Global Investigations Review

The Guide to Monitorships

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

Second Edition

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Publisher's Note

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

It flowed from the observation that there was yet no book available that systematically covered all aspects of the institution known as the 'monitorship' – a situation known to be delicate and challenging for all concerned: the company, the monitor, the appointing government agency and all the professionals helping those players.

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

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

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

Finally, I would like to thank the editors of this guide for their energy and vision, and the authors and my colleagues for the elan with which they have brought that vision to life.

We collectively welcome any comments or suggestions on how to improve it. Please write to us at insight@globalinvestigationsreview.com.

Preface

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

Part I offers an overview of monitorships. First, Neil M Barofsky – former Assistant US Attorney and Special Inspector General for the Troubled Asset Relief Program, who has served as an independent monitor and runs the monitorship practice at Jenner & Block LLP – and his co-authors Matthew D Cipolla and Erin R Schrantz of Jenner & Block LLP explain how a monitor can approach and remedy a broken corporate culture. They consider several critical questions, such as how a monitor can discover a broken culture; how a monitor can apply 'carrot and stick' and other approaches to address a culture of non-compliance; and the sorts of internal partnership and external pressures that can be brought to bear. Next, former Associate Attorney General Tom Perrelli, independent monitor for Citigroup Inc and the Education Management Corporation, walks through the life cycle of a monitorship, including the process of formulating a monitorship agreement and engagement letter, developing a work plan, building a monitorship team, and creating and publishing interim and final reports.

Nicholas Goldin and Mark Stein of Simpson Thacher & Bartlett – both former prosecutors with extensive experience in conducting investigations across the globe – examine the unique challenges of monitorships arising under the US Foreign Corrupt Practices Act (FCPA). FCPA monitorships, by their nature, involve US laws regulating conduct carried out abroad, and so Goldin and Stein examine the difficulties that may arise from this situation, including potential cultural differences that may affect the relationship between the monitor and the company. Additionally, Alex Lipman, a former federal prosecutor and branch chief in the Enforcement Division of the Securities and Exchange Commission (SEC), and Ashley Baynham, fellow partner at Brown Rudnick LLP, explore how monitorships are used in resolutions with the SEC. Further, Bart M Schwartz of Guidepost Solutions LLC – former chief of the Criminal Division in the Southern District of New York, who later served as independent monitor for General Motors – explores how enforcement agencies decide whether to appoint a monitor and how that monitor is selected. Schwartz provides an overview of different types of monitorships, the various agencies that have appointed monitors in the

past, and the various considerations that go into reaching the decisions to use and select a monitor.

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

The four chapters in Part III examine the issues that arise in the context of cross-border monitorships and the unique characteristics of monitorships in different areas of the world. Litigator Shaun Wu, who served as a monitor to a large Chinese state-owed enterprise, and his co-authors at Kobre & Kim examine the treatment of monitorships in the East Asia region. Switzerland-based investigators Daniel Bühr and Simone Nadelhofer of LALIVE SA explore the Swiss financial regulatory body's use of monitors. Judith Seddon, an experienced white-collar solicitor in the United Kingdom, and her co-authors at Ropes & Gray International LLP explore how UK monitorships differ from those in the United States. And Gil Soffer, former Associate Deputy Attorney General, former federal prosecutor and a principal drafter of the Morford Memorandum, and his co-authors at Katten Muchin Rosenman LLP consider the myriad issues that arise when a US regulator imposes a cross-border monitorship, examining issues of conflicting privacy and banking laws, the potential for culture clashes, and various other diplomatic and policy issues that corporations and monitors must face in an international context.

Part IV has eight chapters that provide subject-matter and sector-specific analyses of different kinds of monitorships. With their co-authors at Wilmer Cutler Pickering Hale and Dorr LLP, former Deputy Attorney General David Ogden and former US Attorney for the District of Columbia Ron Machen, co-monitors in a healthcare fraud monitorship led by the US Department of Justice (US DOJ), explore the appointment of monitors in cases alleging violations of healthcare law. Günter Degitz and Richard Kando of AlixPartners, both former monitors in the financial services industry, examine the use of monitorships in that field. With his co-authors at Kirkland & Ellis LLP, former US District Court Judge, Deputy Attorney General and Acting Attorney General Mark Filip, who returned to private practice and represented BP in the aftermath of the Deepwater Horizon explosion and the company's subsequent monitorship, explores issues unique to environmental and energy monitorships. Glen McGorty, a former federal prosecutor who now serves as the monitor of the New York City District Council of Carpenters and related Taft-Hartley benefit funds, and Joanne Oleksyk of Crowell & Moring LLP lend their perspectives to an examination of union monitorships. Michael J Bresnick of Venable LLP, who served as independent monitor of the residential mortgage-backed securities consumer relief settlement with Deutsche Bank AG, examines consumer-relief fund monitorships. Ellen S Zimiles, Patrick J McArdle and their

