Fordham Journal of Corporate & Financial Law

Volume 17 | Issue 2 Article 1

2012

Answering To A Higher Authority: Sovereign-Mandated Oversight In The Board Room And The C-Suite

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Cover Page Footnote

Mr. O’Neil is the founder and President of The Saranac Group LLC, a strategic consulting firm that advises boards of directors and senior management in the areas of corporate governance, business ethics, regulatory compliance, restoration of trust and monitoring. He has held a number of executive positions in publicly-traded companies including Executive Vice Chairman, General Counsel and Secretary of WellCare Health Plans, Inc., and Senior Vice President and General Counsel of The MCI Group. He also has been a partner with two preeminent law firms, DLA Piper LLP (US) and Hogan & Hartson (now Hogan Lovells US LLP). During his tenure at DLA Piper LLP (US), Mr. O’Neil was a Joint Global Practice Group Leader and chaired the U.S. Government Affairs Practice Group. Earlier in his career, Mr. O’Neil served as an Assistant U.S. Attorney for the District of Maryland, a law clerk to U.S. District Judge Alexander Harvey II, and a legislative assistant to former Congressman Stewart B. McKinney. He received his A.B., magna cum laude, from Dartmouth College and his J.D. from Georgetown University, where he is now an adjunct professor of law teaching corporate governance. He is a member of the International Association of Independent Private Sector Inspectors General. ** Mr. Kennedy is a Senior Associate with DLA Piper LLP (US), where he specializes in commercial and regulatory litigation, corporate compliance and defense, and risk assessment and monitoring. He has advised companies in complex compliance matters involving, among other things, data security and privacy, financial controls, policies and procedures and records management. Across a broad array of industrial sectors, Mr. Kennedy has conducted internal investigations and represented companies in voluntary disclosures to regulators and enforcement officials. Mr. Kennedy earned his undergraduate degree from the University of Texas at Austin, and he received his J.D. from the University of Baltimore School of Law, where he served as Articles Editor on the Law Review. † With heartfelt appreciation, the authors thank their colleagues, William O. Mandycz, Esq., Michael M. Sevi, Esq., Ellen E. Smith, Esq., and Rebecca Miller for their exceptional assistance and collaboration in every phase of the development of this article.

VOLUME XVII **2012** **NUMBER 2**

FORDHAM

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ANSWERING TO A HIGHER AUTHORITY: SOVEREIGN-MANDATED OVERSIGHT IN THE BOARD ROOM AND THE C-SUITE[1]

Thomas F. O'Neil III[*]
T. Brendan Kennedy[**†]

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1. The "C-Suite" refers to "Control Suite," common parlance for the senior management team of corporate entities.

* Mr. O'Neil is the founder and President of The Saranac Group LLC, a strategic consulting firm that advises boards of directors and senior management in the areas of corporate governance, business ethics, regulatory compliance, restoration of trust and monitoring. He has held a number of executive positions in publicly-traded companies including Executive Vice Chairman, General Counsel and Secretary of WellCare Health Plans, Inc., and Senior Vice President and General Counsel of The MCI Group. He also has been a partner with two preeminent law firms, DLA Piper LLP (US) and Hogan & Hartson (now Hogan Lovells US LLP). During his tenure at DLA Piper LLP (US), Mr. O'Neil was a Joint Global Practice Group Leader and chaired the U.S. Government Affairs Practice Group. Earlier in his career, Mr. O'Neil served as an Assistant U.S. Attorney for the District of Maryland, a law clerk to U.S. District Judge Alexander Harvey II, and a legislative assistant to former Congressman Stewart B. McKinney. He received his A.B., *magna cum laude*, from Dartmouth College and his J.D. from Georgetown University, where he is now an adjunct professor of law teaching corporate governance. He is a member of the International Association of Independent Private Sector Inspectors General.

