sup>31</sup> This complexity resulted in the use of independent, private outsiders in roles beyond that of detection and prevention and into roles that included responsibility for overseeing organizational remediation efforts. The Part demonstrates that the nation's enforcement regime transitioned from one where the governmental agency took primary responsibility for monitoring enforcement to one where the government outsourced this responsibility. These events converged to create a system wherein it became acceptable to rely heavily on modern-day monitorships to assist with and evaluate the efficacy of organizational remediation efforts in other contexts.

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31. See, e.g., MAX H. BAZERMAN & ANN E. TENBRUNSEL, *BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT* 3 (2014) (explaining that "numerous scandals . . . in the new millennium have damaged our confidence in our businesses and our leaders," creating "pressure to become more ethical" and requiring "organizations and financial organizations [to] undertake[] efforts aimed at improving and enforcing ethical behavior").

### A. Traditional, Court-Ordered Monitorships

Courts have used independent, private outsiders—court-appointed agents—to assist courts in their adjudication efforts for decades.<sup>32</sup> These individuals are referred to by a number of terms often used interchangeably, including master, special master, receiver, trustee, or monitor.<sup>33</sup> The traditional purpose of those serving as agents of the court was to help “a judge process complex evidence at the trial stage of proceedings by taking evidence on specific issues and making a preliminary analysis and recommendation.”<sup>34</sup> Over time, however, the role evolved to include activities after an organization was found to have engaged in wrongdoing. “[A]fter a finding of liability, [the Monitor is] often appointed at the remedial stage of complex cases to aid in formulating the decree, assist the court in implementing it, and monitor compliance.”<sup>35</sup> In other words, the monitor is employed to ensure the monitored organization’s specific performance with the court’s orders and to report on the progress of these efforts directly to the court.<sup>36</sup>

In federal courts, the court’s authority to appoint a monitor in civil<sup>37</sup> cases comes from Federal Rule of Civil Procedure (“FRCP”) 53. Under FRCP 53, a monitor can be appointed in three instances: (i) to “perform duties consented to by the parties,”<sup>38</sup> (ii) to “hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted,”<sup>39</sup> or (iii) to “address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.”<sup>40</sup> The Traditional, Court-Ordered Monitorships that likely led to the initial rise of modern-day monitorships most often fell under the third provision; monitorships were employed to assist the court in posttrial matters.<sup>41</sup> One type of posttrial matter with which court-appointed agents

32. This Article does not provide a complete historical tracing of the origins of monitorships. That history has been outlined in previous scholarship. See Root, *supra* note 8, at 526; Ford & Hess, *Monitorships Improve*, *supra* note 21, at 683; Khanna & Dickinson, *supra* note 21, at 1715 (discussing the historical underpinnings of corporate monitors and relating corporate monitors to the use of special masters, which dates back to the early sixteenth century)..

33. See, e.g., Ruiz v. Estelle, 679 F.2d 1115 (5th Cir. 1982); GARRETT, *supra* note 21, at 175.

34. Ellen E. Deason, *Managing the Managerial Expert*, 1998 U. ILL. L. REV. 341, 351 (1998) (discussing the ability of a court to appoint an outsider to assist the court under Federal Rule of Civil Procedure 53).

35. *Id.* at 352.

36. The Court-Ordered Monitor is someone the court appoints to act as its agent to perform a specific task on behalf of the court. See, e.g., Diaz v. San Jose Unified Sch. Dist., 633 F. Supp. 808, 824 (N.D. Cal. 1985) (describing the compliance monitor as “an arm of the court” and “not the agent of either party”).

37. In criminal cases, courts are permitted in some circumstances to order probation, which may include the imposition of a formal probation officer. See U.S. SENTENCING GUIDELINES MANUAL §§ 8D1.1-1.5 (2014).

38. FED. R. CIV. P. 53(a)(1)(A).

39. FED. R. CIV. P. 53(a)(1)(B).

40. FED. R. CIV. P. 53(a)(1)(C).

41. The idea of allowing the appointment of a monitor to engage in duties consented to by the parties does, however, look like a precursor to the modern-day Corporate Compliance Monitorship. See Part II.B.

assisted courts was to ensure that parties complied with a court's order of specific performance.

For example, in 1988, the Department of Justice ("DOJ") brought a civil Racketeer Influenced and Corrupt Organization Act lawsuit against leaders within the International Brotherhood of Teamsters ("IBT"). The suit resulted in a settlement agreement that, in part, required a court-appointed Election Officer, sometimes referred to as an Election Monitor,<sup>42</sup> "to supervise fair and democratic elections of the general president and other international union officers."<sup>43</sup> The goal of the lawsuit "was to purge organized crime's influence" from the IBT.<sup>44</sup> The court granted the Election Monitor authority to "supervise" the IBT's elections, and provided guidance regarding the types of activities the monitor should engage in to effectuate the court's mandate. Specifically,

"In advance of each election, the Election Officer shall have the right to distribute materials about the election to the IBT membership. The Election Officer shall *supervise* the balloting process and certify the election results for each of these elections as promptly as possible after the balloting." The consent order invested the [Election Officer] with "authority to employ accountants, consultants, experts, investigators, or any other personnel . . ." It also set forth basic rules to govern IBT elections for international officials, including procedures for convention delegate selection, nomination of international officers, and direct mail rank-and-file voting for international officers.<sup>45</sup>

Unsurprisingly, a great deal of tension existed between the Court-Ordered Monitor and the union.<sup>46</sup> Specifically, the IBT claimed that the Election Monitor's staff was "unnecessary and unwarranted" and that their salaries were "excessive."<sup>47</sup> The court, however, dismissed the IBT's objections and ordered the Election Monitor to continue to actively oversee, "intervene in," and "coordinate" the "IBT electoral process" as necessary to ensure compliance with the court's order.<sup>48</sup>

The use of Traditional, Court-Ordered Monitors continues today, even while the modern-day monitorship has become an important remediation tool. For example, in 2011, a district court issued an opinion explaining its decision to require the appointment of a Court-Ordered Monitor to address long-term, systemic discrimination against black and Hispanic applicants to the New York City Fire Department ("FDNY").<sup>49</sup> The court's specific remedial measures were extremely detailed and provided the Court-Ordered Monitor a clear and robust roadmap regarding the activities for which it was responsible.<sup>50</sup> As the court stated:

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42. See *Election Monitor Requests Delay in Teamsters Voting*, CNN (Sept. 9, 1998), <http://www.cnn.com/US/9809/09/teamsters.elex.delay>.

43. James B. Jacobs & Dimitri D. Portnoi, *Combating Organized Crime with Union Democracy: A Case Study of the Election Reform in United States v. International Brotherhood of Teamsters*, 42 LOY. L.A. L. REV. 335, 337-38 (2009).

44. *Id.* at 339.

45. *Id.* at 344 (emphasis added) (citations omitted).

46. *Id.*

47. *Id.* at 345.

48. *United States v. Int'l Bhd. of Teamsters*, 723 F. Supp. 203, 206 (S.D.N.Y. 1989).

49. *United States v. City of New York*, No. 07-2067, 2011 U.S. Dist. LEXIS 115074, at \*4 (E.D.N.Y. Oct. 5, 2011). The court relied upon Federal Rule of Civil Procedure 53 as its authority for appointing the monitor. *Id.*

50. *Id.* at \*35-49.

The Court Monitor will take primary responsibility for leading the parties through the specific remedial steps the court requires the parties to complete. Moreover, the Court Monitor will have the duty and the authority to proactively audit and investigate the City's compliance with the terms of the Draft Remedial Order. For example, the Court Monitor will have the authority to perform independent investigations of the FDNY's EEO compliance program and the post-examination screening phase of the City's process for selecting entry-level firefighters.

A court monitor is necessary because the court lacks the time and resources to perform the supervisory tasks necessary to ensure that the City carries out its obligations under the Draft Remedial Order in good faith and with reasonable diligence. District courts have frequently made use of court-appointed monitors and other masters in similarly large and complex civil rights litigations where ensuring a large organization's or municipality's compliance with the court's orders would be too time-consuming or difficult for the court to undertake without assistance.<sup>51</sup>

The district court ultimately appointed a Court-Ordered Monitor for a ten-year term.<sup>52</sup> As in the IBT case, the City of New York objected vigorously to the Court-Ordered Monitorship, with some objections related to the cost.<sup>53</sup> Ultimately, however, the court permitted the monitor to continue its efforts to ensure the FDNY's compliance with the court's order.<sup>54</sup>

Other examples abound, but the upshot is that Traditional, Court-Ordered Monitorships assist courts in ensuring parties' compliance with courts' orders of specific performance. However, the use of traditional, court-appointed agents has evolved<sup>55</sup> and thereby facilitated the rise of what this Article identifies as modern-day monitorships.

### *B. Increased Regulation Sparks Evolution*

Regulatory and legal frameworks within the United States depend heavily on organizational self-policing to prevent an organization's agents, employees, or members from engaging in misconduct. This reliance on the organization to prevent its own wrongdoing is both necessary and efficient. The government is unable to readily detect many corporate crimes due to their occurrence within large, sophisticated organizations.<sup>56</sup> Moreover, the government's limited resources make it impractical for

51. *Id.* at \*49-50.

52. Editorial, *FDNY Monitor is Excessively Billing the City*, N.Y. POST (Dec. 16, 2013), <http://nypost.com/2013/12/16/fdny-monitor-is-excessively-billing-the-city>.

53. The city appealed to the Second Circuit and received a temporary stay of the monitor's work. Jessica Dye, *N.Y.C. Wins Bid to Block Monitor's Work in FDNY Discrimination Case*, REUTERS (Feb. 9, 2013), <http://www.uyanyc.org/cms/contents/view/14908>. But the work ultimately resumed when the district court's ruling was partially upheld. Joshua Saul, *Cost to Taxpayers for Enforcing FDNY Diversity? \$3M So Far*, N.Y. POST (Dec. 16, 2013), <http://nypost.com/2013/12/16/fdny-monitor-burns-through-3m-in-taxpayer-money-lawyer>.

54. Saul, *supra* note 53.

55. See Root, *supra* note 8, at 529-31; Ford & Hess, *Monitorships Improve*, *supra* note 21, at 683; Khanna & Dickinson, *supra* note 21, at 1715-16.

56. See Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 835 (1994); see also Brian R. Cheffins, *Corporate Governance Since the Managerial Capitalism Era*, BUS. HISTORY REV. (forthcoming), <http://ssrn.com/abstract=2618480> (discussing changes in corporate governance and the different challenges faced by executives running companies in the 1950s and 1960s and those facing corporate scandals in the 1970s and early 2000s).

it to intensely monitor the activities of every firm. Over the past two decades specifically, government regulatory schemes have become increasingly elaborate (i) in response to corporate scandals and (ii) as organizations have expanded the size and breadth of their activities,<sup>57</sup> making compliance with legal requirements a more complex and challenging endeavor.<sup>58</sup>

In response to this more complicated regulatory and legal environment, organizations began to depend more heavily on corporate governance reforms<sup>59</sup> and on a variety of gatekeepers, both within and external to the firm, to effectuate their self-policing efforts.<sup>60</sup> Thus, the importance of gatekeeping—a key component of the corporate governance process that “occurs prior to wrongdoing and is an assurance that investors and the public should trust that the corporation being assessed is acting within appropriate ethical, regulatory, and legal bounds”<sup>61</sup>—increased exponentially, as evidenced by a marked increase in gatekeeping literature.<sup>62</sup> Gatekeepers come in numerous forms, including the external auditors who ensure that organizations are properly reporting their financial information<sup>63</sup> and the in-house counsel who are charged with detecting misconduct.<sup>64</sup> Many gatekeepers are external—independent, private outsiders—to the firm utilizing their gatekeeping services as part of its self-policing effort. Yet when gatekeepers, either internal or external, fail to prevent wrongdoing, it creates an enforcement conundrum.

In many instances, the failure of organizational gatekeepers to prevent wrongdoing results in reluctance to permit the organization to maintain complete autonomy over remediation efforts. Yet the same concerns that made self-policing a necessity—particularly governmental capacity constraints—continue to be at play. This problem requires a solution that allows for external monitoring from non-governmental actors. Government agencies thus began to rely on modern-day monitorships to oversee and assist embroiled firms in remediation efforts *after* the government and organization entered into an agreement to resolve the underlying misconduct.

## 1. Direct Governmental Monitoring

The Federal Trade Commission (“FTC”) is one such agency that has, over time, begun to rely more heavily on modern-day monitorships to assist it in monitoring

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57. Cheffins, *supra* note 56, at 26-27, 36-38 (discussing corporate scandals of the early 2000s, including Enron and WorldCom, and the adoption of regulation like the Sarbanes-Oxley Act of 2002).

58. GARRETT, *supra* note 21, at 6.

59. Cheffins, *supra* note 56, at 18, 26-35 (explaining that a focus on “corporate governance” achieved broad-based recognition in the 1990s).

60. See generally JOHN C. COFFEE, JR., *The Rise, Fall, and Redefinition of the Auditor: From Bookkeeper to Professional to Information Consultant*, in GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 108-91 (2006) (discussing the effects of the Enron scandal and the Sarbanes-Oxley Act on the legal profession and a new duty for lawyers to act as gatekeepers, which ultimately resulted in the current Model Rules of Professional Conduct Rule 1.13).

61. Root, *supra* note 8, at 526.

62. Notably, there has been an explosion of gatekeeping literature over the past two decades.

63. COFFEE, *supra* note 60, at 108-71.

64. Sung Hui Kim, *Gatekeepers Inside Out*, 21 GEO. J. LEGAL ETHICS 411, 445-46 (2008).

firms' remediation efforts. The FTC is an independent federal agency charged with preventing "business practices that are anticompetitive or deceptive or unfair to consumers."<sup>65</sup> Specialized governmental units, such as the FTC, often enter into agreements resolving allegations of organizational wrongdoing without formal court involvement. When this occurs, the government agency may simply require the organization to enter into remediation efforts and provide confirmation of these efforts to the government.<sup>66</sup> The government utilizes this option when it deems it appropriate to allow the organization engaged in wrongdoing to maintain control over remediation efforts. If, however, the government determines that the organization needs more active monitoring, it can launch its own heightened monitoring of the organization,<sup>67</sup> thereby taking direct responsibility for ensuring the organization's compliance.

For example, in March 1999, the FTC entered into a ten-year consent order<sup>68</sup> with Intel Corporation ("Intel") related to Intel's alleged misuse of "its market power to maintain its dominance over the microprocessor market."<sup>69</sup> The consent order included a provision stating:

[F]or the purpose of determining or securing compliance with this Order, upon written request, Respondent [Intel] shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of [Intel] relating to any matters contained in this Order; and

B. Upon five days' notice to [Intel] and without restraint or interference from them, to interview officers, directors, or employees of Respondent, who may have counsel present.<sup>70</sup>

Thus, in 1999, it appears the FTC intended to keep monitoring of Intel's compliance an internal responsibility.

## 2. Outsourcing of Monitoring to Governmental Agent

While many agencies continue to maintain direct enforcement and monitoring control,<sup>71</sup> others have slowly outsourced some of these responsibilities to modern-

65. *About the FTC*, FED. TRADE COMM'N, <http://www.ftc.gov/about-ftc> (last visited Sept. 29, 2015).

66. *See, e.g.*, Decision and Order, *In re Pool Corporation*, No. C-4345, 2012 WL 159752 (F.T.C. Jan. 10, 2012). In the FCPA context, there appears to be a trend toward allowing companies to oversee their own remediation efforts. *See 2014 FCPA and Related Enforcement Actions*, U.S. DEP'T JUST., <http://www.justice.gov/criminal-fraud/case/related-enforcement-actions/2014> (last visited Nov. 8, 2015).

67. *See, e.g.*, *In re Intel Corp.*, No. 9288, 1999 WL 164046 (F.T.C. Mar. 1, 1999) [hereinafter 1999 Intel].

68. While termed a "consent order," a traditional court was not involved in the imposition of this order. The order was issued by the FTC commissioners. *Id.*

69. Press Release, Fed. Trade Comm'n, *FTC Accepts Settlement of Charges Against Intel* (Mar. 17, 1999), <http://www.ftc.gov/news-events/press-releases/1999/03/ftc-accepts-settlement-charges-against-intel>.

70. 1999 Intel, *supra* note 67.

71. Bank Examiners employed by the OCC are a good example of governmental enforcement employees who directly supervise legal and regulatory compliance. *See, e.g.*, *Entry-Level Bank*

day monitorships, which assist the government in its enforcement efforts.<sup>72</sup> The reliance on modern-day monitorships allows for greater supervision of organizations than the government itself has the capacity to provide. It also shifts the costs of monitoring to the offending organization, which is generally held responsible for paying the associated costs.<sup>73</sup> The use of independent, private outsiders for remediation efforts is a natural extension of the use of independent, private outsiders for prevention and detection efforts.<sup>74</sup> Moreover, in instances where the independent, private outsider definitively operates as an agent of the government agency, it appears that the practice is also a natural development of the use of court-appointed agents.

For example, in 2010, Intel and the FTC again entered into a consent order<sup>75</sup> regarding charges that Intel allegedly “stifled competition in the market for computer chips.”<sup>76</sup> The consent order, in part, stated:

- A. At any time after this Order becomes final, and for the limited purpose of assisting the Commission in monitoring and enforcing [Intel’s] compliance . . . the [FTC] may appoint one or more Technical Consultants, subject to the consent of [Intel] whose consent shall not be unreasonably withheld. . . .
- B. [Intel] shall, not later than ten (10) days after appointment, execute an agreement with any Technical Consultant that, subject to the approval of the [FTC], . . . provides, among other things, that the Technical Consultant shall act in a fiduciary capacity for the benefit of the [FTC]. Any Technical Consultants appointed by the [FTC] shall serve without bond or surety at the expense of [Intel] on such reasonable and customary terms and conditions as the [FTC] may set and as provided in the agreement.<sup>77</sup>

Thus, in 2010, it appears that the FTC intended to outsource monitoring of Intel’s compliance with the consent order to an independent, private outsider. The Technical Consultant was retained to oversee Intel’s specific performance with respect to the consent order and was seemingly acting solely as the government’s agent.