co-authors at Guidehouse explore the legal and historical context of sanctions monitorships. Jodi Avergun, a former chief of the Narcotic and Dangerous Drug Section of the US DOJ and former Chief of Staff for the US Drug Enforcement Administration, and her co-authors, former federal prosecutor Todd Blanche and Christian Larson of Cadwalader Wickersham & Taft LLP, discuss the complexities of monitorships within the pharmaceutical industry. And Frances McLeod and her co-authors at Forensic Risk Alliance explore the role of forensic firms in monitorships, examining how these firms can use data analytics and transaction testing to identify relevant issues and risk in a monitored financial institution.

Finally, Part V contains two chapters discussing key issues that arise in connection with monitorships. McKool Smith's Daniel W Levy, a former federal prosecutor who has been appointed to monitor an international financial institution, and Doreen Klein, a former New York County District Attorney, consider the complex issues of privilege and confidentiality surrounding monitorships. Among other things, Levy and Klein examine case law that balances the recognised interests in monitorship confidentiality against other considerations, such as the First Amendment. And former US District Court Judge John Gleeson, now of Debevoise & Plimpton LLP, provides incisive commentary on judicial scrutiny of deferred prosecution agreements (DPAs) and monitorships. Gleeson surveys the law surrounding DPAs and monitorships, including the role and authority of judges in those respects, and separation-of-powers issues.

Acknowledgements

The editors gratefully acknowledge Jenner & Block LLP for its support of this publication, and Jessica Ring Amunson, co-chair of Jenner's appellate and Supreme Court practice, and Jenner associates Jessica Martinez, Ravi Ramanathan and Tessa J G Roberts for their important assistance.

Anthony S Barkow, Neil M Barofsky and Thomas J Perrelli
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Energy and the Environment

Mark Filip, Brigham Cannon and Nicolas Thompson[1]

Monitorships in the energy and environmental contexts present many of the same issues and challenges as monitorships generally, but there are concerns specific to those contexts of which practitioners and companies should be aware. This chapter discusses some of those concerns, as well as the structure of monitorships more broadly in the energy and environmental sectors.

There are several ways to think about the different forms of monitorships and various valid methods of classification. This chapter differentiates them according to how they arise and who implements or enforces them. In this sense, there are three main categories of monitorships commonly faced by companies in the energy and environmental sectors:

- monitorships imposed by US court order;
- monitorships imposed by agreement with a US government agency, such as the US Department of Justice (US DOJ), the Securities and Exchange Commission (US SEC) or the Environmental Protection Agency (EPA); and
- for companies participating in energy or infrastructure projects that receive World Bank funding, monitorships imposed by the World Bank.

Types of monitorships arising in the energy and environmental sectors

Applicable legal frameworks for monitors

In cases involving potential US criminal violations, the legal authority for imposing a monitorship stems from the US Criminal Code and the Sentencing Guidelines promulgated thereunder.[2] Pursuant to this authority, monitorship is just one potential term of corporate probation that courts may choose to impose on defendants.

1 Mark Filip, Brigham Cannon and Nicolas Thompson are partners at Kirkland & Ellis LLP.

2 See 18 U.S.C. Section 3563(b)(22); U.S.S.G. Sections 8B2.1 and 8D1.3.

Section 3563 of Title 18 of the US Criminal Code provides for the terms and conditions of criminal probation generally, while Section 3563(b)(22) of that same title is a catch-all provision allowing courts to impose discretionary conditions of probation that require defendants to 'satisfy such other conditions as the court may impose'. Similarly, Section 8D1.3(c) of the Sentencing Guidelines (the Guidelines) provides courts with broad authority to propose any conditions of corporate probation 'that (1) are reasonably related to the nature and circumstances of the offense or the history and characteristics of the organization; and (2) involve only such deprivations of liberty or property as are necessary to effect the purposes of sentencing'. Section 8B2.1 of the Guidelines contains a more detailed outline of the structure of monitorships, mandating that a compliance and ethics programme be 'reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct'. Consideration of a company's specific industry is relevant: 'An organization's failure to incorporate and follow applicable industry practice or the standards called for by any applicable governmental regulation weighs against a finding of an effective compliance and ethics program.'[3]

In civil cases where a US court imposes a compliance monitor, the terms of monitorship may look similar to the criminal context, but the authority stems from the court's plenary authority to enforce settlements reached by the parties, or from Rule 53 of the Federal Rules of Civil Procedure. Federal Rule 53 allows the court to appoint special masters to 'perform duties consented to by the parties' and to address various post-trial matters.[4]

A court order is not a necessary predicate for a monitorship. Companies and US government agencies can, of course, agree to a monitorship without such an order. For example, the US DOJ enters into deferred prosecution agreements and non-prosecution agreements with parties, pursuant to which the US DOJ agrees not to prosecute as long as the party fulfils its obligations under the agreement, and those obligations can include engaging an independent compliance monitor. Courts have recognised that they have no authority to substantively manage, enforce or pass judgment on such agreements.[5] Companies often have an incentive to seek this type of agreement rather than face prosecution and the prospect of a court order that could involve more severe penalties.

