

**THE PAST, PRESENT, AND
UNCERTAIN POTENTIAL OF
CORPORATE MONITORS**

By
Alex J. Brackett
Katherine Mims Crocker
McGuireWoods LLP

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ABOUT THE AUTHORS

Alex J. Brackett is a Partner with McGuireWoods LLP in the firm's Richmond, VA office. He is a member of the Government Investigations and White Collar Litigation department and co-head of the firm's Strategic Risk and Compliance team. Mr. Brackett regularly counsels and defends clients across the full spectrum of government and internal investigations matters, with a significant focus on the design and implementation of corporate compliance programs. His experience includes working as a member of a monitor team.

Katherine Mims Crocker is an Associate with McGuireWoods LLP in the firm's Richmond, VA office, where she is a member of the Business and Securities Litigation department and Appeals and Issues team. Her practice focuses on appellate litigation, constitutional law, and dispositive motions.

THE PAST, PRESENT, AND UNCERTAIN POTENTIAL OF CORPORATE MONITORSHIPS

INTRODUCTION

Nearly two decades after the phenomenon of corporate monitoring appeared on the scene in full force, the legal community and the clients it serves still struggle to understand what monitors are meant to do, how best to design an equitable and effective monitorship, and where the practice is heading. While there is clear room for improvement to the current model, recent developments call into question the very viability of monitorships as a mechanism for enhanced corporate compliance. This all begs the question: is corporate monitoring a concept worth saving, if it can be saved at all?

I. THE RISE OF CORPORATE MONITORSHIPS

Corporate monitoring is “the imposition of an independent third-party [overseer] by a court, government agency or department upon an organization.”¹ A corporate monitor “traditionally performs a specific set of functions, such as ensuring the organization’s compliance with the terms of a settlement agreement between the

¹ Chaka Patterson & Erica Jaffe, *Corporate Monitors: Looking Back and Looking Forward* 1, A.B.A. (2016), http://www.americanbar.org/content/dam/aba/publications/criminaljustice/wccn2016_patterson.aucthcheckdam.pdf.

organization and the government.”² Monitorships arise most frequently in the criminal context pursuant to plea agreements, such as deferred-prosecution agreements, non-prosecution agreements, and consent decrees.³

The modern concept of corporate monitoring emerged around the turn of the millennium, when scandals of epic proportion (*e.g.*, Enron Corp., WorldCom Inc.) and the government’s response (*e.g.*, the Sarbanes-Oxley Act of 2002) reset the world of corporate accountability.⁴ The rise of corporate monitoring can be traced in large part to the convergence of several practices around that time, including the:

- Use of external supervisory parties like special masters in both the pre-judgment adjudicatory and post-judgment enforcement contexts;
- Appointment of trustees with continuing corporate oversight authority to implement judgments under the Racketeer Influenced Corrupt Organizations Act; and
- Escalating frequency of settlements in organizational prosecutions by the Department of Justice (DOJ) and with other enforcement authorities like the Securities and Exchange Commission (SEC).⁵

In the wake of Arthur Andersen LLP’s criminal conviction in 2002 and its disastrous

² *Ibid.*

³ See Richard Lissack et al., *The Practitioner’s Guide to Global Investigations: Monitorships*, GLOBAL INVESTIGATIONS REV. (Jan. 4, 2017), <http://globalinvestigationsreview.com/insight/the-practitioner%E2%80%99s-guide-to-global-investigations/1079360/monitorships>.

⁴ See *ibid.*; see also Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713, 1718 (2007).