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ABSTRACT

The relationship between business organizations and the sovereign agencies that regulate them is being redefined domestically and abroad. In the context of corporate enforcement proceedings, a critical challenge is how to achieve, most effectively, the time-honored public sector objectives of punishment, deterrence, financial restitution and rehabilitation. At issue are important policy considerations and at stake are the integrity and security of the commercial marketplace.

The public sector increasingly must balance the pressures of limited resources against the need to ensure that corporate citizens behave not only lawfully, but ethically and responsibly. One solution that has been adopted is the imposition of independent, private sector oversight on companies and firms that have been the targets or subjects of investigations. While its success to date has varied, this evolving joint venture model is undeniably viable and it will become even more appealing to enforcement officials in this global era of fiscal restraint.

Answering to a Higher Authority addresses the evolution of private sector oversight and its implementation domestically and in capitalist nations abroad. With equal importance, this Article explores various policy considerations and offers refinements and solutions to all constituencies related to the selection, retention and deployment of independent consultants and monitors.

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INTRODUCTION

The relationship between corporations, private sector creatures of common and statutory law, and the sovereign entities that regulate them has long been a complex one. Indeed, in the United States, and in many other countries, it is continuously redefined. The enforcement dimension of corporate regulation has been especially challenging, and American officials and their Canadian and European counterparts have undertaken to develop legal theories and principles for assessing and addressing alleged organizational misconduct. Perhaps even more vexing in the corporate context has been the ongoing effort to carry out, in both criminal and quasi-criminal proceedings, the undeniably legitimate and time-honored public sector responsibility for punishment, deterrence, financial restitution and rehabilitation. This is especially difficult because the very nature of a corporation requires approaches that are different from those adopted in cases involving malfeasance by individuals.

This Article focuses on the imposition of independent private sector oversight of corporate operations as a means of ensuring that an enterprise acts as a responsible citizen. This Article also addresses the deterrent effects these resolution mechanisms have on corporations, as they are, in a sense, punitive in nature due to their attendant costs, risks and stigma.

Scholars, the judiciary, legislators, enforcement officials, legal practitioners, and corporate directors and executives have analyzed exhaustively the causes of corporate wrongdoing.[2] Typically, corporate wrongdoing arises from a confluence of some or all of the following: inadequate governance; greed; deluded or otherwise impaired judgment or even psychotic behavior in the C-suite; an institutional culture that is founded on and driven by problematic values; the pressures generated by what now appears to be a perpetual capitalist cycle of "boom and bust"; byzantine and often inconsistent regulations and administrative rules; and inept or lax enforcement thereof. Consequently, the rehabilitation of a firm that has run amok ethically and/or legally is a

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2. *See generally* Stephany Watson, *Fostering Positive Corporate Culture in the Post-Enron Era*, 6 TRANS. TENN. J. BUS. L. 7 (2004); Marianne M. Jennings, *The Disconnect Between and Among Legal Ethics, Business Ethics, Law, and Virtue: Learning Not to Make Ethics so Complex*, 1 U. ST. THOMAS L. J. 995 (2004); Kurt Eichenwald, *After a Boom, There Will Be Scandal. Count on It.*, N.Y. TIMES, Dec. 16, 2002, at C3.

decidedly different, and more arduous, undertaking than that crafted for an individual, even an egregious recidivist.[3]

Not surprisingly, over the past several decades, regulators and enforcement officials have come to understand that when more than isolated misbehavior by lower or mid-level rogue employees is involved, the rehabilitation of a business organization takes considerable time and substantial resources, is fragile during its initial phases and can only be confirmed through a sustained period of holistic and impartial oversight.[4] While some federal and state agencies may well have the expertise to conduct some or all facets of that evaluation, none have the resources to do so, particularly in light of recent sector-wide economic implosions and derailments.[5] Many have, therefore, turned to the private sector for assistance in effectuating their enforcement goals. To date, the success of these joint ventures has varied widely and as a matter of public policy, they have generated vigorous debate and reassessment in both sectors.[6] It is the premise of this Article that, when informed by a thorough understanding of its evolution, private sector oversight is not

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3. *See* Cristie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 703-07 (2009); Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713, 1720-21 (2007).