While most monitorships in the energy and environmental contexts arise from US criminal and civil law, or from agreements made between the parties in the shadow of these laws, they can arise from other sources as well. The World Bank, for example, has developed a compliance regime relating to projects financed by the bank that can include a monitorship. Companies that work on World Bank-financed projects can be suspended or debarred from World Bank (and other multilateral development bank) contracts if the bank finds that they engaged in corruption or similar misconduct. Debarment with conditional release (meaning debarment until the company establishes a compliance programme that is satisfactory to the

3 U.S.S.G. Section 8B2.1.

4 See Fed. R. Civ. P 53(a).

5 See, e.g., *United States v. Fokker Servs.*, 818 F.3d 733, 746 (D.C. Cir. 2016) ('[A]lthough charges remain pending on the court's docket under a DPA, the court plays no role in monitoring the defendant's compliance with the DPA's conditions.').

World Bank, is the default sanction.[6] The World Bank's integrity compliance officer monitors a debarred party's performance of required conditions during debarment and may require that an independent monitor be engaged.[7] In addition, a party that voluntarily discloses misconduct to the World Bank can engage an independent monitor to help avoid further sanctions. The legal authority for the World Bank's compliance regime is its contractual arrangements with companies that work on World Bank-financed projects (which agree to be audited) and the World Bank's fiduciary duty to protect the use of bank financing.[8]

Regardless of the exact source of authority, it is important for companies and practitioners to recognise that US courts and government agencies, and international bodies such as the World Bank, have broad discretion to impose, define and enforce terms of monitorship. The relevant statutes, guidelines and contracts typically contain few specific limitations.[9]

Court-ordered energy and environmental monitorships

Court-ordered monitorships can arise in a variety of contexts, including when an environmental crisis heightens the degree of public scrutiny and the government desires to seek a conviction, guilty plea or liability verdict, as demonstrated by the following examples.

BP and the Deepwater Horizon drilling rig

In November 2012, oil and gas company BP agreed to plead guilty to 11 counts of felony manslaughter under federal law, and to misdemeanour criminal violations of the Clean Water Act[10] and the Migratory Bird Treaty Act of 1918.[11] The guilty plea was reached with the US DOJ after the Deepwater Horizon explosion and subsequent oil spill that occurred in the Gulf of Mexico in April 2010. In January 2013, the US District Court for the Eastern District of Louisiana sentenced BP to a fine, probation and a term of monitorship.

Pursuant to the guilty plea, the court imposed dual terms of monitorship: BP was required to retain, subject to the US DOJ's approval, an ethics monitor to review and offer improvements to BP's corporate code of conduct and its implementation, and a process safety monitor with special experience in safety and risk management procedures applicable to oil and gas drilling. In contrast to the ethics monitor, the purpose of the process safety monitor was to provide a more technical review and recommendations relating to BP's safety and accident prevention policies and procedures.

The court's order outlined the process for selecting the monitors and many of their duties. BP was permitted to select a list of candidates and rank them in order of preference, subject to the US DOJ's approval. The term of monitorship was set to four years, unless terminated earlier by the US DOJ. The US DOJ was given sole discretion to resolve disputes that might

6 Frequently Asked Questions, Integrity Compliance at the World Bank Group, at http://pubdocs. worldbank.org/en/162741449169632232/ICO-FAQs.pdf.

7 The World Bank Group's Sanctions Regime: Information Note at 23, at http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/The_World_Bank_Group_Sanctions_Regime.pdf.

8 id., at 14.

9 See, e.g., 18 U.S.C. Section 3563(b) (outlining as prerequisites only the commission of a misdemeanour or felony and requiring only that the conditions imposed be 'reasonably related' to relevant sentencing factors).

10 33 U.S.C. Sections 1319(c)(1)(A) and 1321(b)(3).