⁵ See Khanna & Dickinson, *supra* note 4, at 1715–20; see also Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1796 (2011).

consequences,⁶ settlements including monitorships came to be viewed by the government as a valuable tool for reprimanding and correcting bad behavior without putting large companies out of business and blameless employees out of work.⁷

Unfortunately, the monitorship concept began to propagate well before the stakeholders fully understood how to execute the arrangement without causing unnecessary disruptions in corporate culture and productivity. The result was a proliferation of often ill-defined and rudderless monitoring relationships ripe for misuse and even abuse by the government. Not until DOJ released the “Morford Memo” in 2008 did details surrounding the government’s approach to employing corporate monitorships become somewhat formalized and public.⁸ Even then, the Morford Memo and subsequent government guidance regarding selection and use of corporate monitors⁹ often speak in broad and amorphous terms, and fail to impose

⁶ The June 2002 conviction of Arthur Andersen for obstruction of justice put an end to the 89-year old firm and the employment of over 90,000 employees. *See Reversed and Remanded*, THE ECONOMIST, June 2, 2005, <http://www.economist.com/node/4033351>. The US Supreme Court unanimously overturned the conviction. *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).

⁷ *See* Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 879–80 (2007); John Wood, *Will Corporate Monitor Reports Become Public?*, LAW360 (Apr. 24, 2017), <https://www.law360.com/articles/914502>.

⁸ Memorandum from Craig S. Morford, Acting Deputy Attorney Gen., U.S. Dep’t of Justice, to Heads of Dep’t Components and U.S. Attorneys (Mar. 7, 2008) [hereinafter “Morford Memo”], <https://www.justice.gov/sites/default/files/dag/legacy/2008/03/20/morford-useofmonitorsmemo-03072008.pdf>.

⁹ *See* Memorandum from Lanny A. Breuer, Assistant Attorney Gen., U.S. Dep’t of Justice, to All Criminal Div. Pers. (June 24, 2009) [hereinafter “Breuer Memo”], <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/response3-supp-appx-3.pdf>; Memorandum from Gary G. Grindler, Acting Deputy Attorney Gen., U.S. Dep’t of Justice, to

important constraints that could rein in overreaching prosecutors and the monitors they install.

Notwithstanding these shortcomings, monitors have become ubiquitous. Foreign Corrupt Practices Act (FCPA) enforcement has proved an especially fertile field for monitorships, with over 40 percent of companies that resolved a DOJ or SEC investigation into alleged FCPA violations between 2004 and 2010 having submitted to a monitorship.¹⁰ Indeed, the prominence of monitoring has expanded so dramatically that some commentators have dubbed it “a field ripe for continued growth and expansion,” going so far as to assert a potential for voluntary monitorships driven by board, shareholder, or public pressures as a welcome practice.¹¹ If corporate monitoring is a field ripe for continued growth and expansion, it is also a field ripe for reflection pruning—and other improvements after thoughtful reflection.

II. STRIKING A BALANCE

For all stakeholders, corporate monitoring is a double-edged sword. From a law-enforcement perspective, the government trades the public acclaim and full corporate sting associated with attaining convictions for the ability to conserve

Heads of Dep’t Components and U.S. Attorneys (May 25, 2010), <https://www.justice.gov/sites/default/files/dag/legacy/2010/06/01/dag-memo-guidance-monitors.pdf>.

¹⁰ F. Joseph Warin et al., *Somebody’s Watching Me: FCPA Monitorships and How They Can Work Better*, 13 U. PA. J. BUS. L. 321, 322 (2011).

¹¹ Patterson & Jaffe, *supra* note 1, at 1, 8.

resources by outsourcing key functions to monitors and passing on costs to subject corporations (which foot monitors' multimillion-dollar bills). The government also gains the ability to impose oversight that goes beyond what would typically be available pursuant to a criminal conviction. The government and the public it serves, however, have limited assurance that the monitor will actually provide meaningful oversight.

For corporations, the advantages of avoiding criminal convictions, or of otherwise striking a more favorable settlement with the government, are often sufficient to accept the acute logistical, operational, and decisional intrusions that define the typical monitorship. Corporations must also, however, accept the risk that monitors will overstep their bounds, operate beyond their authority (and expected budgets), or otherwise prove to be unreasonable overseers—excesses that corporations often have limited means to oppose.¹²

With these competing considerations in mind, the legal community and others involved can shape the future of corporate monitoring in a manner that strikes an appropriate balance from the perspectives of both internal design and certain external dangers.