Monitorships where the monitor is retained primarily to assist the government in its efforts to ensure enforcement of agreed upon remediation efforts remain common and are essentially an outgrowth of Traditional, Court-Ordered Monitorships.<sup>78</sup> The government provides very detailed requirements regarding what efforts the organization is to adopt going forward, giving the monitor a concrete roadmap of what

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Examiners, OFF. OF THE COMPTROLLER OF THE CURRENCY, <http://www.careers.occ.gov/careers/explore/bank-supervision/entry-level-mcbs/index-entry-level-mcbs.html> (last visited Sept. 29, 2015).

72. See, e.g., Decision and Order, *In re Intel Corp.*, No. 9341, 2010 WL 4542454 (F.T.C. Nov. 2, 2010) [hereinafter 2010 Intel].

73. *Id.*

74. Adopting these sorts of models allows for (i) “broaden[ing] the decision-making playing field by involving more actors in the various stages of the legal process,” (ii) “diversif[y]ing the types of expertise and experience that those new actors bring to the table,” (iii) “engag[ing] multiple actors,” and (iv) greater self-regulation. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 373, 375 (2004).

75. Again, while termed a “consent order,” a traditional court was not involved in the imposition of this order. The order was issued by the five FTC commissioners. 2010 Intel, *supra* note 72.

76. Press Release, Fed. Trade Comm’n, FTC Approves Modified Intel Settlement Order (Nov. 2, 2010), <http://www.ftc.gov/news-events/press-releases/2010/11/ftc-approves-modified-intel-settlement-order>.

77. 2010 Intel, *supra* note 72, slip op. at 18.

78. See *infra* Part II.B.

precisely it is to supervise. This setup is, however, just one type of remediation effort effectuated through monitorship programs.

### 3. Government and Monitored Organization Agreeing to the Retention of an Independent, Private Outsider

Another type of remediation effort occurs when monitors are charged with more than just enforcement monitoring and are not limited to acting solely as the government's agents.<sup>79</sup> In many instances, after the discovery of an organization's misconduct, an agreement is reached between the government and the corporation wherein the corporation consents to retain a monitor who engages in something more than rote compliance monitoring.<sup>80</sup> Instead, the monitor is focused on performing a root-cause analysis.<sup>81</sup> Specifically, the monitor is "retained to investigate the compliance failure that resulted in the legal or regulatory violation, assess the cause of the compliance failure, and analyze the company's unique business structures against the [applicable] legal and regulatory requirements."<sup>82</sup> In these instances, the monitor is in a cooperative relationship with the government and the organization. The monitor develops a direct relationship with the organization itself. Thus, the use of monitors as a means to assist purely in governmental enforcement efforts morphed into a monitorship structure where the monitor could also provide concrete value to the organization that initially engaged in the wrongdoing that triggered the need for the monitor. This arrangement is, however, just another type of remediation effort. Instead of focusing on compensating those harmed, the monitor aims to develop a plan—consulting both the government and the monitored organization—that will ensure the monitored organization improves its legal and regulatory compliance.

For example, in 2012, Biomet, Inc. ("Biomet") "entered into a deferred prosecution agreement" ("DPA") with the DOJ to resolve allegations that it made improper payments to "publicly-employed health care providers in Argentina, Brazil and China to secure lucrative business with hospitals."<sup>83</sup> As part of the agreement, Biomet agreed to retain a monitor for eighteen months. The monitor's primary responsibility was to "assess and monitor Biomet's compliance with the terms" of the DPA.<sup>84</sup> However, the monitor was also encouraged to work with Biomet to develop an understanding of the facts surrounding the alleged violations, create work plans, and determine if Biomet should be eligible to conclude the monitorship early.<sup>85</sup> In

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79. See generally Root, *supra* note 8 (discussing the monitor's role in investigating the root cause of an organization's misconduct and providing recommendations aimed at preventing the misconduct in the future).

80. *Id.* at 528, 531.

81. *Id.* at 531.

82. *Id.* at 524-25.

83. Press Release, U.S. Dep't Just., Third Medical Device Company Resolves Foreign Corrupt Practices Act Investigation (Mar. 26, 2012), <http://www.justice.gov/opa/pr/third-medical-device-company-resolves-foreign-corrupt-practices-act-investigation>.

84. Deferred Prosecution Agreement at Attachment D ¶ 2, *United States v. Biomet, Inc.*, No. 1:12-cr-00080 (D.D.C. Mar. 26, 2012), <http://www.justice.gov/criminal/fraud/fcpa/cases/biomet/2012-03-26-biomet-dpa.pdf>.

85. *Id.* at ¶¶ 4-5.



addition, the monitor was charged with “making recommendations reasonably designed to improve the effectiveness of Biomet’s program for ensuring compliance with the anti-corruption laws,” which is a service the monitor provided to assist both the government and Biomet in achieving Biomet’s long-term legal and regulatory compliance.<sup>86</sup>

Again, this monitorship structure is a natural progression from use of modern-day monitorships to assist the government in enforcement efforts. In regulatory grey areas, it is often difficult to predetermine a set of mandates that an organizational wrongdoer should follow going forward. That reality necessarily altered the focus from monitors performing rote compliance enforcement to monitors assisting in the development of a remediation program by helping to determine the steps needed for achieving optimal legal and regulatory compliance at the firm in the future.

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As the above discussion demonstrates, the modern-day monitorship is an outgrowth of (i) the use of court-appointed agents, (ii) an increasingly complex regulatory and legal environment, and (iii) the use of independent, private outsiders for gatekeeping purposes. Importantly, each iteration appears to build upon the next. As governmental constraints and regulatory complexity encouraged more dependence on independent, private outsiders, the market for that type of service grew. The rise of the modern-day monitorship is not quite as neat as the above description suggests—the timelines are blurred and are ultimately related to when certain monitorship structures became acceptable within particular industries. Importantly, the appearance of a new iteration of monitorship does not signify the demise of another monitorship structure. That said, the modern-day monitorship is a relatively new phenomenon with a vast reach in enforcement efforts across the nation.

## II. Examples of Modern-Day Monitorships

Courts, the government, and monitored organizations use modern-day monitorships every day to assist in remediation efforts. Monitors themselves look similar across categories: (i) independent, private outsiders, (ii) employed after an institution is found to have engaged in wrongdoing, (iii) who effectuate remediation of the institution’s misconduct, and (iv) provide information to outside actors about the status of the institution’s remediation efforts. As a result, legal scholarship has implicitly assumed that monitorships can be regulated wholesale. This assumption is evidenced by continued suggestions for the adoption of a broad set of formal rules to govern all monitorships.<sup>87</sup>

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86. *Id.* at ¶ 5. Biomet’s federal probation was scheduled to expire in early 2015, but it made a disclosure suggesting additional wrongdoing at the company and its probation was extended another year. Ben Protess, *New Bribery Evidence Adds a Year to Biomet’s Probation*, N.Y. TIMES DEALBOOK, (Mar. 17, 2015), <http://www.nytimes.com/2015/03/18/business/new-bribery-evidence-adds-a-year-to-biomets-probation.html>.

87. *See, e.g.*, GARRETT, *supra* note 21, at 176-77, 192 (discussing the need for more robust court oversight of all monitorships that are the outgrowth of a DPA or non-prosecution agreement); Khanna, *supra* note 21, at 238-40 (discussing proposed legislation in the House of Representatives meant to provide formal rules governing monitorships);

Yet the analysis in this Part reveals that monitorships can take many different forms. They can be grouped into categories by focusing on the remediation effort the monitorship is meant to achieve. This Part begins by describing what are likely the two most common categories of modern-day monitorships—Enforcement and Corporate Compliance Monitorships. It then demonstrates that monitorships are a dynamic and continually evolving phenomenon. For example, the Part explains how modern-day monitorships may influence the manner in which courts employ Court-Ordered Monitorships. Additionally, it identifies what may be an emerging type of monitorship—a Public Relations Monitorship—that private companies have begun to use on their own initiative to assist in reputation remediation efforts.

### *A. Enforcement Monitorships*

After a high-profile scandal occurs at an organization, that organization often enters into a consent order, deferred or non-prosecution agreement, or some other formal resolution with the government. As part of these agreements, it is common for the government to require a modern-day monitorship to oversee and ensure compliance with the agreement.<sup>88</sup> The monitor in these monitorships—Enforcement Monitorships—serves as an agent of the government and ensures that the monitored organization is adhering to the government’s mandate, found in the agreement between the organization and the government.

Enforcement Monitorships are primarily concerned with ensuring the organization’s specific performance with the requirements set out in the relevant agreement. The government<sup>89</sup> provides very detailed requirements regarding what activities the organization is to engage in going forward, which gives the monitor specific parameters on the types of organizational remediation efforts it is responsible for assessing.

The settlement of mortgage foreclosure misconduct (“National Mortgage Settlement”) amongst five banks<sup>90</sup> and various federal and state governmental entities provides an example of an Enforcement Monitorship.<sup>91</sup> The “unprecedented joint agreement” in “the largest federal-state civil settlement ever obtained” required the

88. See, e.g., 2010 Intel, *supra* note 72.

89. Enforcement Monitorships are also found in non-governmental contexts where a regulatory body oversees the conduct of its members or constituents. For example, Enforcement Monitorships have been used to resolve World Bank Sanctions. See *Voluntary Disclosure Program Protocol 8*, WORLD BANK, [http://siteresources.worldbank.org/INTVOLDISPRO/Resources/2720448-1300821628018/VDP\\_Protocol\\_8.pdf](http://siteresources.worldbank.org/INTVOLDISPRO/Resources/2720448-1300821628018/VDP_Protocol_8.pdf). Additionally, the NCAA has used them in a similar way. See Kercheval, *supra* note 7; George Mitchell, *Second Annual Report of the Independent Athletics Integrity Monitor Pursuant to the Athletics Integrity Agreement Among the National Collegiate Athletic Association, The Big Ten Conference and The Pennsylvania State University and as External Monitor Appointed by the Pennsylvania State University*, DLA PIPER LLP (Sept. 8, 2014), <https://www.dlapiper.com/~media/files/insights/publications/2014/09/ncaamonitorssecondannualreport.pdf>. Similarly, certain self-regulatory organizations, like the Financial Industry Regulatory Authority (“FINRA”), have the ability to sanction their members in a manner that often mimics a more formal governmental sanction. *About FINRA*, FINRA, <https://www.finra.org/about> (last visited Nov. 8, 2015).

90. Ally/GMAC, Bank of America, Citi, JPMorgan Chase, and Wells Fargo are the banks subject to the settlement. See *Nat’l Mortgage Settlement*, *supra* note 4.

91. Press Release, U.S. Dep’t Just., Federal Government and State Attorneys General Reach \$25 Billion Agreement with Five Largest Mortgage Servicers to Address Mortgage Loan Servicing and Foreclosure Abuses (Feb. 9, 2012), <http://www.justice.gov/opa/pr/2012/February/12-ag-186.html> [hereinafter *Nat’l Mortgage Settlement Press Release*] (discussing “the deceptive practices in the offering

retention of [a Monitor] who was tasked with “oversee[ing] implementation of the servicing standards required by the agreement; impos[ing] penalties of up to \$1 million per violation (or up to \$5 million for certain repeat violations); and publish[ing] regular public reports that identify any quarter in which a servicer fell short of the standards imposed in the settlement.”<sup>92</sup> The monitor ensured the banks’ specific performance in providing: (i) “[i]mmediate aid to homeowners needing loan modifications,” (ii) refinancing options for those current on their mortgages, “but whose mortgages currently exceed their home’s value,” (iii) “[p]ayments to borrowers who lost their homes to foreclosure with no requirement to prove financial harm and without having to release private claims against the servicers or the right to participate in the OCC review process,” and (iv) “nationwide reforms to servicing standards,” including requiring “single point of contact, adequate staffing levels and training, better communication with borrowers, and appropriate standards for executing documents in foreclosure cases, ending improper fees, and ending dual-track foreclosures for many loans.”<sup>93</sup> On March 18, 2014, the monitor filed “final crediting reports” confirming that the banks have “satisfied their consumer relief and refinancing obligations” under the National Mortgage Settlement.<sup>94</sup> In a statement released in conjunction with the reports, the monitor reported that “[i]n total, the servicers have provided more than \$50 billion of gross relief, which translates into more than \$20 billion in credited relief under the Settlement’s scoring system. More than 600,000 families received some form of relief.”<sup>95</sup>

An Enforcement Monitorship was also used to oversee the State of Georgia’s compliance with a settlement agreement (“Georgia Settlement”) arising out of violations of Title II of the Americans with Disabilities Act (“ADA”).<sup>96</sup> Beginning in

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of loan modifications” and the retention of an independent monitor to oversee compliance with a consent agreement between the DOJ and Bank of America, JP Morgan Chase & Co., Wells Fargo & Company, Citigroup Inc., and Ally Financial Inc.). Additionally, many states employed their own Independent Monitors to oversee the state portions of the National Mortgage Settlement. *See, e.g.*, Press Release, Univ. of Calif., Irvine Sch. of Law, UCI Law Professor Katherine Porter Issues Final Report for California Monitor Program (Oct. 7, 2014), <http://www.law.uci.edu/news/press-releases/10-07-14.html>. The Federal Reserve and the OCC also initiated their own Independent Foreclosure Review, which required the retention of independent consultants. These independent consultants looked much like Independent Monitors, although the review was fraught with difficulties and was highly criticized. *See* Francine McKenna, *Settling the Foreclosure Reviews: Winners and Losers*, FORBES (Jan. 8, 2013), <http://www.forbes.com/sites/francinemckenna/2013/01/08/settling-the-foreclosure-reviews-winners-and-losers>; Ben Protess & Jessica Silver-Greenberg, *Senator Criticizes Lack of Supervision for Banks’ Consultants*, N.Y. TIMES DEALBOOK (June 21, 2013, 10:27 PM), <http://dealbook.nytimes.com/2013/06/20/senator-criticizes-lack-of-supervision-for-banks-consultants>.

92. Nat’l Mortgage Settlement Press Release, *supra* note 91.

93. Nat’l Mortgage Settlement, *supra* note 4.

94. *Final Crediting Report*, OFF. OF THE MORTGAGE SETTLEMENT OVERSIGHT (Mar. 18, 2014), <https://www.mortgageoversight.com/reports/final-crediting-report>.

95. *Id.*

96. *United States v. Georgia*, No. 1:10-249 (N.D. Ga. Oct. 19, 2010), [http://www.ada.gov/olmstead/documents/georgia\\_settle.pdf](http://www.ada.gov/olmstead/documents/georgia_settle.pdf). The court was involved in the monitorship to the extent that it entered the settlement agreement into the record of the case and it effectuated payments to the monitor and served as an overseer of the monitor’s efforts. However, the decision to enter the monitorship was made without motion to the court or on the court’s initiative. It was a part of settlement negotiations between the DOJ and the state prior to any dispositive court proceeding on the merits of the case.

2007, two reporters at the *Atlanta Journal-Constitution* wrote a series of articles entitled “A Hidden Shame,” highlighting the state’s failures with regard to mental health care.<sup>97</sup> The series “revealed that dozens of patients at Georgia’s psychiatric hospitals had died from abuse, and that the state lagged in providing community-based mental health treatment.”<sup>98</sup> After these stories were publicized, Georgia created a mental health agency, and the DOJ Civil Rights Division opened an investigation and eventually brought a suit that resulted in a sweeping settlement agreement in 2010.<sup>99</sup> The settlement agreement required the retention of an “Independent Reviewer[.]”—a modern-day monitor—that the DOJ and the state would jointly select.<sup>100</sup> The monitor was charged with “conduct[ing] the factual investigation and verification of data and documentation necessary to determine whether the state [wa]s in compliance with the terms of” the Georgia Settlement.<sup>101</sup> Additionally, the monitor was to evaluate the state’s efforts to comply with the following, non-exhaustive terms of the settlement agreement:

- cease admissions to state hospitals of all individuals whose reason for “admission is due to a primary diagnosis of a developmental disability”;<sup>102</sup>
- “move 150 individuals with developmental disabilities from” state hospitals to community centers;<sup>103</sup>
- provide familial support for “400 families of people with developmental disabilities”;<sup>104</sup>
- create “six mobile crisis teams for persons with developmental disabilities”;<sup>105</sup> and
- develop “a program to educate judges and law enforcement officials about community supports and services for individuals with developmental disabilities and forensic status.”<sup>106</sup>

In each of these Enforcement Monitorships,<sup>107</sup> the remediation assistance took the form of monitoring compliance with the government’s stated requirements. Importantly, these are activities each organization could have undertaken itself, but needed an outsider to monitor because of the lack of trust stemming from its misconduct. The outsider was necessary to assure that the organization was actually committed to reforming its past misconduct.

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97. Alan Judd, *Georgia Mental Health Talks Fail*, ATLANTA J.-CONST. (July 1, 2010), <http://www.ajc.com/news/news/local/georgia-mental-health-talks-fail/nQhHC>.

98. *Id.*

99. *Id.*

100. *Georgia*, No. 1:10-249, slip op. at 27.

101. *Id.*

102. *Id.* at 5.

103. *Id.* at 6.

104. *Id.*

105. *Id.* at 9.

106. *Id.* at 10.

107. This includes the monitorship discussed in the 2010 Intel example from Part I. See 2010 Intel, *supra* note 72.

These examples demonstrate Enforcement Monitorships' discrete characteristics. First, Enforcement Monitorships provide a service to the government or relevant regulatory body by absorbing some of its oversight and enforcement functions. Second, they provide a specific service to those that an organization's misconduct has harmed by ensuring the firm's specific performance with remediation efforts. Third, Enforcement Monitorships are charged primarily with monitoring compliance with the relevant settlement agreement, but are also tasked with overseeing and, sometimes even implementing, the process necessary for making whole those that the organization's misconduct has injured. Fourth, organizations entering into Enforcement Monitorships are typically reluctant to enter into a settlement agreement initially, but after a significant amount of public awareness regarding the (i) scandal and (ii) firm's reluctance to remedy harms resulting from the misconduct, it often acquiesces and complies with the agreement's compulsory monitorship requirements.