11 16 U.S.C. Sections 703 and 707(a).

arise between BP and the monitors, and BP was required to pay the monitor's expenses. The court described the process safety monitor's duties in broad terms:

> *[T]o review, evaluate and provide recommendations for the improvement of defendant's process safety and risk management procedures, including, but not limited to, the defendant's major accident/hazard risk review of drilling-related process safety barrier and mitigations, for the purpose of preventing future harm to persons, property and the environment resulting from deepwater drilling in the Gulf of Mexico by the defendant and its Affiliates.*[12]

The court granted the monitors a large degree of authority to carry out their duties and imposed on BP an obligation to fully cooperate. It ordered the monitors to take steps to maintain the confidentiality of all non-public information, and made clear that BP did not automatically waive the attorney–client privilege or work-product protections over any material simply because it was provided to the monitors to carry out their duties.[13] The court ordered the monitors to prepare periodic reports on their findings and on BP's progress, to be shared with the US DOJ (but not the public).[14]

PG&E and the San Bruno pipeline[15]

In August 2016, a federal jury found Pacific Gas and Electric Company (PG&E) guilty of, among other things, violations of the Natural Gas Pipeline Safety Act of 1968. The guilty verdict stemmed from an incident in September 2010 in which where a natural gas pipeline in San Bruno, California, exploded. The US District Court for the Northern District of California sentenced PG&E to a term of probation, at the US DOJ's request, that included a corporate compliance and ethics monitorship. Similar to the BP example discussed above, the monitor's duties outlined in the court order include preparation of periodic reports on the status of PG&E's compliance efforts.[16] The order also contemplates that the final report issued by the monitor be made publicly available.[17]

Monitorships created by agreement with the government

As part of settlements, consent decrees and agreements to defer prosecution, federal agencies such as the US DOJ, the SEC and the EPA may agree to terms of monitorship that contain similar provisions to the court-ordered monitorships described above. If there are disputes regarding these agreements, the relevant agency may still seek intervention from the courts in some cases. As such, these may be considered hybrid monitorships, for which the

12 Guilty Plea Agreement, Ex. B at 1, *United States v. BP Exploration & Production, Inc.*, No. 2:12-cr-00292 (E.D. La. 2012), ECF No. 2-1.

13 id., at 4.

14 id., at 5.

15 The author of this chapter was selected as the corporate compliance monitor in the *PG&E* matter. Neither the author nor the law firm of which he is a partner, Kirkland & Ellis LLP, expresses in this chapter an opinion regarding that monitorship or the events leading up to it, and no confidential information has been disclosed in this description.

16 Order at 7-8, *United States v. Pacific Gas and Electric Company*, No. CR-14-00175 (N.D. Cal. 2014), ECF No. 916.

17 id.

provisions are closely negotiated with the opposing party, but the final terms may ultimately be enforced, if necessary, by a court. In the case of a deferred prosecution agreement, the government may simply decide to pursue charges and prosecute the case if the agreement is breached. While the process by which these hybrid agreements develop differs from their court-ordered counterparts, their impact can be similar.

Monsanto Company and Penncap-M

In November 2019, Monsanto Company pleaded guilty to a criminal misdemeanour offence relating to the company's use on crops in Hawaii of a banned pesticide known as Penncap-M. The active ingredient in Penncap-M, methyl parathion, is a restricted use pesticide banned by the EPA. Monsanto simultaneously entered into a deferred prosecution agreement with the US DOJ relating to two felony counts of unlawfully storing acute hazardous waste (Penncap-M) in violation of 42 USC Section 6928(d)(2)(A).[18] As part of the deferred prosecution and plea agreements, Monsanto agreed to a criminal fine of US$6 million and an additional US$4 million in community service payments to various organisations in Hawaii. Although the US DOJ prosecuted the case, the matter began with an investigation by the EPA's criminal division.[19]

Both the deferred prosecution and plea agreements also required Monsanto to abide by certain conditions of probation for two years. One of these conditions was that Monsanto develop and maintain an environmental compliance programme meeting the requirements of the Resource Conservation and Recovery Act and the Federal Insecticide, Fungicide, and Rodenticide Act for all its Hawaii operations. The terms of probation required Monsanto to engage a third-party environmental compliance monitor to oversee implementation and conduct audits every six months to ensure compliance. The agreement required the auditor to provide written reports to the US DOJ and Monsanto's probation officer after each audit, and required full cooperation from Monsanto.[20]

Wood Group PSN and West Delta 32

In February 2017, Wood Group PSN Inc entered into a plea agreement with the US DOJ to pay US$9.5 million for a violation of the Clean Water Act relating to conduct that led to an oil spill in the Gulf of Mexico. The case involved a failure to properly inspect and maintain facilities for which Wood Group had responsibility on the Outer Continental Shelf's Creole Loop. This led to an explosion at an offshore oil production facility in the West Delta 32 area of the Gulf of Mexico and to the discharge of oil into the Gulf.

Although the case was brought by the US Attorney's Office in Louisiana, the investigation was led by the US Department of the Interior's Office of Inspector General (OIG) and

18 'Any person who knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter without a permit under this subchapter or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C. 1411 et seq.].'

