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Articles

SOMEBODY’S WATCHING ME: FCPA MONITORSHIPS AND HOW THEY CAN WORK BETTER

F. Joseph Warin*
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Veronica S. Root

Few penalties imposed on a corporate criminal offender cause as much consternation as do compliance monitors. After the late-night crisis management meetings, after the invasive and expensive internal investigation, after the shakeup of senior managers, and after the protracted negotiations with federal authorities, companies just want to get back to business. They want to sell their goods and services, be profitable, invest, and grow. In short, they want to move on. Fundamentally, the corporate compliance monitor stands in the way of forgetting the past and going back to “business as usual”—at least when it comes to obeying the law. The monitor’s purpose is to see that the company follows applicable laws and regulations going forward and institutes the proper policies and procedures to help ensure compliance. Corporations will never welcome this “tail” to their criminal prosecutions. Monitorships inevitably involve significant expenditures of funds and time. Indeed, the Government Accountability Office reported to Congress in November 2009 that corporations have expressed concern about “how monitors were carrying out their responsibilities” and “the overall cost of the monitorship.”¹ By taking the

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1. *Prosecutors Adhered to Guidance but DOJ Could Better Communicate: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 11 (2009) [hereinafter Larence Testimony] (statement of Eileen R. Larence,

right steps, however, companies can often help tailor and guide the monitorships they receive to help ensure that the organization realizes value.

This article explores the rise of the corporate compliance monitor as a condition for settling violations of the U.S. Foreign Corrupt Practices Act (“FCPA”)—a setting in which federal prosecutors routinely impose monitors. From 2004 to 2010, more than 40 percent of all companies that resolved an FCPA investigation with the U.S. Department of Justice (“DOJ”) or Securities and Exchange Commission (“SEC”) through a settlement or plea agreement retained an independent compliance monitor as a condition of that agreement.² And although the trend line is somewhat unclear, this practice seems unlikely to abate. In 2007, almost 38% of corporate FCPA settlements entailed monitors; 60% in 2008; 18% in 2009; and 32% in 2010.³

If U.S. enforcement authorities maintain their current approach, the reality is that companies facing liability for violating the FCPA are likely to have a monitor imposed on them as part of a settlement agreement. From the U.S. government’s perspective, monitorships make sense for companies that violate anti-bribery laws, making it important for offending corporations to learn how to deal with monitors. Pulling from the authors’ extensive experience with three major FCPA compliance monitorships, as well as their work assisting clients operating under an FCPA monitorship, this article aids in that process. It also hopes to help monitors themselves, as well as the prosecutors who appoint them, in making the monitorship a more constructive feature of an FCPA settlement. Part I provides some basic background on the FCPA and discusses the use of compliance monitors as a term in settlement agreements with federal regulators. Part II examines why some companies receive a monitor as a term of an FCPA settlement, while others do not. Part III discusses what FCPA monitorships most commonly entail. Part IV identifies best practices for FCPA compliance monitors: what they should and should *not* do in their quest to help mold an ethical organization. Finally, Part V advises how companies can utilize their role in the selection, retention, and management of the

Director, Homeland Security and Justice, Government Accountability Office), *available at* <http://judiciary.house.gov/hearings/pdf/Larence091119.pdf>.

2. Monitors are referred to by various names, including independent consultant, independent compliance consultant, compliance consultant, compliance counsel, outside compliance consultant, etc. Despite the various names, these individuals all, at a minimum, act to independently monitor a corporation and its adherence to the FCPA.

3. Gibson, Dunn & Crutcher LLP, Internal Statistical Analysis (2010) (on file with authors).

monitor to help make the process anodyne and the results valuable for the organization.

I. FCPA ENFORCEMENT AND THE COMPLIANCE MONITOR AS A CONDITION OF SETTLEMENT

Before delving into the details of FCPA compliance monitorships, it is helpful to consider briefly the FCPA and its enforcement, more generally, as well as recent FCPA enforcement actions that have featured a monitor.

A. *The FCPA and its Enforcement*

In 1977, following revelations about the corrupt activities of major U.S. corporations overseas, Congress passed the FCPA, 15 U.S.C. §§ 78m and 78dd-1 et seq.⁴ At the heart of the statute are its anti-bribery provisions, which prohibit giving or offering anything of value⁵ to a foreign official,⁶ political party, or party official with the corrupt intent to influence the recipient in his or her official capacity or to secure an improper

4. 15 U.S.C. §§ 78m, 78dd-1, et seq. (2006).

5. The phrase “anything of value” encompasses a broad range of items and can include anything a recipient would find interesting or useful, including theater tickets, gifts, stock, travel, education, employment, donations, and illicit items. *See, e.g.*, *United States v. Kozeny*, 582 F. Supp. 2d 535, 538 (S.D.N.Y. 2008) (discussing that bribes “in any form whatsoever” are within the scope of the prohibition); *United States v. ABB Vetco Gray, Inc.*, No. 04-cr-00279, slip op. at 6-17 (S.D. Tex. June 22, 2004) (detailing the extensive bribery scheme that the defendant engaged in with Nigerian governmental oil officials); *Deferred Prosecution Agreement at Attachment A § IV(B), United States v. Daimler AG*, No. 1:10-cr-00063 (D.D.C. Mar. 22, 2010), *available at* <http://www.law.virginia.edu/pdf/faculty/garrett/daimler.pdf> [hereinafter *Daimler Deferred Prosecution Agreement*] (detailing the broad range of bribes employed by Daimler in China); Letter from Mark F. Mendelsohn, Deputy Chief, U.S. Dep’t of Justice, to Martin J. Weinstein, Willkie Farr & Gallagher LLP, at app. A, Statement of Facts 8 (Nov. 14, 2007), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/docs/11-14-07lucent-agree.pdf> [hereinafter *Lucent Technologies Inc. Non-Prosecution Agreement*] (detailing the broad range of Lucent’s bribes to Chinese government officials, including payments covering tuition and living expenses of an employee of a Chinese government ministry, who was obtaining a master’s degree).

6. The U.S. government defines “foreign official” broadly and includes any officer or employee, including low-level employees and officials, of a foreign government or any department, agency, or instrumentality of the government. *See* U.S. Dep’t of Justice, *Lay-Person’s Guide to FCPA*, *available at* <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf> (detailing anti-bribery provisions of the FCPA). The statute also includes as “foreign officials” officers and employees of public international organizations, such as the United Nations, the International Monetary Fund, and the Red Cross. *See* Ex. Ord. No. 12643, June 23, 1988, 53 F.R. 24247 (conferring public international organization status upon the International Committee of the Red Cross); Ex. Ord. No. 9751, July 11, 1946, 11 F.R. 7713 (conferring public international organization status upon the International Monetary Fund); Ex. Ord. No. 9698, Feb. 19, 1946, 11 F.R. 1809 (conferring public international organization status upon the United Nations).

advantage in order to obtain or retain business.⁷ The anti-bribery provisions apply to three categories of persons: (1) “issuers”⁸—any company whose securities are registered in the United States or that is required to file periodic reports with the SEC; (2) “domestic concerns”—any individual who is a U.S. citizen, national, or resident of the United States, or any business organization that has its principal place of business in the United States or which is organized in the United States; and (3) other persons who take any act in furtherance of a corrupt payment while within the territory of the United States.⁹

The FCPA also contains two accounting provisions, which require publicly traded companies to maintain (1) accurate “books and records” and (2) reasonably effective internal controls.¹⁰ Under the books-and-records provision, issuers must “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect transactions and dispositions of the assets” consistent with Generally Accepted Accounting Principles.¹¹ The books-and-records provision applies to all transactions, not just corrupt activities. Under the internal controls provision, issuers must implement and maintain a system of internal accounting controls that “provide reasonable assurances” that no off-book accounts or disbursements or other unauthorized payments are made.¹²

The FCPA does permit some payments that otherwise satisfy its elements. It provides an exception for payments that facilitate or expedite some routine governmental actions.¹³ And it allows for two affirmative defenses: (1) payments expressly permitted by the written laws of the host country, and (2) “[r]easonable and bona fide expenditure[s], such as travel and lodging expenses . . . directly related to (A) the promotion, demonstration, or explanation of products or services; or (B) the execution of performance of a contract with a foreign government or agency

7. § 78dd-1(a).

8. If an issuer or domestic concern authorizes a third party (e.g., local agents, consultants, attorneys, or subsidiaries) to make payments that the issuer or domestic concern “knows” are corrupt, the issuer or domestic concern can be held liable under the FCPA. Knowledge means either (1) being aware of such conduct or substantially certain that such conduct will occur; or (2) consciously disregarding a “high probability” that a corrupt payment or offer will be made. *See* U.S. Dep’t of Justice, *supra* note 6 (defining the five elements that must be met to constitute a violation of the FCPA).

9. §§ 78dd-1, 78dd-2, & 78dd-3.

10. § 78m(b).

11. *Id.*

12. *Id.*

13. *Id.* at § 78dd-1(b).

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thereof.”¹⁴ Much of the time and energy expended on FCPA compliance by corporate lawyers today involves ensuring that benefits provided to foreign officials safely fall under one of these affirmative defenses.¹⁵

That corporate counsel expends much time at all worrying about the FCPA is a relatively recent phenomenon. Until the past decade, FCPA enforcement was fairly dormant. Years would pass without any prosecutions. In fact, federal authorities brought only five enforcement actions in 2004.¹⁶ But enforcement exploded in 2007, the statute’s thirtieth year, with thirty-eight enforcement actions.¹⁷ In 2009, this number grew to forty, with the DOJ bringing twenty-six alone.¹⁸ The SEC and DOJ combined for 137 enforcement actions over the past three years.¹⁹ Last year, the SEC and DOJ broke all FCPA enforcement records, with the two agencies combining for seventy-four enforcement actions.²⁰

FCPA enforcement can result in criminal and/or civil liability. The DOJ may bring criminal and civil enforcement actions against violators; the SEC has civil authority only. If a corporation violates the anti-bribery provisions, the criminal penalties include a \$2 million fine or twice the pecuniary gain or loss, and possible suspension and debarment by the U.S. government.²¹ If a corporation violates the accounting provisions, it may suffer a criminal penalty of up to \$25 million, per violation.²² Civil penalties may include fines and disgorgement of profits.²³

Ultimately, however, these monetary penalties can pale in comparison to the other difficulties (formal and collateral) that attend corporate FCPA enforcement actions. Following the discovery of a potential FCPA problem, the responsible company will conduct an internal investigation and take appropriate remedial steps. This usually entails a significant expenditure of money on attorneys’ fees, the appropriation of employee time, and even the permanent loss of employees who must be terminated

14. *Id.* at § 78dd-1(c).

15. F. Joseph Warin, Michael S. Diamant, Jill M. Pfenning, *FCPA Compliance in China and the Gifts and Hospitality Challenge*, 5 VA. L. & BUS. REV. 33, 61-70 (2010).

16. See Gibson, Dunn & Crutcher LLP, *2010 Year-End FCPA Update* (Jan. 3, 2011), available at <http://www.gibsondunn.com/publications/pages/2010Year-EndFCPAUpdate.aspx> (tracking the number of FCPA enforcement actions brought by the FCPA’s enforcers during the past seven years).

17. *Id.*

18. *Id.*

19. *Id.*

20. See *id.* (noting that “it is clear that 2010 will go down as yet another landmark year for FCPA enforcement.”). The statistics in this paragraph include enforcement actions brought against individuals as well as corporations.

21. 15 U.S.C. § 78dd-2(g)(1) (2006); 18 U.S.C. § 3571(d) (2006).

22. 15 U.S.C. § 78ff(a).

23. §§ 78u(d), 78dd-2(g), 78dd-3(e). Disgorgement can be a significant penalty, with companies like Siemens AG and Daimler AG disgorging \$350 million and \$91.4 million, respectively, to settle their FCPA actions. *Infra* note 86; *infra* note 53.

for improper behavior. Once the scandal becomes public, other collateral consequences may include a decline in reputation or goodwill, a drop in stock price, lawsuits by investors or others, suspension or debarment from government contracting, and various tax law problems.

The consequence on which this article focuses, the corporate compliance monitor, is one of the greatest challenges that may accompany an FCPA enforcement action. Imposed as a condition of the settlement, the monitor siphons both financial and human resources, while increasing the probability that another corruption problem could be uncovered and the parade of collateral consequences could resume. It is, therefore, little wonder that corporations wish to avoid monitors.

B. Monitorships as Part of FCPA Settlements

It is unsurprising that the government frequently imposes independent compliance monitors as a term of an FCPA settlement. As some observers have noted, foreign bribery cases tend to involve a culture of corruption, trigger individual rationalizations or deflection of responsibility, and implicate an entire organization's "social architecture" and incentive system.²⁴ In other words, FCPA transgressions may reveal systemic problems at an organization. This is why compliance professionals typically point to a "culture of compliance" as the most effective tool for combating corporate corruption.²⁵

A federal prosecutor turning to the DOJ's McNulty Memorandum for guidance on how to handle a corporate offender is advised that "the government [should] address and be a force for positive change of corporate culture [and] alter corporate behavior,"²⁶ while the SEC's Seaboard Report advises securities enforcement officials to consider whether "a tone of lawlessness [was] set by those in control of the company."²⁷ Concepts like "tone" and "culture," as important as they may

24. See David Hess and Cristie Ford, *Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem*, 41 CORNELL INT'L L.J. 307, 322 (2008) (arguing that requiring corporations merely to adopt a compliance program and stronger internal controls may be insufficient).

25. See H. Lowell Brown, *Parent-Subsidiary Liability under the Foreign Corrupt Practices Act*, 50 BAYLOR L. REV. 1, 39-52 (1998) (arguing that an effective culture of compliance requires formal policies, awareness throughout the corporation, ex-ante vigilance, and ex-post remedies).

26. See Memorandum from Paul J. McNulty, Deputy Attorney General, U.S. Dep't of Justice, to Heads of Department Components and U.S. Attorneys (Dec. 12, 2006), available at http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.

27. Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of

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be, are often hard to quantify and harder still to ensure through even very good policies and procedures. Corporate culture is inherently organic, and altering it requires time before reforms take root and permeate the organization. Therefore, in addition to demanding appropriate remedial actions, prosecutors trying to ensure that a corporate defendant sets a compliant tone within the organization and changes its culture will undoubtedly see a “tail” to a settlement in the form of a monitor as a useful tool. During the years that follow the settlement, the monitor can help ensure that the corporation’s leaders continue to sound the right “tone from the top” and take the steps necessary to infuse the corporation with high standards of ethical behavior. Occasionally, corporations use the presence of an FCPA monitor as an opportunity for effecting significant change. As the DOJ’s Morford Memorandum notes, effective monitorships help to “reduce[] recidivism of corporate crime and . . . protect[] the integrity of the marketplace.”²⁸

A second reason why monitorships may be particularly attractive in the FCPA context is that overseas bribery often results from the environments in which companies operate, rather than representing a conscious decision by employees to gain a leg up on competitors.²⁹ Frequently, businesspeople complain that it is “impossible” to do business

1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 1470, Accounting and Auditing Enforcement Release No. 1470 (Oct. 23, 2001), *available at* <http://www.sec.gov/litigation/investreport/34-44969.htm>.

28. Memorandum from Craig S. Morford, Acting Deputy Att’y Gen., to Heads of Department Components and United States Attorneys (Mar. 7, 2008), *available at* <http://www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf> [hereinafter Morford Memo]. *See also Transparency and Integrity in Corporate Monitoring: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Committee on the Judiciary*, 111th Cong. (2009) (statement of Rep. Trent Franks), *available at* http://judiciary.house.gov/hearings/printers/111th/111-64_53640.pdf (stating that deferred prosecution agreements serve to rehabilitate the company, root out illegal and unethical conduct, discipline culpable employees, help promote good corporate citizenship going forward, and allow prosecutors to achieve more than they could through court-imposed fines and restrictions alone).

29. *See, e.g.,* Jose Armando Fajul, *Corporate Corruption in Latin America: Acceptance, Bribery, Compliance, Denial, Economics, and the Foreign Corrupt Practices Act*, 26 PENN. ST. INT’L L. REV. 735-36, n.5 (2007-2008) (“Corruption is far from being a novelty. Its practice is as ancient as other social phenomena like prostitution and contraband.” (quoting INSTITUTE OF LATIN AMERICAN STUDIES, POLITICAL CORRUPTION IN EUROPE AND LATIN AMERICA 2 (1996) (internal quotation marks omitted))); Patricia A. Butenis, Ambassador, Bangl., Remarks at the Conference on Good Governance (June 25, 2006), *available at* http://dhaka.usembassy.gov/06.25.06_good_governance.html (“The private sector needs to play a more active role in stemming the supply side of corruption. I understand that most businesses look at corruption as a necessary evil. Some have told us that they just account for it on their books—as much as 10%—as a cost of doing business.”).

in certain countries without paying bribes.³⁰ Because overseas bribery is so often a response to a “shakedown” rather than an aggressive business maneuver, one would expect backsliding to be more common following an FCPA problem than other white collar crimes. Again, the “tail” that is the compliance monitorship makes this less likely.

FCPA monitorships may attend different types of settlements with the U.S. authorities. For SEC enforcement, the monitorship is usually a term of an administrative settlement or a final judgment entered by a court.³¹ The DOJ usually includes the monitorship as a term in a deferred prosecution agreement (“DPA”) or a non-prosecution agreement (“NPA”), but monitorships have also been part of plea agreements.³² From 2004 through 2010, seventy-one companies resolved FCPA allegations by entering into one or more of these resolutions with the DOJ or SEC. Of these seventy-one companies thirty, or 42.25%, were required to retain a monitor as part of the resolution. This is a significant percentage, especially when one considers, as a point of comparison, that from 1993 through September 2009, DOJ prosecutors negotiated a total of 152 DPAs and NPAs—FCPA-related and otherwise—and forty-eight, or slightly more than 30%, required the imposition of a monitor.³³

In 2010, twenty-two corporations settled FCPA-related enforcement

30. Indeed, corporate actions in some highly corrupt countries support this contention. For instance, Panalpina withdrew from Nigeria following U.S. government inquiries there. Panalpina, *Smooth Withdrawal from Nigeria*, (Oct. 10, 2008), available at http://www.panalpina.com/www/global/en/media_news/news/news_archiv_ordner/08_10_09.html. And Ikea very publicly froze any additional development in Russia due to public corruption in that country. Andrew E. Kramer, *Ikea Plans to Halt Investment in Russia*, N.Y. TIMES, June 23, 2009, available at <http://www.nytimes.com/2009/06/24/business/global/24ruble.html>.