4. *See* Ford & Hess, *supra* note 3, at 703-07.

5. Although the American housing bubble is the most recent example, boom and bust cycles have been endemic in capitalism since its earliest days. For instance, during the Dutch Tulip Mania of the early 17th century, tulip bulbs were the subject of mass market speculation and prices "skyrocketed to the point where the Dutch traded such personal belongings as furniture, jewels, and even land to acquire the most highly sought after tulips." *See* Peter L. Cockrell, *Subprime Solutions to the Housing Crisis: Constitutional Problems with the Helping Families Save Their Homes Act of 2009*, 17 GEO. MASON L. REV. 1149, 1149 (2010). The Tulip Mania also demonstrated that governments have attempted to manage and intervene in financial crises resulting from the boom and bust cycles long before their recent attempts to stabilize economies in the wake of the American housing bubble. *See id.* For additional discussion of sector-wide economic collapses and government responses, *see also* Watson, *supra* note 2, at 7, 10-15; Eichenwald, *supra* note 2.

6. *See generally* Ford & Hess, *supra* note 3; Jayne W. Barnard, *Corporate Therapeutics at the Securities and Exchange Commission*, 2008 COLUM. BUS. L. REV. 793, 814-15 (2008); Khanna & Dickinson, *supra* note 3; Jennifer O'Hare, *The Use of the Corporate Monitor in SEC Enforcement Actions*, 1 BROOK. J. CORP. FIN. & COM. L. 89, 89 (2007); Benjamin M. Greenblum, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1870-71 (2005).

only viable, it is perhaps the only realistic option in the current era of global fiscal restraint.

Part I of this Article addresses private sector oversight of corporate affairs in both domestic and transnational settings. Part I.A.1 provides a historical overview of this practice in the United States, followed in Part I.A.2 by a discussion of key American agencies that have utilized private sector oversight pursuant to their statutorily-granted powers. Part I.A.3 provides case studies and addresses the methods adopted by the United States Department of Justice (the "DOJ"), the United States Securities and Exchange Commission (the "SEC" or the "Commission"), the United States Department of Health and Human Services ("HHS"), the United States Environmental Protection Agency (the "EPA"), and the United States Department of Labor (the "DOL"). Part I.B focuses on corporate oversight abroad, offering case studies from the United Kingdom and an overview of the Organisation for Economic Co-operation and Development.

Part II of this study considers the ramifications of independent private sector oversight; it reviews duties and responsibilities assumed by the independent monitor tasked with overseeing a corporate entity. It also addresses the selection, retention and ultimate deployment of an independent consultant or monitor, and explores various policy considerations attendant to private sector oversight of corporate entities.

I. PRIVATE SECTOR OVERSIGHT OF CORPORATE AFFAIRS

A. THE UNITED STATES

1. Historical Overview

The notion of private sector oversight of corporate affairs—an amalgamation of American jurisprudence and enforcement and regulatory initiatives—is now well developed in the United States. Over roughly the past decade, American scholars and practitioners have identified and analyzed many facets of the model, particularly in the sovereign proceeding setting.[7] No matter the designated moniker of the corporate overseer—auditor, consultant, ombudsperson, monitor,

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7. For a historical perspective of the evolution of the corporate monitor, *see, e.g.*, Ford & Hess, *supra* note 3, at 683-89; Khanna & Dickinson, *supra* note 3, at 1715-20; O'Hare, *supra* note 6, at 89-93.

receiver or review organization—this increasingly important role is the offspring of the judiciary and the legislature. As such, it has been driven by direct application of criminal law, quasi-criminal statutes, and administrative regulations to business organizations, both publicly-traded and privately held.[8]

Courts have long used their equitable powers in the name of justice, crafting remedies to address past wrongdoing and to prevent its recurrence.[9] As Justice Brandeis observed almost a century ago, "[c]ourts have . . . inherent power to provide themselves with appropriate instruments required for the performance of their duties," which "includes authority to appoint persons unconnected with the court to aid judges in the performance of specific duties, as they may arise in the progress of a cause."[10] Indeed, the judiciary's authority to appoint special masters and receivers is codified in the Federal Rules of Civil Procedure.[11]