19 US DOJ, Press release, 'Monsanto Agrees to Plead Guilty to Illegally Spraying Banned Pesticide at Maui Facility' (21 November 2019), at https://www.justice.gov/usao-cdca/pr/monsanto-agrees-plead-guilty-illegally-spraying-banned-pesticide-maui-facility.

20 Plea Agreement Exhibit C at 1-2, *United States of America v. Monsanto Company*, Case No. 1:19-cr-00162-JMS (D. Haw. 2019), ECF No. 3-3.

the EPA.[21] As part of its plea agreement with the US DOJ, Wood Group agreed to enter into an administrative agreement with the EPA – essentially a corporate compliance programme dictated by the agency.[22]

Wood Group's administrative agreement with the EPA was detailed and imposed many duties and responsibilities on the company. Wood Group was required to maintain a corporate ethics and compliance officer who would report directly to a safety, assurance and business ethics subcommittee of the company's board to ensure that communications regarding compliance activities and fraud risks would be shared regularly and directly with the company's leadership. The administrative agreement also overhauled the requirements of Wood Group's existing ethics and compliance training programme, including by imposing new requirements relating to record-keeping, tracking and review protocols for training materials used in the programme, in addition to other substantive changes.[23]

The administrative agreement required Wood Group to hire an independent monitor for the duration of the agreement (three years), subject to the EPA's approval. The monitor was required to be a subject-matter expert capable of evaluating the company's compliance with the agreement's many provisions. In addition, the monitor was tasked with performing periodic reporting on Wood Group's compliance activities and progress toward the goals of the company's corrective action plan, as well as performing on-site audits. The monitor was required to share its reports, which covered several predetermined subject-matter categories, with both the EPA and the Interior Department's OIG.[24]

Citgo and the Lemont Refinery

In November 2016, Citgo entered into a consent decree with the US DOJ and the EPA in respect of Citgo's alleged violations of the Clean Air Act involving a failure to control pollutants released from a refinery in Lemont, Illinois. The consent decree, which was the product of a long period of negotiation and cooperation between Citgo and the government, did not involve the appointment of a traditional monitor *per se*, who would have broad authority to oversee improvements and make recommendations. However, the decree did contain detailed requirements regarding specific emissions at the refinery and required appointment of an independent technical auditor who would measure the rates of leaks of various pollutants to determine whether they exceeded permitted limits as part of the agreement's 'Leak Detection and Repair' programme.[25]

The consent decree in the *Citgo* case was more detailed than typical court orders implementing monitorships, probably in large part because it resulted from years of input from the EPA's and the US DOJ's environmental subject-matter experts.

21 US DOJ, Press release, 'Company to Pay $9.5 Million for False Reporting of Safety Inspections and Clean Water Act Violations That Led to Explosion in Gulf of Mexico' (23 February 2017), at https://www.justice.gov/usao-edla/pr/company-pay-95-million-false-reporting-safety-inspections-and-clean-water-act.

22 Guilty Plea Agreement at 3, *United States of America v. Wood Group PSN, Inc.*, Case No. 6:16-cr-00192 (W.D. La. 2016), ECF No. 5.

23 Administrative Agreement at 10 to 25, *In re: John Wood Group PLC*, EPA Case No. 16-0731 (22 February 2017).

24 id., at 26 to 30.

25 Consent Decree at 37, 38, 63 to 67, *United States of America v. Citgo Petroleum Corp.*, Case No. 1:16-cv-10484 (N.D. Ill. 2016), ECF No. 4-1.

Total SA and the Foreign Corrupt Practices Act

Allegations of violations of the US Foreign Corrupt Practices Act (FCPA) may lead to monitorships for companies in every industry, and the energy industry is no exception.

In May 2013, French oil and gas company Total SA (Total) entered into a deferred prosecution agreement with the US DOJ relating to allegations that it violated the anti-bribery, internal controls and books-and-records provisions of the FCPA.[26] The charges related to the payment of US$60 million in bribes meant to induce Iranian officials to give Total rights to certain oil supplies.

Total agreed to a monetary penalty and a three-year term of monitorship in exchange for deferred prosecution. It also entered a related settlement with the SEC to resolve a parallel FCPA civil action. As part of the agreement with the US DOJ, Total admitted the facts included in the US DOJ's criminal information, and agreed that if it breached the agreement, and the US DOJ pursued the deferred prosecution, it would not contest the charges.[27]

The monitor's mandate included continuing evaluation of Total's internal controls, bookkeeping and financial reporting policies in light of US and French anti-corruption laws. The agreement required the monitor to report on the company's progress, but also expressly provided that the reports would remain confidential and not be disclosed to the public.[28]

Monitorships imposed by the World Bank

The World Bank's Integrity Vice Presidency, which is responsible for deterring and investigating corruption in World Bank projects, has imposed sanctions on hundreds of companies and individuals since 2010, including in the energy and environmental sectors. The bank has its own internal monitor, the integrity compliance officer, but can also mandate third-party monitorships, as shown by the following examples.