A. Revisiting the Model

In most cases under the prevailing model, monitors wield immense power over

¹² See Khanna & Dickinson, *supra* note 4, at 1721, 1724.

corporations, with corporations afforded few checks on that power. As a result, some leaders in the corporate community may perceive such arrangements as a “nuclear option.”¹³ As one monitor has explained:

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.¹⁴

This tension can be traced in part to the fact that although monitorships are cast in terms of rehabilitation, in reality they often serve a more punitive function. By acting as an extension—and even an expansion—of the government, rather than as an independent aid to oversight, a monitorship may actually never enhance corporate compliance. Put differently, to be effective, a monitor should be more than a super-cop on the beat. Rather, a monitor must act as a partner in pursuit of the corporation’s long-term interests, primarily seeking to help an ailing company heal and ultimately thrive from a compliance perspective rather than seeking to sniff out additional instances of bad behavior.

¹³ Warin et al., *supra* note 10, at 345 n.123 (quoting 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.usc.gov/sites/default/files/pdf/amendment-process/public-comment/20100317/ACC_Hackett_comments.pdf).

¹⁴ Warin et al., *supra* note 10.

To this end, the preferred monitorship model is one built on the following five

pillars:

1. *Credibility*. The underlying concept supporting a monitorship is that the corporation has failed to establish or maintain adequate compliance controls, often in a specific legal, regulatory, or operational area. Accordingly, a monitor should have relevant experience in that subject matter, in the company's industry (if possible), and in the design and implementation of compliance programs and controls.¹⁵ Any whiff of cronyism in the monitor's selection or posturing in the monitor's approach will undermine credibility with both internal and external audiences.¹⁶
2. *Collaboration*. Open dialogue and the sharing of information and ideas between a monitor and a subject company can be central to making the desired compliance improvements.¹⁷ If the relationship is adversarial, these exchanges are unlikely to occur. But, if the relationship is

¹⁵ See Monitors Standards § 24-2.4(1)(b), (c) (A.B.A. 2015) [hereinafter "ABA Standards"], https://www.americanbar.org/groups/criminal_justice/standards/MonitorsStandardsFourthEdition-TableofContents.html (stating that a candidate's "expertise or experience in the industry or specific subject matter of the monitorship," as well as the "relevant skills and experience necessary to discharge the duties" of the monitorship, are relevant to determining the necessary qualifications); Code of Professional Conduct: Principles and Standards of Practice § 4.2 (Int'l Ass'n of Indep. Corporate Monitors 2016) [hereinafter "IAICM Standards"], <http://iaicm.org/wp-content/uploads/2015/04/Adopted-IAICM-Code-of-Professional-Conduct.pdf> (stating that "[f]or a Monitor to serve with facility and acumen, he or she must attain and maintain a level of understanding, experience, and knowledge commensurate with the responsibilities, authorities, and obligations of each respective" settlement agreement or court order); see also Warin et al., *supra* note 10, at 361–62, 370–71; Patterson & Jaffe, *supra* note 1, at 4.

¹⁶ Monitor selection has received enhanced scrutiny from both courts and commentators since the widely criticized appointment of former Attorney General John Ashcroft by then-U.S. Attorney Chris Christie as the result of a no-bid process—a monitoring contract allegedly worth as much as \$52 million. See Warin et al., *supra* note 10, at 349 n.137; Patterson & Jaffe, *supra* note 1, at 3. The Morford Memo and subsequent DOJ guidance have helped curtail especially egregious selection practices by instituting checks within DOJ.