### *B. Corporate Compliance Monitorships.*

Corporate Compliance Monitorships are distinct from Traditional, Court-Ordered and Enforcement Monitorships, because the agreements between the organization and the government contemplate a different type of remediation effort.<sup>108</sup> After the discovery of the firm's misconduct, an agreement is often reached between the government and the corporation where the corporation consents to retain a monitor.<sup>109</sup> In these instances, the organization's decision to enter into the monitorship has more elements of organizational consent than in Traditional, Court-Ordered Monitorships or Enforcement Monitorships.<sup>110</sup> Unlike the Traditional, Court-Ordered or Enforcement Monitorships, the Corporate Compliance Monitor is not

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108. See generally Root, *supra* note 8 (describing a remediation effort focused on conducting a root-cause analysis and providing recommendations for improvement).

109. *Id.* Evidence of the ability of organizations to negotiate these types of monitorships could be inferred by the changes surrounding their imposition in the past twenty or so months. The Fraud Division at DOJ ("DOJ Fraud") entered into many Corporate Compliance Monitorships from 2004-2012, but there has been a sharp decline in the past several months, with many companies allowed to resolve FCPA violations without the imposition of a monitor. See 2014 FCPA and Related Enforcement Actions, *supra* note 66. When a monitor has been contemplated from mid-2013 to present, organizations have been permitted to retain a monitor for eighteen months and then engage in their own supervision for eighteen months. See, e.g., Richard L. Cassin, *Avon 'Reaches Understanding' to Pay \$135 Million for FCPA Settlement*, FCPA BLOG (May 1, 2014, 10:08 AM), <http://www.fcpablog.com/blog/2014/5/1/avon-reaches-understanding-to-pay-135-million-for-fcpa-settl.html>. Traditionally, monitorships of this type were most often engaged in for thirty-six months. See Warin, Diamant & Root, *supra* note 8, at 347. This shift could, however, simply reflect a change in DOJ Fraud's enforcement priorities. In contrast, the Antitrust Division at the DOJ ("DOJ Antitrust") is posturing as if it intends to ramp up its use of monitorships. In November 2014, post Apple-debacle, see *infra* Part II.C, DOJ Antitrust announced that it "reserve[s] the right to insist on probation, including the use of [corporate] monitors, if doing so is necessary to ensure an effective compliance program and to prevent recidivism." Mark L. Krotoski, *DOJ Warning About Corporate Compliance Programs, Probation and External Compliance Monitors*, NAT'L L. REV. (Nov. 6, 2014), <http://www.natlawreview.com/article/doj-warning-about-corporate-compliance-programs-probation-and-external-compliance-mo>. Corporate probation is, however, a remedy limited to criminal enforcement actions. See *infra* note 138.

110. Based on presentations I have given, I am aware that there are many who would disagree with this assertion, although I do not believe I have seen a written critique to date. The general

charged solely with monitoring compliance with specific judicial or governmental demands.<sup>111</sup> The necessary remediation effort in these instances—which involves an overhaul of the organization’s corporate compliance program with respect to the area of misconduct—is difficult for the government to delineate at the outset.<sup>112</sup> Instead, the monitor is retained to engage in a sort of root-cause analysis.<sup>113</sup> Specifically, the Corporate Compliance Monitor is “retained to investigate the compliance failure that resulted in the legal or regulatory violation, assess the cause of the compliance failure, and analyze the company’s unique business structures against the legal and regulatory requirements.”<sup>114</sup> The monitor is then responsible for delivering a set of recommendations that the organization should implement to ensure long-term legal and regulatory compliance.<sup>115</sup>

For example, in 2012, HSBC Bank USA, N.A. (“HSBC”) entered into a five-year DPA with the federal government after, in addition to committing other legal violations, HSBC failed “to maintain an effective anti-money laundering program.”<sup>116</sup> As part of the DPA, HSBC agreed to retain a government-approved monitor with at least the following qualifications: (i) expertise in anti-money laundering laws, (ii) “experience designing and/or reviewing corporate compliance policies, procedures and internal controls,” (iii) the ability to “access and deploy resources as necessary to discharge the Monitor’s duties,” and (iv) “sufficient independence from HSBC Holdings to ensure effective and impartial performance of the Monitor’s duties as described in the Agreement.”<sup>117</sup> The monitor was to provide periodic assess-

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concern is that in any instance the corporation is compelled, at least to a certain extent, by concerns regarding aggressive governmental sanction due to the organizational misconduct. That intuition appears correct, but the negotiating power of a company facing a monitor imposed by a court and a company choosing to enter into a monitorship that will result in a Corporate Compliance Monitorship does appear to be different and reflect a willingness for the corporation to have more direct involvement and control over the monitorship process. See Root, *supra* note 8, at 540-46, 550-70.

111. *Id.* at 528. There is typically very little active court involvement in Corporate Compliance Monitorships and, in fact, they are often entered into without ever consulting a court. There are courts, however, that are actively challenging this practice. See *2014 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)*, GIBSON, DUNN & CRUTCHER LLP (Jan. 6, 2015), <http://www.gibsondunn.com/publications/pages/2014-Year-End-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.aspx> [hereinafter *Gibson Dunn, 2014 DPA/NPA*] (discussing a district court judge’s appointment of Professor Brandon Garrett to “provide the Court with advocacy on questions regarding the scope of the Court’s authority, if any, to consider the fairness and reasonableness of a deferred prosecution agreement in deciding whether to accept or reject such an agreement”).

112. Additionally, some would argue that it is inappropriate for the government to engage in those sorts of dictates because they amount to suggesting corporate governance reform, an area in which DOJ prosecutors often lack relevant expertise. Compare Lawrence A. Cunningham, *Deferred Prosecution and Corporate Governance: An Integrated Approach to Investigation and Reform*, 66 FLA. L. REV. 1 (2014) (noting literature that criticizes the ability of prosecutors to engage in effective corporate governance reform efforts), with Brandon L. Garrett, *Rehabilitating Corporations*, 66 FLA. L. REV. F. 1 (2014) (explaining that the problem is larger than prosecutors’ expertise in corporate governance and suggesting that corporate prosecutions should be overhauled).

113. Root, *supra* note 8, at 528.

114. *Id.* at 524-25.

115. *Id.*

116. Deferred Prosecution Agreement ¶¶ 1, 3, *United States v. HSBC Bank USA, N.A.*, No. 12-763, (E.D.N.Y. Dec. 11, 2012), <http://www.justice.gov/opa/documents/hsbc/dpa-executed.pdf>.

117. *Id.* ¶ 9.

ments that make “recommendations reasonably designed to improve the effectiveness of HSBC Group’s program for ensuring compliance with the anti-money laundering laws.”<sup>118</sup> In addition, the monitor was “encouraged to consult with HSBC Holdings concerning his or her findings and recommendations on an ongoing basis, and to consider and reflect HSBC Holdings’ comments and input to the extent the Monitor deem[ed] appropriate.”<sup>119</sup> In 2014, the conclusions of the monitor’s first scheduled report became public. The report indicated the “monitor’s mixed assessment” regarding HSBC’s anti-money laundering programs.<sup>120</sup> Specifically, the monitor noted his belief that the bank was committed to improving its anti-money laundering efforts, but that the current systems in place at the bank lacked “integration, coordination, and standardization.”<sup>121</sup> Thus, in this instance, the information the monitor sent to outsiders was that the organization had not yet fully remediated the underlying problems that resulted in the failure to comply properly with legal and regulatory requirements.

Additionally, in 2014, Miron Construction Company, Inc. (“Miron”) entered into a non-prosecution agreement (“NPA”) with the government regarding an investigation into “Miron’s billing practices in Wisconsin public school construction projects” as well as “Miron’s financial reporting practices in these and other construction projects.”<sup>122</sup> Miron agreed to a variety of remedial efforts, including the retention of a monitor.<sup>123</sup> The monitor was responsible for reviewing and monitoring Miron’s compliance with the Agreement and making recommendations to Miron to assist Miron’s efforts to improve compliance and execute an effective Corporate Responsibility Program.<sup>124</sup> The monitorship thus involved more than rote enforcement monitoring. It required the monitor to work with Miron to develop long-term compliance recommendations for the firm to adopt.

In Corporate Compliance Monitorships, the remediation efforts typically take the form of assisting the organization and the government in determining the changes, modifications, or additions the firm needs to make to its internal compliance programs going forward to ensure improved future legal and regulatory compliance. When a monitor conveys to third parties that the organization is successfully engaged in effective remediation efforts, the organization benefits from the monitor’s reputational capital.<sup>125</sup> The monitor provides information, in those instances, that reassures

118. *Id.* at Attachment B ¶ 4.

119. *Id.*

120. Rachel Louis Ensign & Max Colchester, *U.S. Monitor Says HSBC Anti-Money Laundering Systems Need Upgrade*, WALL ST. J. (Apr. 1, 2014), <http://online.wsj.com/news/articles/SB10001424052702304157204579475390409390188>.

121. *Id.*

122. Press Release, U.S. Dep’t Just., The Office of the United States Attorney Reaches Settlement with Miron Construction Company, Inc. and Corporate Officers (Apr. 16, 2014), [http://www.justice.gov/usao/wie/news/2014/pr20140416\\_Miron\\_Construction\\_Co\\_Settlement.html](http://www.justice.gov/usao/wie/news/2014/pr20140416_Miron_Construction_Co_Settlement.html).

123. Letter from James L. Santelle, U.S. Att’y, E. Dist. of Wis., to Stephen Hurley, Hurley, Burish, & Stanton, S.C., ¶ 5 (Feb. 14, 2014), [http://www.justice.gov/usao/wie/news/2014/Downloads/Miron\\_NPA.pdf](http://www.justice.gov/usao/wie/news/2014/Downloads/Miron_NPA.pdf).

124. *Id.* at ¶ 5.

125. There is a significant literature discussing the importance of reputational capital in a variety of contexts. *See, e.g.*, Kathryn Judge, *Fee Effects*, 98 IOWA L. REV. 1517 (2013) (discussing importance of reputational capital for financial intermediaries); Alex Raskolnikov, *The Cost of Norms*:

the public and the government that the organization is engaged in efforts that will ensure similar misconduct does not reoccur.

The above examples demonstrate some of the common characteristics of Corporate Compliance Monitorships. First, the monitorship is undertaken to provide a service to the government and the corporation entering into the relevant agreement. Second, the remediation effort undertaken in the Corporate Compliance Monitorship encompasses more than monitoring compliance with the settlement agreement between the government and the corporation. This broader mandate is a necessity, as one of the Corporate Compliance Monitorship's goals is to determine what changes the corporation needs to implement to ensure its future compliance with legal and regulatory requirements. Corporate Compliance Monitorships still engage in monitoring certain aspects of specific performance, but the primary goal of this type of monitorship is to provide recommendations, to both the firm and the government, meant to assist the corporation in its efforts to improve its legal and regulatory compliance.<sup>126</sup> They provide a service above and beyond specific performance, which might be characterized as "specific performance plus." Third, the impetus to enter the agreements comes from the government and the organization and is not the result of a court order or extreme government coercion. That is not to suggest that the government has no power to push organizations into entering agreements that require monitorships—it certainly does and each scenario is a bit different—but the Corporate Compliance Monitorship appears to have more elements of organizational consent than Traditional, Court-Ordered Monitorships via FRCP 56(a)(1)(C) or Enforcement Monitorships. The court is usually not involved or is only minimally involved in the appointment of the monitor in Corporate Compliance Monitorships, and if the monitorship arises as part of an NPA, there generally is no court involvement whatsoever.<sup>127</sup>

### *C. Modern-Day, Court-Ordered Monitorships*

The rise of the modern-day monitorship has influenced the manner in which courts utilize monitors as court-appointed agents. Specifically, the increasing permissibility of outsourcing government enforcement activities to independent, private outsiders may be giving current judges the perception that their ability to define the scope of a monitorship is broader than legal authority permits. Additionally, the use of modern-day monitorships in non-court-ordered, purely civil contexts may influ-

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*Tax Effects of Tacit Understandings*, 74 U. CHI. L. REV. 601, 671-73 (providing a discussion of reputational capital within economic theory).

126. Root, *supra* note 8, at 531.

127. The HSBC DPA is unique in that the district court approved the DPA, but "maintain[ed] supervisory power" and required the "government to file quarterly reports with the Court while the case is pending." Mem. Op at \*2, *United States v. HSBC Bank USA, N.A.*, 12-763, 2013 WL 3306161 (E.D.N.Y. July 1, 2013). Yet, even in that case, where the court took a more active interest in a Corporate Compliance Monitorship, the decision-making regarding who would serve as the monitor and regarding the monitor's responsibilities was determined solely between the corporation and the government. See Douglas Gillison, *HSBC Monitor Will be Ex-NY Ethics Chief Michael Cherkasky*, *Justice Department Says*, MAIN JUSTICE (June 5, 2013, 2:09 PM), <http://www.mainjustice.com/2013/06/05/hsbc-monitor-will-be-ex-ny-ethics-chief-michael-cherkasky-justice-department-says>.



ence governmental actors' requests that courts order the imposition of monitors. Finally, the current, general public (or lawyer-public) understanding of the role of the modern-day monitorship may influence individuals who are serving as monitors in a manner that leads them to believe their grant of authority as court-appointed agents is greater in scope than is actually appropriate or legally permissible.

As explained in Part I, federal courts have express authority to impose a monitor under FRCP 53, but this authority is limited. Courts have, however, long been understood to have an inherent authority "to provide themselves with appropriate instruments required for the performance of their duties," which "includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties."<sup>128</sup> Despite these limitations on courts' authority to utilize independent, private outsiders, after the corporate scandals of the early 2000s, courts have sometimes taken a more aggressive approach in appointing monitors than what looks to be appropriate or, in some instances, legally permissible.<sup>129</sup>

In June 2002, the Securities and Exchange Commission ("SEC") filed a civil action "charging major global communications provider WorldCom, Inc. with a massive accounting fraud totaling more than \$3.8 billion."<sup>130</sup> As part of the civil action, the SEC requested the appointment of "a corporate monitor to ensure that documents [we]re not destroyed and that no . . . extraordinary payments [we]re made [to executives or WorldCom's affiliates]."<sup>131</sup> Two days later, WorldCom and the SEC entered into a stipulated agreement that included the appointment of a monitor, who was appointed less than a week later.<sup>132</sup> The initial grant of authority to the monitor looked very similar to the authority typically extended to a Traditional, Court-Appointed Monitor. It was limited in scope, very explicit in delineating the specific performance the monitor was meant to oversee, and consistent with the SEC's original request to: (i) ensure evidence was not destroyed and (ii) "prevent the payment of excessive executive compensation."<sup>133</sup> Whether the monitor was appointed under FRCP 53 or through the court's inherent authority to make such appointments, the grant of authority did not look to be anomalous, particularly given WorldCom's consent. Per FRCP 53(a)(1)(A), the federal courts are permitted to appoint monitors to undertake actions stipulated to by the parties.

But in August 2002, the district court further explained the scope of the monitorship, in part to clarify how WorldCom's bankruptcy filing would impact the monitorship. The court emphatically stated:

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128. Khanna & Dickinson, *supra* note 21, at 1716 (quoting *In re Peterson*, 253 U.S. 300, 312 (1920)). Additionally, Sarbanes-Oxley contains a provision that authorized "the granting of 'any equitable relief that may be appropriate or necessary for the benefit of investors.'" O'Hare, *supra* note 21, at 93 (citing Securities Exchange Act of 1934 § 21(d)(5), 15 U.S.C. § 78(u)(d)(5) (Supp. II 2002)).

129. O'Hare, *supra* note 21, at 89.

130. Litigation Release No. 17588, Sec. & Exch. Comm'n, SEC Charges WorldCom with \$3.8 Billion Fraud Commission Action Seeks Injunction, Money Penalties, Prohibitions on Destroying Documents and Making Extraordinary Payments to WorldCom Affiliates, and the Appointment of a Corporate Monitor (June 27, 2002), <http://www.sec.gov/litigation/litreleases/lr17588.htm>.

131. *Id.*

132. Jonathan Burns, *Former SEC Chairman Breeden Appointed WorldCom Monitor*, WALL ST. J. (July 3, 2002), <http://www.wsj.com/articles/SB1025709085658152120>; O'Hare, *supra* note 21, at 95.

133. O'Hare, *supra* note 21, at 95.

To put it bluntly, it is the responsibility of the [m]onitor, among other responsibilities, to prevent unnecessary compensatory expenditures by the company, not only in the form of looting by miscreants but also in the form of excessive compensation of those who mistake a damaged company for a broken piggybank.

...  
To carry out his important functions, it is also vital that the [m]onitor be provided with all relevant information, both from the company itself and from its outside advisors, committees, agents, affiliates, and the like. The [m]onitor can hardly determine what is "necessary to the operation of the business" if he is not provided with complete information about every aspect of the business *he deems* relevant to his assessments.<sup>134</sup>

Thus, while the scope of the monitor's work technically remained related to issues of executive compensation, in practice the monitor's power increased exponentially after this order. The monitor was able to demand access to virtually every decision made at the company and, as such, was perceived both inside and outside the company as having very broad authority that went beyond ensuring document preservation and reasonable executive compensation.<sup>135</sup> Thus, the court-appointed agent utilized in the WorldCom case did not look like a Traditional, Court-Ordered Monitor; the role evolved to become something more.

WorldCom presents a classic chicken and egg problem. There was certainly an enforcement shift in the early 2000s that contributed to the rise of the modern-day monitorship.<sup>136</sup> The backlash to corporate scandals resulted in the government pursuing new enforcement tools.<sup>137</sup> It is not clear whether the use of the modern-day monitorship in other contexts (e.g., in Enforcement and Corporate Compliance Monitorships) influenced the manner in which the court envisioned an appropriate grant of authority for the WorldCom monitorship or vice versa. That said, WorldCom is a bit of an anomaly because the company was in such dire straits post-scandal that it *consented* to the Court-Ordered Monitorship and did not object when the court issued its order describing a monitorship with extremely broad powers.<sup>138</sup> It is unclear whether a strong defensive posture by WorldCom against the monitor's broad scope of authority would have resulted in a different outcome.<sup>139</sup> There is, however, a recent example of a Court-Ordered Monitorship where the district court granted the monitor extremely broad powers.