SNC-Lavalin

In April 2013, the World Bank debarred subsidiaries of Canadian infrastructure and energy construction group SNC-Lavalin for 10 years after finding that the company had paid bribes to officials in Bangladesh and Cambodia in connection with infrastructure and power transmission projects financed by the World Bank.[29]

As part of a negotiated resolution between the company and the bank, the company agreed to engage an independent compliance monitor. The monitor reports directly to the World Bank at least twice each year on the company's progress. Specifically, the monitor reviews the implementation and effectiveness of the company's ethics and compliance programme, measuring it against the World Bank's Integrity Compliance Guidelines. The monitor also offers

26 See 18 U.S.C. Section 371; 15 U.S.C. Sections 78m(b)(2)(A), 78m(b)(5), and 78ff(a).

27 Deferred Prosecution Agreement at 2, *United States v. Total, S.A.*, Case No. 13-cr-00239 (E.D. Va. 2013), ECF No. 2.

28 Deferred Prosecution Agreement, Attachment D at D-2, *United States v. Total, S.A.*, Case No. 13-cr-00239 (E.D. Va. 2013), ECF No. 2.

29 World Bank, Press release, 'World Bank Debars SNC-Lavalin Inc. and its Affiliates for 10 years' (17 April 2013), at www.worldbank.org/en/news/press-release/2013/04/17/world-bank-debars-snc-lavalin-inc-and-its-affiliates-for-ten-years.

recommendations for improvements.[30] The debarment period can potentially be shortened to eight years if the company implements an effective compliance programme and complies with all other aspects of the settlement.

Alstom SA

In February 2012, the World Bank debarred two subsidiaries of Alstom SA (Alstom) for three years owing to improper payments to a former government official in Zambia connected with a World Bank-financed hydropower project. As part of a negotiated resolution, Alstom agreed to engage an independent compliance monitor. The monitor was responsible for verifying that Alstom would design and implement a compliance programme consistent with the World Bank's Integrity Compliance Guidelines.[31]

In December 2014, Alstom entered into an unrelated plea agreement in the United States for violations of the FCPA that involved bribes to officials in countries including Indonesia, Saudi Arabia, Egypt and the Bahamas. As part of the plea, the court and the US DOJ agreed not to impose a second compliance monitor and instead took the somewhat unusual step of deferring to the Word Bank monitorship that was already in place. If the company satisfied the requirements of the World Bank monitorship, no US DOJ monitorship would be required.[32] In February 2015, the World Bank determined that Alstom had implemented an appropriate corporate compliance programme, released Alstom from debarment and ended the monitorship.[33]

Unique challenges in the energy and environmental sectors

Many of the challenges posed by compliance monitors in the energy and environmental industries are the same as those faced by companies in all industries, including the costs relating to engaging a monitor and implementing new compliance regimes; the disruption of company operations; managing difficult or overzealous monitors; and protecting the company's confidential information from public disclosure or leaks. There are some issues, however, to which practitioners and companies should be particularly sensitive in the energy and environmental contexts.

Technical complexity

Practitioners should be prepared for, and comfortable with, the high level of complexity attendant to companies in this sector (typically oil and gas, power generation or infrastructure companies). While these companies are not the only ones that exist against a highly complex

30 SNC-Lavalin, Press release, 'SNC-Lavalin announces agreement to settle class actions brought in 2012' (22 May 2018), at www.snclavalin.com/en/media/press-releases/2018/snc-lavalin-announces-agreement-settle-class-actions-brought-2012.aspx.

31 World Bank, Press release, 'Enforcing Accountability: World Bank Debars Alstom Hydro France, Alstom Network Schweiz AG, and their Affiliates' (22 February 2012), at www.worldbank.org/en/news/ press-release/2012/02/22/enforcing-accountability-world-bank-debars-alstom-hydro-france-alstom-network-schweiz-ag-and-their-affiliates.

32 Plea Agreement at D-1, *United States of America v. Alstom S.A.*, Case No. 3:14-cr-00246-JBA (D. Conn. 22 December 2014), ECF No. 5.

33 World Bank, Press release, 'Alstom Released from Debarment' (23 February 2015), at www.worldbank.org/ en/news/press-release/2015/02/23/alstom-released-debarment.

and technical backdrop, there is a broad range of statutes, including environmental statutes, that can serve as hooks for liability, and this liability may lead to terms of monitorship that are substantively different from a typical FCPA compliance programme, for example.