31. See, e.g., SEC v. Con-Way Int’l, Inc., No. 08-cv-01478 (D.D.C. Aug. 27, 2008), available at <http://www.sec.gov/litigation/complaints/2008/comp20690.pdf>; Cease-and-Desist Order, *In re Con-Way Inc.*, Exchange Act Release No. 58433, Accounting and Auditing Enforcement Release No. 2867 (Aug. 27, 2008), available at <http://www.sec.gov/litigation/admin/2008/34-58433.pdf>.

32. See, e.g., Criminal Plea Agreement, *United States v. Latin Node, Inc.*, No. 09-cr-20239 (S.D. Fla. 2009), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/docs/latinnode-plea-agree.pdf> (providing that the Department of Justice will be given access to all of the corporation’s officers, employees, and records relating to the illegal activities charged); Letter from Steven A. Tyrrell, Chief, Dep’t of Justice, to Nathan J. Muyskens, Shook Hardy & Bacon L.L.P. (Sept. 29, 2009), available at <http://www.law.virginia.edu/pdf/faculty/garrett/agco.pdf> (implementing a compliance and ethics program designed to detect and prevent FCPA violations, as part of defendant corporation’s plea agreement); Letter from Steven A. Tyrrell, Chief, Dep’t of Justice, to Leo Cunningham, Wilson Sonsini Goodrich & Rosati (Dec. 31, 2009).

33. Larence Testimony, *supra* note 1, at 3.

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actions with the SEC and/or DOJ. Of these, seven retained independent corporate monitors as a condition of settlement:

BAE SYSTEMS PLC (“BAES”) – From 2000 to 2002, BAES represented to various U.S. government agencies that it would create and implement procedures designed to ensure the company’s compliance with the FCPA.³⁴ Allegedly, BAES knowingly and willfully failed to create such procedures, made a series of substantial payments to shell companies and third-party intermediaries, and regularly retained “marketing advisors” to assist in securing sales of defense products.³⁵ This was all allegedly done without BAES properly scrutinizing the relationships to ensure that wrongdoing did not occur.³⁶ Various U.K. reporters discovered the alleged wrongdoing, prompting an investigation by the United Kingdom’s Serious Fraud Office (“SFO”) and eventually the DOJ.³⁷ On March 1, 2010, BAES pleaded guilty to conspiring to defraud the United States by impairing and impeding its lawful functions and making false statements about the company’s FCPA compliance program, as well as other items.³⁸ BAES agreed to pay a criminal fine of \$400 million and to retain an independent compliance monitor for three years.³⁹

INNOSPEC, INC. (“INNOSPEC”) — From 2000 to 2003, Innospec’s Swiss subsidiary, Alcor, allegedly paid or promised to pay at least \$4 million in kickbacks to the former Iraqi government as part of the United Nations (“U.N.”) Oil-for-Food Program (“OFFP”) scandal.⁴⁰ Alcor was

34. See Press Release, Dep’t of Justice, BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 Million Criminal Fine (Mar. 1, 2010), *available at* <http://www.justice.gov/opa/pr/2010/March/10-crm-209.html>.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. Press Release, Dep’t of Justice, Innospec Inc. Pleads Guilty to FCPA Charges and Defrauding the United Nations; Admits to Violating the U.S. Embargo Against Cuba (Mar. 18, 2010), *available at* <http://www.justice.gov/opa/pr/2010/March/10-crm-278.html>; SEC Files Settled Foreign Corrupt Practices Act Charges Against Innospec, Inc. for Engaging in Bribery in Iraq and Indonesia with Total Disgorgement and Criminal Fines of \$40.2 Million, Litigation Release No. 21454 (Mar. 18, 2010), *available at* <http://www.sec.gov/litigation/litreleases/2010/lr21454.htm>. After Iraq invaded Kuwait in 1990, the United Nations Security Council voted to enact a resolution prohibiting member states from trading in any Iraqi commodities or products. Press Release, Dep’t of Justice, Flowserve Corporation to Pay \$4 Million Penalty for Kickback Payments to the Iraqi Government Under the U.N. Oil for Food Program (Feb. 21, 2008), *available at* http://www.justice.gov/opa/pr/2008/February/08_crm_132.html. Subsequently, the U.N. authorized Iraq to sell oil on the condition that the proceeds be deposited in a bank account monitored by the U.N. and used only to purchase designated humanitarian goods to benefit the Iraqi people. *Id.* The OFFP was subsequently established to administer Iraq’s sale of oil and humanitarian goods purchases. *Id.* The OFFP was intended to maximize the Iraqi government’s flexibility in meeting its humanitarian needs, while preventing it from undermining trade sanctions. *Id.*

awarded five contracts valued at more than €40 million to sell tetraethyl lead to refineries run by the Iraqi Ministry of Oil.⁴¹ Alcor allegedly inflated the price by approximately 10% to cover the cost of the illegal payments before submitting them to the U.N. for approval.⁴² Innospec also admitted to selling chemicals to Cuban power plants, in violation of the U.S. embargo against Cuba.⁴³ On March 18, 2010, Innospec pleaded guilty to the charges brought by the DOJ and entered into a settlement agreement with the SEC.⁴⁴ Innospec agreed to pay a \$14.1 million criminal fine to the DOJ and to retain an independent compliance monitor.⁴⁵ In addition, Innospec, without admitting or denying the SEC's allegations, consented to the entry of a court order enjoining it from future violations and ordering it to disgorge \$60,071,613.⁴⁶ The SEC, however, waived all but \$11.2 million of the disgorgement.⁴⁷ Innospec also paid a criminal fine of \$12.7 million to the SFO and \$2.2 million to the U.S. Department of Treasury's Office of Foreign Assets Control.⁴⁸

TECHNIP S.A. ("TECHNIP") — For a decade, Technip allegedly paid Nigerian government officials bribes to obtain engineering, procurement, and construction contracts.⁴⁹ Technip won contracts to construct liquefied natural gas facilities that were valued at more than \$6 billion.⁵⁰ On June 28, 2010, Technip entered into a DPA with the DOJ and agreed to pay a \$240 million criminal fine and to retain an independent compliance

In practice, however, the Iraqi government was able to circumvent the OFFP's restrictions by demanding massive under-the-table payments from its contract partners. *Id.* Starting in 2000, each Iraqi ministry demanded a 10% "after sales service fee" on all humanitarian goods purchased under the OFFP. *Id.* The fee bore no relation to any actual services and was, in reality, an illicit 10% kickback to the Iraqi regime. *Id.*

41. Press Release, Dep't of Justice, Innospec, *supra* note 40.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. SEC Files Settled Foreign Corrupt Practices Act Charges Against Innospec, *supra* note 40.

47. *Id.*

48. *Id.*

49. Press Release, Dep't of Justice, Technip S.A. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$240 Million Criminal Penalty (June 28, 2010), available at <http://www.justice.gov/opa/pr/2010/June/10-crm-751.html>; SEC Charges Technip with Foreign Bribery and Related Accounting Violations – Technip to Pay \$98 Million in Disgorgement and Prejudgment Interest; Company Also to Pay a Criminal Penalty of \$240 Million, Litigation Release No. 21578, Accounting and Auditing Enforcement Release No. 3147 (June 28, 2010), available at <http://www.sec.gov/litigation/litreleases/2010/lr21578.htm>.

50. *Id.*

monitor for two years.⁵¹ In addition, Technip—without admitting or denying the SEC’s allegations—entered into an agreement with the SEC, was enjoined from violating portions of the Exchange Act, and disgorged \$98 million in profits.⁵²

DAIMLER AG (“DAIMLER”) — Daimler and three of its subsidiaries, DaimlerChrysler Automotive Russia SAO (“DCAR”), Export and Trade Finance GmbH (“ETF”), and DaimlerChrysler China Ltd. (“DCCL”), resolved allegations that they violated the FCPA.⁵³ The U.S. government alleged that Daimler engaged in a decade-long scheme of paying bribes to foreign government officials to obtain contracts with government customers for the purchase of Daimler vehicles.⁵⁴ Daimler and its subsidiaries allegedly made tens of millions of dollars in improper payments in at least twenty-two countries.⁵⁵ According to the court filings, the improper payments were often recorded as commissions, special discounts, or useful or necessary payments, which were understood as euphemisms for “bribes.”⁵⁶ Allegedly, the improper payments continued after the DOJ began its investigation.⁵⁷ DCAR and ETF pleaded guilty to one count of conspiracy to violate the anti-bribery provisions of the FCPA and one count of violating those provisions.⁵⁸ Daimler and DCCL entered into DPAs.⁵⁹ In total, Daimler agreed to pay a criminal fine of \$93.6 million to the DOJ, disgorge \$91.4 million in profits, and retain an independent compliance monitor for three years.⁶⁰

ALLIANCE ONE INTERNATIONAL, INC. (“ALLIANCE ONE”) — Alliance One’s predecessor companies allegedly made improper payments in excess of \$1.2 million to Thailand Tobacco Monopoly (“TTM”) officials between 2000 and 2004 to obtain more than \$18.3 million in sales contracts.⁶¹ In addition, one predecessor company allegedly paid monies to Kyrgyz officials to induce the purchase of tobacco for resale and made improper payments to certain tax officials to reduce tax penalties. A different predecessor company allegedly provided improper gifts, travel,

51. *Id.*

52. *Id.*

53. Press Release, Dep’t of Justice, Daimler AG and Three Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay \$93.6 Million in Criminal Penalties (Apr. 1, 2010), *available at* <http://www.justice.gov/opa/pr/2010/April/10-crm-360.html>; Press Release, SEC, SEC Charges Daimler AG with Global Bribery (Apr. 1, 2010), *available at* <http://www.sec.gov/news/press/2010/2010-51.htm>.

54. *Id.*

55. *Id.*

56. Press Release, Dep’t of Justice, *supra* note 53.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*; Press Release, SEC, *supra* note 53.

61. *See* Gibson, Dunn & Crutcher LLP, *2010 Year-End FCPA Update*, *supra* note 16.

and entertainment to certain foreign officials. Alliance One entered into an NPA with the DOJ, had foreign subsidiaries plead guilty to violating the FCPA's anti-bribery and books-and-records provisions, and settled civil anti-bribery, books-and-records, and internal controls charges with the SEC. Alliance One paid \$19.45 million to settle the matter and was required to retain an independent compliance monitor for the three-year term of its NPA.

UNIVERSAL CORPORATION ("UNIVERSAL") – Between 2000 and 2004, Universal allegedly paid approximately \$800,000 to TTM officials to obtain approximately \$11.5 million in sales contracts for its Brazilian and European subsidiaries.⁶² It also allegedly paid \$165,000 to government officials in Mozambique to secure an exclusive right to purchase tobacco from regional growers and to influence the passage of favorable legislation. Finally, Universal allegedly made improper payments totaling \$850,000 to high-ranking Malawian officials. Universal also entered into an NPA with the DOJ, had foreign subsidiaries plead guilty to violating the FCPA's anti-bribery and books-and-records provisions, and settled civil anti-bribery, books-and-records, and internal controls charges with the SEC. Universal paid \$10 million to settle the matter and was required to retain an independent compliance monitor for the three-year term of its NPA.

ALCATEL-LUCENT, S.A. ("Alcatel-Lucent") — On December 27, 2010, Alcatel-Lucent settled with the DOJ and SEC, resolving allegations of widespread bribery of foreign government officials.⁶³ According to the charging documents, from 2002 to 2006, prior to its merger with Lucent Technologies, Inc., Alcatel S.A. used third-party agents to pay more than \$8 million in bribes to government officials in Costa Rica, Honduras, Malaysia, and Taiwan in exchange for hundreds of millions of dollars worth of public-sector telecommunications contracts. To resolve the SEC's complaint, Alcatel-Lucent agreed to pay \$45.4 million in disgorgement and consented to an injunction from future violations of the anti-bribery, books-and-records, and internal controls provisions of the FCPA. To resolve the criminal charges, Alcatel-Lucent consented to the filing of information charging it with violating the books-and-records and internal controls provisions, three of its subsidiaries pleaded guilty to FCPA conspiracy counts, and the companies paid a combined criminal fine of \$92 million. The parent company's charges are stayed for the three-year term of a DPA. Alcatel-Lucent also paid \$10 million to settle corruption charges filed by

62. *Id.*

63. *Id.*

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Costa Rican authorities, the first time in Costa Rica's history that it has recovered damages from a foreign corporation for corruption of its own government officials. This case marks just the second time in the history of the FCPA—the first being Siemens AG (“Siemens”) in 2008—that a company has resolved criminal internal controls charges.

Fifteen settlements did not require the retention of a compliance monitor:

NATCO GROUP INC. (“NATCO”) — In February and September of 2007, a NATCO subsidiary, TEST Automation & Controls, Inc. (“TEST”), allegedly made improper payments totaling approximately \$45,000 to Kazakh government officials.⁶⁴ The bribes were paid in response to an extortion threat.⁶⁵ Kazakh immigration prosecutors had conducted audits and claimed that TEST Kazakhstan's expatriate workers were working without proper immigration documentation.⁶⁶ The prosecutors threatened the employees with fines, jail, or deportation if they did not pay cash “fines.”⁶⁷ The employees capitulated and received reimbursement from TEST, which documented the payments as advances on a “bonus.”⁶⁸ In late 2007, NATCO discovered the payments during a routine internal audit review. NATCO conducted an internal investigation and voluntarily disclosed the matter to the SEC.⁶⁹ Allegedly, the company's “system of internal accounting controls failed to ensure that TEST recorded the true purpose of the payments.”⁷⁰ Without admitting or denying the allegations in the SEC's complaint, NATCO consented to the entry of a cease and desist order and agreed to pay a civil penalty of \$65,000.⁷¹ The SEC considered these remedial efforts when accepting NATCO's offer of settlement.⁷²

NEXUS TECHNOLOGIES, INC. (“NEXUS”) — From 1999 to May 2008, Nexus allegedly bribed foreign officials from Vietnam and Russia in an attempt to induce them to influence decisions of their respective governments and direct business to Nexus.⁷³ The bribes were falsely

64. SEC Files Settled Action Charging NATCO Group Inc. with Violations of the Foreign Corrupt Practices Act, Litigation Release No. 21374, Accounting and Auditing Enforcement Release No. 3102 (Jan. 11, 2010), *available at* <http://www.sec.gov/litigation/litreleases/2010/lr21374.htm>.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. Press Release, Nexus Technologies Inc. and Three Employees Plead Guilty to Paying Bribes to Vietnamese Officials (Mar. 16, 2010), *available at* <http://www.justice.gov/opa/pr/2010/March/10-crm-270.html>.

described as “commissions” in the company’s records.⁷⁴ As part of its guilty plea, Nexus agreed to cease operations.⁷⁵ On March 16, 2010, the company pleaded guilty to the charges;⁷⁶ on September 15, 2010, the district court imposed the “corporate death penalty” on Nexus, finding that Nexus was a “criminal purpose organization” under section 8C1.1 of the U.S. Sentencing Guidelines and ordering a dissolution of the organization, with all of its assets to be turned over to the court. Three Nexus employees and one business partner were also prosecuted as part of this scandal, two of whom received prison terms.

VERAZ NETWORKS, INC. (“VERAZ”) — From 2007 to 2008, Veraz employed a consultant in China who allegedly gave gifts and offered improper payments to government officials, attempting to obtain business for Veraz.⁷⁷ The value of the gifts and payments was approximately \$40,000.⁷⁸ During the same period, a Veraz employee made improper payments to the CEO of a Vietnam government-controlled telecommunications company.⁷⁹ These improper payments were also given in an attempt to obtain business for Veraz.⁸⁰ The alleged misconduct was discovered when Veraz conducted an internal investigation in response to an SEC inquiry involving an unrelated issue.⁸¹ Veraz provided information regarding the improper payments to the SEC.⁸² On June 29, 2010, without admitting or denying the allegations in the SEC’s complaint, Veraz consented to the entry of a final judgment enjoining it from future violations of portions of the Exchange Act and ordering it to pay a \$300,000 civil penalty.⁸³

ENI S.P.A (“ENI”) — Italian integrated energy company, ENI, and its Dutch subsidiary, Snamprogetti Netherlands B.V. (“Snamprogetti”), settled FCPA charges stemming from alleged bribes paid by its joint venture to senior Nigerian officials to obtain approximately \$6 billion worth of engineering, procurement, and construction contracts.⁸⁴ ENI and

74. *Id.*

75. *Id.*

76. *Id.*

77. SEC Charges California Telecommunications Company with FCPA Violations, Litigation Release No. 21581 (June 29, 2010), available at <http://www.sec.gov/litigation/litreleases/2010/lr21581.htm>.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. See Gibson, Dunn & Crutcher LLP, *2010 Year-End FCPA Update* (Jan. 3, 2011),

Snamprogetti jointly consented to the entry of an injunction against future FCPA violations and agreed to disgorge \$125 million to the SEC. Snamprogetti also entered into a DPA with the DOJ and agreed to pay a \$240 million criminal fine. This case is related to the above-discussed Technip matter, which *did* involve the imposition of a monitor.