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134. Mem. Order at 3, SEC v. WorldCom, Inc., No. 02-CV-4963, 2002 U.S. Dist. LEXIS 14201 (S.D.N.Y. Aug. 1, 2002) (emphasis added).

135. See O'Hare, *supra* note 21, at 103-06.

136. *Id.* at 89.

137. See, e.g., Cunningham, *supra* note 112, at 14 (explaining that the number of DPAs utilized since 2003 exploded when compared to their previous use).

138. Absent WorldCom's consent, I believe the court went too far, and that, if contested, the monitorship should have been reined in for lack of appropriate legal basis to pursue such an aggressive remedy. Under the Organizational Sentencing Guidelines, there are parameters allowing a court to provide a broad grant of authority like that found in WorldCom to a court-appointed agent, but that authority is available for *criminal* actions. See U.S. SENTENCING GUIDELINES MANUAL ch. 8, intro. cmt. (2012); Root, *supra* note 8, at 539 n.63. WorldCom arose out of a civil action. As noted by Professor Jennifer O'Hare, there are real concerns about allowing a court-appointed agent, with no duties to shareholders, to make sweeping corporate governance reforms, because there is no assurance that the agent is making decisions in the best interests of shareholders. See O'Hare, *supra* note 21.

139. WorldCom was not in a position to take an aggressive posture. Its ability to weather the scandal was, in part, related to its public commitment to reform. The monitor assisted WorldCom in

In a 2013 civil antitrust case, Apple was found to have “colluded with five major U.S. publishers to drive up the prices of e-books.”<sup>140</sup> In October 2013, the district court appointed a monitor for a two-year term.<sup>141</sup> However, because Apple did not consent to enter into the monitorship under FRCP 53(a)(1)(A), the court was limited to appoint a monitor only to “address pretrial and posttrial matters that [could not] be effectively and timely addressed by an available district judge or magistrate judge of the district.”<sup>142</sup> Per the terms of the court’s order, the monitor’s scope of authority was to “review and evaluate Apple’s existing internal antitrust compliance policies and procedures” and “to recommend to Apple changes to address any perceived deficiencies in those policies, procedures, and training.”<sup>143</sup> On its face, the order did not necessarily look overly broad and would likely have survived scrutiny if challenged for failure to comply with FRCP 53(a)(1)(C). Indeed, after Apple lost its attempt to stop the imposition of the monitorship, it did not initially appeal the imposition of the Court-Ordered Monitorship.<sup>144</sup> But when the monitor actually developed a monitorship work-plan under the court’s order, it became apparent that the order was susceptible to an interpretation that permitted the monitor to engage in activities that were broader than Apple previously contemplated.<sup>145</sup>

For example, Section V. of the court’s final judgment outlines the responsibilities given to a newly appointed “Antitrust Compliance Officer” within Apple.<sup>146</sup> That judgment required the officer to engage in activities like communicating with Apple’s Board of Directors and other leadership as well as ensuring that individuals within Apple received comprehensive and effective annual training.<sup>147</sup> The external monitor was responsible for evaluating whether the internal Antitrust Compliance Officer was properly effectuating his or her duties. Section VI.B. of the court’s order details the responsibilities of the “External Compliance Monitor” and states the monitor “shall have the power to review and evaluate Apple’s existing internal antitrust compliance policies and procedures and the training program required by *Section V.C.* of this Final Judgment.”<sup>148</sup> Section V.C. required the Antitrust Compliance Officer to ensure that Apple’s Board of Directors and other high level executives received comprehensive and effective training on antitrust laws from an attorney with

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these efforts by providing information to third-party outsiders about WorldCom’s progress. As noted in an article published after WorldCom successfully completed Chapter 11 bankruptcy, the appointment of the monitor “helped reassure customers and regulators.” Paul Davidson, *WorldCom’s Black Cloud About to Lift*, USA TODAY (Apr. 18, 2004), [http://usatoday30.usatoday.com/money/industries/telecom/2004-04-18-worldcom-reorganization\\_x.htm](http://usatoday30.usatoday.com/money/industries/telecom/2004-04-18-worldcom-reorganization_x.htm).

140. Christopher M. Matthews, *It’s in the ‘Public Interest’ to Monitor Apple’s Antitrust Reforms*, *Judge Says*, WALL ST. J. LAW BLOG (Jan. 16, 2014, 12:13 PM), <http://blogs.wsj.com/law/2014/01/16/its-in-the-public-interest-to-monitor-apples-antitrust-reforms-judge-says>.

141. Mem. Op. at 10, *United States v. Apple, Inc.*, No. 12-2826, 2013 WL 4774755 (S.D.N.Y. Sept. 5, 2013) [hereinafter *Apple Monitorship Court Order*].

142. FED. R. CIV. P. 53(a)(1)(C).

143. See *Apple Monitorship Court Order*, *supra* note 141, at 11.

144. Roger Parloff, *Who Won the Battle of the Apple Antitrust Monitor*, *FORTUNE* (Feb. 11, 2014), <http://fortune.com/2014/02/11/who-won-the-battle-of-the-apple-antitrust-monitor>.

145. *United States v. Apple*, 787 F.3d 131, 134, 140-41 (2d Cir. 2015).

146. See *Apple Monitorship Court Order*, *supra* note 141, 8-10.

147. *Id.*

148. *Id.* at 11 (emphasis added).

relevant antitrust experience.<sup>149</sup> Thus, on its face, the court's order seemed to suggest that the internal Antitrust Compliance Officer would oversee interactions regarding potential antitrust concerns with senior Apple officials and the External Compliance Monitor would, in turn, evaluate that Antitrust Compliance Officer's effectuation of his or her duties in this regard. Additionally, the court's order, in Section VI.B., seemed to limit the External Compliance Monitor's scope of work to a review of Apple's antitrust policies, procedures, and training and a responsibility to "recommend to Apple changes to address any perceived deficiencies in those policies, procedures, and training."<sup>150</sup> Thus, the Court-Ordered Monitorship appeared to have a limited scope of looking at Apple's existing antitrust policies—a narrow zone of information—and recommending changes based on "perceived deficiencies." The order did not appear to authorize a vast cultural assessment.<sup>151</sup>

But later, in Section VI.G., the order states:

Apple shall assist the External Compliance Monitor in performance of the responsibilities set forth in this Section VI. . . . The External Compliance Monitor may, in connection with the exercise of his or her responsibilities under this Section VI, and on reasonable notice to Apple:

1. Interview, either informally or on the record, any Apple personnel, who may have counsel present . . . .

One might read these provisions and assume that the External Compliance Monitor's grant of authority to conduct interviews in Section VI.G. was limited by the scope set out in Section VI.B., but one could also read the provisions more expansively to permit the monitor to conduct direct interviews of *any* individual at Apple, even those who were not engaged in activities related to Apple's alleged antitrust failures.

When the Court-Ordered Monitorship began, it appears the monitor took the more expansive view of the activities that he was permitted to engage in under the agreement. When the monitor began his work, he almost immediately began seeking interviews with Apple's entire executive team and its entire board of directors.<sup>152</sup> The breadth of these inquiries reportedly surprised Apple, "since few of these officials had any direct involvement with antitrust compliance issues."<sup>153</sup> This type of

149. *Id.* at 8-9.

150. *Id.* at 11.

151. This narrow scope likely made sense, as Apple was also required to "designate a person not [currently] employed by Apple . . . to serve as Antitrust Compliance Officer, who shall report to the Audit Committee or equivalent committee of Apple's Board of Directors and shall be responsible, on a full-time basis until the expiration of [the Court's Final Judgment], for supervising Apple's antitrust compliance efforts." *Id.* at 8. The wisdom of permitting courts and the government to develop corporate governance reforms is an open question. *See* Cunningham, *supra* note 112, at 44-47. In other words, the court's order, at DOJ request, also required Apple to install an internal antitrust gatekeeper. Thus, there was already a court-appointed individual—although an individual who would become an internal, at least on a temporary basis, employee—to engage in more robust development of a compliance program at Apple. The Antitrust Compliance Officer was charged with ensuring that employees "receive[d] comprehensive and effective training annually on the meaning and requirements of . . . the antitrust laws" from "an attorney with relevant experience in the field of antitrust law." Apple Monitorship Court Order, *supra* note 141, at 8-9. The Antitrust Compliance Officer was also supposed to work with the monitor in conducting "annual antitrust compliance audit[s]." *Id.* at 9. Thus, the monitor's decision to engage in broad, sweeping inquiry seems questionable, as he was already given a designated point of contact at the company responsible for assisting the monitor in his efforts.

152. *United States v. Apple*, 787 F.3d 131, 140-41 (2d Cir. 2015).

153. Parloff, *supra* note 144.

activity does not appear to be legally permissible under the textual terms of the court's order. Apple argued that the monitor "stepped beyond the scope of his appointment."<sup>154</sup> The district court judge who appointed the monitor, however, defended the monitor's broad scope of inquiry, stating she "believed that a permissible part of his job was to scope out Apple's 'tone' and 'culture.'"<sup>155</sup> The judge thereby seemingly provided approval of the monitor's view that he needed to "'crawl inside [the] company.'"<sup>156</sup>

If Apple had entered into the monitorship voluntarily, as in a Corporate Compliance Monitorship, these requirements likely would not have resulted in much contention. For a Corporate Compliance Monitorship, where the monitor is charged with conducting an individualized inquiry into the firm's needs, assessing its specific challenges, and providing organization-tailored recommendations for developing and modifying the firm's compliance program,<sup>157</sup> a "crawl inside the company" approach may make sense.<sup>158</sup> An important component to developing a compliance program is assessing the organization's culture. A key component of the Corporate Compliance Monitorship is that the company works with the monitor, so that the monitor can create a set of recommendations that are specifically tailored to the company and that are aimed at improving the company's future legal and regulatory compliance. But Apple did not agree to the monitorship. Indeed, Apple vigorously objected to the imposition of the Monitor.<sup>159</sup>

Resistance to the imposition of a court-appointed agent is unremarkable, and it was evidenced in the above IBT and NYFD examples.<sup>160</sup> But resistance when the court-appointed agent's role is merely to monitor compliance with very specific court orders and resistance when the court-appointed agent is charged with a broad grant of discretion are two very different things.

It is important to remember that there are different levels of cooperation. If a monitor is asked to observe a union election, that may require cooperation in the form of permitting the monitor to be on site during the election and conduct random spot checks of election procedures. Mandating access for a monitor is certainly something that a court can effectively achieve via court order. If a monitor is asked to develop new corporate governance protocols to ensure future legal and regulatory compliance, that likely requires cooperation of a different sort. The cooperation level needed is not limited to access. It requires organizational buy-in and, importantly, buy-in from key employees at the monitored organization to ensure success. That type of cooperation is difficult to mandate via court order, because if the key employees and

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154. Matthews, *supra* note 140

155. Parloff, *supra* note 144.

156. *Id.*

157. See Root, *supra* note 8, at 550-54; *supra* Part II.B.

158. Whether this approach is appropriate will depend on the scope of the monitorship as agreed to by the government and the monitored organization and articulated in the corresponding settlement agreement.

159. In part, Apple objected to the costs associated with the monitorship. The first two weeks of work resulted in a bill of \$138,432.40. Matthews, *supra* note 140; Martha Neil, *2nd Circuit Puts Court-Appointed Monitor Back to Work in Apple e-Book Case But Limits His Duties*, ABA J. (Feb. 11, 2014), [http://www.abajournal.com/news/article/2nd\\_circuit\\_puts\\_court-appointed\\_monitor\\_back\\_to\\_work\\_in\\_apple\\_e-book\\_case\\_](http://www.abajournal.com/news/article/2nd_circuit_puts_court-appointed_monitor_back_to_work_in_apple_e-book_case_).

160. See *supra* Part I.A.

organization are resistant to change, it is unlikely that the monitor will be able to glean all of the data necessary to develop effective recommendations. If organizational buy-in is not achieved, it is unlikely that a new culture of compliance will actually result from the monitor's efforts.

In the case of Apple, the resistance to the court-appointed monitor resulted in a variety of objections, including an objection regarding the monitor's authority to engage in specific activities alleged to be outside the appropriate scope of the monitorship. Apple's argument here may very well have been valid. Whether it is legally permissible for a district court to grant a monitorship with this type of broad scope is an open question, but a strict, textual reading of FRCP 53 suggests that the district court's actions enlarged the scope of the monitor's activities beyond what is legally permissible.<sup>161</sup> On appeal, the Second Circuit "concluded that the [court's] order 'should be interpreted narrowly,' as simply allowing the monitor to 'assess the appropriateness of the compliance programs adopted by Apple and the means used to communicate those programs to its personnel.'"<sup>162</sup> Thus, the appellate court required the monitorship to utilize a structure where the monitor took a role more akin to those undertaken by traditional, court-appointed agents. There would have been no need for the Second Circuit to rein in the monitorship if it had been within appropriate bounds. Yet there technically has been no formal Second Circuit ruling invalidating or prohibiting the use of Court-Ordered Monitorships where the monitor is provided an extremely broad grant of authority without consent by all parties.<sup>163</sup>

If, as the actions by the court and monitor in the case of Apple may suggest, the realities of modern-day monitorships have changed the understanding that the public (or the lawyer-public) has of the appropriate role of Court-Ordered Monitorships, there may be subtle, legally-questionable changes occurring regarding their use. Instead of engaging in remediation efforts aimed at monitoring specific performance with the courts' orders, Modern-Day, Court-Ordered Monitorships may be attempting to act more like consensually-created Corporate Compliance Monitorships with "specific performance plus." Courts may be attempting to order a remediation effort similar to what is found in Corporate Compliance Monitorships without fully realizing the nuances within the different types of monitorships and their corresponding structural components.

The above examples suggest some common characteristics of the Modern-Day, Court-Ordered Monitorship, which is, admittedly, a phenomenon in flux. First, the monitorship is technically meant to provide a service to the court, and the monitor is serving as an agent of the court. However, the monitor's deliverable is supposed to result in a monitored organization with an improved compliance framework that will ensure better regulatory and legal compliance. Thus, the monitorship does appear to

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161. I believe that appointing a monitorship in this *civil* context, absent consent by both parties, was an unlawful action by the district court, which merely serves to demonstrate the current complexities with modern-day monitorships. This raises the question of whether FRCP 53 should be amended, so that courts can appoint monitors with broad scopes of authority. I believe this would be a mistake, because the kinds of corporate governance reforms that the court was attempting to achieve in the Apple monitorship require organizational buy-in of a nature that would be difficult to mandate via court order.

162. Parloff, *supra* note 144.

163. *United States v. Apple*, 787 F.3d 131, 137-38 (2d Cir. 2015) (explaining that the court was without appropriate jurisdiction to rule on the appropriateness of appointing a monitor in this context).

be providing a service—albeit a possibly unwanted service—to the monitored organization. Second, the remediation effort undertaken by the Modern-Day, Court-Ordered Monitorship surpasses ensuring specific performance with a court's detailed order. Instead, the monitor is given a grant of authority that is broader in scope, leaving a great deal more discretion with the monitor regarding the appropriate activities s/he should engage in than what is found in Traditional, Court-Ordered Monitorships. Third, the court initiates the monitorship, often at the government's strong request. Additional time will likely be needed to fully assess Modern-Day, Court-Ordered Monitorships, but, at a minimum, it does appear that the Modern-Day, Court-Ordered Monitor is imbued with more inherent power and freedom to set its own agenda than traditional, court-ordered agents, although the legality of such a monitorship remains an open question.

### *D. Public Relations Monitorships*

A more recent evolution on the monitorship spectrum may be an organization's completely voluntarily retention of a monitor after misconduct is publicly uncovered. During the Public Relations Monitorship, the monitor conducts an independent investigation into the scope of organizational wrongdoing and provides a public accounting of the investigation, along with suggestions for remediation measures. Nevertheless, no regulatory or governing body serves as a countervailing check on the monitorship. The monitorship is meant to remediate the underlying organizational misconduct, but it is also meant to heal the damaged relationship between the monitored organization and the public through the monitorship's deliverable—the public monitorship report. The public monitorship report also sends information—although the reliability of the information is currently unclear—to applicable regulatory bodies that there is no need to inflict aggressive or severe sanctions against the organization for the underlying misconduct.

This strategy of entering into a monitorship for the purpose of engaging in a fully independent investigation appears to be a novel use of the modern-day monitorship. In most instances, an organization would enter into an attorney-client relationship with a lawyer who is retained to conduct a privileged, independent investigation. After the investigation is concluded, the attorney sometimes releases his or her findings in a public report, but the report was generated within the confines of an attorney-client relationship. This approach allows the organization to provide the public with the appearance of a genuine attempt at disclosure and future compliance, but the organization maintains the ability to control the messaging and use of the attorney's work product. This strategy was utilized in the investigation into Chris Christie's involvement in the Port Authority Scandal,<sup>164</sup> and it is an increasingly common mechanism for attempting to assuage concerns regarding continued organizational

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164. *Report of Gibson, Dunn & Crutcher LLP Concerning Its Investigation on Behalf of the Office of the Governor of New Jersey into Allegations Regarding the George Washington Bridge Lane Realignment and Superstorm Sandy Aid to the City of Hoboken*, GIBSON, DUNN & CRUTCHER LLP 35-38 (Mar. 26, 2014), <http://online.wsj.com/public/resources/documents/nybridge0327.PDF> (making no explicit claim of actual independence from the Office of the Governor).

misconduct (while technically maintaining organizational control over the information disseminated to the public).<sup>165</sup> But those engaging in Public Relations Monitorships do not enter into privileged relationships with the monitor at the outset. They are novel precisely because the monitor has a purely independent mandate to investigate the organization.