Managing complexity and the related costs

The *BP* monitorship discussed previously is a good example of the complexity that can be associated with monitorships in this industry. The *BP* probation order called for dual monitorships: one was the more typical ethics monitor intended to police the company's code of conduct; the other was a more technical process safety monitor, responsible for assessing BP's risk management and safety policies and suggesting improvements, with the goal of preventing future incidents like the one that occurred on the Deepwater Horizon rig.

The court's order in *BP* required the process safety monitor to have expertise specifically applicable to oil and gas drilling.[34] As such, the monitor would probably need to be an engineer, or supported directly by engineers, with knowledge of oil drilling and related matters. Such a monitor represents a relatively new development in corporate compliance, in that the monitor is not just applying legal standards and assessing compliance but is appointed specifically to engage in a form of root-cause analysis, to determine how the company's internal systems led to the violation in the first instance.[35] In the case of BP, the process safety monitor would need to know, from a technical perspective, how BP's risk management systems were deficient in the first place before recommending new procedures or mitigation.

Legal practitioners representing energy and environmental clients in connection with monitorships should be prepared to engage subject-matter experts to help address technical complexities where necessary. Moreover, practitioners and their clients should recognise that engaging specialists can be costly and disruptive, beyond what may be typical in other industries. In addition, monitors like the process safety monitor in *BP* may have highly technical, data-driven thresholds that they require companies to meet, which can cost more in terms of both money and time to achieve than more flexible, non-technical standards.

A corollary to the points above regarding anticipating and managing complexity, practitioners should also be familiar with the many environmental statutes that may lead to liability in these cases and thus result in subject-matter specific compliance monitors. Many of these statutes involve criminal liability for violations in addition to civil liability. A non-exhaustive list of environmental statutes with criminal provisions includes the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, the Hazardous Materials Transportation Act, the Safe Drinking Water Act, the Toxic Substances Control Act, the Endangered Species Act, the Migratory Bird Treaty Act of 1918 and the Natural Gas Pipeline Safety Act of 1968.

34 Guilty Plea Agreement, Ex. B at 1, *United States v. BP Exploration & Production, Inc.*, Case No. 2:12-cr-00292 (E.D. La. 2012), ECF No. 2-1.

35 See Root Martinez, Veronica, 'Modern-Day Monitorships', 33 *Yale Journal on Regulation*, 109, 127 to 130 (2016) (describing 'root-cause analysis' often required to be conducted by the monitor in corporate compliance monitorships).

Resolving disputes with monitors against a highly technical backdrop

Although supervised by a government authority, monitors in the energy and environmental sectors may, as a practical matter, wield a larger amount of discretion than usual because they possess a level of expertise that at least some at the relevant government agency may not. Practitioners should thus be prepared to identify and push back on unreasonable or unfounded monitor recommendations that the relevant agency may be less able to detect, and should contest these recommendations articulately and plainly if a court or a government agency must mediate a dispute.

Significantly, the US DOJ's policy manual anticipates disputes with monitors and provides a path for companies to contest burdensome or unfounded recommendations. The US DOJ's Grindler Memorandum of 25 May 2010 states:

> *With respect to any Monitor recommendation that the company considers unduly burdensome, impractical, unduly expensive, or otherwise inadvisable, the company need not adopt the recommendation immediately; instead, the company may propose in writing an alternative policy, procedure, or system designed to achieve the same objective or purpose. As to any recommendation on which the company and the Monitor ultimately do not agree, the views of the company and the Monitor shall promptly be brought to the attention of the Department. The Department may consider the Monitor's recommendation and the company's reasons for not adopting the recommendation in determining whether the company has fully complied with its obligations under the Agreement.*[36]

The US DOJ's Grindler Memorandum suggests that monitors should not be allowed to exceed their mandates and that practitioners should be proactive in defining a company's relationship with a monitor early in the process. Effectively working with a monitor in this context requires up-front and clear communication with the monitor and, perhaps more importantly, the supervising government agency about the appropriate scope of work and objectives. Proactive management also requires the ability to understand and engage with complex and technical industry-specific topics.

Maintaining confidentiality and privilege

Although applicable to any context, it is imperative that practitioners in this area do everything they can to protect confidentiality and privilege during the pendency of a monitorship. Just because a monitorship may involve as many or more technical matters than legal ones does not lessen the importance of legal advice or diminish the role of the lawyer in guiding the client through the process. Moreover, the fact of monitorship does not waive attorney–client privilege with respect to the monitor. Indeed, the applicable order or agreement that creates the monitorship, whether a plea, consent decree or deferred prosecution, is often sensitive to the fact that the company's confidential information will be shared with the monitor, an external party.