GENERAL ELECTRIC CO. (“GE”) — On July 27, 2010, GE and two companies that were acquired by GE after they allegedly committed wrongdoing, Amersham plc and Ionics, Inc., settled civil charges alleging violations of the FCPA’s accounting provisions arising from the participation of certain foreign subsidiaries in the OFFP.⁸⁵ Without admitting or denying the SEC’s allegations, GE, Amersham, and Ionics each consented to the entry of a permanent injunction against future violations of the books-and-records and internal controls provisions of the FCPA, GE paid a civil penalty of \$1 million, and all three entities collectively disgorged approximately \$22.5 million in profits plus prejudgment interest. GE’s settlement is noteworthy among both OFFP settlements and FCPA settlements more broadly for at least two reasons. First, GE is the only company out of sixteen to settle OFFP-related charges that has avoided criminal prosecution. Second, this settlement marks an aggressive use of successor liability by the SEC, as GE was required to disgorge allegedly illicit profits earned by businesses independent of GE at the time of the wrongdoing.

MERCATOR CORP. (“MERCATOR”) — On August 6, 2010, Mercator pleaded guilty to one count of violating the FCPA’s anti-bribery provisions in connection with the 1999 gifting of two snowmobiles to senior officials of the Republic of Kazakhstan.⁸⁶ On November 19, 2010, the district court sentenced Mercator to pay a \$32,000 fine. This brought to an end one of the longest-running investigations in the history of the FCPA.

ABB LTD. (“ABB”) — On September 29, 2010, Swiss ADR-issuer ABB resolved criminal and civil FCPA charges with the DOJ and SEC, arising from two separate allegedly improper payment schemes.⁸⁷ The first involved six ABB subsidiaries based in Europe and the Middle East that allegedly paid approximately \$810,000 (and agreed to pay an additional \$240,000) to the Iraqi government in connection with thirty OFFP contracts. The second, unrelated scheme concerned a U.S.-based subsidiary of ABB that, between 1997 and 2004, allegedly paid approximately \$1.9 million through various intermediaries to officials of state-owned utility companies in Mexico in exchange for approximately \$90 million in contracts. To resolve the criminal charges alleging

supra note 16.

85. *Id.*

86. *Id.*

87. *Id.*

conspiracies to violate the wire fraud statute and books-and-records provision of the FCPA, ABB entered into a three-year DPA and agreed to pay a criminal fine of \$1.9 million. Additionally, ABB's U.S. subsidiary pleaded guilty to violating and conspiring to violate the FCPA's anti-bribery provisions and paid a \$17.1 million fine (down from the \$28.5 million fine stipulated in the plea agreement, based on a finding by the district court that the U.S. subsidiary was not, as the DOJ had claimed, a recidivist violator of the FCPA). To settle civil charges with the SEC, ABB consented to the entry of a permanent injunction prohibiting future violations of the anti-bribery, books-and-records, and internal controls provisions of the FCPA and paid more than \$39.3 million in penalties, disgorgement, and prejudgment interest.

RAE SYSTEMS INC. ("RAE") — Between 2004 and 2008, two of RAE's majority-owned joint ventures in China provided their third-party agents with cash advances generated through false or misleading invoices, portions of which were passed on to Chinese officials.⁸⁸ RAE allegedly uncovered this practice during pre-acquisition due diligence for one of the joint ventures, but failed to implement a system of internal controls sufficient to stop the payments post-acquisition. With respect to the other joint venture, RAE allegedly failed to conduct any FCPA due diligence in connection with the transaction, and as a result, the company continued to make improper payments following the acquisition. To resolve the criminal allegations, RAE entered into an NPA with the DOJ, agreeing to pay a \$1.7 million fine. The DOJ cited RAE's substantial cooperation with the investigation and its voluntary disclosure of the conduct as factors relevant to the decision to resolve the matter with an NPA. With respect to the SEC, RAE consented to the entry of a civil injunction against future violations of the FCPA's accounting provisions and agreed to disgorge approximately \$1.1 million in allegedly ill-gotten profits, plus approximately \$100,000 in prejudgment interest.

The other seven 2010 corporate settlements were part of an industry sweep of the global oil and oil services industry.⁸⁹ Industry sweeps have become a typical approach of the DOJ and SEC in recent years. The companies involved were a global freight forwarder, PANALPINA WORLD TRANSPORT (HOLDING), LTD. ("Panalpina"), and six oil and oil service firms (most of which were Panalpina customers), ROYAL DUTCH SHELL PLC; TRANSOCEAN, INC. ("Transocean"); TIDEWATER MARINE INT'L, INC.; PRIDE INT'L INC.; NOBLE CORP.; and GLOBALSANTAFE CORP.

88. *Id.*

89. *Id.*

(“GlobalSantaFe”). The origin of much of this investigation dates back to February 2007, when three subsidiaries of global oil services company Vetco International Ltd. resolved FCPA charges arising from improper payments made on their behalf by Panalpina. In the wake of the Vetco settlement, on July 2, 2007, the DOJ sent letters to eleven oil and oil services companies, requesting information about their dealings with Panalpina. With the exception of GlobalSantaFe (which merged with Transocean in 2007, presumably making it subject to the terms of the Transocean agreement) each of these companies entered into a DPA or NPA with the DOJ and paid a substantial criminal fine. All seven corporations involved consented to the filing of a civil complaint or administrative action by the SEC and disgorged profits from the allegedly improper conduct. These seven settlements resulted in more than \$230 million in disgorgement, fines, and penalties.

II. FACTORS INFLUENCING THE GOVERNMENT’S DECISION TO REQUIRE AN FCPA MONITOR

The settlements from 2010 demonstrate that it is hard to determine from the factual recitation of any given case precisely what factors prove dispositive in the government’s desire for a compliance monitor as a condition of settlement. If anything, an examination of the past half-decade of FCPA settlements show that no single factor wholly determines whether the DOJ or SEC will require a company to retain a monitor. Although prosecutors consider a variety of issues,⁹⁰ at least two factors emerge as those most determinative of whether the FCPA settlement will include a monitorship: (1) the degree of ingrained corruption at the corporation; and (2) the existence of an effective corporate compliance program prior to the offense. Companies with a more entrenched culture of corruption and those lacking effective compliance programs seem most likely to receive FCPA monitors, while the nature of the actual underlying offenses appears to be a less important consideration.

A. *Culture of Corruption*

The pervasiveness of corrupt activity within a corporation seems to significantly affect whether or not it receives a compliance monitor. Past settlement agreements indicate that prosecutors look at the corporate

90. See Cristie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 698 (2009) (discussing multiple factors that are considered when deciding whether to require a corporate monitor as part of a settlement agreement); see also Morford Memo, *supra* note 28, at 2 (explaining that a “monitor should only be used where appropriate given the facts and circumstances of a particular matter”).

culture and consider whether it itself is “corrupt” and in need of further reform and monitoring. Indicators of such a pervasive culture include the existence of widespread misconduct⁹¹ and whether wrongdoing is condoned by the organization’s upper management.⁹² This is in contrast to the misconduct of a few rogue actors.⁹³ In the latter situation, it appears that prosecutors are much less likely to demand a monitor.

The quintessential example of pervasive corporate corruption is the Siemens prosecution. Court filings alleged that Siemens made thousands of corrupt payments to third parties in a manner contemplated to obscure the purpose of the transactions and ultimate recipients of the money.⁹⁴ “At least 4,283 of those payments, totaling approximately \$1.4 billion, were used to bribe government officials in return for business to Siemens around

91. *See, e.g.*, Press Release, Dep’t of Justice, Transcript of Press Conference Announcing Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations (Dec. 15, 2008), *available at* <http://www.usdoj.gov/opa/pr/2008/December/08-opa-1112.html> (describing Siemens’s conduct as “egregious”).

92. *See, e.g.*, Deferred Prosecution Agreement, United States v. AGA Med. Corp., No. 0:08-cr-00172-1 (D. Minn. June 3, 2008) (alleging that a high-ranking officer and part owner with power to set policy condoned violations). Interestingly, although this agreement requires that AGA Medical Corporation engage a monitor by August 2, 2008, we understand that, at least as of June 2010, no monitor has been approved. No public explanation for the delay has been issued. In the fourth quarter of 2010, St. Jude Medical, Inc., acquired AGA Medical Corporation, but relevant SEC filings do not indicate whether a monitor has been appointed. *See* St. Jude Medical, Inc., Form S-4 (Oct. 20, 2010), *available at* <http://sec.gov/Archives/edgar/data/203077/000104746910008733/0001047469-10-008733.txt>.

93. *See, e.g.*, Press Release, Dep’t of Justice, Helmerich & Payne Agrees to Pay \$1 Million Penalty to Resolve Allegations of Foreign Bribery in South America (July 30, 2009), *available at* <http://www.justice.gov/opa/pr/2009/July/09-crm-741.html> (discussing the mitigating factors of Helmerich and Payne’s voluntary disclosure and self-investigation, which ultimately allowed it to settle without a monitor being imposed).

94. A collection of all of the most important court documents in the Siemens case is located on Siemens’s website as a compiled document. *See* Complaint at 2, SEC v. Siemens Aktiengesellschaft, (D.D.C. Dec. 12, 2008) (No. 1:08-cv-02167), *available at* <http://www.siemens.com/press/pool/de/events/2008-12-PK/SEC.pdf> [hereinafter Siemens Complaint]; Final Judgment, SEC v. Siemens Aktiengesellschaft, (D.D.C. Dec. 12, 2008) (No. 1:08-cv-02167), *available at* <http://www.siemens.com/press/pool/de/events/2008-12-PK/SEC.pdf> [hereinafter Siemens Final Judgment]; Consent, SEC v. Siemens Aktiengesellschaft, (D.D.C. Dec. 12, 2008) (No. 1:08-cv-02167), *available at* <http://www.siemens.com/press/pool/de/events/2008-12-PK/SEC.pdf> [hereinafter Siemens Consent]; Certificate of Corporate Resolution, SEC v. Siemens Aktiengesellschaft, (D.D.C. Dec. 12, 2008) (No. 1:08-cv-02167), *available at* <http://www.siemens.com/press/pool/de/events/2008-12-PK/SEC.pdf>; Civil Cover Sheet, SEC v. Siemens Aktiengesellschaft, (D.D.C. Dec. 12, 2008) (No. 1:08-cv-02167), *available at* <http://www.siemens.com/press/pool/de/events/2008-12-PK/SEC.pdf>.

the world.”⁹⁵ Multiple corporate segments at Siemens, including Communications, Industrial Solutions, Medical Solutions, Power Generation, Power Transmission, and Transportation Systems, allegedly engaged in bribery.⁹⁶ To make matters worse, investigations in Italy and other countries had alerted Siemens’s top management well in advance to a corruption problem; and yet, according to prosecutors, nothing was done to bolster the company’s internal compliance program.⁹⁷ Unsurprisingly, Siemens received a compliance monitor, despite its herculean remediation efforts and expansive internal investigation.⁹⁸

In the case of Faro Technologies, Inc. (“Faro”), the violations did not permeate the company as in the Siemens case, but rather just upper management, who allegedly knew about the corrupt payments.⁹⁹ The Director of Asia-Pacific Sales (“Sales Director”) recommended a former employee of Faro’s Chinese distributor for a new Country Sales Manager position.¹⁰⁰ After the Country Manager was hired, he requested permission from the Director of Asia-Pacific Sales and two other Faro officers to “do business the Chinese way” and bribe officials. The request was officially denied, but soon after, the Sales Director authorized the Country Manager to make illegal cash payments to employees of Chinese state-owned companies to obtain contracts.¹⁰¹ The Country Manager repeatedly expressed the need to provide cash in return for the award of contracts, and the Sales Director indicated his understanding of this need and continued to approve the transactions.¹⁰² To ensure the scheme was not discovered, the Sales Director instructed Faro-China’s staff to alter account entries and delete those referring to improper payments.¹⁰³ While this conduct transpired, Faro failed to provide any training or education regarding the

95. Siemens Complaint, *supra* note 94, at 2.

96. *Id.*

97. *Id.*

98. See MARTIN T. BIEGELMAN & DANIEL R. BIEGELMAN, FOREIGN CORRUPT PRACTICES ACT COMPLIANCE GUIDEBOOK: PROTECTING YOUR ORGANIZATION FROM BRIBERY AND CORRUPTION 112-14 (2010) (discussing Siemens’s leniency and amnesty programs for current and former employees as tools to gain additional information and evidence).

99. See Press Release, Dep’t of Justice, Statoil ASA Satisfies Obligations Under Deferred Prosecution Agreement and Foreign Bribery Charges are Dismissed (Nov 19, 2009), available at <http://www.justice.gov/opa/pr/2009/November/09-crm-1257.html> (discussing Statoil’s acknowledgement that it had made corrupt payments and its agreement to pay a \$10.5 million penalty).

100. See generally Cease-and-Desist Order, Faro Techs., Inc., Exchange Act Release No. 57933, Accounting and Auditing Enforcement No. 2836 (June 5, 2008), available at <http://www.sec.gov/litigation/admin/2008/34-57933.pdf> [hereinafter Faro Techs. Cease-and-Desist Order].

101. *Id.*

102. *Id.*

103. *Id.*

FCPA to its employees, agents, or subsidiaries.¹⁰⁴ In addition, Faro lacked an established corporate program to monitor its business operations to ensure compliance with the FCPA. The U.S. prosecutors required Faro, like Siemens, to retain a monitor.¹⁰⁵

In contrast, the relevant conduct generally seemed less pervasive at companies that were not required to retain a monitor. It appears, although it is by no means a rule, that the government tends not to impose monitors when the illegal conduct is limited to just a few individuals within a company or when the conduct was limited in its scope.¹⁰⁶

In the case of hedge fund Omega Advisors, Inc., a single employee was responsible for the inappropriate conduct.¹⁰⁷ Indeed, there was no evidence of corruption or improper conduct outside the actions of the isolated employee.¹⁰⁸ Omega entered into an NPA, but was not required to retain an outside monitor. Similarly, the SEC did not require Oil States International (“Oil States”) to retain a monitor to resolve wrongdoing at the company.¹⁰⁹ Employees in the eastern Venezuelan branch office of an Oil States subsidiary, Hydraulic Well Control, LLC, allegedly made corrupt payments.¹¹⁰ The conduct was limited to this single branch office and did

104. *Id.*

105. There are other instances where improper conduct involving the ratification of high-level officials resulted in the imposition of an independent compliance monitor. *See, e.g.*, Deferred Prosecution Agreement, United States v. Willbros Group, Inc., No. 08-cr-0287 (S.D. Tex. May 14, 2008) [hereinafter Willbros Deferred Prosecution Agreement]; SEC Sanctions Westinghouse Air Brake Technologies Corporation for Improper Payments to Indian Government Employees, Litigation Release No. 20457 (Feb. 14, 2008), *available at* <http://www.sec.gov/litigation/litreleases/2008/lr20457.htm>.

106. *See, e.g.*, Cease-and-Desist Order, Oil States Int’l, Inc., Securities Exchange Act Release No. 53732, Accounting and Auditing Enforcement Release No. 2424 (Apr. 27, 2006) [hereinafter Oil States Cease-and-Desist Order] (finding that the illegal conduct was limited to employees of a subsidiary).

107. Letter from Michael J. Garcia, U.S. Attorney for the Southern District of New York, to Robert J. Anello, Morvillo, Abramowitz, Grand, Iason, Anello, & Bohrer, P.C. (June 19, 2007), *available at* <http://www.law.virginia.edu/pdf/faculty/garrett/omegoadvisors.pdf>; Press Release, U.S. Attorney’s Office, S. Dist. N.Y., U.S. Announces Settlement with Hedge Fund Omega Advisors, Inc. in Connection with Omega’s Investment in Privatization Program in Azerbaijan (Jul. 6, 2007), *available at* <http://www.usdoj.gov/usao/nys/pressreleases/July07/omeganonprospr.pdf>.

108. Similarly, the illegal conduct in the *Immucor* case was also limited to a single individual. *Immucor* was not required to hire a monitor. *See* SEC Files Action Naming Officer of *Immucor*, Inc., Litigation Release No. 20316 (Sept. 28, 2007), *available at* http://fcpaenforcement.com/FILES/tbl_s31Publications/FileUpload137/4495/DeChiricoPressRelease.pdf (describing a final judgment ordering payment of a \$30,000 civil penalty).

109. Oil States Cease-and-Desist Order, *supra* note 106.

110. *Id.*

not represent typical Oil States business dealings. Furthermore, the improper conduct was isolated to low-level employees; there was no indication that senior management was involved.

It is unsurprising for at least two reasons that prosecutors are more likely to require monitors in cases of pervasive FCPA violations. First, because the illegal conduct is widespread, eliminating it is more difficult and time-consuming. This may very well result from a culture of corruption within the company—ingrained business practices that are difficult to uproot. A more thorough review of a company's activities is probably necessary to engage employees in a range of businesses and locations and help the company stamp out lingering pockets of non-compliance. Such a task is well-suited for a monitor who can dedicate himself or herself to reviewing the various functions and businesses independently.

The second reason why monitors may make more sense in cases of pervasive corruption is that they also often point to an ineffective system of internal controls. Developing such a system is often a complex, laborious, and time-intensive project. Undoubtedly, by the time the monitor begins his or her work, the company will have embarked on a remedial augmentation of its internal controls; the monitor, however, can provide invaluable guidance on where weaknesses remain or risks linger, insufficiently addressed. Due to the expense and inconvenience of many internal controls, the monitor's independence and authority may aid the company in instituting needed controls in spite of grumbling from the business line.