For example, in March 2011, allegations connecting Jerry Sandusky, a former assistant football coach at Pennsylvania State University (“Penn State”), to sexual abuse activities became known. Questions began to arise with regard to who at Penn State had been aware of Sandusky’s activities (and to what extent).<sup>166</sup> In the first few weeks of November 2011, criminal charges were filed against Sandusky and several high-ranking university officials,<sup>167</sup> prompting the university to take dramatic action in response to the allegations. On November 21, 2011, the Penn State Board’s Special Investigation Task Force retained Louis Freeh, former director of the Federal Bureau of Investigations, as Special Investigative Counsel.<sup>168</sup>

Freeh initiated a comprehensive and thorough investigation and developed an action plan for the university to adopt going forward. Freeh’s 267-page report includes a section entitled “Independence of the Investigation,” where he explains his complete freedom to conduct an expansive investigation free from conflicts of interest.<sup>169</sup> Freeh notes that “[n]o party interfered with, or attempted to influence, the findings in this report. The Special Investigative Counsel revealed this report and the findings herein to the Board of Trustees and the general public at the same time.”<sup>170</sup> The report’s “most saddening finding . . . [wa]s the total and consistent disregard by the most senior leaders at Penn State for the safety and welfare of Sandusky’s child victims.”<sup>171</sup> Thus, the report admits that individuals employed at Penn State were engaged in egregious wrongdoing. The report goes on to explain that “[t]hese individuals, unchecked by the Board of Trustees that did not perform its oversight duties, empowered Sandusky to attract potential victims to the campus and football events by allowing him to have continued, unrestricted and unsupervised access to the University’s facilities and affiliation with the University’s prominent football program.”<sup>172</sup> Thus, the report strongly criticizes the very entity that retained the monitor, thereby bolstering the impression of monitor independence. The report includes 120 recommendations developed by the monitor in eight areas aimed to prevent similar

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165. See, e.g., Martin Bricketto, *Gibson Dunn Subpoena Row Sends Warning on Firm Probes*, LAW360 (Oct. 9, 2015), <http://www.law360.com/articles/712914/gibson-dunn-subpoena-row-sends-warning-on-firm-probes> (discussing dispute between Gibson Dunn and interested parties in the Port Authority scandal regarding access to Gibson Dunn’s “interview notes and metadata tied to about 430 pages of interview summaries”).

166. *Report of the Special Investigative Counsel Regarding the Actions of the Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky*, FREEH SPORKIN & SULLIVAN, LLP 8-9 (July 12, 2012), [http://health-equity.pitt.edu/3956/1/REPORT\\_FINAL\\_071212.pdf](http://health-equity.pitt.edu/3956/1/REPORT_FINAL_071212.pdf).

167. *Id.* at 13-14.

168. *Id.* at 8.

169. *Id.* at 11.

170. *Id.* at 12.

171. *Id.* at 14.

172. *Id.* at 15.



misconduct at the university.<sup>173</sup> All 120 recommendations were made public in Freeh's report, which is readily accessible via Penn State's website.<sup>174</sup>

The result of this completely voluntary and private Public Relations Monitorship is that when the NCAA did officially impose a monitor for a five-year probationary term, the new monitor deferred to many of Freeh's conclusions and credited Penn State for adopting Freeh's recommendations. Specifically, the NCAA-appointed monitor in the Penn State Monitorship refers to the Freeh Report repeatedly when reporting on Penn State's progress. For example, the NCAA-appointed monitor's second report stated that "Penn State also made significant strides toward completing the implementation of the three most challenging long-term projects that were included in the Freeh Report recommendations . . . ."<sup>175</sup> Moreover, the monitor determined that Penn State was performing exceptionally well in its remediation efforts, and stated that it will likely suggest ending the monitorship "substantially earlier than scheduled."<sup>176</sup> Indeed, in the NCAA-appointed monitor's third report, it went ahead and "recommended that the monitorship conclude at the end of the 2015 calendar year . . . a full twenty months before the end of the five-year term."<sup>177</sup> Therefore, it appears that, by employing this Public Relations Monitorship, Penn State sidestepped some of the penalties it otherwise would have faced as part of its discipline from the NCAA for its failure to detect the misconduct.

General Motors's ("GM") response to a scandal related to a "defect in the ignition switch of certain vehicles" provides another example of a private organization utilizing the resources of a modern-day monitorship in a purely voluntary manner.<sup>178</sup> The defect caused the death or injury of an unknown number of individuals, prompting GM to set aside \$400 to \$600 million as part of a victim compensation effort.<sup>179</sup> GM voluntarily retained Kenneth Feinberg to administer the fund.<sup>180</sup> Feinberg had previously served as the special master overseeing the distribution of the 9/11 compensation funds, as well as "funds for victims of the BP oil spill, Boston Marathon bombing and Virginia Tech campus shootings."<sup>181</sup>

Like the parties in the Penn State example, GM and Feinberg took great pains to demonstrate Feinberg's independence. As reported in the news, Feinberg stated that "GM delegated to me full and sole discretion to decide which claims are eligible, and

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173. *Id.* at 17.

174. *Id.* at ch. 10.

175. Mitchell, *supra* note 89, at 6.

176. *Id.* at 7.

177. Press Release, DLA Piper, Monitor Announces Delivery of Third Annual Report to Penn State, the NCAA, and the Big Ten Conference (Sept. 21, 2015), <https://www.dlapiper.com/en/us/news/2015/09/third-annual-report-to-penn-state>.

178. *Final Protocol for Compensation of Certain Death and Physical Injury Claims Pertaining to the GM Ignition Switch Recall*, GM IGNITION COMP. CLAIMS RESOLUTION FACILITY (June 30, 2014), <http://www.gmignitioncompensation.com/docs/FINAL%20PROTOCOL%20June%2030%20%202014.pdf>.

179. James R. Hood, *19 Death Claims Approved in GM Ignition-Switch Program*, CONSUMER AFF. (Sept. 15, 2014), <http://www.consumeraffairs.com/news/19-death-claims-approved-in-gm-ignition-switch-program-091514.html>.

180. James R. Healey, *Feinberg Announces How GM Switch Victims Will Be Paid*, USA TODAY (June 30, 2014), <http://www.usatoday.com/story/money/cars/2014/06/30/feinberg-gm-switch-compensation/11718321>.

181. *Id.*

how much money they should get. There are no appeals (by GM or victims).”<sup>182</sup> Additionally, Feinberg created a website to allow individuals to file claims. The homepage of the website makes the following points:

- Mr. Feinberg retains complete and sole discretion over all compensation awards to eligible victims, including eligibility to participate in the Program and the amounts awarded. By agreement, GM cannot reject the Administrator’s final determinations as to eligibility and amount of compensation.
- The Program has no aggregate cap; GM has agreed to pay whatever the Administrator deems appropriate in each and every individual case.<sup>183</sup>

Thus, similar to the Penn State example, GM placed the authority of all remediation efforts—in this case the administration of victim compensation—in the hands of an independent, private outsider or a modern-day monitor. This particular Public Relations Monitorship looks more like an Enforcement Monitorship than a Corporate Compliance Monitorship, as Feinberg was not engaged to assist the corporation in developing policies and procedures for reform. Instead, he, like the National Mortgage Settlement monitor, was engaged for the purpose of overseeing a monitorship with the sole remediation goal of providing compensation to victims of the underlying organizational misconduct.

The effect of GM’s use of the Public Relations Monitorship, in conjunction with other remedial activities,<sup>184</sup> is that when GM ultimately received a formal sanction from the government via DPA, it was much less severe than it likely would have been without those efforts. For example, the government credited GM for providing “extraordinary cooperation” during the federal government’s investigation into the scandal.<sup>185</sup> As a result, the monetary fine GM received was “25 percent less than the record \$1.2 billion Toyota” settlement from 2014.<sup>186</sup> Additionally, if GM adheres to the DPA, the company “can have its record wiped clean.”<sup>187</sup> The GM settlement does require the appointment of a monitor,<sup>188</sup> but the reaction of many is that GM’s sanction was not as severe as was expected given the nature and scope of the misconduct.<sup>189</sup>

182. *Id.*

183. GM IGNITION COMP. CLAIMS RESOLUTION FACILITY, <http://www.gmignitioncompensation.com> (last visited Feb. 25, 2015).

184. GM engaged in a variety of efforts to address the misconduct related to the ignition switch failure. For example, GM’s chief executive officer testified before Congress and apologized for the failure. See Bill Vlasic & Aaron M. Kessler, *At Hearing on G.M. Recall, Mary Barra Gives Little Ground*, N.Y. TIMES (July 17, 2014), <http://www.nytimes.com/2014/07/18/business/senate-hearing-on-general-motors.html>.

185. *Id.*

186. Danielle Ivory & Bill Vlasic, *\$900 Million Penalty for G.M.’s Deadly Defect Leaves Many Cold*, N.Y. TIMES (Sept. 18, 2014), <http://www.nytimes.com/2015/09/18/business/gm-to-pay-us-900-million-over-ignition-switch-flaw.html>.

187. *Id.*

188. Nate Raymond, *Federal Monitor for GM Appointed in Settlement*, REUTERS (Oct. 29, 2015), <http://www.reuters.com/article/2015/10/29/us-usa-gm-monitor-idUSKCN0SN2WU20151029#g7AhMdoIct3TR7R0.97>.

189. Mike Spector & Christopher M. Matthews, *U.S. Charges GM with Wire Fraud, Concealing Facts on Ignition Switch*, WALL ST. J. (Sept. 17, 2015), <http://www.wsj.com/articles/u-s-charges-gm-with-wire-fraud-concealing-facts-on-ignition-switch-1442502075>.

These examples suggest that the Public Relations Monitorship also has common characteristics. First, the monitorship is undertaken to provide what is presented as a service to the public. The organization, due to the extreme nature of the underlying scandal, has lost public trust, and the monitorship is a mechanism to assure the public that the organization will completely and thoroughly remediate the harm caused. But the monitorship also provides a valuable service to the organization. It allows the organization to borrow the reputational capital of the monitor. It is no accident that the people appointed to oversee the monitorships in the above two examples were well-known individuals with impeccable reputations. The word of these individuals carries with it a legitimacy and gravitas that the organizations desperately need to assist in restoring the trust of the public.

Second, the remediation effort undertaken in the Public Relations Monitorship is a completely voluntary process on the part of the monitored organization. Stressing the “voluntary” nature of this monitorship type is not meant to suggest that there are not powerful external forces motivating the embroiled organization to enter into the Public Relations Monitorship. Indeed, in both the Penn State and GM examples, formal sanctions were certainly looming on the horizon. Yet the actual decision to enter into the Public Relations Monitorship was done at the organization’s own initiative without a formal decree or request from a third party like a court, governmental agency, or self-regulatory organization. Instead, the organization borrows a remediation model that the government has previously used and privatizes it. Third, the organization initiates the monitorship, but then completely steps back and distances itself from the monitorship process for fear of tainting the results of the remediation effort.

It is likely too early to pass judgment on the privatization of monitorships. Nonetheless, there are potential concerns. For example, there is no entity serving as a check on the monitor’s actions like in Court-Ordered, Enforcement or Corporate Compliance Monitorships. The monitor’s interest in his own reputation appears to be the only factor in place to ensure that the monitorship is genuinely undertaken in a purely independent manner. Additionally, privatizing monitorships may delegitimize other forms of monitorships. There are, however, possible benefits. The use of monitorships is a reaction to failed organizational self-policing. If organizations can engage in efforts to effectively address this failure on their own, these private efforts could lessen burdens on regulatory bodies. Public Relations Monitorships also provide a tangible service to the public, as they allow for remediation efforts to be completed in a manner that has strong organizational buy-in, which could result in long-term and systematic change within the organization. Regardless, the use of Public Relations Monitorships is a new phenomenon that requires careful observation and further study.

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Monitorships can take a variety of forms, but this diversity is related directly to the remediation effort the monitorship is intended to achieve. The above categorization is by no means exhaustive. Yet these examples do demonstrate that monitorships are evolving. Without this type of analysis, it could be difficult to detect the changes occurring within Court-Ordered Monitorships. It could also be difficult to appreciate the potential of monitorship privatization as a remediation tool. More importantly,

this categorization serves as a frame within which commonly proposed monitorship reforms can be placed to see whether they can be effectively and practically applied in a universal manner. Part III begins this effort.

### III. The Differences Matter.

As demonstrated in Parts I and II, modern-day monitorships are widely used by courts, regulators, prosecutors, and private organizations. Yet there are no formal standards of conduct or rules governing monitorships. Courts and scholars have expressed concern about this lack of formal oversight and guidance.<sup>190</sup> And the need for a set of standards has been widely recognized. Indeed, there have been unsuccessful attempts for reform by policymakers.<sup>191</sup> For example, in 2008 and 2009, around the same time as DOJ guidance was provided to prosecutors outlining the appropriate use of monitorships,<sup>192</sup> two bills were put forward in the House of Representatives aimed at regulating monitor assignments,<sup>193</sup> but these efforts stalled. No new bills have since been introduced. Additionally, in 2012, the American Bar Association launched a task force charged with setting standards for corporate monitors, which resulted in the publication of a broad set of standards in August 2015, but an effort to provide commentary on the published standards remains ongoing.<sup>194</sup> Thus, the status quo continues: monitorships are heavily relied upon as important overseers of organizations' remediation efforts, while modern-day monitorships themselves lack a technical source of legal authority governing their use.

This Part establishes the difficulty with attempting to adopt universal rules meant to govern all monitorships. As examples, this Part briefly addresses three issues that scholars and policymakers often reference—the appropriateness of court involvement, the need for confidentiality, and the monitor's responsibilities toward the parties involved in the monitorship—to demonstrate that once monitorships are understood as heterogeneous remediation tools, it becomes more difficult to make broad-based claims regarding norms that should govern all monitorships.<sup>195</sup> The Part demonstrates that the analysis for each of the proposed reforms varies depending

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190. See Gibson Dunn, 2014 DPA/NPA, *supra* note 111 (discussing a court's ruling addressing issues of confidentiality related to monitors' work product); GARRETT, *supra* note 21, at 176-77, 192 (discussing the benefits of judicial involvement in overseeing corporate monitors); Peter J. Henning, *When Judges Refuse to Be Rubber Stamps*, N.Y. TIMES DEALBOOK (Mar. 22, 2010, 12:33 PM) (discussing an instance where a district court judge questioned aspects of a monitorship during a plea hearing), <http://dealbook.nytimes.com/2010/03/22/when-judges-refuse-to-be-rubber-stamps>.

191. The DOJ has provided guidance to prosecutors on when monitors should be appointed and what kind of responsibilities might be appropriate for monitors to have, but that guidance primarily provided a restraint and check on prosecutors (and not on monitors directly). Khanna, *supra* note 21, at 238-240.

192. Morford, *supra* note 29.

193. *Id.* (discussing Accountability in Deferred Prosecution Act of 2009, H.R. 1947, 111th Cong. (2009); Accountability in Deferred Prosecution Act of 2008, H.R. 6492, 110th Cong. (2008)).

194. *Monitors*, A.B.A. (Aug. 2015), [http://www.americanbar.org/groups/criminal\\_justice/standards/MonitorsStandardsFourthEdition-TableofContents.html](http://www.americanbar.org/groups/criminal_justice/standards/MonitorsStandardsFourthEdition-TableofContents.html).

195. The new ABA monitor standards do not definitively address these issues. *Id.* The standards do briefly discuss confidentiality, but do not address when confidentiality should occur or discuss factors that should be considered by the parties when deciding whether confidentiality should apply to the monitor's work product. *Id.* at Standard 24-4.3.

upon the type of monitorship assessed. This conclusion supports the argument that differences amongst monitorships matter and should be taken into account by scholars assessing monitorships and policymakers considering monitorship reform.

### A. Court Oversight

One of the most common suggestions for reforming monitorships is to establish more robust court oversight.<sup>196</sup> There are legitimate concerns that, when modern-day monitorships are conducted without active court involvement, they operate without sufficient oversight to protect the interests of the public.<sup>197</sup> This Part discusses the potential impact of court involvement on each of the monitorship categories identified in Parts I and II. To frame this inquiry, this Part questions whether robust court oversight appears likely to be a benefit or detriment to the particular remediation effort the monitorship is charged with achieving—whether it is likely to assist in effectuating the *remediation effort being sought*. A court could assist the remediation effort by increasing the likelihood of long-term future and regulatory compliance, but the court could also diminish the remediation effort by taking actions that may in fact be harmful to the organization’s compliance efforts.

#### 1. Traditional, Court-Ordered Monitorships

There are possible benefits to allowing courts to have an active role in monitorship oversight. In the examples of Traditional, Court-Ordered Monitorships, the organizations engaged in misconduct vigorously objected to the imposition of a monitorship.<sup>198</sup> In part, these objections were the result of a more general view on the part of the organizations that they had not engaged in inappropriate conduct deserving of punishment. If an organization is unwilling to take responsibility for the wrongdoing it engaged in, it would seem sensible and necessary to find a mechanism to oversee the remediation efforts required to address the underlying harm. Due to the reticent nature of the organization, it may be helpful for the monitor to be able to return to the court if the organization fails to comply with the court’s order. The court’s authority to levy mandates and issue sanctions might encourage the organization to fully address its history of misconduct.

The danger, however, in mandating compliance without voluntary organizational participation and buy-in is that it can result in less ethical behavior overall within the organization. As other scholarship has noted, “[a]ggressive compliance monitoring can have an unfavorable effect on the motivation of agents to comply with rules.”<sup>199</sup> Behavioral ethics literature demonstrates that, when individuals are told to comply with rules for the sake of compliance instead of for the sake of acting

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196. GARRETT, *supra* note 21, at 176-77, 192; Garrett, *supra* note 112, at 2-3; Alison Frankel, *DOJ Should End Secret Selection Process for Corporate Watchdogs*, REUTERS (July 14, 2014), <http://blogs.reuters.com/alison-frankel/2014/07/14/doj-should-end-secret-selection-process-for-corporate-watchdogs> (discussing the importance of judicial oversight in the imposition of corporate monitors).