¹⁷ See IAICM Standards, *supra* note 15, § 6 cmt. (providing that "[o]ver the course of a Monitorship," a monitor "should have frequent, informal, and open communications with both the Reporting Agency and Host Organization" and that "[t]hese communications help ensure, among other things, transparency in the [Monitor's] work and that the [Monitor] is acting within his or her scope and on target in prioritizing and addressing the issues relevant to" the settlement agreement or court order); see also Morford Memo, *supra* note 8, at 5 ("[T]here should be open dialogue among the corporation, the Government and the monitor throughout the duration of the agreement.").

collaborative, with the monitor cultivating internal company resources, the monitorship will promote transparency and improve both efficiency and outcomes.¹⁸

3. *Mentorship.* The purpose of a monitorship should be both oversight and improvement—what one might loosely refer to as mentorship. Monitors, therefore, should focus on finding ways to share their experience and expertise with the people inside the subject corporation who will run the relevant compliance program after the monitorship concludes.¹⁹
4. *Transition.* The typical monitorship has a term of one to five years, often with some flexibility to decrease or increase the term as needed to accomplish defined goals. The overriding goal—for all involved—should be for the monitorship to conclude as quickly as possible.²⁰ One model with a track record of success involves transitioning the monitor’s oversight functions to internal company resources upon clearing completion of certain goals. This model can even include transition of such functions to a permanent compliance ombudsman within the company.
5. *Absolution.* Where possible (although it will not be so in all cases), a settlement should provide that issues uncovered by or brought to the attention of the monitor within the scope of the engagement will not

¹⁸ See ABA Standards, *supra* note 15, § 24-4.4(2) (“Absent exceptional circumstances, the monitor should work cooperatively with the Host Organization in developing recommendations. The Monitor should consider the Host Organization’s existing plans, recommendations, and concerns. The Monitor should consider any reasonable changes proposed or made by the Host Organization, and if rejecting a proposal, the Monitor should articulate the reasons for the rejection.”); IAICM Standards, *supra* note 15, § 6.9 (similar); ABA Standards, *supra* note 14, § 24-3.4(2)(a) (“The Monitor should incur only costs that are reasonably necessary for carrying out the monitorship. Where appropriate, the Monitor should look to utilize the Host Organization’s resources to reduce costs.”); see also Veronica Root, *The Monitor-“Client” Relationship*, 100 VA. L. REV. 523, 553–54 (2014); Warin et al., *supra* note 10, at 364, 374; Patterson & Jaffe, *supra* note 1, at 7.

¹⁹ See IAICM Standards, *supra* note 15, § 4.9 (providing that monitors “should continuously seek to effectively utilize resources belonging to the Host Organization” and stating that doing so “enables the Host Organization not only to reduce the costs of the Monitorship, but to learn from the Monitor methods or techniques that it may use or implement upon expiration of the Monitorship”).

²⁰ See ABA Standards, *supra* note 15, § 24-3.2(2)(c) (providing that settlement agreements “should allow, and state the criteria for, a Monitor to recommend granting an early termination and for the Host Organization to apply for early termination” and recommending early termination as an option even if the agreement does not provide for it); see also Warin et al., *supra* note 10, at 347–48, 367–68.

result in the imposition of further penalties. This type of amnesty provision fosters transparency and liberates both company personnel and the monitor from anxiety over the potential implications of additional misconduct coming to light.

A monitorship built on these five pillars is more likely both to achieve the desired result of enhanced compliance and to do so without costly quarrels and continuous government intervention. Some means of encouraging these goals are to:

- Give the subject company the right to select its monitor, subject to government approval and pursuant to mutually agreed selection criteria;²¹
- Spend time designing the monitorship provisions of the settlement to define clear, measurable, and objective criteria for success and transition;²²
- Impose accountability by requiring the monitor to regularly report not just to the government, but also to the subject company;²³ and
- Where the subject company has made penalty or forfeiture payments, fund some portion of monitor compensation tied to performance criteria (the monitor's own and that of the company) from such payments, thereby

²¹ See Breuer Memo, *supra* note 9, at 2–6 (outlining a default selection process whereby the corporation recommends a pool of three candidates and DOJ selects a monitor from among the pool or requests additional candidates); see also ABA Standards, *supra* note 15, § 24-2.1 (“Absent extraordinary circumstances, both the Host Organization and the Government should be allowed to have a significant role in the selection process.”).