B. Existence and Enforcement of Internal Compliance Programs

In fact, the existence of an effective compliance program is perhaps independently the most important factor in whether or not a company receives a monitor. The Morford Memorandum specifically states that “it may be appropriate to use a monitor where a company does not have an effective internal compliance program, or where it needs to establish necessary internal controls.”¹¹¹ In light of this guidance, prosecutors heavily weigh the pre-existence of an effective compliance program designed to detect and guard against illegal activity. For example, the Micrus Corporation (“Micrus”)¹¹² and GE InVision Inc. (“InVision”)¹¹³

111. See Morford Memo, *supra* note 28, at 2.

112. See Press Release, Dep't of Justice, Micrus Corporation Enters into Agreement to Resolve Potential Foreign Corrupt Practices Act Liability (Mar. 2, 2005), available at http://www.justice.gov/opa/pr/2005/March/05_crm_090.htm (requiring Micrus to retain an independent policy expert for a period of three years as a result of its criminal violations of the FCPA).

agreements noted that the offending companies had no effective FCPA compliance programs; prosecutors required monitors in both cases. In contrast, the SEC did not impose a monitor on ITT. At the time of the allegedly improper conduct, the company already had in place a Corporate Compliance Ombudsman program to receive and respond to complaints of alleged wrongdoing throughout the organization.¹¹⁴

The mere existence of a compliance program, however, is not in itself enough to ward off the imposition of a monitor. Indeed, the government is particularly sensitive to instances where compliance programs were clearly ineffective or effectively ignored.¹¹⁵ “Paper programs” are simply insufficient. The United States Sentencing Guidelines outline the requirements of an effective compliance and ethics program.¹¹⁶ Organizations must (1) establish standards and protocols to prevent and detect criminal conduct; (2) require organizational leaders, including the board and senior management, to supervise the program; (3) use reasonable efforts to exclude individuals who have engaged in illegal activities or other improper conduct from supervising the compliance program; (4) regularly train employees and furnish them with information regarding the organization’s compliance program; (5) monitor, evaluate, and publicize the organization’s compliance program to ensure its continued effectiveness; (6) promote the compliance and ethics program through incentives to act in accordance with the program and disciplinary measures for failing to adhere to the program requirements; and (7) take reasonable

113. See GE InVision Inc., Security Act Release No. 51199, Accounting and Enforcement Release No. 2186 (Feb. 14, 2005), available at <http://www.sec.gov/litigation/admin/34-51199.htm> (describing an order instituting a cease-and-desist proceeding and indicating that “InVision provided no formal training or education to its employees . . . or its sales agents and distributors regarding the requirements of the FCPA” and “failed to establish a program to monitor its foreign agents and distributors for compliance with the FCPA”).

114. See SEC Files Settled Charges Against ITT Corporation, Accounting and Auditing Enforcement Release No. 2934, Litigation Release No. 20896, available at <http://www.sec.gov/litigation/litreleases/2009/lr20896.htm> (discussing the failure of ITT to maintain proper books, records, and accounts with sufficient detail to account for the actions of its subsidiary, NGP).

115. See, e.g., Press Release, Dep’t of Justice, Baker Hughes Subsidiary Pleads Guilty to Bribing Kazakh Official and Agrees to Pay \$11 Million Criminal Fine as Part of Largest Combined Sanction Ever Imposed in FCPA Case (Apr. 26, 2007), available at http://www.justice.gov/opa/pr/2007/April/07_crm_296.html (describing Baker Hughes’s agreement to hire an independent monitor for a period of three years to oversee its compliance program and make proper reports to the company and the DOJ).

116. See generally U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b) (2010). Please note that this version of the Sentencing Guidelines went into effect on November 1, 2010.

steps, if criminal conduct is discovered, to address the conduct and make any needed changes to the organization's compliance and ethics program to prevent future misbehavior.¹¹⁷

C. No Clear Pattern Emerges From Other Aspects of the Enforcement Actions

Surprisingly, the nature of the underlying improper payments that drive the enforcement action in the first place does not seem to be determinative (with the limited exception of the OFFP prosecutions).¹¹⁸ An analysis of DPAs and NPAs formed since 2004 shows no clear, overarching pattern in this regard. It also suggests that factors such as whether a company voluntarily discloses the FCPA violations, the amount of bribes paid, and the amount of business gained by the bribes do not seem to have much predictable effect on whether a company must hire a monitor.

One might expect that the amount of bribes paid and the financial benefit they generated would play a major role in determining whether a company receives a monitor, but this does not appear to be the case. For example, the government did *not* require Lucent Technologies to hire a monitor after paying hundreds of thousands of dollars in benefits related to

117. *Id.* at 32-34. The 2010 amendments to the Sentencing Guidelines provide an additional Application Note, which clarifies the meaning of § 8B2.1(b)(7). The addition states that subsection (b)(7) has two aspects:

First, the organization should respond appropriately to the criminal conduct. The organization should take reasonable steps, as warranted under the circumstances, to remedy the harm resulting from the criminal conduct. These steps may include, where appropriate, providing restitution to identifiable victims, as well as other forms of remediation. Other reasonable steps to respond appropriately to the criminal conduct may include self-reporting and cooperation with authorities.

Second, the organization should act appropriately to prevent further similar criminal conduct, including assessing the compliance and ethics program and making modifications necessary to ensure the program is effective. The steps taken should be consistent with subsections (b)(5) and (c) and may include the use of an outside professional advisor to ensure adequate assessment and implementation of any modifications.

U.S. Sentencing Commission, Amendments to the Sentencing Guidelines 34-35 (May 3, 2010), *available at* http://www.ussc.gov/Guidelines/2010_guidelines/Proposed_Amendments/20100503_Reader_Friendly_Proposed_Amendments.pdf.

118. Few OFFP-related settlements have resulted in the imposition of a compliance monitor. This may reflect the unusual nature of these cases, involving a unique U.N. program and improper conduct that was required by the highest levels of the Iraqi government. In fact, with the exception of the Ingersol-Rand settlement, only those cases that also involve other improper conduct outside of the OFFP (e.g., the Daimler, Innospec, and Siemens settlements) have resulted in a monitorship.

approximately \$2 billion worth of potential business.¹¹⁹ Compare this to the Monsanto Company agreement, which imposed a monitor when the underlying bribe was only \$50,000.¹²⁰ Likewise, the Schering-Plough Corporation agreement mandated a monitor to settle a case involving only \$76,000 in improper payments.¹²¹

One of the most unusual incongruities in the U.S. government's imposition of FCPA monitors arose out of an FCPA case in which federal prosecutors alleged that four companies, Halliburton Co./KBR, Inc./Kellogg Brown & Root LLC, Technip, Snamprogetti, and JGC Corporation of Japan, conspired to bribe Nigerian officials. (The Technip and Snamprogetti settlements are discussed above.) Surprisingly—and without explanation—the regulators imposed an FCPA compliance monitor on KBR, Inc., and Technip, but did not require a monitor as a term of its settlement with Snamprogetti.¹²²

Other factors that one might reasonably anticipate would usually

119. Lucent Technologies Inc. Non-Prosecution Agreement, *supra* note 5, at 2. See Complaint at 11, SEC v. Lucent Techs. Inc. (D.D.C. 2007), available at <http://www.sec.gov/litigation/complaints/2007/comp20414.pdf> (describing expectations of potential business opportunities reaching \$2-3 billion).

120. See Press Release, Dep't of Justice, Monsanto Company Charged with Bribing Indonesian Government Official: Prosecution Deferred for Three Years (Jan. 6, 2005), available at http://www.usdoj.gov/opa/pr/2005/January/05_crm_008.htm (describing the repercussions of Monsanto's attempted payment of \$50,000 to an Indonesian official to induce him to modify the requirements of an environmental impact statement).

121. See generally SEC v. Schering-Plough Corp., Litigation Release No. 18740, (June 9, 2004), available at <http://www.sec.gov/litigation/litreleases/lr18740.htm>. It is an open question, however, if these matters arose today in the current mega-monetary-sanction environment, whether the government would impose a monitor.

122. See Deferred Prosecution Agreement at 4, United States v. Technip S.A., No. H-10-439 (S.D. Tex. 2010), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/docs/06-28-10-technip-agreement.pdf> [hereinafter Technip Deferred Prosecution Agreement] (discussing Technip's conduct related to corrupt payments and false books); Press Release, Dep't of Justice, Snamprogetti Netherlands B.V. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$240 Million Criminal Penalty (July 7, 2010), available at <http://www.justice.gov/opa/pr/2010/July/10-crm-780.html> (describing Snamprogetti's agreement to pay a \$240 million penalty for its involvement over a ten-year period in bribing Nigerian government officials to obtain various procurement and construction contracts); Press Release, Dep't of Justice, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay \$402 Million Criminal Fine (Feb. 11, 2009), available at <http://www.justice.gov/opa/pr/2009/February/09-crm-112.html> (describing Kellogg's guilty plea relating to its participation in a decade-long scheme to bribe Nigerian government officials to grant various contracts); Press Release, Securities and Exchange Commission, SEC Charges KBR and Halliburton for FCPA Violations (Feb. 11, 2009), available at <http://www.sec.gov/news/press/2009/2009-23.htm> (discussing KBR Halliburton's agreement to pay \$177 million in disgorgement to settle its SEC fines).

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influence a prosecutor's decision in this area are also not determinative. For example, a company's willingness to report its misconduct voluntarily or to cooperate with prosecutors does not seem to affect whether the government mandates the appointment of a monitor. In fact, in many settlements where prosecutors noted the company's efforts at self-reporting and willingness to cooperate, the government still required monitors. Of the thirty companies that received compliance monitors from 2004 to 2010, twenty voluntarily disclosed the improper conduct to the government, which seems to exemplify the adage that no good deed goes unpunished. All of this is not to say that factors such as the amount paid in bribes, the amount of business acquired through bribes, and a company's willingness to cooperate are irrelevant to prosecutors' decisions. But these factors have no consistently evident or measureable effects on whether the government will require a company to retain a monitor as a term of an FCPA settlement agreement.

III. COMMON TERMS OF FCPA MONITORSHIPS

Today, no official definition of a compliance monitor exists, and this is unlikely to change. The United States Sentencing Commission recently considered a proposed amendment to § 8D1.4 of the United States Sentencing Guidelines. The proposed amendment would have required that a monitor be independent and properly qualified and that the scope of the monitorship be subject to court approval. On April 7, 2010, the Sentencing Commission rejected this proposal, leaving the status quo of DOJ and SEC oversight and control.¹²³

Each FCPA monitorship is strictly a creation of the settlement with the government, and the settlement agreement, in effect a written contract,

123. Corporate counsel were largely uneasy about having the Sentencing Guidelines formally address the issue of monitors. See Susan Hackett, Ass'n of Corporate Counsel, Testimony to the U.S. Sentencing Commission regarding proposals to amend Chapter 8 of the Guidelines Manual 3 (Mar. 17, 2010), available at http://www.uscc.gov/AGENDAS/20100317/Hackett_ACC_Testimony.pdf ("We believe that repeated insertion of a 'monitor option' into the Guidelines' Manual suggests that the Commission sees the practice as some kind of 'best' or common practice that judges should consider routinely, rather than the nuclear option that most folks who've ever worked in a monitor situation perceive it to be."); Gibson, Dunn & Crutcher LLP, *U.S. Sentencing Commission Amends Requirements for an Effective Compliance and Ethics Program* (Apr. 13, 2010), available at <http://www.gibsondunn.com/publications/pages/USSentencingCommissionAmendsRequirementsForEffectiveComplianceEthicsProgram.aspx> ("As for the second component (steps to prevent future similar criminal conduct), the Commission's original version of the amendment would have stated that '[t]he organization may take the additional step of retaining an independent monitor to ensure adequate assessment and implementation of the modifications' to the compliance program. The reference to monitors drew criticism for appearing to endorse and encourage a tool that rarely is necessary or appropriate.").

defines its terms. Theoretically, the settlement agreements tailor each monitorship as is necessary to assuage the government's concerns and to help ensure compliance with the FCPA. In reality, however, some basic parameters tend to frame FCPA settlement agreements. The DOJ's Morford Memorandum, which was issued in 2008, has lent some standardization to the FCPA monitorship process by providing useful guidance for prosecutors on the selection and use of monitors.

The Morford Memorandum explains that a monitor should be selected based on his or her "merits."¹²⁴ The selection process must ensure that (1) "a highly qualified and respected person or entity" is selected "based on suitability for the assignment and all of the circumstances," (2) "potential and actual conflicts of interest[]" are avoided, and (3) there is public confidence in the effectiveness of the monitorship.¹²⁵ To ensure that conflicts of interest do not arise, prosecutors are not permitted to veto a monitor candidate unilaterally, but instead must create a standing or ad hoc committee in the DOJ "component or office where the case originated to consider monitor candidates."¹²⁶ After the committee approves of a monitor candidate, the Office of the Deputy Attorney General must also approve the monitor.¹²⁷

To garner public confidence in the monitorship, the government should decline to accept a monitor if he or she has "an interest in, or relationship with, the corporation or its employees, officers or directors that would cause a reasonable person to question the monitor's impartiality."¹²⁸ In addition, the corporation must agree not to employ or become affiliated with the monitor for at least one year from the date the monitorship is terminated.

Once a monitor is selected, the following principles must be followed:

A monitor's primary responsibility should be to assess and monitor a corporation's compliance with those terms of the agreement that are specifically designed to address and reduce the risk of recurrence of the corporation's misconduct, including, in most cases, evaluating (and where appropriate proposing) internal controls and corporate ethics and compliance programs.

. . . .

In carrying out his or her duties, a monitor will often need to

124. Morford Memo, *supra* note 28, at 3.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

understand the full scope of the corporation's misconduct covered by the agreement, but the monitor's responsibilities should be no broader than necessary to address and reduce the risk of recurrence of the corporation's misconduct.¹²⁹

The Morford Memorandum, which addresses all compliance monitorships, not just those that involve FCPA enforcement, provides intentionally "flexible" guidelines.¹³⁰ This reflects the reality that monitorships will differ "[g]iven the varying facts and circumstances of each case."¹³¹ The past six years of FCPA settlements exemplify this anticipated diversity in the terms of monitorships. Of the thirty companies that received monitors in this time period as a result of an FCPA violation, surprisingly, no two formed settlement agreements with the government that had identical monitorship parameters. Terms vary as to the length of the monitorship, the process of selecting the monitor, the role of the monitor, and the scope of review. The agreements demonstrate that the requirements for FCPA compliance monitorship continue to evolve and that corporations have some flexibility in negotiating for terms that best fit their situations.

A. *Length of Monitorship*

The length of FCPA monitorships has varied greatly, lasting anywhere from a few months to four years. Over time, the length of monitorships has generally increased; the most common monitorship length is three years. Between 2004 and 2010, seventeen companies received three-year FCPA monitorships, six companies received monitorships of less than one year, two companies had monitorships of eighteen months, and two companies had a two-year monitorship.

In December 2008, the government settled with Siemens and required a four-year monitorship—the first FCPA monitorship of its kind.¹³² The agreement, however, contained a clause allowing the length of the monitorship to be decreased or increased depending on the results of periodic reports to the government. This flexibility in duration was also a first, and settlement agreements entered into after the Siemens agreement included language allowing the monitorship's timeframe to be decreased or increased if needed. The upside to this greater flexibility, of course, is the opportunity for the company to fix problems and exit the monitorship as soon as possible. Shortening the duration of the monitorship has the

129. *Id.* at 5-6.

130. *Id.* at 2.

131. *Id.*

132. The change starting with Siemens may be attributable to the apparent failures of the Aibel monitorship, which is discussed below.

potential of providing the company with large cost savings. If, however, the government determined that the monitor had not yet met with enough success, the company could be doomed to an expensive, seemingly never-ending monitorship.

A company negotiating a settlement agreement that requires retaining a monitor should strongly consider whether it wants language similar to that found in the Siemens agreement. It may be worthwhile to push for a term that includes the ability to curtail the monitorship's duration, without the corresponding opportunity to increase its length.

B. Number of Reports

The number of reports an FCPA monitor must provide to the government varies and is usually tied to the length of the monitorship. Most settlement agreements require an initial report in the monitorship's first year and annual follow-up reports. In fact, there were only two exceptions to this pattern between 2004 and 2010: Micrus and Diagnostic Products Corporation entered into settlement agreements that mandated biannual reports to the government, resulting in a total of six reports over three years. These two minor exceptions aside, the duration of the FCPA monitorship generally determines the number of reports.

If the length of the monitorship increases or decreases based on language similar to that found in the Siemens agreement, then the number of required reports will also change. In addition to formal reports, the Siemens agreement included language requiring informal meetings among the company, monitor, and government to ensure that the monitorship is progressing in a positive and productive manner. This extra "check" on the monitorship is valuable, and companies and regulators alike should strongly consider including it in settlement agreements.

C. Choosing a Monitor

As is discussed in the Morford Memorandum, the selection of a monitor requires cooperation between the government and the company. Only four FCPA settlement agreements formed between 2004 and 2010 specified who the monitor would be: Paradigm BV, Ingersoll-Rand, Siemens, and Daimler.¹³³ If the agreement does not provide the monitor's

133. See Deferred Prosecution Agreement, *supra* note 5 (specifying that Louis J. Freeh was proposed by Daimler and approved by the DOJ to serve as monitor); Deferred Prosecution Agreement, *United States v. Ingersoll-Rand Italiana SpA*, No. 1:07cr00294,

identity, it will require the company to obtain government approval of the company's chosen candidates—usually within sixty days of the agreement's finalization.

This practice, however, was recently lambasted by the district court judge overseeing the guilty plea of Innospec.¹³⁴ She expressed concern that the monitor was not specified in the agreement.¹³⁵ And although she ultimately accepted the plea, the judge informed the government that she wanted to review the person selected as monitor, as well as the monitor's work plan.¹³⁶ The judge's reaction was unexpected, and it is unclear what effect this event may have on future monitorship agreements.¹³⁷ To date, FCPA settlement agreements have only required a monitor's selection and

(D.D.C. Nov. 14, 2007), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/docs/ingersollrand-deferred-agree.pdf> [hereinafter *Ingersoll-Rand Deferred Prosecution Agreement*] (specifying that Jeffrey M. Kaplan was retained as an outside consultant to review the compliance program of Ingersoll and its subsidiaries); Letter from Steven A. Tyrrell et al., Dep't of Justice, to Scott W. Muller and Angela T. Burgess, Davis Polk & Wardwell (Dec. 15, 2008), *available at* <http://www.justice.gov/opa/documents/siemens.pdf> (specifying that Dr. Theo Waigel would serve as an independent monitor); Letter from Steven A. Tyrrell, Chief, Dep't of Justice, to Saul M. Pilchen, Skadden, Arps, Slate, Meagher & Flom LLP, at app. C (Sept. 21, 2007), *available at* <http://judiciary.house.gov/hearings/pdf/deferredprosecution/Paradigm070921.pdf> [hereinafter *Paradigm Deferred Prosecution Agreement*] (specifying that the law firm of Skadden Arps Slate Meagher and Flom LLP was retained as outside compliance counsel).