197. GARRETT, *supra* note 21, at 176-77, 192; Garrett, *supra* note 112, at 2-3.

198. See *supra* Part I.A.

199. Milton C. Regan, Jr., *Risky Business*, 94 GEO. L.J. 1957, 1970 (2006).

ethically, it can actually diminish ethical behavior within firms.<sup>200</sup> Thus, aggressive mandates from courts requiring monitorships may address the immediate concerns of the court's order, but they also may have the unintended consequence of decreasing overall ethical behavior within the organization. Yet given the resistance that commonly results in and is associated with Traditional, Court-Ordered Monitorships, it may be worth risking the harms associated with mandating compliance in favor of empowering courts to provide the necessary incentives to the monitored organization to encourage it to properly engage in remediation efforts.

## 2. Enforcement Monitorships

Enforcement Monitorships might also benefit from court oversight. As explained in Part II, the goal of an Enforcement Monitorship is to ensure the organization's specific performance with the agreement's requirements.<sup>201</sup> The scope of the Enforcement Monitorship is often quite narrow, which would make it relatively easy for a court to assess whether the monitored organization is in compliance with the agreement. Thus, allowing court oversight could assist the monitorship's objectives by providing another incentive for the organization to comply with the settlement agreement with the government and with the monitor's requests and dictates. Yet it has not been established that a court is needed to ensure specific performance. In a well-functioning Enforcement Monitorship, the organization's failure to comply with the monitorship's parameters would result in the monitor alerting the government. The government would be free to file a formal action, civil or criminal, in response to the organization's noncompliance. Thus, there is a mechanism in place to incentivize compliance. This available consequence for noncompliance does not, however, satisfy concerns regarding the potential "capture" of regulatory entities or monitors by monitored organizations.

Capture here "refers to the development of an extremely close relationship between" the monitored organization and the regulator or monitor.<sup>202</sup> Scholars have expressed concern that such a close relationship could lead to sympathy from the regulator or monitor toward the organization that engaged in misconduct as well as "lax enforcement."<sup>203</sup> Allowing courts to directly oversee monitorships could be beneficial, because they could provide an additional check on the conduct of both the government and the monitor, thereby deterring occurrences of capture. If the government or monitor were not taking an appropriately aggressive stance in monitoring the organization's remediation efforts, the court could correct this deficiency.

Concerns regarding the possible effects of capture on monitorships, however, have yet to be proven. While a certain level of monitorship capture likely exists, the scope and breadth of the problem are currently an unknown. Indeed, there are exam-

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200. BAZERMAN & TENBRUNSEL, *supra* note 31, at 103-08.

201. See *supra* Part II.A.

202. Root, *supra* note 8, at 579 (quoting Dorit Rubinstein Reiss, *The Benefits of Capture*, 47 WAKE FOREST L. REV. 569, 570 (2012)).

203. *Id.*

ples of (i) monitors providing negative information regarding an organization's remediation efforts<sup>204</sup> and (ii) regulators expressing displeasure with the results of a monitorship.<sup>205</sup> Without empirical evidence demonstrating the extent of the threat of capture to effective monitorships—a question that would benefit from future study and is likely equally relevant to assessments of both Enforcement and Corporate Compliance Monitorships—it may be premature to adopt a rule requiring active court oversight of all monitorships entered into as a result of agreements between organizations and the government settling instances of firm misconduct.

There are potential detriments associated with robust court oversight of monitorships. First, as is mentioned in Part III.A.1., court oversight could diminish the development of a positive corporate culture that results in ethical behavior, because mandating compliance with particular norms can diminish personal motivations to act ethically.<sup>206</sup> Allowing for voluntary Enforcement Monitorships without robust court oversight would allow private actors to maintain accountability for their actions, albeit with the check of governmental presence. Second, a current benefit of monitorships is that they “shift the costs of enforcement from the government and the public to” the organization that engaged in wrongdoing, because the organization is typically responsible for compensating the monitor.<sup>207</sup> Requiring more active court involvement will shift some of those cost savings back to the public via court costs. The shift thereby eliminates one of the benefits associated with outsourcing oversight activities to monitors.

### 3. Corporate Compliance Monitorships

The benefits of court oversight for Corporate Compliance Monitorships are more opaque than those for Traditional, Court-Ordered and Enforcement Monitorships. The Corporate Compliance Monitorship's scope is less concrete, as the deliverable is often a set of recommendations for the organization to adopt that are developed after the monitor works with the monitored organization to engage in a “root-cause analysis.”<sup>208</sup> Thus, there would likely be greater difficulty for a court to assess successfully the Corporate Compliance Monitorship's effectiveness than when the monitor is engaged in simply ensuring specific performance.

The voluntary nature of the agreement produces additional differences, as the monitored organization in the Corporate Compliance Monitorship has little insight at the outset of the monitorship into the types of recommendations the monitor will develop. Thus, the organization's voluntary agreement is obtained despite the organization's relatively unclear understanding of the remediation efforts that will become necessary as a result of the monitorship. The government or regulatory body almost certainly has a persuasive, or possibly even coercive, influence over the organization's decision-making, but the organization voluntarily agreed to enter into a monitorship in a manner that necessarily required a higher level of organizational buy-in

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204. See Ensign & Colchester, *supra* note 120 (discussing the monitor's mixed assessment of HSBC's remediation efforts).

205. See, e.g., Hamilton & Hopkins, *supra* note 12.

206. See BAZERMAN & TENBRUNSEL, *supra* note 31, at 103-07.

207. Root, *supra* note 8, at 525; Khanna, *supra* note 21, at 241.

208. Root, *supra* note 8, at 531.

than what would typically be needed in, say, an Enforcement Monitorship. This higher level of organization buy-in may suggest a diminished need for court involvement, as the firm appears committed to engage in reform efforts. Moreover, a firm involved in a Corporate Compliance Monitorship is often charged with transforming a “culture of corruption” into a “culture of compliance.”<sup>209</sup> The importance of creating a culture of compliance is well-documented,<sup>210</sup> but the ability of the monitorship to assist in the creation of this culture could be harmed by overly aggressive court-involvement.

There are some concrete detriments associated with allowing heightened court-involvement for Corporate Compliance Monitorships. First, and most importantly, court proceedings are often subject to heightened public disclosure norms, which could deter organizations from entering into Corporate Compliance Monitorships.<sup>211</sup> Second, and as noted in the above discussion of Enforcement Monitorships, if the organization is serious about working with the monitor and the government to develop a plan that will allow the organization to avoid similar misconduct in the future, the presence of the court might serve to increase the costs of enforcement without providing a clear tangible benefit.

#### 4. Modern-Day, Court-Ordered Monitorships

The benefits of Traditional, Court-Ordered Monitorships are applicable to Modern-Day, Court-Ordered Monitorships. In an environment where a firm fails to accept responsibility for organizational misconduct, it would seem appropriate for the court that oversaw the formal determination of organizational misconduct to also maintain oversight of the organization’s use of a monitorship as a court-ordered remediation tool.

The dangers associated with mandating compliance versus achieving organizational participation and buy-in are also present. These concerns are, however, likely more pronounced when dealing with Modern-Day, Court-Ordered Monitorships. Modern-Day, Court-Ordered Monitorships are often interpreted by the monitor as granting the monitor a large amount of leeway in his activities.<sup>212</sup> For example, one criticism levied at the WorldCom Monitorship related to the monitor’s power to “interfere with the ability of the board and corporate officers to manage the company.”<sup>213</sup> When Modern-Day, Court-Ordered Monitors take an expansive view of their authority, they may diminish employees’ individual beliefs that they should act ethically because it is the right course of action. In fact, an aggressive monitorship that dictates actions for executives and other organizational members may lead to

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209. Warin, Diamant & Root, *supra* note 8, at 326, 337-41.

210. *Id.*

211. See Root, *supra* note 8, at 546-48 (discussing a monitorship involving AIG and a reporter’s claim that because the monitorship was approved by a court, the monitor’s reports were public records that were required to be disclosed to third parties); see also Gibson Dunn, 2014 DPA/NPA, *supra* note 111, at 8 (arguing for the importance of “preserving the confidentiality of monitor work product and independent third-party monitors as a feature of the DPA and NPA landscape” and stating that “if such confidentiality is significantly undermined, monitorships as a facet of corporate enforcement action resolution will likely become less attractive to the government and corporations”).

212. See *supra* Part II.C.

213. O’Hare, *supra* note 21, at 103.



their abdication of responsibility for their actions. Behavioral ethics research cautions against this approach:

[Mandated] goals can create systematic problems. Specifically, they can encourage employees to 1. focus too narrowly on their goals, to the neglect of nongoal areas; 2. engage in risky behavior; 3. focus on extrinsic motivators and lose their intrinsic motivation; 4. and, most importantly . . . , engage in more unethical behavior than they would otherwise.<sup>214</sup>

If, for example, an aggressive Modern-Day, Court-Ordered Monitor requires an executive to meet the particular goal of conducting expansive antitrust compliance training within the employee workforce, it could backfire. The executive may focus on ensuring everyone at the company receives general antitrust training. That would be in line with the monitor's direction, but it might be that a more targeted, in-depth training with a subset of employees likely to deal with antitrust issues would be a more effective work-plan. Additionally, the executive might focus on training and look past questions that could alert the executive to antitrust misconduct within the organization. Instead of viewing herself as a gatekeeper who could detect misconduct during training, the executive might view herself narrowly as a gatekeeper engaged in a preventative function by providing training.

Additionally, a Modern-Day, Court-Ordered Monitorship's ability to remediate organizational misconduct could be stifled by a court's or a monitor's imposition of unwise corporate governance reforms.<sup>215</sup> Such a court or monitor may lack significant corporate governance expertise. A set of remediation efforts might look to be quite sensible on paper, but may be challenging in practice. For example, a not uncommon provision in settlements for claims of unfair competition requires annual training of all employees and agents of the organization involved in misconduct.<sup>216</sup> It may be appropriate for a monitor or court to require the monitored organization to undertake this type of remediation effort, but it also may be practically unreasonable depending upon the size of the organization and the relevant connection between employees and the likelihood that they may be engaged in conduct that might give rise to antitrust concerns. An expert in organizational behavior and corporate governance may readily see this type of nuance, which may not be as obvious to a monitor or court without similar expertise.

## 5. Public Relations Monitorships

In the most extreme example, it does not appear that robust court oversight for Public Relations Monitorships would be appropriate, as these monitorships are employed on a completely voluntary basis. Mechanisms for determining the reliability of these types of monitorships are probably needed, but it does not appear, at this

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214. BAZERMAN & TENBRUNSEL, *supra* note 31, at 104.

215. See, e.g., Cunningham, *supra* note 112 (discussing the wisdom of permitting corporate outsiders, like prosecutors, to develop corporate governance reforms and questioning the efficacy of the phenomenon).

216. See Decision and Order, In re Nat'l Ass'n of Music Merchs., Inc., Docket No. C-4255, 2009 WL 1102975 (F.T.C. Apr. 8, 2009).

time, that this effort should occur in a judicial setting. There will likely be other opportunities for formal governmental and judicial interventions if the underlying organizational misconduct warrants such actions.

### *B. Transparency and Confidentiality Norms*

Another common concern regarding the use of monitorships, which is related to the arguments in favor of robust court oversight, involves the appropriate rules for disclosing monitorships' processes and findings. Attempts to obtain information about monitorships and monitors' work product have proven difficult.<sup>217</sup> This difficulty has led to a struggle between some scholars and reporters, who advocate in favor of greater public access to information regarding monitorships,<sup>218</sup> and monitors and practitioners, who assert a need for binding confidentiality in monitorship relationships.<sup>219</sup> To assess this issue, this Section focuses on whether adopting certain norms regarding confidentiality or transparency would be likely to assist the monitorship in achieving its stated remediation goals. The monitorships described in this Article appear to fall into one of two categories: monitorships that would likely benefit from (i) high levels of transparency with low confidentiality protections and (ii) low levels of transparency paired with high confidentiality protections.

#### 1. High Transparency & Low Confidentiality

*Court-Ordered Monitorships.* There is little practical wiggle room when considering issues of transparency and confidentiality for Court-Ordered Monitorships. Both Traditional and Modern-Day, Court-Ordered Monitorships are likely subject to the same transparency and confidentiality norms and procedures that govern court proceedings generally. The status quo errs on the side of public disclosure, as these monitorships are an outgrowth of what is often a very public court proceeding with active court involvement in determinations of organizational misconduct.<sup>220</sup> If the Court-Ordered Monitor's work product qualifies as a judicial record, it will normally be deemed a document that must be made accessible to the public.<sup>221</sup> As with any court matter, sensitive documents detailing personally identifying information or

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217. GARRETT, *supra* note 21, at 177 (explaining that the government has in some instances refused to disclose even the identity of the monitor).

218. See 100Reporters, LLC v. U.S. Dep't of Justice, No. 14-CV-1264-RC, 2014 WL 6817009, at \*4 (D.D.C. Dec. 3, 2014) (arising out of a not-for-profit news media organization's FOIA request for all documents authored or submitted by a monitor to the government); GARRETT, *supra* note 21, at 176-78; Root, *supra* note 8, at 546-48 (citing SEC v. Am. Int'l Grp., 854 F. Supp. 2d 75, 77-78 (D.D.C. 2012) (discussing an attempt by a reporter to gain access to a monitor's reports to the government)).

219. Gibson Dunn, 2014 DPA/NPA, *supra* note 111, at 5 ("With [the monitor's] unfettered access to sensitive and confidential company information, companies understandably want to preserve the confidentiality of the monitor's reports and other communications to the government.").

220. Compare SEC v. Am. Int'l Grp., 854 F. Supp. 2d 75, 77-78 (D.D.C. 2012) (granting release of redacted monitorship reports on the basis of them being judicial records), with SEC v. Am. Int'l Grp., 712 F.3d 1, 3-4 (D.C. Cir. 2012) (reversing the district court and finding the reports were "not judicial records subject to the right of access because the district court made no decisions about them or that otherwise relied on them" (emphasis added)).

221. Am. Int'l Grp., 712 F.3d at 4.

highly confidential information like a trade secret can (and should) be sealed from the public, but most of the information associated with the Court-Ordered Monitorship will likely remain publicly accessible.

The high transparency and low confidentiality associated with Court-Ordered Monitorships, however, may explain some of the organizational reluctance to enter into Modern-Day, Court-Ordered Monitorships. If an organization is concerned that robust access to its business operations could lead to third-party civil litigation, a means of private enforcement,<sup>222</sup> it may try to minimize its exposure by attempting to avoid a monitorship with high levels of transparency and low confidentiality. Transparency concerns are likely very important for companies facing Modern-Day, Court-Ordered Monitorships, because the monitors in these instances appear to obtain larger pools of data and provide more expansive assessments. That information, if made public, could potentially put the monitored organization at risk for related, subsequent civil litigation. These concerns may not, however, be particularly important for companies undergoing a Traditional, Court-Ordered Monitorship, because the monitor is engaged in an effort to confirm the organization's specific performance with the court's orders. Indeed, Traditional, Court-Ordered Monitorships may benefit from a public accounting of the monitor's findings, because the individuals that the organization harmed likely need information about the monitorship process.

*Enforcement Monitorships.* Enforcement Monitorships look relatively similar to Traditional, Court-Ordered Monitorships. The monitorship is charged primarily with confirming the monitored organization's specific performance with what is often a public and very detailed settlement agreement. Thus, the monitor's reports discussing the status of the monitorship should generally be relatively narrow in scope and explain whether the monitored organization has or has not complied with the specific settlement terms. A public reporting of this information could assist the monitorship in achieving its stated remediation goals, because, again, it would allow individuals that the organization harmed to receive information regarding the status of remediation efforts. As a result, the monitored organization appears to have little interest in obtaining confidentiality protections with respect to the monitor's work. Similar to court proceedings, the specific remediation that particular harmed individuals receive should likely remain confidential.

For example, the National Mortgage Settlement monitorship required banks to provide financial remediation to homeowners who were subject to improper foreclosure proceedings.<sup>223</sup> The monitor publicly detailed his efforts and the requirements

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222. David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1919 (2014). Engstrom explains two competing accounts regarding the use of private enforcement: "The standard account sees profit-driven private enforcement as a mechanistic and manipulatable engine of regulatory output that frictionlessly adapts to shifts in litigation incentives (such as available damages or attorneys' fees) and also the amount of misconduct, thus picking up slack for regulatory failures elsewhere in the system. A more jaundiced account, by contrast, sees private enforcement as contingent, not mechanistic, and prone to chronic information failures that cause litigation activity to lurch from socially inefficient 'explosions' to equally costly 'droughts.' Profit-seeking private enforcers, runs this alternative view, will also relentlessly push into legal interstices, exploiting statutory and regulatory ambiguities in suits against much or all of an industry rather than targeting the patently illegal conduct of a few malefactors." *Id.* at 1921-22.

223. See *supra* Part II.A.

homeowners needed to fulfill to obtain financial remediation. This public accounting of the monitor's work was an important component of his ability to achieve the monitorship's stated remediation goals. A homeowner's individual financial information related to a mortgage remained outside of the public sphere, but the remediation information reported in the aggregate was made available for public disclosure and provided information to third parties about whether the banks had successfully engaged in the necessary remediation efforts.

*Public Relations Monitorships.* Public Relations Monitorships obtain their legitimacy and power from the extremely transparent manner in which they operate. That transparency is a key component of the monitorship's remediation effort, which includes assuring the public that the organizational misconduct is addressed fully and completely. Without a large grant of transparency, the monitorship would be unlikely to achieve one of its goals, which is to improve the monitored organization's relationships with third parties. There are open questions about the efficacy of trusting the monitorship to actually function in a highly transparent manner, but this is a separate question from whether the monitorship should be highly transparent.

## 2. Low Transparency & High Confidentiality

The appropriate transparency and confidentiality norms for Corporate Compliance Monitorships are different from the other monitorships discussed in this Article. In previous work, I argued that the relationships amongst the Corporate Compliance Monitor, the government, and the corporation would benefit from privilege, which would allow the parties to conduct the monitorship within the confines of binding confidentiality.<sup>224</sup> As currently structured, Corporate Compliance Monitorships require cooperation between the monitor and the corporation to develop a set of recommendations that the monitored organization will adopt to prevent future misconduct. This form of problem solving is becoming necessary in an environment where internal stakeholders often have superior access to the organizational information necessary to design the most effective solution to a particular regulatory issue.<sup>225</sup> In the instance of Corporate Compliance Monitorships, the monitor must garner information from members of the monitored organization to develop a set of effective recommendations. Thus, allowing for certain levels of reliable and binding confidentiality amongst the parties might help achieve greater cooperation between the monitor and monitored organization and, in turn, more effective monitorships.<sup>226</sup>

### C. Duties

Each monitorship structure involves a slightly different set of actors, albeit actors in an interconnected set of networks. One of the primary concerns regarding the use of monitorships is that an entity with no binding, legal duties to any other party,

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224. Root, *supra* note 8, at 550-70.