²² See IAICM Standards, *supra* note 15, § 5 cmt. (stating that the settlement agreement or court order “should provide an adequate detailing of the scope of a Monitorship” and that “[v]arying and unaligned perceptions about scope can create significant disagreement(s) and delay(s) in affecting a Monitorship and ultimately can lead to an ineffective Monitorship”); see also Khanna & Dickinson, *supra* note 4, at 1737–38; Warin et al., *supra* note 10, at 355–56, 359–61, 365. It is also critical that the monitor’s “work plan,” which outlines the operational details of the relationship, be as thorough and unambiguous as possible. See IAICM Standards, *supra* note 15, § 5.1; see also Warin et al., *supra* note 10, at 362–63.

²³ See IAICM Standards, *supra* note 15, § 6.2 (providing that “[u]nless otherwise restricted or prohibited,” a monitor “should allow the Host Organization and the Reporting Agency to review and make suggestions to the . . . reports, including challenging or further informing the report’s findings or recommendations”); see also Warin et al., *supra* note 10, at 364, 374–75.

giving the monitor an incentive to see the company succeed without the company facing a contrary disincentive.²⁴

B. Defending Against Intrusions

While the foregoing proposals for improving corporate monitoring derive from the authors' perspective as insiders looking out, the perspective of outsiders looking in cannot be ignored. Commentators describing monitorships use words like "secretive"²⁵ and assert that "the world of corporate monitorships is largely opaque."²⁶ Even the leading association of monitors admits that the "mysteriousness" of the monitoring industry is "enhanced by the difficulty in obtaining information on the topic."²⁷

They are right. It comes as little surprise, therefore, that groups ranging from academics and journalists to enterprising plaintiffs' attorneys and even monitors themselves have recently sought to shed light on the who, what, when, where, why, and how of corporate monitorships.

Some have sought to spotlight the prevalence and performance of monitors as

²⁴ This proposal also recognizes that "as one of the main functions of the monitorship is to provide the government with an additional enforcement agent, it would seem plausible that the government should bear at least some of the enforcement costs associated with the monitorship." Root, *supra* note 18, at 582.

²⁵ Steven Davidoff Solomon, *In Corporate Monitor, a Well-Paying Job but Unknown Results*, N.Y. TIMES DEALBOOK (Apr. 15, 2014), https://dealbook.nytimes.com/2014/04/15/in-corporate-monitor-a-well-paying-job-but-unknown-results/?_r=0.

²⁶ Jody Godoy, *Corporate Monitors Want Sunshine, Just Not Too Much*, LAW360 (Apr. 6, 2017), <https://www.law360.com/articles/909691/corporate-monitors-want-sunshine-just-not-too-much>.

²⁷ Int'l Ass'n of Indep. Corporate Monitors, <http://iaicm.org/> (last visited July 6, 2017).

a means of enhancing the model's long-term viability. One new and invaluable resource in this regard is the International Association of Independent Corporate Monitors, whose website includes a searchable repository of agreements requiring monitorships and an extensive archive of media reports, government guidance, and academic studies on corporate monitoring.²⁸ The American Bar Association also issued a broad set of black-letter standards in 2015,²⁹ and the IAICM followed suit by adopting a detailed Code of Professional Conduct in 2016.³⁰ These and similar efforts to elucidate the circumstances and enhance the structure of corporate monitorships deserve applause.

Others efforts, by contrast, have sought to publicize information in a manner that threatens to eliminate many of the advantages of monitorships altogether.³¹ Some litigants, for instance, have sought disclosure of monitor work product and related documents as a cat's paw for uncovering potentially damaging corporate information. To the extent that they succeed, such efforts may well sow the seeds of the demise of corporate monitoring, making it imperative for proponents of

²⁸ *Resources*, Int'l Ass'n of Indep. Corporate Monitors, <http://iaicm.org/resource/> (last visited July 6, 2017).

²⁹ ABA Standards, *supra* note 15.

³⁰ IAICM Standards, *supra* note 15.