134. See Christopher M. Matthews, *Judge Blasts Compliance Monitors at Innospec Plea Hearing*, MAIN JUSTICE, Mar. 18, 2010 *available at* <http://www.mainjustice.com/2010/03/18/innospec-pleads-guilty-fcpa-charges/> (discussing U.S. District Judge Ellen Segal Huvelle's dissatisfaction with the Innospec agreement and critique of independent compliance monitors in general).

135. See *id.* ("Huvelle was disturbed that the monitor was not named in the plea agreement . . . 'I want to know how this is going to work, I have an obligation to the public to find out,' she said.").

136. *Id.*

137. The judge's reaction may reflect the very public controversy and ensuing criticism surrounding the (non-FCPA) monitorship of former Attorney General John Ashcroft, whose engagement, reportedly worth up to \$52 million, resulted from a no-bid referral from a former colleague at the Department of Justice. See *Transparency and Integrity in Corporate Marketing: Hearing Before the Subcomm. On Commercial and Administrative Law of the H. Comm. On the Judiciary*, 111th Cong. 1 (2009) (statement of Rep. Steve Cohen) *available at* http://judiciary.house.gov/hearings/printers/111th/111-64_53640.PDF ("One notorious example, which we explored in our previous hearings, was the Zimmer case. That is when Caesar's wife was very disturbed. U.S. Attorney then, now governor-to-be Christopher Christie, selected former Attorney General John Ashcroft to serve as a corporate monitor, for which Mr. Ashcroft collected a fee of up to or in the neighborhood of or resembling or within the margin of error of \$52 million. A tidy sum, it could pay for some drycleaning for Mrs. Caesar's robes."); Nina Totenberg, *House Panel Questions Ashcroft on No-Bid Contract*, NPR: MORNING EDITION, Mar. 12, 2008, *available at* <http://www.npr.org/templates/story/story.php?storyId=88132206&ft=1&f=1006> (discussing the House Judiciary Committee's questioning of former Attorney General John Ashcroft about a no-bid contract that his consulting firm received from a former colleague in the Justice Department).

work plan to be approved by the government; they have not included language mandating court approval as well. Adding a layer of judicial scrutiny could increase costs, as the monitor and the company would need to make court appearances and respond to the judge's requests, which would most likely be more unpredictable than those of the regulators, who regularly handle FCPA cases. On the other hand, courts could theoretically serve as a check on the government and even an out-of-control monitor.

Other factors related to the selection of monitors are much less standardized and include who selects the monitor and how the monitor is ultimately chosen, whether the same person serves as the monitor for related DOJ and SEC settlements, and how to handle a dispute between the monitor and the company. Typically, the government has allowed companies to identify and propose monitorship candidates. In some agreements, the company must submit a pool of acceptable candidates, leaving the government to select the monitor from that pool or request additional candidates.¹³⁸ In other instances, the government allowed the company to continue presenting prospective monitors to the government until agreement on a mutually acceptable candidate.¹³⁹ Occasionally, the government selected the monitor for the company, but the Morford Memorandum has presumably put an end to that practice.¹⁴⁰ The DOJ recently exercised its authority to reject a monitor picked by a corporation. As discussed above, in March 2010, BAES entered into a settlement agreement with the DOJ that required the imposition of a monitor.¹⁴¹

138. *E.g.*, Plea Agreement, *United States v. Kellogg Brown & Root, LLC*, No. H-09-071, (S.D. Tex. Feb. 11, 2009), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/docs/kbr-plea-agree.pdf> [hereinafter *Kellogg Brown & Root Plea Agreement*].

139. *E.g.*, Letter from Steven A. Tyrrell, Chief, Fraud Section, Dep't of Justice, to Gregory S. Bruch, Willkie Farr & Gallagher LLP., at app. C (June 3, 2008), *available at* <http://www.corporatecrimereporter.com/documents/FaroAgreement.pdf>. It appears to have taken Faro and the DOJ nearly two years to agree on a monitor. Mike Koehler, *Faro's Monitor – Late and Expensive*, FCPA Professor Blog (Dec. 27, 2010, 5:21 AM), *available at* <http://fcpaprofessor.blogspot.com/2010/12/faros-monitor-late-and-expensive.html>.

140. *See, e.g.*, Deferred Prosecution Agreement at 10, *United States v. York Int'l Corp.*, No. 07-CR-00253 (D.D.C. Oct. 15, 2007), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/docs/10-15-07york-agree.pdf> [hereinafter *York Int'l Deferred Prosecution Agreement*] (allowing the DOJ to choose the monitor if the DOJ and company could not decide on a mutually agreeable monitor within thirty days); Deferred Prosecution Agreement at 12, *United States v. Baker Hughes, Inc.*, No. 07-CR-130 (S.D. Tex. Apr. 11, 2007), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/docs/04-11-07bakerhughes-prosecution.pdf> [hereinafter *Baker Hughes Deferred Prosecution Agreement*] (allowing the DOJ to choose the monitor if the DOJ and company could not decide on a mutually agreeable monitor within thirty days).

141. Christopher M. Matthews, *Justice Department Opposed BAE Monitor Picks*, MAIN

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Under the terms of the agreement, BAES had ninety days in which to hire a monitor, but the DOJ rejected the proposed candidates because they “appeared to lack experience establishing or monitoring the effectiveness of compliance programs,” in addition to other perceived weaknesses.¹⁴² Regardless of the process involved, the government may veto the chosen monitor, and the court may, as is evidenced by the agreement with Innospec, also weigh in on the selection.¹⁴³

Frequently, both the SEC and the DOJ have required the imposition of a monitor for related FCPA conduct. The agreements with each agency, however, typically employ different language to impose the requirement. Strikingly, few FCPA settlement agreements include language requiring that the monitor be the same individual for both the DOJ and SEC settlements. In fact, only two companies entered into agreements between 2004 and 2010 that indicate that the DOJ and SEC are to have the same monitor: Schnitzer Steel Industries, Inc. (“Schnitzer Steel”) and InVision. It is possible that, in the absence of such of provision, the SEC and DOJ may not agree on a prospective monitor. But because the agencies usually coordinate so closely on FCPA enforcement, this is unlikely.¹⁴⁴

One wrinkle in FCPA monitor selection has been the increasing frequency with which the government imposes monitors on non-U.S. offenders. Indeed, FCPA settlements with non-U.S.-based multinational corporations implicate a range of thorny conflict of law questions. The FCPA settlement with Technip, for instance, mandates that the monitor be a French citizen, as French criminal law prohibits a foreign investigation in France.¹⁴⁵ Similarly, Alcatel-Lucent, which publicly announced its pending FCPA settlement, agreed with the U.S. government that the monitor must

JUSTICE, June 3, 2010, *available at* http://www.mainjustice.com/2010/06/03/justice-department-opposed-bae-monitor-picks/print/#comments_controls.

142. *Id.* Although BAES’s alleged conduct included actions that could be deemed violative of the FCPA, the company did not technically plead guilty to violations of the FCPA.

143. Letter from Kathleen M. Hamann, Dep’t of Justice, to Laurence Urgenson, Kirkland & Ellis LLP 8 (Mar. 5, 2010), *available at* <http://fcpa.shearman.com/files/b62/b621ad75bdd7f13a615b7d90a994e415.pdf?i=0b2e9227a0b54ac8bd3942b083fa9605>.

144. The two agencies did, however, diverge in handling the recent FCPA enforcement actions against Alliance One International. The DOJ filed charges in the District Court for the Eastern District of Virginia; the SEC pursued the case in federal court in Washington, D.C. Press Release, Dep’t of Justice, Alliance One International Inc. and Universal Corporation Resolve Related FCPA Matters Involving Bribes Paid to Foreign Government Officials (Aug. 6, 2010), *available at* <http://www.justice.gov/opa/pr/2010/August/10-crm-903.html>; Complaint, SEC v. Alliance One International Inc., Case No. 1:10-cv-01319 (D.D.C. Aug. 6, 2010), *available at* <http://www.sec.gov/litigation/complaints/2010/comp21618-alliance-one.pdf>. This means that different judges will oversee the company’s monitorship.

145. Technip Deferred Prosecution Agreement, *supra* note 122, at Attachment D.

be French.¹⁴⁶ Finally, the Siemens FCPA settlement explicitly provides for a German monitor, Dr. Theo Waigel, former German Minister of Finance, supported by independent U.S. counsel.¹⁴⁷ In contrast, other Europe-based multinationals, like Daimler and Statoil ASA (“Statoil”), opted for U.S.-based monitors.¹⁴⁸

Finally, FCPA settlement agreements differ in the procedures outlined for resolving disputes between the company and the monitor regarding the monitor’s recommendations to the company for compliance program improvement. Ten FCPA settlement agreements formed between 2004 and 2010 required the company to submit to the monitor’s decision if the company and monitor are unable to reach an agreement within a specified amount of time. This language leaves the company at the mercy of the monitor. Four companies were required to notify the government of the dispute without having a discussion of how the dispute would be resolved. Ten companies, nine of which were Siemens and the eight cases requiring monitors that settled after Siemens, specified that the government would settle disputes between the company and monitor. One company was required to consult France’s Central Service for the Prevention of Corruption (“SCPC”), a department attached to the French Ministry of Justice.¹⁴⁹ If after consultation with the SCPC, the company and monitor failed to reach agreement, the monitor was required to take into consideration the view of the SCPC and make the ultimate decision as to whether the company should adopt the monitor’s recommendation.

Language similar to that found in the Siemens agreement is the most beneficial to the company. It allows the company to present alternatives to the monitor’s recommendations and ensures that the monitor is held accountable by the government. It also enhances the probability that the recommendations will ultimately serve the government’s goals. The DOJ

146. *Alcatel-Lucent Consolidated Financial Statements at December 31, 2009*, at 114 (Nov. 2, 2010), available at http://www1.alcatel-lucent.com/4q2009/pdf/Consolidated-Financial-Statements-2009-GB11_feb10.pdf.

147. Letter from Steven A. Tyrrell et al., Dep’t of Justice, to Scott W. Muller and Angela T. Burgess, Davis Polk & Wardwell (Dec. 15, 2008), available at <http://www.justice.gov/opa/documents/siemens.pdf>.

148. Daimler retained former FBI Director, Judge Louis Freeh; Statoil selected F. Joseph Warin. Daimler Deferred Prosecution Agreement, *supra* note 5, at 10; Statoil, Annual Report (Form 20-F) (Mar. 26, 2010), available at <http://www.statoil.com/AnnualReport2009/en/Sustainability/Society/EthicsAndTransparency/Pages/HortonCaseClosedContinuedFocusOnEthicsAndAnti-Corruption.aspx>.

149. Deferred Prosecution Agreement, *United States v. Technip*, No. H-10-439, (D.D.C. June 28, 2010), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/docs/06-28-10-technip-agreement.pdf> [hereinafter *Technip Deferred Prosecution Agreement*].

recently issued additional guidance to prosecutors via the Grindler Memorandum regarding the drafting of settlement agreements, stating that “an agreement should explain what role the Department could play in resolving any disputes between the monitor and the corporation, given the facts and circumstances of the case.”¹⁵⁰ Thus, future FCPA settlement agreements should resemble the Siemens agreement in this respect.

D. Attorney-Client Privilege

Companies required to retain monitors today typically agree *not* to enter into an attorney-client relationship with the monitor. This was not always the case. Some earlier agreements did not strictly prohibit the company from forming an attorney-client relationship with the monitor, but any attorney-client privilege had to be waived with respect to the agency with which the company settled.¹⁵¹ Today, however, the vast majority of agreements expressly forestall the creation of an attorney-client relationship.¹⁵² The most recent agreements simply state that there is no such relationship.¹⁵³ Because this language is so explicit, companies may find it extremely difficult to assert attorney-client privilege if an outside party attempts to gain access to information communicated by the company to the monitor.

Regardless of the language used, the lack of an attorney-client relationship between the monitor and the company can pose a significant risk of further legal exposure for the company. Because the monitor is independent, actively reviews the company’s practices, and reports to the

150. Memorandum from Gary G. Grindler, Acting Deputy Attorney General, to Heads of Department Components United States Attorneys, on Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (May 25, 2010), *available at* <http://www.justice.gov/dag/dag-memo-guidance-monitors.html>.

151. *See, e.g.*, Deferred Prosecution Agreement at 7, United States v. Monsanto Co., 1:05-cr-00008 (D.D.C. Jan. 6, 2005), *available at* <http://www.corporatecrimereporter.com/documents/monsantoagreement.pdf> [hereinafter Monsanto Deferred Prosecution Agreement] (“To the extent that . . . the attorney-client privilege could conceivably be applicable, it shall be a condition of that retention that Monsanto Company shall waive . . .”).

152. The Statoil agreement, however, acknowledged that the monitor would maintain the company’s trade secrets and other confidential information in conformity with Norwegian law. Deferred Prosecution Agreement at ¶ 12, United States v. Statoil, ASA, No. 06-cr-00960 (S.D.N.Y. Oct. 12, 2006) [hereinafter Statoil Deferred Prosecution Agreement], *available at* <http://www.abanet.org/intlaw/fall07/materials/StatoilDeferredProsecutionAgreement.pdf>.

153. *See, e.g.*, Kellogg Brown & Root Plea Agreement, *supra* note 138; Plea Agreement, United States v. Control Components, Inc., SA CR No. 09-162 (C.D. Cal. July 24, 2009) *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/control-components.html> [hereinafter Control Components Plea Agreement].

government, the monitor might discover and reveal previously undisclosed wrongdoing. Any such wrongdoing may or may not be FCPA related, but if found by a monitor, it can lead to further scrutiny by the government and additional penalties. For example, in May 2008, Willbros Group, Inc. (“Willbros”) entered into FCPA settlement agreements with the DOJ and SEC.¹⁵⁴ On May 20, 2010, Willbros filed an 8-K with the SEC, which stated that its monitor’s recent report to the DOJ

sets out for the DOJ’s review the monitor’s findings relating to incidents that came to the monitor’s attention during the course of his review which he found to be significant, as well as recommendations to address these incidents. We and the monitor have met separately with the DOJ concerning certain of these incidents. The monitor, in his report, did not conclude whether any of these incidents or any other matters constituted a violation of the FCPA. We do not believe that any of these incidents or matters constituted a violation of the FCPA based on our own investigations of the incidents and matters raised in the report. Notwithstanding our assessment, the DOJ could perform further investigation at its discretion of any incident or matter raised by the report.¹⁵⁵

The implications of this lack of attorney-client privilege and how companies may address it are discussed further in Part V.D.

E. Conflict of Interest

The monitor is supposed to perform an independent review of the company’s FCPA compliance policy and procedures. One of the reasons that FCPA settlement agreements forbid an attorney-client relationship is that it could undermine the monitor’s independence. Similarly, it is important that the company not retain the monitor as legal counsel immediately after the monitorship concludes. Even if doing so would not actually undermine the monitor’s independence during the course of the monitorship, the public’s perception of the effectiveness of monitors could be diminished if companies routinely hired monitors upon their monitorships’ conclusion. Because of this, almost every company entering into an FCPA monitorship has been required to agree to a provision

154. Willbros Deferred Prosecution Agreement, *supra* note 105.

155. Willbros Group, Inc., Annual Report (Form 8-K), Exhibit 99.2: Risk Factors (May 20, 2010).

prohibiting it from affiliating with or hiring a monitor for one or two years after the monitorship term expires. Only five companies entered into agreements without this cooling-off-period language between 2004 and 2010. The current trend is for the recusal period to last for one year.¹⁵⁶

F. Language Describing Monitor's Responsibility

FCPA monitors typically develop a work plan and then issue recommendations to the company throughout the course of executing that plan. The language used in describing the monitor's responsibilities regarding the recommendations he or she must issue varies only slightly from agreement to agreement, but those minor variations can sometimes have significance. The following represents the types of language contained in agreements. Recommendations that

- are "reasonably designed" to achieve;
- will "ensure";
- are "reasonably designed to ensure";
- are "necessary and appropriate" to achieve;
- are "appropriately designed and implemented to ensure"; or
- are "appropriately designed to accomplish" FCPA compliance.¹⁵⁷

Note that the language choice leads to very different base-line standards for the monitor's recommendations. Recommendations that are "reasonably designed" to achieve FCPA compliance will likely be less severe than those that are given to "ensure" compliance. "Ensuring" compliance is an elevated standard and may result in the company being forced to adhere to recommendations that will severely burden aspects of the company's business. Companies should carefully negotiate this type of

156. See, e.g., Plea Agreement at app. C, ¶ 3, *United States v. Universal Leaf Tabacos Ltda.*, No. 3:10-cr-225 (E.D. Va. Aug. 6, 2010), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/universal-leaf/08-06-10universal-leaf-sentencing-memo.pdf> ("The Company agrees that it will not employ or be affiliated with the Monitor for a period of not less than one year from the date the Monitor's work has ended."); Letter from Denis J. McInerney, Dep't of Justice, to Edward J. Fuhrapp, Hunton and Williams LLP. C, ¶ 4 (Aug. 6, 2010), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/docs/08-06-10alliance-one-mpa.pdf> ("Alliance agrees that it will not employ or be affiliated with the Monitor for a period of not less than one year from the date the Monitor's work has ended.").