36 US Department of Justice Gary G Grindler, Acting Deputy Attorney General, 'Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations' [Grindler Memorandum] (25 May 2010), at https://www.justice.gov/jm/criminal-resource-manual-166-additional-guidance-use-monitors-dpas-and-npas.

Practitioners should take all steps necessary to ensure that privilege protections are included in whatever agreement governs the monitorship. In the *BP* example discussed above, the order entered by the court after the guilty plea explicitly stated that providing privileged materials to the monitor would not automatically waive privilege.[37] Another provision required the US DOJ or monitor to give notice to the company before seeking disclosure of any privileged material, presumably to give the company an opportunity to challenge any such disclosure in court.[38] The court was also sensitive, generally, to the sort of confidential information BP would be providing in the course of the monitorship:

> *Each monitor shall maintain as confidential all non-public information, documents and records it receives from the defendant, subject to the monitor's reporting requirements herein. Each monitor shall take appropriate steps to ensure that any of his/her consultants or employees shall also maintain the confidentiality of all such non-public information.*[39]

Further, companies can, and often do, engage their own experts to conduct work similar to that to be undertaken by the monitor, both to prepare for the monitor and to improve further their operations and risk profile. This work can be done under the protection of the attorney–client privilege if appropriate steps are taken in advance. The work should always be done, for example, at the direction of counsel and for the purpose of providing legal advice (e.g., compliance with the company's legal obligations). This work may involve experts who are not familiar with working under these conditions, and it is crucial that both the in-house and external attorneys directing the work are vigilant in instructing all involved of the importance of best practices for maintaining privilege and confidentiality in this area.

Finally, despite the fact that many cases historically have expressly made reports by the monitor confidential, there is an increasing push to make monitors' reports public. Practitioners should be prepared for public disclosure and, in light of the possibility of disclosure, take steps to prevent privileged information from ever being provided to the monitor.

The future of monitors in the energy and environmental sectors

In many industries, there may be reason to believe that the number of monitorships sought by US authorities will decrease. The US DOJ's Criminal Division released a memo on 11 October 2018 noting that 'the imposition of a monitor will not be necessary in many corporate criminal resolutions, and the scope of any monitorship should be appropriately tailored to address the specific issues and concerns that created the need for the monitor'.[40]

37 Guilty Plea Agreement, Ex. B at 4, *United States v. BP Exploration & Production, Inc.*, Case No. 2:12-cr-00292 (E.D. La. 2012), ECF No. 2-1.

38 id.

39 id.

40 US Department of Justice, Brian A Benczkowski, Assistant Attorney General, 'Selection of Monitors in Criminal Division Matters' (11 October 2018) [Benczkowski Memorandum] at 2, at https://www.justice.gov/criminal-fraud/file/1100366/download.

The memorandum elaborates that in evaluating the prudence of a monitor, the government should consider:

> *(a) whether the underlying misconduct involved the manipulation of corporate books and records or the exploitation of an inadequate compliance program or internal control systems; (b) whether the misconduct at issue was pervasive across the business organization or approved or facilitated by senior management; (c) whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal control systems; and (d) whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future.*[41]

The memorandum was widely seen as a signal that the US DOJ would exercise more restraint in future cases in determining whether to impose a compliance monitor.

Whether this apparent policy shift will affect monitorships in the energy and environmental space remains to be seen. Given the scale and public attention often accompanying environmental incidents, it is possible, and perhaps even likely, that companies in this sector in particular will continue to face a high risk of monitorships.

41 id.

Appendix 1

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Mark Filip is a partner in Kirkland's Chicago and Washington, DC, offices. Mark leads the firm's government enforcement defence and internal investigations group, and serves as a members of the firm's worldwide management committee. Mark has broad experience in both private practice and in government service. In private practice, he leads internal investigations for a wide array of boards and companies, which involve numerous industries, settings and countries. Mark also represents, for example, several multinational healthcare companies in government investigations concerning their core products. His clients include some of the largest financial institutions in the world, and Fortune 500 companies in diverse industries, including professional sports, energy, defence contracting, mining, manufacturing, agricultural production, gaming and heavy infrastructure.

His experience includes investigations by the US Department of Justice, Securities and Exchange Commission, Federal Trade Commission, Department of Labor, Environmental Protection Agency, Department of Defense, Department of Homeland Security, Congress, Federal Reserve, New York Department of Financial Services, state attorneys general and foreign regulators, as well as special board committees convened in response to shareholder demands.

On the civil side, Mark has an active class action defence practice. This includes, for example, a broad securities practice for clients in a variety of industries. Mark has substantial experience with the federal multi-district litigation process, and he has served as a judge in class action matters during his tenure on the federal bench and as an advocate in these types of cases in private practice. He is also a fellow of the American College of Trial Lawyers.

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

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

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