³¹ See *Guidepost Solutions Chair Bart Schwartz on Corporate Monitors*, CORP. CRIME REP. (Mar. 22, 2017), <https://www.corporatecrimereporter.com/news/200/guidepost-solutions-chair-bart-schwartz-corporate-monitors/>.

monitorships to be aware of and to actively oppose such unwarranted incursions.³²

Although the traditional attorney-client privilege generally does not apply to the relationship between monitors and subject corporations, reports by monitors and similar watchdogs and underlying corporate data have often been considered private.³³ Cracks in the edifice of confidentiality began to appear a few years ago,³⁴ and two recent, high-profile rulings have further endangered this norm—and, with it, the overarching utility and even viability of monitorships.

First, in 2016, a federal district court in New York ordered the release of a redacted monitor’s report concerning the deferred prosecution of a large banking institution, holding that the report was a judicial record to which the public had a First Amendment right of access.³⁵ An appeal of that ruling is pending before the US Court of Appeals for the Second Circuit.

Second, an investigative-journalism group brought an action under the federal Freedom of Information Act (FOIA) attempting to obtain monitor reports and other documents relating to an industrial giant’s post-settlement remedial efforts. This past March, a federal district judge in Washington, DC, rejected attempts to preclude the

³² See Wood, *supra* note 7.

³³ See, e.g., *SEC v. Am. Int’l Grp.*, 712 F.3d 1 (D.C. Cir. 2013); see also Root, *supra* note 18, at 540–46; Warin et al., *supra* note 10, at 353, 375–80.

³⁴ E.g., *In re DePuy Orthopaedics, Inc. Pinnacle Hip Implant Prod. Liab. Litig.*, MDL No. 3:11-MD-2244-K, 2013 WL 2091715 (N.D. Tex. May 15, 2013); see Patterson & Jaffe, *supra* note 1, at 5–6.

³⁵ *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763 (JG), 2016 WL 347670 (E.D.N.Y. Jan. 28, 2016).

release of these documents in whole.³⁶ Although the court agreed that some information is subject to FOIA exemptions, including attorney work product, it rejected other bases for withholding information, including the deliberative-process privilege, which protects documents relating to the formulation of government decisions. Ultimately, the court ordered DOJ to produce representative documents—including an annual report—for *in camera* review, paving the way for a potential public release.

These rulings—and the many more that could follow—may portend the death knell of corporate monitoring as we know it.³⁷ Unless monitorships can proceed in an environment where exchanges between the monitor, the corporation, and the government remain free from outside interference by third parties, the model will soon become untenable for companies weighing the possibility of settling enforcement actions.³⁸ Stifling the free flow of information with the possibility of public release will fundamentally undermine the monitor concept and thus deprive all involved—including the public—of a device that, when used properly, can be a powerful tool for enhancing compliance through corporate remediation.³⁹ Depending on the results of the pending court cases, the only means of protecting monitorships

³⁶ *100Reporters LLC v. U.S. Dep't of Justice*, Civ. A. No. 14-1264 (RC), 2017 WL 1229709 (D.D.C. Mar. 31, 2017).

³⁷ See Wood, *supra* note 7.

³⁸ See *ibid.*

³⁹ See *ibid.*; see Root, *supra* note 18, at 574–76.

may be through legislation creating protections against the disclosure of communications and investigative or deliberative records.⁴⁰

CONCLUSION

In sum, the past and present of corporate monitoring reveal opportunities and pitfalls for all involved, with both internal and external threats emerging. In considering the uncertain potential for the institution, the legal community stands at a double inflection point: it can work to transform the monitor concept into a more useful tool for enhancing compliance, but it must remain wary of outside interests that threaten to undermine the concept's very viability. If the monitorship model is to survive, it must continue to evolve, and the legal community must protect it as it does.

⁴⁰ See Root, *supra* note 18, at 564–67. In part because of confidentiality concerns, the IAICM recommends that parties to a monitorship consider presenting interim reports orally with the aid of presentation platforms like Microsoft PowerPoint. IAICM Standards, *supra* note 15, § 6 cmt. While that suggestion is creative and potentially helpful, third parties could still be expected to seek access to underlying documents and data absent more explicit protections.