157. See, e.g., Willbros Deferred Prosecution Agreement, *supra* note 105; Agreement between Dep't of Justice and Micrus (Feb. 28, 2005), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/docs/02-28-05micrus-agree.pdf>; Cease-and-Desist Order, Westinghouse Brake Tech. Corp., Exchange Act Release No. 57333, Accounting And Auditing Enforcement Release No. 2785 (Feb. 14, 2008), available at <http://www.sec.gov/litigation/admin/2008/34-57333.pdf>; Ingersoll-Rand Deferred Prosecution Agreement, *supra* note 133; Monsanto Deferred Prosecution Agreement, *supra* note 151.

language to make sure reasonable expectations are established.

G. Differences in Monitorship Requirements in DOJ and SEC Settlements

If a company is settling with both the DOJ and SEC, it will have to negotiate independently with each agency. In the past, this circumstance has often resulted in two settlement agreements that include different requirements. For example, Baker Hughes, Inc. (“Baker Hughes”) entered into a DPA with the DOJ and submitted to the entry of a Final Judgment to settle with the SEC.¹⁵⁸ The DPA and SEC Final Judgment, however, risked conflicts for the company. The DPA specified the length of the monitorship as thirty-six months, but the SEC agreement did not include this information.¹⁵⁹ The DOJ required three reports—one initial review within 120 days of the monitor’s retention, a follow-up review one year after the initial review, and another follow-up review a year from the first follow-up.¹⁶⁰ The SEC required one report—150 days after the monitor’s retention.¹⁶¹ The DPA stated that if the DOJ and Baker Hughes could not agree upon a monitor within thirty days, the DOJ “in its sole discretion” would select the monitor. This did not, however, guarantee that the DOJ’s choice would be acceptable to the SEC, which required its own approval of the monitor.¹⁶² The wording of these agreements could have resulted in Baker Hughes having to retain two monitors. Even a single monitor may have needed to issue two separate work plans.

This is in stark contrast to the FCPA settlements that Schnitzer Steel entered into with the DOJ and SEC.¹⁶³ Unlike most FCPA agreements negotiated with multiple agencies, Schnitzer Steel’s agreements closely mirror each other. The DPA specified that the Monitor should be the same

158. Baker Hughes Deferred Prosecution Agreement, *supra* note 140; Final Judgment, SEC v. Baker Hughes Inc., No. H-07-1408 (S.D. Tex. May 1, 2007) [hereinafter Baker Hughes Final Judgment].

159. Baker Hughes Deferred Prosecution Agreement, *supra* note 140, at 12.

160. *Id.* at 15-17.

161. Baker Hughes Final Judgment, *supra* note 158, at 7.

162. *Id.* at 5.

163. Cease-and-Desist Order, Schnitzer Steel Industries, Inc., Exchange Act Release No. 54606, Accounting and Auditing Enforcement Release No. 2493 (Oct. 16, 2006), available at <http://www.sec.gov/litigation/admin/2006/34-54606.pdf> [hereinafter Schnitzer Steel Cease-and-Desist Order]; Deferred Prosecution Agreement, Schnitzer Steel Industries, Inc. (Oct. 16, 2006), available at http://www.sec.gov/Archives/edgar/data/912603/000107261306002130/exh10-I_14656.htm [hereinafter Schnitzer Steel Deferred Prosecution Agreement].

person appointed pursuant to an agreement with the SEC.¹⁶⁴ Both the DPA and SEC Order (1) stated that the monitor's reports should go to both agencies,¹⁶⁵ (2) required Schnitzer Steel to retain a monitor for thirty-six months,¹⁶⁶ (3) required three reports from the monitor,¹⁶⁷ (4) explained that the monitor was to assess and make recommendations "reasonably designed to improve Schnitzer Steel's programs, policies, and procedures for ensuring compliance with the FCPA" and other applicable laws,¹⁶⁸ and (5) dictated that the company could not hire the monitor for two years after it completed its work under the DPA and SEC Order.¹⁶⁹

H. Outliers

Several FCPA settlement agreements formed between 2004 and 2010 fall outside the norm. Two, in particular, are worth highlighting. In September 2007, Paradigm BV ("Paradigm") entered into an NPA with the DOJ.¹⁷⁰ The NPA mandated probably the least onerous monitorship terms ever imposed by an FCPA settlement. It specifically named the compliance monitor—who, ironically, was the company's defense counsel—but did not include typical FCPA monitorship language.¹⁷¹ In fact, the text outlining Paradigm's responsibilities under the monitorship fill only about half of a sheet of paper.¹⁷² This stands in contrast to other FCPA agreements that expend multiple pages to define the imposed monitorship. The length of the monitorship was eighteen months—also unusual—and the agreement did not explicitly specify the requirements for reporting to the DOJ.¹⁷³ The only relevant term similar to the standard FCPA settlement agreement was the requirement that the monitor "[r]ecommend, where necessary and appropriate, enhancements to Paradigm's compliance code, policies and procedures as they relate to the FCPA."¹⁷⁴

The Aibel Group's FCPA settlement represents another outlier. The company entered a guilty plea after it failed to adhere to the terms of its DPA.¹⁷⁵ The DPA required Aibel to (1) establish a Compliance Committee

164. Schnitzer Steel Deferred Prosecution Agreement, *supra* note 163, at 9.

165. *Id.* at 12; Schnitzer Steel Cease-and-Desist Order, *supra* note 163, at 6.

166. Schnitzer Steel Deferred Prosecution Agreement, *supra* note 163, at 3, 5.

167. *Id.* at 6-7, 11.

168. *Id.* at 6, 11-12.

169. *Id.* at 8, 17.

170. Paradigm Deferred Prosecution Agreement, *supra* note 133.

171. *Id.* at app. C.

172. *Id.* at 2.

173. *Id.* at 1.

174. *Id.*

175. Plea Agreement at 1, United States v. Aibel Group Ltd., No. CR H-07-005 (S.D. Tex. 2008), available at http://www.fcpaenforcement.com/documents/document_detail.asp

of its Board of Directors, (2) engage outside compliance counsel to monitor its duties and obligations under the DPA, and (3) establish and effectively implement a compliance program with respect to the FCPA.¹⁷⁶ The guilty plea noted that Aibel “committed substantial time, personnel, and resources to meeting the obligations of the DPA.”¹⁷⁷ Despite that fact, [Aibel] failed to meet its obligations.”¹⁷⁸ Aibel pleaded guilty and paid a \$4.2 million fine,¹⁷⁹ which, from a cost perspective, is probably a better deal than living with a monitor for another year. On its own, the facts surrounding this plea would qualify Aibel Group as a company falling outside the typical route of companies required to implement monitorships. But what is arguably even more interesting is the changes in subsequent agreements after Aibel’s guilty plea.

The companies that entered into settlement agreements after Aibel pleaded guilty had strikingly different language in their agreements. First, the agreements changed the handling of disputes between the company and the monitor regarding the monitor’s recommendations. Instead of deferring to the monitor, the disputes are now referred to the appropriate agency’s staff, and the agency makes the determination as to whether the company should abide by the monitor’s recommendation. Further, pending the agency’s determination, the company is no longer required to implement any contested recommendations. In addition, the agreements contain a provision requiring the company and the agency to meet at least annually to discuss the monitorship and any suggestions, comments, or improvements the company may wish to propose. These changes may indicate that the relationship between Aibel and its monitor became untenable.

IV. WHAT AN EFFECTIVE FCPA MONITORSHIP LOOKS LIKE

Having described the nature of FCPA monitorships and examined how they have varied, the remainder of this article turns to a discussion of how they can work better. Volumes have been written on virtually all professional activities that lawyers may undertake. Indeed, many practitioners can offer lengthy advice on what an effective deposition, oral argument, brief, or internal investigation looks like. This is certainly true with regard to FCPA enforcement generally and for designing effective

?ID=5488&PAGE=2.

176. *Id.* at 10.

177. *Id.*

178. *Id.*

179. *Id.* at 9.

compliance programs to avoid FCPA violations. There is, however, very little guidance on how to conduct an effective monitorship.

One only needs to look at the very public questioning of now-Deputy Attorney General Jim Cole's performance as AIG compliance monitor to see that even extremely knowledgeable commentators may not always have a clear view of the monitor's role.¹⁸⁰ The benchmark for any monitor's success is fulfilling the terms of the applicable settlement agreements. And yet, in that particular case, no critics actually attempted to measure Mr. Cole's performance against his mandate. As the Morford Memorandum clearly states, "[a] monitor's primary responsibility should be to assess and monitor a corporation's compliance with those terms of the [settlement] agreement that are specifically designed to address and reduce the risk of recurrence of the corporation's misconduct"¹⁸¹ In other words, Mr. Cole's success or failure turns on meeting the four corners of the settlement agreement between AIG and the government, not whether AIG subsequently had financial troubles.

This is also true of FCPA monitorships. Success or failure hinges on fulfilling the monitor's mandate. Yet, there are certainly better and worse ways to approach the core tasks that generally constitute the FCPA monitorship. As shown above, the mandates for FCPA monitorships are sufficiently similar such that practitioners in this field can begin to sketch out some best practices. This section attempts to start that conversation.

A. *The Settlement Agreements Constitute the Monitor's Bible*

The cardinal rule for any monitor is that he or she must, at all times, abide by the terms of the agreements with the DOJ and SEC. As it is the deal for which the company bargained, it is incumbent upon all actors to honor this contract and for the monitor to appreciate that his or her very existence is a function of the settlements. The settlement agreements dictate many of the key components of the specific FCPA monitorship: the length of the monitorship, when and for how long the monitor will conduct reviews, any certifications that a monitor may have to make, the nature and general structure of fieldwork, and any work product that the monitor must submit to the government and the company.

In short, the settlement agreements are the monitor's bible. But, as with biblical texts, exegeses can differ, and the monitor will certainly at

180. See, e.g., Sue Reisinger, *It's Broken: AIG's Federal Monitor Failed to Curtail Bad Behavior. Is it Time to Reexamine the Program?*, CORPORATE COUNSEL (July 1, 2009), available at <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202431504805> (discussing the challenges faced by AIG's DOJ-imposed monitor and questioning the value of the monitor program in light of its massive failure).

181. Morford Memo, *supra* note 28, at 5.

times disagree with the company. Currently, FCPA settlements normally provide that any disputes are resolved by the government,¹⁸² but monitors and companies alike should avoid resorting to this. Successful monitorships run on trust and cooperation. The minute a dispute is appealed to the SEC or DOJ, the relationship may be irrevocably damaged. Monitors and companies should therefore try to iron out any differences and align their understandings of the monitorship mandate well in advance of any fieldwork or report writing.

The best place to do this is in the monitor's work plan. Just as a legal opinion starts with a statute and builds out from the text, so too does an effective work plan clearly construct the monitor's reasoning for the company, based on the settlement. To avoid squabbles in front of the regulators, the monitor should allow the company to review and comment on the draft work plan to be sure that both sides understand how the monitor interprets his or her mandate. Once both sides agree, the mandate discussion in the work plan can serve as a gloss on the settlement agreement to be applied in subsequent years of the monitorship.

One difficulty that the company and the monitor may face during these early goings is that the monitor only has the text of the settlement agreements to interpret. The company, on the other hand, will inevitably have the thrust and parry of the lengthy negotiations coloring its view of the ultimate agreements. Despite protestations from the company, the monitor cannot allow any parol evidence from the negotiations to influence his or her view of the settlement agreements. It is, after all, unfair to allow the company to change the monitor's interpretation without similar evidence from the government. If, however, the government and the company agree that a drafting error obscures the true intention behind the settlement agreements, the monitor could adjust his or her approach. The alteration of a monitorship based on settlement agreements approved by a court would also require judicial sign-off, of course.

The terms of the settlement agreement not only empower monitors. They also serve to protect the company from the monitor's overreach. For instance, the time period provided for the initial and follow-up reviews should limit any impulses that the monitor may have to conduct a year-round review. Further, FCPA settlements sometimes provide explicitly that the monitor need not reinvestigate the old conduct that led to the settlement.¹⁸³ This restricts the monitor and his or her team to testing and

182. See, e.g., Control Components Plea Agreement, *supra* note 153; Kellogg Brown & Root Plea Agreement, *supra* note 138.

183. See, e.g., Letter from Paul E. Pelletier, Dep't of Justice, to Lawrence Bryne,

evaluating, not investigating. The company and the monitor should both rigorously adhere to the time commitments in the settlement document and avoid mission creep in the duties of the monitor.

B. The Monitor's Work Must Reflect Knowledge of the Business

It is easy for a monitor to focus on a company's compliance program to the exclusion of all else. The compliance program is, after all, the monitor's core concern. The monitor will almost certainly have a strong background in the area of internal compliance programs, so he or she will focus like a laser on the program and how it can be improved. Comparing the company's compliance program to past programs the monitor has worked with or designed is relatively straightforward. More challenging, however, is understanding the business that the controls seek to safeguard. Although obtaining such an understanding can be tedious and difficult, it is essential.

There are a number of reasons why knowledge of the business is so important. First, the monitor cannot begin to develop an initial risk profile for the company if he or she fails to learn the business. The monitor's fieldwork should reflect the risks that attend the business. The intersection of internal controls and difficult business environments that potentially expose the company to corruption should consume much of the monitorship team's initial focus. Without understanding the business, developing this focus is virtually impossible. Second, the monitor cannot effectively evaluate the controls unless he or she knows how they work with the business. Indeed, the company may boast controls that function perfectly but fail to respond fully to the *actual* risks faced by the business. Without understanding the company's business, the monitor will never detect this problem.

Finally, an understanding of the business is essential for crafting

Pedersen & Houpt (Feb. 4, 2010), *available at* <http://www.justice.gov/criminal/pr/documents/03-01-10bae-plea-%20agreement.pdf> ("In order to conduct an effective initial review of the Anti-bribery and Export Control Policies and Procedures, the Monitor's initial work plan shall include such steps as are reasonably necessary to develop an understanding of the facts and circumstances surrounding any violations that may have occurred, but the parties do not intend that the Monitor will conduct his or her own inquiry into those historical events."); *see also* Siemens Final Judgment, *supra* note 94, at 8 ("The Monitor's work plan for the initial review shall include such steps as are reasonably necessary to conduct an effective initial review in accordance with the Mandate, including by developing an understanding, to the extent the Monitor deems appropriate, of the facts and circumstances surrounding any violations that may have occurred before the entry of the Final Judgment, but in developing such understanding the Monitor is to rely to the extent possible on available information and documents provided by Siemens, *and it is not intended that the Monitor will conduct his or her own inquiry into those historical events.*") (emphasis added).

workable recommendations. During the course of the monitorship, the monitor and his or her team will develop an in-depth understanding of the company's anti-corruption compliance program. This is, of course, the team's main activity. But without an appreciation for what the business does and how it does it, the monitor's work may consist of mere abstractions. Often what appear to be ideal solutions flounder when judged against the realities of the business, existing controls, and management structures. And anti-bribery controls should secure the business without fundamentally changing the way in which the business operates. Indeed, substantive changes to the business to address a compliance problem, although sometimes necessary, are a last resort. Whenever possible, any recommendations should work within the current size and structure of the company's existing compliance program, and the monitor's recommendations should be practical given the existing organization, its business model, and its culture.

C. Detailed Work Plans Establish Transparency and Trust

An effective work plan for an FCPA monitorship establishes in sufficient detail the contours of the monitor's work for that review period. Although the monitor should build in contingencies and must not slavishly follow the plan in the face of significantly changed circumstances, the monitor as much as possible should endeavor to execute the work plan as drafted. The monitorship will already be traumatic for the company, and the uncertainty of a vague or unfocused work plan only will exacerbate institutional unease. Further, it is important that the U.S. regulators have a clear view of what precisely the monitor will do. A detailed work plan gives the government and company alike a chance to comment.

Importantly, it is impossible to construct a detailed work plan for the initial monitorship review without some advance fieldwork. The company may allow its key compliance and business employees to present to the monitor and his or her team pertinent information on the company and the compliance program. By collecting and synthesizing such background information, the monitor can craft a work plan that appropriately targets the review and minimizes any dead ends or fruitless exercises. The production of the detailed work plan following these information sessions then gives the company a chance to correct any misunderstandings or erroneous conclusions on the part of the monitor. By hiding the ball from the company or the government with a vague work plan, the monitor may create more work, engender mistrust, and waste the company's resources.

A sufficiently detailed work plan will address all of the core activities

that the monitor anticipates in that year. It will typically include the following:

- An overview of the monitor's role and objectives, rooted in the text of the settlement agreements, to ensure that all parties understand how the monitor views his or her mandate;
- A proposed timeline for the monitorship based on the settlement agreements, including the date on which the monitor will submit a final report to the government and company;
- A description of relevant compliance policies and procedures to evaluate;
- A list of relevant documents to review;
- A list of interviewees (company employees and others, like independent directors, external auditors, ombudsmen, and maybe even external vendors);
- A list of proposed site visits (with proposed dates); and
- A list of tests, studies, and analyses to conduct and how they will be conducted (including whether external or internal audit resources will be utilized).

The more detailed the work plan is, the easier the process will be for the company, and the more useful it will be for the monitor as a map of the necessary work. It is important, however, that the work plan genuinely reflect the tasks reasonably anticipated and that the monitor and his or her team strive to adhere to it at all times. This includes meeting the proposed dates for completion of fieldwork and submission of reports to the company and the U.S. government. Delays in producing annual reports may occur due to unanticipated events beyond the monitor's control. But even under such trying circumstances, the monitor should try to produce the report on time. Failure to do so can sap credibility from the monitorship, complicate the company's efforts to implement recommendations in a timely manner, and engender cynicism about the process.

D. The Monitor's Report Should Give the Parameters of the Review, Along With the Recommendations

An FCPA compliance monitor's initial written report should detail the scope of the review, the monitor's evaluation of the company's compliance program, and any recommended enhancements to the compliance program.