225. See, e.g., David M. Trubek & Louise G. Trubek, *New Governance & Legal Regulation: Complementarity, Rivalry and Transformation*, 13 COLUM. J. EUR. L. 539 (2007).

226. A previous article by the author provides a more robust discussion of this issue. See Root, *supra* note 8, at 550-70.

other than courts in some instances, is given huge responsibility for overseeing remediation efforts within firms.<sup>227</sup> This Section will briefly highlight how an analysis of a monitor's potential fiduciary duties could vary depending upon the monitorship structure.

### 1. Traditional, Court-Ordered Monitorships

When a monitor is a court-appointed agent, it is clear that it owes a duty to the court, because it is the court's express agent.<sup>228</sup> The monitor is appointed by the court, sometimes with party input, to act as an extension of the court and provide a service for the court. If the monitorship truly is engaged in ensuring pure specific performance with the court's order, it seems permissible to conclude that the court is the sole party to whom a Traditional, Court-Ordered Monitor owes a duty.

### 2. Enforcement Monitorships

Similarly, monitors engaged in simple rote enforcement monitoring on behalf of the government, as seen in Enforcement Monitorships, appear to owe a duty to the government and are often perceived as agents of the government. They may, however, also have a duty—or should have a duty—to outsiders with tangible interests in the monitorship's ultimate remediation efforts, because the monitorship is undertaken for their benefit. For example, a lawyer may sometimes owe a duty to a non-client when the lawyer knows a non-client may rely on the lawyer's work product.<sup>229</sup> An Enforcement Monitor is often aware that the individuals whom the monitored organization harmed are relying upon the monitor's work to receive appropriate remediation. Thus, in the National Mortgage Settlement monitorship,<sup>230</sup> it may be that the monitor should owe duties to the governmental agencies that were able to secure the agreement with the relevant banks, as well as to the homeowners who were the victims of improper foreclosure proceedings.

### 3. Corporate Compliance Monitorships

In contrast, monitors overseeing Corporate Compliance Monitorships may owe duties to the government *and* the monitored organization. Both the government and monitored organization typically take an active role in the selection of the monitor.<sup>231</sup> These monitors act as agents of the government in overseeing the remediation effort that the underlying settlement agreement requires, but they also function as agents of the monitored organization by providing a concrete service to the organization (developing a set of recommendations for the organization to adopt going forward).<sup>232</sup> The precise nature and depth of these duties and whether other outsiders, including

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227. See Khanna, *supra* note 21, at 234-36 (providing preliminary discussion of the duties monitors may owe as a result of the monitorship relationship).

228. Ruiz v. Estelle, 679 F.2d 1115, 1161-62 (5th Cir. 1982).

229. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 (2000).

230. See *supra* Part II.A.

231. See, e.g., Warin, Diamant & Root, *supra* note 8, at 349-50.

232. See *supra* Part II.B.

shareholders, should be owed a duty by the monitor is an open question in need of further academic study.<sup>233</sup>

#### 4. Modern-Day, Court-Ordered Monitorships

A monitor overseeing a Modern-Day, Court-Ordered Monitorship is technically an agent of the court and owes a corresponding duty to the court. The Modern-Day, Court-Ordered Monitorship, however, appears to grant a strong amount of autonomy to the monitor to make what could be significant corporate governance reforms.<sup>234</sup> The types of decisions that the monitor made in the WorldCom example were normally made by organizational insiders who had clear duties to shareholders. If courts utilize court-ordered agents with broad grants of authority to make decisions within the organization as part of formal remedies to organizational misconduct, there may need to be a correspondingly robust analysis of who within the organization will be held responsible for the impact of those decisions on shareholders. If the monitor undertakes ill-advised actions, it may be appropriate to subject him to some sort of concrete consequences. Those consequences should likely be established prior to the monitorship period so that shareholders are aware of their rights under the monitorship *ex ante*.

#### 5. Public Relations Monitorships

The Public Relations Monitorship presents an interesting conundrum when considering to whom the monitor would or should owe duties. It may owe a limited duty to the monitored organization to oversee remediation efforts competently, but given the great efforts taken to demonstrate the separation between the monitor and the monitored organization, it may be inappropriate to find that the monitor owes a robust duty to the organization. The monitorship is generally undertaken for the benefit of the public and, in some instances, a particular subset of the public, but that could be a difficult universe to define when attempting to articulate a formal set of duties. Thus, it may be that a monitor's duties within a Public Relations Monitorship may vary from one monitorship to another depending upon the parties involved, thereby making it extremely difficult to make a broad, *ex ante* pronouncement about the appropriate boundaries for outlining the duties owed by a Public Relations Monitor.

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The upshot of the analysis in Part III is that differences amongst monitorships matter when considering common issues of monitorship reform. The Part demonstrates that the benefits and detriments associated with court oversight differ with each identified monitorship type. Court oversight appears to be most important when an organization appears hostile toward the imposition of a monitorship, thereby mak-

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233. Root, *supra* note 8, at 556-57; *see also* Khanna, *supra* note 21, at 234-236 (discussing rationales, briefly, under which monitors could be considered fiduciaries to shareholders).

234. *See supra* Part II.C.

ing the court's involvement a valuable incentive (or big stick) to encourage cooperation. But when the organization has entered the monitorship on a voluntary basis, the rationale for robust court supervision diminishes. In contrast, the majority of monitorships identified in this Article would seem to benefit from high levels of transparency and low levels of confidentiality. High levels of confidentiality appear to be important only when the monitorship requires a great deal of cooperation and organizational buy-in from the monitored firm. Finally, it appears that the different structure of monitorships results in a unique principal/agent construct for each monitorship type. The implication of this conclusion is that it would seem to be difficult to make a sweeping pronouncement regarding the appropriate fiduciary duties for all monitors.<sup>235</sup> The analysis provided in Part III is preliminary and additional study would likely be beneficial, but at a minimum it raises concerns about attempting to treat all monitorships in the same manner. In short, differences matter when evaluating monitorships, and these differences must be taken into account when considering methods of analyzing, reforming, or regulating monitorships.

#### IV. Additional Considerations

The above analyses establish that monitorships take different forms depending upon the type of remediation effort undertaken and that these differences are critical in assessing the advisability of commonly suggested monitorship reforms. This Article's findings present a number of additional considerations that lawmakers, scholars, and the public should contemplate. This Part addresses five such concerns. First, it discusses how modern-day monitorships are related to past efforts to achieve structural reform litigation. Second, it distinguishes modern-day monitorships from compliance actors designated as "internal monitors" and situates modern-day monitors within the larger world of compliance actors focused on remediation efforts. Third, it argues in favor of more targeted monitorship reform efforts. Fourth, it explains how this Article's framework could assist in efforts to assess the effectiveness of monitorships. Fifth, it demonstrates how this Article's findings could lead to improved monitor-selection processes.

##### *A. Role of Structural Reform Litigation*

One question raised by this Article is whether modern-day monitorships are genuinely distinct from court-appointed agents utilized in the structural reform litigation of yesteryear. Traditionally, structural reform litigation was used as part of remediation efforts aimed at issues like desegregation and prison reform.<sup>236</sup> It was conceived as a new "public law model" meant to "adjust future behavior" and "not to compensate for past wrong."<sup>237</sup> It "provide[d] for a complex, on-going regime of performance rather than a simple, one-shot, one-way transfer," which was more common

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235. Khanna, *supra* note 21, at 233-34 (discussing briefly the issue of a monitor's duties and the lack of guidance on the issue).

236. John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387, 1409-10 (2007).

237. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1298 (1976).

in traditional litigation models.<sup>238</sup> Specifically, the parties to the litigation entered into a negotiation process to develop an order that could be entered by the court and in some circumstances the judge would rely on third-party agents, like “masters, amici, experts, panels, [or] advisory committees” for information and evaluation of proposals for relief.”<sup>239</sup> These agents sometimes found “themselves exercising mediating and adjudicatory functions among the parties” and in some circumstances “put forward their own suggestions.”<sup>240</sup> In short, the remediation efforts imposed as part of structural reform litigation could be quite broad and took a variety of forms depending upon the issues presented in the underlying litigation, just as the modern-day monitorships of today.

Many scholars would agree that modern-day monitorships are inextricably related to structural reform litigation efforts.<sup>241</sup> Yet there do appear to be some distinguishing features between the two related, yet distinct, phenomena. First, structural reform litigation was typically used by “federal courts ordering comprehensive changes in state and local institutions.”<sup>242</sup> Second, it was most often used to remediate violations of “soundly established constitutional rights.”<sup>243</sup> Third, because it necessarily arose out of a judicial decree, court involvement was a necessary component of the model, even while recognizing that the parties involved in the underlying litigation were allocated “a good deal of party control” as a result of their participation in negotiations leading to the judicial order.<sup>244</sup>

It is not the aim of this Article to suggest that there is no connection between structural reform litigation and modern-day monitorships. The connection is uncontroversial, and the evolution of modern-day monitorships can be traced to court-appointed agents like those utilized in structural reform litigation. It is, however, the goal of this Article to concretely demonstrate how monitorships are utilized today, which includes much higher instances of reliance on independent, third-parties to oversee remediation efforts in both private and public contexts (often when no constitutional concerns are raised). As a result, modern-day monitorships present new questions and areas of concern for scholars and lawmakers to consider and address. This Article seeks merely to frame these issues in a manner that makes these challenges more apparent.

### *B. Understanding Internal Monitors*

It is relatively common for settlement agreements to include a provision requiring the appointment of an individual *internal* to the organization to maintain responsibility and oversight of the firm’s remediation efforts. For example, in 2013, Ruby Tuesday, Inc. (“Ruby Tuesday”) settled a class age discrimination lawsuit filed by

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238. *Id.*

239. *Id.* at 1298-1301.

240. *Id.* at 1301.

241. *See, e.g.,* GARRETT, *supra* note 21, at 176-77 (discussing the role of structural reform litigation in corporate prosecutions).

242. Jeffries & Rutherglen, *supra* note 236, at 1387.

243. *Id.* (quoting Paul J. Mishkin, *Federal Courts as State Reformers*, 35 W. & L. L. REV. 949 (1978)).

244. Chayes, *supra* note 237, at 1299.



the U.S. Equal Employment Opportunity Commission. In the settlement agreement, Ruby Tuesday agreed to “designate a Decree Compliance Monitor (‘DCM’), who shall be an officer or high-level management official of [Ruby Tuesday] who shall possess the knowledge, capability, organizational authority, and resources to monitor and ensure [Ruby Tuesday’s] compliance with the terms” of the agreement.<sup>245</sup> Individuals like the Ruby Tuesday DCM look quite similar to the monitors identified in this Article,<sup>246</sup> because they are (i) employed after a firm has been found to have engaged in wrongdoing (ii) to effectuate remediation of the organization’s misconduct. They are, however, distinct, because they are direct employees of the firm.

A key component of the modern-day monitorships outlined in Parts II and III is that the monitor retains independence from the monitored organization. This independence allows courts, the government, and the public to be less concerned about the institution’s capture of the monitor, which makes the monitor’s findings more credible. Empirical research supports this intuitive notion. For example, a study of accountants has demonstrated that the entity an accountant works for has a significant impact on the accountant’s findings.<sup>247</sup> In one study, “139 professional auditors employed full-time by one of the Big Four accounting firms in the United States” were given auditing problems to assess.<sup>248</sup> “Half of the participants’ materials told them that they had been hired as the external auditor for the firm in question.” The other half were told “that they were working for an outside investor considering investing money in the firm.”<sup>249</sup> The study hypothesized, and proved, that “participants would be more likely to conclude that the accounting behind a firm’s financial reports complied with [Generally Accepted Accounting Principles] if they were working for the firm rather than for an outside investor.”<sup>250</sup> This study confirmed opinions that others had expressed. Specifically, that “[i]ndependence is necessary to prevent auditors from biasing their opinions in favor of their clients.”<sup>251</sup> Monitors are distinct from financial auditors, but the insights of this study demonstrate the importance of maintaining a strong level of independence when attempting to evaluate an institution’s compliance with legal and regulatory requirements.

That leaves, however, questions regarding the role the actor in the Ruby Tuesday example, and others similarly situated, serves within compliance efforts. The lack of scholarship clearly defining what sort of conduct monitors are engaged in, paired with the importance of the concept of “monitoring” in corporate governance scholarship, has resulted in instances of confusion and a lack of precision when referring

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245. Consent Decree, *EEOC v. Ruby Tuesday, Inc.*, No. 2:09-cv-01330-MRH, slip op. at 7 (W.D. Pa. Dec. 9, 2013).

246. Because the term “monitor” is already used in legal scholarship for the compliance actors this Article is discussing, this Article continues with this trend. Attempting to argue that others use a new name for this type of independent, private outsider would likely not be a particularly fruitful discussion.

247. See Don A. Moore, Lloyd Tanlu & Max H. Bazerman, *Conflicts of Interest and the Intrusion of Bias*, 5 JUDGMENT & DECISION MAKING 37 (2010).

248. *Id.* at 39.

249. *Id.*

250. *Id.*

251. Max H. Bazerman & Don Moore, *Is It Time for Auditor Independence Yet?*, 36 ACCT. ORGS. & SOC’Y 310, 310 (2011) (citing M.W. Nelson, *Ameliorating Conflicts of Interest in Auditing: Effects of Recent Reforms on Auditors and Their Clients*, 31 ACAD. MGMT. REV. 1 (2006)).

to different compliance actors. The complexity of compliance efforts at organizations is quite vast, and a variety of actors assist in these efforts. Because corporate compliance literature is still in a relatively early stage, legal scholarship has not yet adequately addressed many of these intricacies.<sup>252</sup>

One such intricacy heretofore unidentified in legal scholarship is that there appear to be three primary stages of compliance efforts: (i) gatekeepers are charged with preventing and detecting misconduct, (ii) investigators are charged with investigating misconduct once it is discovered, and (iii) a third category of actors, currently unnamed within legal scholarship, are charged with overseeing efforts to remediate the harms that gatekeepers detected and that investigators investigated. One might refer to this last category as remediators. Remediators, like gatekeepers, can be external to a firm, but there are also internal remediators. Modern-day monitorships fit within this third category and are external remediators; the internal compliance actor used in the Ruby Tuesday case appears to be an internal remediator. Their roles are similar but distinct.

### *C. More-Targeted Reform Efforts*

Attempts to reform monitorships may benefit from a more targeted approach than what has typically been suggested. This type of segmented regulatory reform is utilized in many different contexts. For example, there are special regulatory requirements for subsets of gatekeepers. The Sarbanes-Oxley Act provides an organization's independent audit committee primary control over decisions regarding auditor compensation.<sup>253</sup> Auditors are traditional gatekeepers, but this regulatory requirement is not applied universally to all forms of gatekeepers. The Sarbanes-Oxley Act also required the SEC to adopt regulations that would obligate attorneys practicing before the SEC to "go up the corporate ladder and report evidence of fraud."<sup>254</sup> Again, the lawyers whom the SEC's regulations target are gatekeepers, but this requirement is limited to lawyers and not universally extended to other gatekeepers. Thus, in the same statute, which was enacted to help curb organizational misconduct, Congress saw fit to pass targeted reforms for particular subsets of gatekeepers. As a general matter, policymakers and scholars are quite good at parsing the differences amongst different actors and developing rules and standards that are best suited to

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252. See Geoffrey P. Miller, *The Compliance Function: An Overview* 1 n.2 (N.Y.C. Ctr. For Law, Econ. & Org., Working Paper No. 14-36, 2014) ("Legal scholarship on the law of compliance is as yet underdeveloped.").

253. COFFEE, *supra* note 60, at 170.

254. Susan P. Koniak, *The Bar's Struggle with the SEC*, 103 COLUM. L. REV. 1236, 1270 (2003) (citing Sarbanes-Oxley Act of 2002 § 307, 15 U.S.C.A. § 7245 (West Supp. 2003)). In-house attorneys are required to report misconduct up the chain within their organization, but if the organization fails to remedy the misconduct, the in-house attorney typically is required to maintain the privilege and withdraw from the representation. An accountant who found a similar point of wrongdoing would not have a similar restriction. See MODEL RULES OF PROF'L CONDUCT r. 1.13(b) (2013); see also Steven Davidoff Solomon, *Keeping Corporate Lawyers Silent Can Shelter Wrongdoing*, N.Y. TIMES DEALBOOK (Aug. 26, 2014, 6:28 PM), <http://dealbook.nytimes.com/2014/08/26/keeping-corporate-lawyers-silent-can-shelter-wrongdoing> (discussing an in-house attorney at Walmart who resigned after attempts to investigate potential FCPA misconduct were stifled by her superiors and who is now restricted from discussing the events due to Walmart's assertion of the attorney-client privilege).

achieve improved regulatory and legal compliance. Monitorships should likely be treated in a similar manner.

When evaluating monitorship reform, policymakers and scholars should first identify the particular monitorship subset that is of interest to them. This identification will allow them to better consider the ramifications of proposed reforms. For example, if one assumed all monitorships could be universally regulated, one might conclude that all monitorships should be (i) granted low levels of confidentiality and (ii) required to adopt high levels of transparency. The monitorships identified in this Article overwhelmingly look as if they would benefit from that type of confidentiality/transparency model.<sup>255</sup> Yet, when one breaks down monitorships based on the type of remediation effort being overseen, it looks as if Corporate Compliance Monitorships could be stymied by high levels of transparency because the corporation may not cooperate as expansively as it would in an environment with high levels of confidentiality and low levels of transparency.<sup>256</sup> Thus, a policymaker may want to create a default rule requiring high levels of transparency for monitorships generally with an exception for Corporate Compliance Monitorships specifically.