In terms of scope, it is important that the company and the U.S. regulators understand not only the areas of the company (geographic and otherwise) on which the monitor concentrates, but the monitor's methodology as well. For instance, if the monitor wishes to engage an external auditor to assist him or her in conducting tests, studies, or analyses of key controls, he or she should use the work plan and then the report to explain the reason for this (and why it is necessary to use an external auditor, instead of in-house resources). When detailing the monitor's evaluation, the report should catalogue all of the work that the monitor and his or her team performed and explain why this work was sufficient to gain the information needed to arrive at substantive conclusions. In light of this, it is important that, during fieldwork, the monitor's team carefully documents all of its activities. Among the review metrics that this portion of the initial report should provide are the number of employees interviewed and their corresponding functions and levels, the number and nature of the site visits conducted, and any past or external work relied upon to reach conclusions (like past compliance evaluations, anti-bribery risk assessments, or auditor reports). Finally, and perhaps most importantly, the initial report must provide the recommendations. The recommendations are the only mandatory action items for the company that spring from the report. Therefore, in addition to vetting all recommendations fully in advance with the company (and allotting time in the work plan to do so), the monitor should present in the text of the report a sufficient evidentiary basis for each recommendation. The monitor should seek the utmost clarity in explaining the contours of, rationale for, and evidence supporting a set of concrete, specific, and implementable recommendations.

E. Cooperation Is Vital

Finally, the monitor must strive whenever possible to have a cooperative—not an adversarial—relationship with the company. The goal should be to add real value to the organization by enhancing its compliance program. To achieve this goal, the monitor must ensure that the company, including the board of directors and senior management, supports the monitor's work. In addition, the monitor should identify an individual or committee with knowledge of the corporation's compliance policies and procedures to serve as the monitor's primary point of contact and to assist with each review. The goal should be no surprises for either the monitor or the company, so constant communication is imperative and should include iterative work plans, planning meetings prior to any substantive work, and mid-review meetings, to name a few.

V. SOME GUIDANCE FOR COMPANIES FACING AN FCPA MONITORSHIP

After exploring thoroughly the nature of FCPA monitorships and offering some advice on how they can work better, this article concludes with some guidance for companies that face an FCPA monitor. As discussed in the introduction, there are few punishments that companies dislike more than a monitor. The monitor is an uninvited guest who almost always outstays his or her welcome, but as with typical in-laws, the company must continue to welcome the monitor and his or her annual raft of recommendations with open arms. What follows are some tips on how a company can minimize the pain of this experience and realize greater value from the monitorship process.

A. *Carefully Negotiate the Terms of the Settlement Agreement*

As discussed above, a monitor acts in accordance with the settlement agreement between the government and the company. Before the company even begins to consider the process of selecting an FCPA compliance monitor, it must focus on negotiating the best agreement possible with, hopefully, the least onerous burdens as are feasible to help ensure compliance with the FCPA. Many FCPA settlement agreements contain inconsistencies and imprecise language that could permit a monitor to make unreasonable demands. The company must read, analyze, and negotiate each sentence of the settlement agreement extremely carefully. During this scrubbing process, it should insert clarifying text wherever possible.

One area where companies have negotiated different wording is in the certification required of the monitor during the follow-up reviews. Small changes can make a big difference in the obligations imposed on the monitor and, ultimately, the inconvenience and cost inuring to the company. Like most FCPA settlements, the terms of Statoil's monitor requirement provide that during each of his follow-up reviews, Statoil's monitor must "certify whether Statoil's anti-bribery compliance program, including its policies and procedures, is appropriately designed and implemented to *ensure* compliance with the FCPA."¹⁸⁴ The requirement that Statoil's policies and procedures ensure compliance with the FCPA is in tension with the monitor's mandate in the same document. The mandate is to determine "whether Statoil's policies and procedures are reasonably

184. Statoil Deferred Prosecution Agreement, *supra* note 152, at 11 (emphasis added); Cease-and-Desist Order, Statoil, Exchange Act Release No. 54599 (Oct. 13, 2006), available at www.sec.gov/litigation/admin/2006/34-54599.pdf (emphasis added) [hereinafter Statoil Cease-and-Desist Order].

designed to *detect* and prevent violations of the FCPA.”¹⁸⁵ The concept that an effective program inevitably involves the detection of violations implicitly acknowledges that no compliance program, even the most effective ever created, is airtight. This is an unassailable contention, as large multinational companies will inevitably have employees who intentionally circumvent internal controls or worse. Therefore, the existence of the word “ensure,” which connotes total security, complicates the duty of the monitor and will almost certainly lead to a more exacting review.

In its global FCPA settlement, Siemens headed off this problem. The certification mandate for the monitor mirrors his actual review mandate: he must “certify whether the compliance program of Siemens, including its policies and procedures, is reasonably designed and implemented to detect and prevent violations within Siemens of the anti-corruption laws.”¹⁸⁶ This simple change comforts the monitor since the program need only be calibrated to the level of corruption risk facing the entity and not to an ultimately quixotic level of anti-bribery compliance. In doing so, it may save the company millions of dollars in monitor’s fees and internal costs to implement additional controls.

Indeed, the Siemens settlement featured a number of deviations from the standard FCPA monitorship mandate. Notably, it provided that the monitor’s review did not need to be comprehensive: “The Monitor is not expected to conduct a comprehensive review of all business lines, all business activities or all markets.”¹⁸⁷ Undoubtedly, Siemens was concerned that its monitorship would involve probes of all of its countless business lines and geographically ubiquitous operations. It included this language to guard against just such abuses. Likewise, other companies facing FCPA monitorships should consider how their monitor could spin out of control, identify the aspects of the business he or she may find particularly vexing, as well as the compliance risks that are likely to become an unwarranted focus, and try to guard against such problems by inserting appropriate

185. *Id.*

186. Siemens Final Judgment, *supra* note 94, at 10-11; Statement of Offense at Attachment 2, ¶ 6, United States v. Siemens Aktiengesellschaft, No. 08-367 (D.D.C. 2008), available at <http://www.justice.gov/opa/documents/siemens-ag-stmt-offense.pdf> [hereinafter Siemens Statement of Offense].

187. Siemens Final Judgment, *supra* note 94, at 7-8; Siemens Statement of Offense, *supra* note 186, at Attachment 2 at ¶ 3. See also Siemens Consent, *supra* note 94, at 5-6 (“The Monitor’s work plan for the initial review shall include such steps as are reasonably necessary to conduct an effective initial review in accordance with the mandate . . . to the extent the Monitor deems appropriate . . .”).

language in the settlement documents. Among the explicit parameters all settlement agreements should feature are clear deadlines for annual reviews and reporting, adoption of recommendations, and completion of the monitorship. The timelines for performing certain tasks are one of the key ways to hem in costs and guard against abuses. Of course, it is vital that the relevant language be identical for both the DOJ and SEC agreements if the company settles with both agencies. Indeed, all settlement documents should contain substantively identical descriptions of the company's responsibilities and the monitor's role. Differences can only foment confusion.

When focusing on timelines and obligations, companies should not neglect their own duties. One area of confusion in some FCPA settlements is whether the company must "implement" or "adopt" the monitor's recommendations within 120 days. The standard settlement agreement discusses "the time period for implementation" of the monitor's recommendations, while also noting that the company must "adopt all recommendations in the report."¹⁸⁸ Clearly, an organization can formally adopt a particular reform long before it implements it globally. In fact, most multinationals will find 120 days an alarmingly short time period to roll out any significant changes.¹⁸⁹ Unless companies are extremely careful in negotiating with the government for the right words in their settlement agreements, they can face significant burdens during the monitorship. Other thorny areas that should be clearly addressed in the settlement agreements include the reporting obligations if the monitor uncovers potentially illegal conduct or encounters intentionally uncooperative employees.

Finally, the settlement agreements provide an opportunity for the company to try to limit the expenses incurred during the monitorship. A number of innovations are potentially available to the settling entity. Most usefully, it can try to obtain a provision allowing for a sunset of the monitorship under certain conditions. Nothing will save as much money as simply having the monitorship terminate early. The Morford Memorandum stated that "in most cases, an agreement should provide for early termination if the corporation can demonstrate to the government that there exists a change in circumstances sufficient to eliminate the need for a monitor."¹⁹⁰ Accordingly, most post-Morford Memorandum settlement

188. Siemens Final Judgment, *supra* note 94, at 14; York Int'l Deferred Prosecution Agreement, *supra* note 141, at 13-14; Statoil Deferred Prosecution Agreement, *supra* note 152, at 10-11; *see also* Control Components Plea Agreement, *supra* note 153 (stating that all recommendations must be adopted).

189. To avoid further complicating this challenge, it is helpful to map out the various holidays and corporate priorities that could complicate implementation.

190. Morford Memo, *supra* note 28.

agreements include a sunset provision, including those of Willbros,¹⁹¹ KBR,¹⁹² AGA Medical,¹⁹³ Siemens,¹⁹⁴ and Daimler.¹⁹⁵ Companies also should try to negotiate agreements that rely on the company's own internal resources for some of the analyses, studies, and testing. This is another area where the Siemens settlement provides a good example: "[T]he Monitor is encouraged to coordinate with Siemens personnel including auditors and compliance personnel and, to the extent the Monitor deems appropriate, he or she may rely on Siemens processes, on the results of studies, reviews, audits and analyses conducted by or on behalf of Siemens and on sampling and testing methodologies."¹⁹⁶ Additionally, although it may prove a difficult negotiation point, if the alleged misconduct was limited in scope, the company could attempt to negotiate an agreement where the monitor only oversees the rogue business unit, or at the very least, to have the monitor concentrate primarily on the main area or areas that caused the underlying violations.

Although it is tempting to focus on the dollar figures associated with the settlement and the need for the organization to move forward and put the criminal matter behind it, it is important to negotiate the terms of the settlement agreement very carefully and make sure that the company's three-year guest has clear ground rules under which to operate.

191. See Willbros Deferred Prosecution Agreement, *supra* note 105, at 3 ("Conversely, in the event the Department finds, in its sole discretion, that there exists a change in circumstances sufficient to eliminate the need for the Monitor, the term of the Agreement may be terminated early.").

192. See Kellogg Brown & Root Plea Agreement, *supra* note 138, at Exhibit 2 at 6 ("[T]he Monitor may apply to the Department for permission to forego the second follow-up review.").

193. Deferred Prosecution Agreement, United States v. AGA Medical Corp., No. 0:08-cr-00172 (D. Minn. June 3, 2008) available at <http://www.justice.gov/criminal/fraud/fcpa/cases/docs/06-03-08aga-agree.pdf> ("Conversely, in the event the Department finds, in its sole discretion, that there exists a change in circumstances . . . the Term of the Agreement may be terminated early.").

194. Siemens Final Judgment, *supra* note 94, at 10 ("[T]he Monitor may apply to the Commission staff for permission to forego the third follow-up review.").

195. Daimler Deferred Prosecution Agreement, *supra* note 5 ("Conversely, in the event the Department finds, in its sole discretion, that there exists a change in circumstances . . . the Term of the Agreement may be terminated early.").

196. Siemens Consent, *supra* note 94, at 5-6; Siemens Final Judgment, *supra*, note 94, at 7-8; Siemens Statement of Offense, *supra* note 186, Attachment 2, ¶ 3. See also Technip Deferred Prosecution Agreement, *supra* note 122 (requiring terms that rely on company's internal resources in a deferred prosecution agreement); Control Components Plea Agreement, *supra* note 153 (outlining terms that utilize existing resources in a plea agreement).

B. *Selection of a Monitor*

Generally, the company must select a monitor who is acceptable to the government.¹⁹⁷ As discussed above, the government will ultimately play an active role in this selection process—a reality that BAES experienced first hand. Indeed, for this reason, the company should communicate constantly with the government during the process, so that the prosecutors understand the company's methodology and its good faith in selecting the most effective and efficient monitor. The monitor selection process is yet another area where the company needs to exercise the utmost caution and perform extensive due diligence. Remember that even well-crafted settlement agreements will still surely grant the FCPA monitor a great deal of control over the company. If a monitor becomes abusive, runs up massive fees, or exceeds his or her mandate, the corporation may be stuck in an unproductive and costly relationship. Ultimately, a handful of key characteristics should serve as the central points of inquiry in selecting the monitor. These include the FCPA background of the prospective monitor, his or her experience with similarly situated companies, and his or her view of the role of an FCPA monitor.

1. FCPA Background

Possibly nothing is more important than the background and reputation of the prospective FCPA monitor. The company should contact as many clients and practitioners as possible to develop a clear picture of how the particular candidate behaves professionally. As an obvious prerequisite, the monitor and his or her firm must have a large, dynamic FCPA practice. This is important for a number of reasons. First, the company does not want the monitor and his or her colleagues to be developing an understanding of the FCPA or best practices relating to internal controls and compliance policies during the monitorship. They should know all of this already, so that the company pays only for the actual analysis of its own systems.

Ideally, the monitor and his team will also have substantive experience with FCPA monitorships, either in the role of monitor or counsel to a

197. See, e.g., Control Components Plea Agreement, *supra* note 153, at 14 (“The Department retains the right, in its sole discretion, to accept or reject any Monitor proposed by CCI pursuant to the Agreement.”); Faro Techs. Cease-and-Desist Order, *supra* note 100, at 5 (“Retain . . . an independent consultant . . . not unacceptable to the staff of the” SEC.); Cease-and-Desist Order at 5, Delta & Pine Land Co. and Turk Deltapine, Inc., Exchange Act Release No. 56138, Accounting and Auditing Enforcement Release No. 2658 (July 26, 2007) available at <http://www.sec.gov/litigation/admin/2007/34-56138.pdf> (“Retain, through Delta & Pine’s Board of Directors, within 60 days after the entry of this order, an independent consultant . . . not unacceptable to the staff of the Commission.”).

company that has had an FCPA monitor. As with most lawyers' professional conduct generally, the past tends to be prologue. If the monitor was abusive in his last engagement, he will probably be abusive in future monitorships.

Deep experience with a wide variety of clients and in a number of different settings will also make it more likely that the monitor will take a measured, balanced view of what an effective compliance program looks like. It is essential that the monitor appreciate the complexities of multinational organizations and the compliance challenges that attend them. A panicky monitor who sees conspiracies and massive failures of corporate culture behind every isolated incident can cause unwarranted headaches for the company.

Quite candidly, it is also important that the monitor have other clients and obligations. The open-ended nature of the FCPA compliance monitorship can tempt an unethical monitor to expend vast amounts of time and effort inefficiently peering into every corner of the corporation, rather than utilizing a risk-based methodology that applies appropriate sampling. If the monitor has clients and other commitments demanding his or her time, the chances of such abuse decline dramatically. Further, a monitor with a large and active private practice needs to worry about his or her professional reputation. Behavior on the part of the monitor that the company sees as abusive will not stay private forever—as Attorney General John Ashcroft's experience showed—and repeat players are less likely to overstep their bounds.

Importantly, all of these attributes should extend to the monitor's team. The company should request in advance a description of the backgrounds of the foot soldiers who will likely execute the lion's share of the fieldwork for the monitor. They should share these aforementioned qualities, as it does little good for an experienced FCPA practitioner to be surrounded by novices who will undoubtedly flounder during the early stages of the monitorship and expend unreasonable amounts of time on basic tasks.

2. Experience with Similarly Situated Companies

Just as he or she must be an FCPA expert, the monitor also should have a background working with companies like the one receiving the monitor. It is important for any lawyer to understand the business of his or her corporate client, but the relevance of this element of an effective legal representation is significantly amplified in the monitorship context. For the monitor to be effective, he or she must develop a thorough understanding

of the company's global business and that business's inherent exposure to corruption risk, as well as the systems and procedures that govern it. It is rare that lawyers in private practice need to develop such a comprehensive view of a corporation's business model and practices. This job will be much easier if the monitor and his team already have similar clients. The flatter the learning curve, the more focused and effective the monitorship, and the lower the costs.

3. View of the Monitorship

There is no reason why, in the course of interviewing a prospective monitor, the company cannot ask pointed questions about how the monitor sees his or her role. The company will want to listen for assurances that he or she will religiously adhere to the terms of the settlement agreements, constantly communicate with the company about findings and possible recommendations, maintain the utmost efficiency in the conduct of fieldwork, and operate cooperatively with the company as much as possible. This is the same point at which the corporation should request from the candidate a detailed budget for the monitorship's initial review, as discussed below. Any reluctance on the part of the candidate to make these assurances or to disclose his or her vision for the tasks at hand should be considered a significant red flag.

4. Personal Characteristics

Finally, it is important not to discount the rapport the leaders of the company feel they have with the prospective monitor. The best monitorships involve cooperation and communication—both of which are easier if the people involved simply get along. The company will want to avoid candidates who appear abrasive, imperious, or solipsistic. Beyond the monitor himself or herself, those tendencies can be magnified by the members of the monitorship team, who will undoubtedly reflect the tone at the top in the manner in which they interact with the organization. Of course, it is best if the company can confirm its perception of those personal characteristics by talking to clients and professional contacts of the prospective monitor.

C. Managing the Monitor

Having touched on monitor selection, the discussion now turns to managing the monitor that the company selects. This section provides some tips for ensuring that the company's FCPA monitorship is as effective and efficient as possible. Importantly, the first recommendation,

concerning the usefulness of obtaining a detailed annual budget, should initially occur *before* the selection of any monitor. These measures serve as vehicles for the company to increase the transparency and efficiency of the monitor's fieldwork.

1. Obtaining a Detailed Budget

It is very difficult to limit the cost of a monitorship. Some monitors will claim that any attempt at budgeting or capping fees will undermine their independence. But a monitorship is different from an investigation or litigation—it is very predictable. Like an auditor, the monitor should be able to provide a detailed budget that reflects his or her vision for the engagement.

In advance of selecting the monitor, the company should obtain a budget that will be complied with absent unusual or changed circumstances. The candidate's budget should show projected attorney time spent on the key activities of the monitorship, including reviewing documents and preparing for, conducting, and documenting meetings and interviews. The budget should also estimate the cost of producing the initial report. If possible, the company could also ask the monitor to project fees and expenses beyond the first year of the monitorship, although this may be more difficult.