One potential drawback to this type of segmented regulatory approach, of course, is that it might take more time and be more costly to implement.<sup>257</sup> It is more difficult to ascertain the differences between categories of monitorships than the differences between auditors and lawyers. Additionally, because there are many different types of monitorships, it could be quite difficult to engage in a broad-based regulatory reform effort that effectively addresses the concerns that all monitorship types present. These legitimate concerns, however, may suggest that monitorships should be regulated on a more localized level.

For example, instead of attempting to pass a broad statute governing all monitorships, which was proposed in the House of Representatives in 2008 and 2009,<sup>258</sup> it may be preferable to delegate authority to administrative agencies to adopt the types of reforms that make the most sense to them based on the type of remediation efforts they ask monitors to oversee. If agencies like the FTC and SEC were required to engage in a standard notice and comment regulatory process<sup>259</sup> in adopting their particular set of standards, it might assuage some concerns regarding regulator capture and appease those who are skeptical of the government's neutrality in the face of organizational wrongdoing. Because the vast majority of monitorships are imposed with the involvement of a governmental actor, this approach—requiring individual agencies to adopt formal standards, through notice-and-comment rulemaking,

255. See *supra* Part III.B.

256. See *supra* Part III.B.2.

257. In part, this is a classic rules versus standards conundrum. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 561 (1992). A general rule provides a legal command that can resolve issues in advance; thus a rule regarding confidentiality, for example, for all monitorships would leave less ambiguity but also less flexibility. *Id.* at 562. A standard, however, regarding confidentiality would allow enforcement authorities to take into account monitorship types prior to making a binding determination regarding appropriate confidentiality norms in a particular situation. *Id.*

258. See Khanna, *supra* note 21 (discussing proposed legislation in the House of Representatives).

259. Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 472-90 (2013) (explaining notice and comment requirements generally).

that will govern their use of monitorships—could effectuate meaningful reform efforts on a targeted basis.<sup>260</sup>

#### *D. Improved Assessment Ability*

This Article's categorization of monitorships might improve the ability of policymakers and scholars to assess monitorships.

First, the categorization allows for easy identification of monitorships, because each monitorship type has certain common characteristics. Specifically, the Article's analysis demonstrates that a monitorship can be identified when (i) an independent, private outsider is retained by a firm, (ii) after the discovery of organizational misconduct, (iii) to oversee the firm's remediation efforts, and (iv) provide information to third parties about the efficacy of the firm's efforts. As is demonstrated in Part II, monitorships are used in a variety of contexts and are often not referred to as monitorships, which may make it difficult to draft a statute or adopt a bright-line rule regulating monitorships.<sup>261</sup> Yet, by focusing on the *function* monitors provide and the *timing* of their retention, it becomes easier to identify monitorships across a variety of contexts. This identification is important, because it will allow researchers to better understand the scope and breadth of monitorships when engaging in evaluative efforts. Additionally, this identification mechanism makes pinpointing changes in the use of monitorships, like in the case of the Public Relations Monitorship, more readily apparent.

Second, understanding that monitorships can be grouped based on the type of remediation effort the monitorship is meant to achieve may make it easier to engage in studies comparing the effectiveness of monitorships within and across categories of monitorships. Studies evaluating the effectiveness of Enforcement Monitorships versus Corporate Compliance Monitorships may provide valuable insight into the manner in which greater legal and regulatory compliance is obtained within organizations generally. Additionally, researchers may be able to identify industries or types of harm that are well-suited for remediation through a particular type of monitorship. The research possibilities are numerous, but understanding the nuances within monitorships may result in more productive and fruitful assessments.

That is not, however, to suggest that the categorization in this Article is the only means by which monitorships could be grouped. There could be many different ways in which someone could decide to focus in on a subset for monitorships. For example, it may be completely sensible to limit one's research to the universe of monitorships that arise out of DPAs or NPAs.<sup>262</sup> There could be sound rationales for believing that

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260. This type of solution would not, of course, assist in regulating the use of Public Relations Monitorships, because a governmental entity is not involved in that monitorship process. That point conceded, focusing on reform efforts that could effectively target subsets of monitorships would seem preferable to adopting ineffectual, broad-based reforms that fail to capture the nuances associated with different categories of monitorships.

261. See, e.g., 2010 Intel, *supra* note 72 (requiring the retention of a Technical Consultant).

262. Many analyses of monitorships are done so within the context of discussions about DPAs and NPAs more broadly. See, e.g., GARRETT, *supra* note 21, at 172-95 (analyzing monitorships that arise out of DPAs and NPAs). Monitorships arising out of DPAs/NPAs are, however, just a subset of the larger phenomenon.

monitorships arising out of DPAs or NPAs are special in some way and should be treated alike in terms of structure and regulatory requirements. This Article is not unequivocally arguing in favor of adopting the particular categorization provided in Part II. Instead, the Article is arguing that monitorships take a variety of forms and attempts to regulate all monitorships wholesale are likely misguided. Scholars and policymakers who take this insight into account and who are explicit in identifying the type of monitorships they are researching and addressing will, it is hoped, develop more precise and effective monitorship reform efforts.

### *E. Improved Criteria for Monitor Selection*

This Article's findings regarding the underlying differences among monitorships might be helpful in efforts aimed at improving monitor-selection processes. Scholars,<sup>263</sup> policymakers,<sup>264</sup> reporters,<sup>265</sup> and courts<sup>266</sup> have lamented the processes by which monitors are selected. Receiving an appointment as a monitor has the potential to be a very lucrative assignment, yet there is no standard selection process.<sup>267</sup> And, as established in Part II, monitors can wield an impressive amount of authority over organizations. Thus, issues surrounding monitorship selection have been ripe for criticism.

The selection of monitors, however, may not need to be overly complicated or necessitate congressional action mandating "that monitors be selected from a public national pool of prequalified candidates."<sup>268</sup> Instead, the selection of a monitor could be tied to the monitor's perceived ability to effectively oversee the particular remediation effort being undertaken at or for the monitored firm. The applicable remediation effort is determined prior to the retention of a monitor, so interested parties should be able to identify important characteristics for the monitor to have prior to selecting a monitor.

For example, if the monitorship involves rote compliance enforcement, it might make sense to appoint a monitor who has past experience reviewing and assessing an organization's compliance with legal requirements. Research to date has found that over half of monitors appointed as the result of DPAs or NPAs were former prosecutors.<sup>269</sup> This statistic easily garners criticism related to potential cronyism concerns (prosecutors are picking their friends to be monitors), as well as expertise concerns (former prosecutors may lack sufficient corporate governance expertise to serve as monitors).<sup>270</sup> Yet it might be entirely appropriate to pick former prosecutors

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263. See, e.g., GARRETT, *supra* note 21, at 178-79; Khanna, *supra* note 21, at 234, 241.

264. See, e.g., Khanna, *supra* note 21, at 238-40 (discussing a monitor selection process included in proposed legislation in the House of Representatives as well as internal DOJ guidance to prosecutors regarding the selection of monitors).

265. See, e.g., Shenon, *supra* note 19 (discussing concerns of cronyism in the selection of Ashcroft to serve as a monitor).

266. Henning, *supra* note 190.

267. GARRETT, *supra* note 21, at 178.

268. Khanna, *supra* note 21, at 238 (discussing one of the provisions of the proposed legislation in the House of Representatives aimed at regulating monitorships).

269. GARRETT, *supra* note 21, at 178.

270. See *id.* at 178-79; Cunningham, *supra* note 112, at 44-47.

or government attorneys to serve as monitors for Enforcement Monitorships. A monitor with prior prosecutorial experience may be particularly well-suited for gauging an organization's progress in fulfilling specified requirements.

In contrast, the selection of a Corporate Compliance Monitor might benefit from an attempt to identify an individual with robust experience developing corporate compliance programs or with expertise in corporate governance and the area of law that the monitored organization violated. These types of experiences are analogous to the type of work the monitor will be asked to engage in during the Corporate Compliance Monitorship. Thus, if high numbers of former prosecutors without corporate compliance or governance expertise are charged with overseeing Corporate Compliance Monitorships, it may raise a valid concern that warrants critical inquiry.

This insight about monitorship selection may seem intuitive, but the Apple monitorship suggests that it may not be. The Apple monitorship was a Modern-Day, Court-Ordered Monitorship. Thus, its stated monitoring scope looked narrow, but in practice the scope became quite broad and appeared to attempt to grant the monitor authority to engage in activities more commonly associated with a Corporate Compliance Monitorship.<sup>271</sup>

The individual appointed as Apple's External Compliance Monitor has significant public and private legal expertise and heads a consulting firm that offers "monitoring, crisis management, strategic advisory, and public affairs services." The firm's website states:

We have oversight and monitoring experience second to none. In addition to [the External Compliance Monitor's] five years serving as the Inspector General of the Department of Justice, our oversight experience includes current assignments monitoring two of the largest and best-known companies in the world, [including Apple]. In addition, [the External Compliance Monitor] has served as counsel to entities subject to monitorships, providing guidance on how to establish relationships with the monitor most conducive to an effective and conflict-free relationship.<sup>272</sup>

This statement raises a few potential concerns. First, a decision was made to highlight the monitor's extensive governmental bona fides, suggesting that this experience will be an asset when engaging in monitoring activities. Statements of this nature could reinforce the perception that a monitor is an agent of the government, which, as explained in Part II, could result in difficulties during a Modern-Day, Court-Ordered Monitorship where the monitor is doing more than monitoring compliance with a specific court order. Second, the statement acknowledges that monitorship relationships are often associated with conflict. There is, however, evidence that the monitor's tone when communicating with Apple may have exacerbated potential conflicts between himself and the company. For example, in response to Apple's concerns regarding the costs of monitorship, the monitor explained that Apple "misconceived [the monitor's letter]. It was not to begin a negotiation about fees, rates, and ex-

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271. See *supra* Part II.C.

272. *Monitoring*, BROMWICH GROUP, <http://www.bromwichgroup.com/services/monitoring> (last visited Feb. 28, 2015).

penses, nor was it meant to provide [Apple] with an opportunity to provide [the monitor] with guidelines.”<sup>273</sup> This aggressive stance is likely appropriate to take in Court-Ordered Monitorships, where the monitor is the agent of the court. In Apple’s case, the responsibility for negotiating the monitor’s fee was explicitly delegated to the government.<sup>274</sup> Nevertheless, one could understand how a company on the receiving end of that type of statement might be wary of entering into a cooperative, working relationship with the monitor.<sup>275</sup> Indeed, statements of this nature might serve to entrench a view on the part of the monitored organization that the monitor is an agent of the government and not an independent actor. Third, there is nothing in the statement, or in the monitoring portion of the monitor’s website,<sup>276</sup> that suggests the monitor has experience architecting corporate compliance programs or expertise in corporate governance within the confines of a monitorship relationship.<sup>277</sup> One previous monitorship assignment undertaken by Apple’s External Compliance Monitor (which is not mentioned in the above statement) was as the Enforcement Monitor for the District of Columbia Metropolitan Police Department (“MPD”), where the monitor was tasked with ensuring the MPD’s implementation of the specific reforms contained in a memorandum of understanding between the MPD and the DOJ.<sup>278</sup>

Based on the information available on the monitor’s website, the individual selected as Apple’s External Compliance Monitor likely would have been an excellent pick if the Apple Monitorship had taken a form similar to Traditional, Court-Ordered Monitorships. It cannot be disputed that the monitor has significant experience assessing an organization’s compliance with specific requirements. Yet the court and monitor appeared to initially conceive of the monitor’s role more broadly, despite

273. Christopher M. Matthews, *Apple Feud Deepens with Court-Appointed Monitor*, WALL ST. J. (Dec. 30, 2013), <http://www.wsj.com/articles/SB10001424052702304361604579291042388608328>.

274. See Apple Monitorship Court Order, *supra* note 141, at 14.

275. Matthews, *supra* note 273. Companies retaining a Corporate Compliance Monitorship typically have input in the monitor’s selection process, which does give them an opportunity to negotiate items like rates and expenses. See, e.g., Warin, Diamant & Root, *supra* note 8, at 372.

276. A lack of information on the website does not necessarily prove an absence of this type of experience on the part of the monitor. It does, however, demonstrate the experiences that were deemed important to include on the website.

277. I am taking a rather nuanced and narrow view when I refer to expertise developing corporate compliance programs or corporate governance reforms. As Professor Miriam Baer has recently explained, much of the work that compliance professionals engage in falls into two categories: “the corporate policing approach that is familiar to many, and a structural approach one might call ‘corporate architecture.’” Miriam Baer, *Confronting the Two Faces of Corporate Fraud*, 66 FLA. L. REV. 87, 93 (2014). The policing function is what monitors within Traditional, Court-Ordered Monitorships and Enforcement Monitorships are generally asked to provide, and a career as a prosecutor or regulator likely makes one particularly well suited to oversee such policing efforts. The Corporate Compliance Monitorship and the Modern-Day, Court-Ordered Monitorship, however, also require the monitor to provide guidance on corporate architecture, and I do not assume that individuals with significant practice experience, even significant practice experience overseeing activities like internal investigations, necessarily have the corporate governance expertise necessary to assist a firm in its efforts to improve its corporate architecture. Thus, the same concerns that one may have about whether prosecutors have sufficient expertise to oversee corporate governance reforms and dictate specific compliance programs could also exist for individuals with significant practice experience.

278. Michael R. Bromwich, *Final Report of the Independent Monitor for the Metropolitan Police Department*, OFF. INDEP. MONITOR FOR METROPOLITAN DISTRICT COLUMBIA POLICE DEP’T (June 13, 2008), <http://www.policemonitor.org/MPD/reports/080613reportv2.pdf>.

the fact that the monitor lacked significant antitrust expertise.<sup>279</sup> Indeed, the monitor hired an antitrust assistant to aid him in the matter.<sup>280</sup> It appears that the court did not foresee why this might cause problems during the monitorship term.<sup>281</sup> This lack of understanding may be related to improper initial consideration by the court and the government about the type of background a monitor would need to effectively assist a corporation with improving its internal antitrust compliance program.<sup>282</sup>

Thus, this Article's analysis suggests that parties involved in a monitor-selection effort—whether a court, prosecutor, or private firm—should engage in a robust assessment of what types of remediation efforts the monitor is going to be responsible for overseeing. Using those efforts as a baseline, the parties should identify a list of important experiences and qualifications. Once that list is created, potential monitors should be identified. It appears that, all too often, parties select monitors who are well-known in certain circles or who have conducted previous monitorships without assessing whether the well-connected individual with previous monitorship experience is well-suited for the particular monitorship at issue. It is no wonder that such a lackluster selection process has been fraught with turmoil and scandal.

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A variety of considerations flow from the findings presented in this Article. This Part highlights five, but many other concerns remain, including: (i) matters related to the high costs of monitorships, (ii) the government's potential overuse or misuse of monitorships, and (iii) the incentives that the use of career monitors may create for the independent, private outsiders engaged as monitors. The Article's framework, however, provides a valuable tool for assessing these issues in a more robust manner.

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279. *United States v. Apple*, 787 F.3d 131, 136 (2d Cir. 2015) (explaining that Bromwich's team included an antitrust lawyer who supplied "an expertise" Bromwich "lacked"); *see also* Editorial, *All Along the Apple Watchtower*, WALL ST. J. (Feb. 17, 2015) (explaining that Bromwich "had no prior antitrust experience but does have the dubious honor of being the first and only involuntary monitor ever in civil antitrust litigation"), <http://www.wsj.com/articles/all-along-the-apple-watchtower-1424132878>.

280. *Anti-trust Monitor Bromwich Reiterates Claims in Rebuttal*, ELECTRONISTA (Dec. 31, 2013, 2:00 AM), <http://www.electronista.com/articles/13/12/31/cites.previous.experience.but.had.to.hire.anti.trust.assistant> ("Apple pointed out that Bromwich required a second lawyer with actual experience in antitrust issues to assist him. Bromwich demanded a \$1,100 per hour rate, as well as a 15 percent 'administrative fee' to his consulting firm—on top of the \$1,025 per hour for the antitrust lawyer assistant. Though the hourly rate is typical for top-flight lawyers, both the 'administrative fee' and his need for an assistant is [sic] unusual. For his first two weeks on the case, Bromwich billed Apple over \$138,000.").

281. It is not clear whether formal legal mechanisms could avoid this problem in the future. In part, the goal of this Article is to bring more awareness of different monitorship types in an effort to encourage lawmakers and policymakers to think through the remediation effort the monitorship is meant to achieve and to consider what qualities a monitor would need to ensure the remediation effort is successful.

282. *United States v. Apple*, 787 F.3d 131, 135 n.1 (2d Cir. 2015) (explaining that "Bromwich's past monitorships arose out of *voluntary* resolutions of litigation" and that "Bromwich has adapted to the distinct posture of the monitorship" and was "desisting" from certain activities that were not appropriate within the context of this type of monitorship).



## Conclusion

Monitorships have become a diffuse and diverse tool for effectuating remediation efforts at firms that have engaged in misconduct. As demonstrated in this Article, their use can be found in a myriad of contexts, and a great deal of responsibility has been outsourced to monitorships from courts, the government, and organizations.

This Article makes three new contributions to legal scholarship. First, it establishes that modern-day monitorships take a variety of forms that are dependent upon the remediation function the monitor is charged with overseeing. Second, it demonstrates that monitorships are currently evolving and that two recent evolutions—courts' use of expansive monitorships and the privatization of monitorships—should be of particular concern to policymakers and scholars. Third, it makes clear that differences amongst monitorships matter when assessing the efficacy of reform efforts aimed at regulating monitorships. The failure to identify this fact may have contributed to unsuccessful reform efforts.

Modern-Day Monitorships are an important tool within compliance and remediation efforts at organizations that have failed to adhere to legal and regulatory requirements. This Article's contributions can be utilized by scholars and lawmakers studying and addressing the unique circumstances created by monitorships. Obtaining a greater understanding of their use and potential impact will assist in efforts aimed at achieving greater compliance and improved ethicality within firms.