Once the monitorship begins, the company should request periodic updates from the monitor on the current level of fees and whether he or she is on budget. This will allow it to raise potential cost overruns with the monitor immediately and prevent surprises about the cost of particular tasks. If certain tasks are unreasonably expensive, the company can work with the monitor to reduce their cost. In addition to providing the company with a window on the monitor's activities, the budgetary process will force the monitor and his team to consider the cost of their activities and adjust accordingly. The goal here, like much of monitor management, is to prevent the engagement from becoming the proverbial "gravity train."

2. Obtaining a Detailed Timeline

A detailed timeline is also important for controlling costs. By pegging a timeline to the budget, the company and the monitor can better manage costs and increase transparency. The timeline will also allow the company to prepare for the monitorship better and help ensure that there are no surprises.

An initial proposed timeline from the monitor candidate should show

when he or she will do the following:

- Meet with company employees in advance of the fieldwork to learn about the business, its corruption risk assessments, and its compliance program;
- Conduct fieldwork at relevant company locations—the approximate number of interviews and the amount of time on the ground;
- Review relevant documents (both the amount and type of documents);
- Write the report;
- Present findings from the report to the relevant government agencies; and
- Prepare for each follow-up review (and, ideally, how the follow-up reviews will differ from the initial review).

Like the budget, the timeline will serve the dual role of providing transparency regarding the process, while disciplining the monitor and his or her team.

3. Establish a Single Point of Contact

Few things are more important to ensuring a positive experience with a company's FCPA monitor than having a single point of contact, a company official or office that can speak for the organization being monitored. And ultimately, the company needs to have one person who can speak authoritatively for it and represent its interests in the monitorship process. This is harder than it sounds, as the monitor will undoubtedly have contact with a wide range of company stakeholders, including members of the board. For this reason, it is important that everyone understand at the beginning of the process who will speak for the organization (usually the general counsel or a senior legal official) and monitor the engagement. It is vital that the monitor not have back channels to other senior officials in the company, who may not be as savvy about the process or understand exactly what the monitor is doing. Finally, whoever the contact person is must have sufficient authority to aid the monitor in the review and recommendation implementation process. In particular, regional leaders should not feel free to disregard directives about cooperating with the monitor. Such a strong central point of contact, therefore, also benefits the monitor by serving as a reliable partner and aid in the entire process.

4. Marshall Internal Resources to Assist the Monitor

No corporation subject to an FCPA compliance monitor should expect the process to be a painless or inexpensive experience. In light of the various inconveniences and the overall cost, companies may be tempted to provide minimal resources for the monitor to utilize. Often, this can be a huge mistake. By not supporting the monitor, the company risks that the monitor deploys his or her own resources or hires outside vendors to do what the company is not doing. In fact, by putting significant resources and information at the monitor's disposal at the beginning of the process, the company might very well save money.

Most obviously, the company should provide upfront for the monitor a complete description of the nature of its past violative conduct, the subsequent remedial actions, and the current state of its FCPA compliance program. The organization should have all of this information at its fingertips; there is no reason to make the monitor expend countless billable hours developing this factual basis for the initial review. Additionally, the corporation should give the monitorship team a reasonably detailed overview of its business and operations. As discussed above, without knowing the business, the monitor cannot possibly assess the company's anti-bribery policies and procedures. It may be a significant and unnecessary cost for the monitor to develop an understanding of the business through fieldwork.

The company should also consider assigning its employees to the monitorship team for each review period. Having employees working under the direction of the monitor will almost always be significantly cheaper than paying the hourly rates of a legal, consulting, or forensic auditing professional. Further, company employees will know the organization better than an outside vendor. They can help give the monitor confidence that the review does not have any significant blind spots. Some FCPA monitors have found it particularly efficient to utilize the resources of internal audit, as those employees often conduct reviews similar to what the monitor is performing.

5. Preview the Report and Recommendations

Finally, it is entirely reasonable for the company to request access to the monitor's report and recommendations in advance of the U.S. authorities. This is good for the monitor and for the company. It is good for the company because it ensures that the report will not be a total surprise upon submission, and more importantly, the preview will allow the

corporation to correct any errors in the monitor's report. It is also a chance to vet the monitor's recommendations with internal stakeholders at the company and determine their feasibility. If they can be changed slightly in advance to make implementation easier, they should be. For the monitor, what is most helpful about this advance review is the company's opportunity to correct factual errors. Nothing could be more embarrassing to a responsible monitor than to have his or her work corrected by the corporation in front of the U.S. regulators. And ultimately, there is no reason why either the U.S. government or the monitor should fear the company having an opportunity to comment on the monitor's work in advance.

D. Preventing Others from Exploiting the Monitorship Relationship

One final consideration for an organization facing the imposition of an FCPA monitor is how to help prevent outside parties from utilizing the monitor's work for their own benefit—most likely, securities plaintiffs seeking to exploit the monitor's fieldwork. The monitor's work makes two categories of information vulnerable to discovery. First, the monitor, as an independent outside party with whom the company does not have an attorney-client relationship, may risk waiving privilege on internal company materials. In particular, it is likely that the monitor will need to review some internal investigation reports drafted by or at the direction of company counsel. This may render these materials discoverable in a civil lawsuit. Second, it is possible that the monitorship process itself will identify and document information that could aid in a lawsuit.

The company should work with the monitor to minimize both of these risks, as they will undermine the monitorship, in addition to hurting the company. At the very least, the company should include a privilege non-waiver agreement as part of the monitor's retention agreement to try to prevent otherwise privileged information from becoming discoverable. The language of such an agreement may read as follows:

In the event that any third party seeks disclosure of materials that may be protected by the attorney-client privilege or work product doctrine, pursuant to court order or otherwise, the monitor shall (a) notify the company and make all reasonable efforts to allow the company to resist such disclosure on the basis that the materials are protected by the attorney-client privilege, and/or work product doctrine, or similar protective doctrine, and (b) support the company's position. The monitor may disclose the materials pursuant to a protective order if disclosure is required by court order.

It is unclear, however, whether a court would view any applicable

privilege as preserved. Some courts have recognized the doctrine of “limited waiver” when a company provides information as part of cooperation with a governmental investigation.¹⁹⁸ These courts consider the privilege waived only as to the government entity or agent that receives the privileged information; the company can continue to assert attorney-client privilege if an outside party attempts to obtain the information. The majority of courts, however, do not accept the concept of limited waiver. In fact, in 2006 one federal court observed that “every appellate court that ha[d] considered the issue in the last twenty-five years” had held that a company and its attorneys could not “waive the attorney-client privilege selectively.”¹⁹⁹

But a recent D.C. Circuit ruling could provide some independent basis for enforcing a non-waiver of privilege agreement. The court held that when a corporation provides attorney work product regarding anticipated litigation with the IRS to its auditors in connection with the audit of the company’s financial statements, it does not waive the work product protection.²⁰⁰ The court explained that, even though the auditors were an independent party—much like a monitor—disclosure to them was not a waiver because the auditors were not an adversary of the company.²⁰¹ The

198. *See Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978) (en banc) (determining that a limited waiver of the attorney-client privilege occurred, because the corporation voluntarily surrendered material protected by the privilege in the context of a separate and nonpublic investigation by the SEC); *see, e.g., In re Target Tech Co., LLC*, 208 F. App’x 825, 827 (Fed. Cir. 2006) (finding waiver based on an extrajudicial disclosure that revealed the attorney’s conclusion, but did not reveal the details of the privileged communication, and stating that when ordering production in light of the waiver, the court should ensure that its order is limited to the subject matter of the disclosure); *Bittaker v. Woodford*, 331 F.3d 715, 728 (9th Cir. 2003) (stating that a district court must enter appropriate orders clearly delineating the contours of the limited waiver before the commencement of discovery, and strictly police those limits thereafter); *In re Woolworth Corp. Sec. Class Action Litig.*, 1996 U.S. Dist. LEXIS 7773, *7 (S.D.N.Y. June 7, 1996) (“A finding that publication of an internal investigative report constitutes waiver might well discourage corporations from taking the responsible step of employing outside counsel to conduct an investigation when wrongdoing is suspected.”).

199. *See United States v. Reyes*, 239 F.R.D. 591, 603 (N.D. Cal. 2006) (rejecting the concept of limited waiver); *see, e.g., Ratliff v. Davis Polk & Wardell*, 354 F.3d 165, 170 n.5 (2d Cir. 2003) (“This court has previously rejected a ‘limited waiver’ rule that would preserve attorney-client privilege even after documents had been disclosed to a third party, such as the SEC.” (quoting *In re John Doe Corp.*, 675 F.2d 482, 489 (2d Cir. 1982))); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 302 (6th Cir. 2002) (rejecting the concept of limited waiver in all forms and collecting cases discussing limited waiver).

200. *United States v. Deloitte, LLP*, 610 F.3d 129, 139 (D.C. Cir. 2010).

201. *Id.* at 140.

court relied in part on the fact that the company had a reasonable expectation of privacy in light of the auditor's duty of confidentiality under American Institute of Certified Public Accountants' rules.²⁰² In doing so, the court extended work product protection to a document authored by the audit team recording statements of counsel that reflected their work product.²⁰³ It rejected arguments by the IRS that the auditors' duty to issue a report meant that the company had waived workproduct protection. Using this logic, companies could attempt to include a confidentiality agreement in their retention agreements with the monitor and then ask courts to apply the same reasoning whenever faced with a discovery request.

One other possibility for avoiding waiver could be to seek a court order under Federal Rule of Evidence 502(d):

A federal court order that the attorney-client privilege or work product protection is not waived as a result of disclosure in connection with the litigation pending before the court governs all persons or entities in all state or federal proceedings, whether or not they were parties to the matter before the court, if the order incorporates the agreement of the parties before the court.²⁰⁴

If the monitorship is pursuant to a DPA, it seems that Rule 502(d) may apply if the judge were willing to issue a court order mandating that information disclosed to the monitor or his or her team in the course of the monitorship does not waive privilege.

As tricky as it may be to avoid having the monitorship waive privilege or work product protection, it may be even harder to avoid discovery of the monitor's work that is not otherwise protected. Presumably, a party suing the company could subpoena the monitor's non-privileged work product. It is largely unclear what a company may do to protect these types of documents, but there is some case law that could be used to cobble together a protection.

Indeed, then-district court Judge Patrick Higginbotham may have provided some basis for synthesizing such a privilege in his *In re LTV Securities Litigation* opinion.²⁰⁵ That case featured a court-appointed Special Officer, who serves a role quite similar to that of a monitor. The court explained:

There are important differences between the role of the Special Officer and that of the ordinary counsel. Unlike the situation typically presented where counsel has been hired in anticipation of civil or criminal liability, . . . the Special Officer here was

202. *Id.* at 142.

203. *Id.* at 139.

204. FED. R. EVID. 502(d).

205. *In re LTV Securities Litigation*, 89 F.R.D. 595 (N.D. Tex. 1981).

retained by LTV to implement an SEC consent decree. Atypically, LTV, the “client,” is not the final arbiter of the Special Officer’s duties, functions or authority. That power is held by the court, which may resolve any disagreement between LTV and the Special Officer concerning his duties, functions or authority. The Final Judgment identifies certain duties owed to the Special Officer. LTV must “cooperate fully” with the Special Officer, may not assert against the Special Officer any corporate privilege except as to matters prepared for or by LTV in the course of the SEC investigation, and must authorize the directors, officers, employees and agents of LTV to testify under oath and provide all requested information.²⁰⁶

Additionally, the court noted that “the Special Officer has obligations toward the SEC that may conflict with the normal duties owed a client by private counsel.”²⁰⁷ It was also stated that, “[a]t the Commission’s discretion, [the Special Officer] must furnish the SEC any documents, statements or other information in his possession as well as reports or recommendations he prepares prior to submitting them to LTV.”²⁰⁸ Thus, the district court observed that “the Special Officer is more akin to a public official than privately retained counsel,” and in its hybrid role of “government investigator and privately retained counsel,” “the sphere of confidentiality which the Special Officer might expect to enjoy is a synthesis of the privileges available to his ‘clients’ were he serving in the roles of government investigator or private investigator counsel.”²⁰⁹

The district court first concluded that “if the Special Officer were privately retained counsel, the information he is now gathering would be protected from all discovery unless supported by good cause.”²¹⁰ It then went on to explain that “[t]he SEC has indicated that this investigation, if conducted by SEC employees, is the type of investigation ordinarily considered confidential under the Commission’s regulations.”²¹¹ The court noted that the information collected would not likely be discoverable through a FOIA request.²¹² Finally, the court considered the “immediate adverse impact on the ongoing investigation” that the discovery request would have and weighed the “long-term effect of permitting this type of

206. *Id.* at 614.

207. *Id.* at 614-15.

208. *Id.* at 615.

209. *Id.*

210. *Id.* at 616.

211. *Id.* at 617.

212. *Id.*

discovery,” as “the SEC will seek to negotiate [similar] consent decrees.”²¹³
It contended:

If such discovery is permitted, a corporation concerned about its exposure to civil liability would be more willing to risk SEC investigation, particularly in light of the exemption from public disclosure generally afforded the Commission’s investigatory records. Allowing the type of discovery requested here may kill the goose that lays the golden egg – the Commission may be deprived of a useful enforcement option, while shareholders will hardly be benefited by inhibiting corporate self-investigation.²¹⁴

It was observed that “[t]he SEC simply cannot staff individual cases with lawyers of [the Special Officer’s] experience, skill and support facilities; at least not without great risk of misallocation of its resources.”²¹⁵ Thus, the district court opined that there existed a privilege—unique from but derivative of the attorney-client privilege and work product doctrine—that “sets a standard of protection akin to that of work-product under Rule 26(b).”²¹⁶

Although the facts of the *LTV* case and those presented when a monitor is retained by a company are similar, key differences remain that make it difficult to predict whether an analogous privilege could apply to monitorships. First, as noted above, there is no attorney-client relationship between the company and monitor. The *LTV* opinion did not indicate whether the existence of an attorney-client relationship was explicitly foreclosed in that matter, as it is in almost all settlement agreements that require the retention of a monitor. Additionally, in *LTV*, the Special Officer had discretion under the Final Judgment to request that the SEC keep the Special Officer’s report confidential, and the Special Officer’s retention agreement required him to do so.²¹⁷ But for many monitorship

213. *Id.* at 619.

214. *Id.*

215. *Id.*

216. *Id.* at 622. *See also* United States v. Alex. Brown & Sons, Inc., 963 F. Supp. 235 (S.D.N.Y. 1997) (applying *LTV* ruling to non-disclosure provision of consent decree).

217. *Id.* at 615. *See also* United States v. MIT, 129 F.3d 681, 683 (1st Cir. 1997) (noting that, in declining to apply the *Diversified* ruling, there was “no unconditional promise to keep the [disclosed] documents secret”); *In re Sealed Case*, 676 F.2d 793, 824-25 (D.C. Cir. 1982) (finding no error in district court ruling ordering disclosure where no confidentiality agreement existed); *In re Leslie Fay Cos. Sec. Litig.*, 161 F.R.D. 274, 284 (S.D.N.Y. 1995) (holding that, where U.S. Attorney “agreed to hold all materials produced . . . in confidence,” no waiver of attorney-client privilege occurred); *Enron Corp. v. Borget*, 1990 U.S. Dist. LEXIS 12471, *2 (S.D.N.Y. Sept. 22, 1990) (“In making its submission to the SEC, Enron specifically reserved all applicable legal privileges and rejected any implication of waiver from their submission.”); *SEC v. Amster & Co.*, 126 F.R.D. 28, 29-30 (S.D.N.Y. 1989) (stating that privilege was not waived even though there had been an agreement with the SEC to maintain the confidentiality of disclosed documents).

agreements, the applicable confidentiality provision is limited in scope and only applies to the monitor, not to the government.²¹⁸

Despite these meaningful differences, there exist good arguments—based on public policy concerns and derived from the limited waiver cases, the D.C. Circuit’s ruling, and Judge Higginbotham’s *LTV* opinion—that a company can advance in an attempt to protect the monitor’s work product.

First, permitting third-party discovery punishes corporate offenders for entering into FCPA settlements with the SEC and DOJ. Courts should encourage such agreements rather than force companies to fight investigations, taxing judicial and agency resources while hindering enforcement and remedial action.

Second, the monitor can assert that he or she is really acting as an adjunct to a governmental investigation, not as private counsel. In this capacity, the monitor and his or her team should enjoy protections similar to those of federal investigators.

Third, any discovery requests contemporaneous with the monitor’s activities will hinder the monitor’s ongoing efforts by siphoning human and financial resources dedicated to monitoring the company.

While these are valid arguments in favor of denying a discovery request and granting some sort of privilege, in the absence of either a confidentiality agreement with the government or an attorney-client relationship between the company and the monitor, any claims of privilege are unlikely to succeed. In addition, the case law is far from consistent across all circuits on whether this type of privilege may be asserted. It is therefore advisable that all parties proceed as if resisting discovery requests will fail in the end.

VI. CONCLUSION

Ultimately, irrespective of how companies view FCPA monitorships, they are, by all indications, here to stay. It therefore behooves corporations facing an FCPA enforcement action, the FCPA enforcers at the SEC and DOJ, and monitors themselves to understand the recent history of FCPA monitorships and consider how they can work better. As the U.S.

218. See Statoil Deferred Prosecution Agreement, *supra* 152, at ¶ 12 (“[T]he Compliance Consultant shall agree to maintain the confidentiality of Statoil’s trade secrets and other confidential business information in conformity with Norwegian law, and to give due consideration to Statoil’s need for operational flexibility and preservation of business relationships with third parties, provided that nothing in this paragraph shall preclude the Compliance Consultant from sharing such confidential information with the Commission staff and DOJ.”).

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government's FCPA enforcement efforts become more robust, all potential stakeholders need to weigh carefully when the imposition of a monitor will lead to a better corporate citizen and when it is more likely to be a redundant, punitive measure. In situations that may call for an independent compliance monitor, all participants should seek to maximize the value of the monitorship and minimize inefficiency. In the final analysis, this will help reduce the frequency of future FCPA violations and lead to a more effective enforcement regime.