Private sector oversight of companies and firms has been spawned by the judicial expansion of legislatively created enforcement authority powers.[12] Federal securities laws enacted in the wake of the 1929 stock market crash endow the SEC with broad discretion and a panoply of remedies to protect investors and financial markets.[13] In this regard,

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8. *See* Ford & Hess, *supra* note 3, at 683-89; Khanna & Dickinson, *supra* note 3, at 1715-20; Greenblum, *supra* note 6.

9. *See* Daniel J. Morrissey, *SEC Injunctions*, 68 TENN. L. REV. 427, 432-39 (2001).

10. *In re Peterson*, 253 U.S. 300, 312-13 (1920) (citations omitted). *See* Khanna & Dickinson, *supra* note 3, at 1715 (discussing the authority of court-appointed special masters); Robert E. Buckholz, Jr. et al., *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 826-27 (1978).

> These court appointed agents are identified by a confusing plethora of titles: 'receiver,' 'Master,' 'Special Master,' 'master hearing officer,' 'Monitor,' . . . 'Administrator' . . . . Terminological confusion is compounded by functional confusion. A 'master' may at the same time gather information, make recommendations, and act to implement a decree. While the first two activities are part of the Master's traditional role, the latter is not.

Id.

11. *See* FED. R. CIV. P. 53 (masters) and 66 (receivers).

12. For a discussion of the rise and use of receivers in SEC enforcement actions, as part of the ancillary relief available under securities law, *see* Morrissey, *supra* note 9, at 444-47.

13. *See* Securities Act of 1933 (the "Securities Act") § 8A(a), 15 U.S.C. § 77a *et seq*. (2006); Securities Exchange Act of 1934 (the "Exchange Act") § 21(d) (providing

some observers primarily credit the equitable powers of the courts in the context of federal securities laws, which provide injunctive relief to effectuate the Commission's mandates.[14] As the SEC's use of injunctions blossomed, so did the scope of equitable relief that the Commission sought.[15] The 1960s saw the expansion of what some observers call "ancillary relief"; with increasing frequency, the federal district courts imposed, in civil and enforcement proceedings, equitable remedies – such as the requirement of an accounting or the appointment of receivers – that were not explicitly recognized in the pertinent statutes and regulations, but were complimentary and logical extensions of statutory enforcement tools. It was an appealing approach in an era of judicial activism.[16]

Judge Stanley Sporkin's bias towards the use of consultants during his tenure as Enforcement Chief of the SEC may be viewed as another step in the evolution of the Commission's use of the private sector to supplement its resources and fulfill its enforcement mandate.[17] More recently, the SEC has utilized "undertakings" in negotiated resolutions of security law violations in order to transform corporate culture, including the appointment of independent private sector consultants.[18] Such measures were fully embraced by the Sarbanes-Oxley Act of 2002 ("SOX"),[19] which granted the SEC the authority to seek, and the courts the authority to grant, "any equitable relief that may be appropriate or necessary for the benefit of investors."[20]

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for, among other remedies, "any equitable relief that may be appropriate or necessary for the benefit of investors") & 21C(a) (Commission's authority to craft orders and take steps to "effect compliance"), 15 U.S.C. § 78 (2006); Richard G. Wallace & Benjamin R. Dryden, *Use of Independent Consultants as a Remedy in Securities Enforcement Actions*, 42 BNA'S SEC. REG. & L. REP. 750 (2010). In his article, *SEC Injunction*s, Professor Morrissey details the use of injunctions under federal securities law as an example of an enforcement authority's application for, and use of, the court's equitable powers to carryout statutorily prescribed policy. *See* Morrissey, *supra* note 9.

14. *See* Morrissey, *supra* note 9, at 436-39; *see also* O'Hare, *supra* note 6, at 89, 90, 93.

15. *E.g.*, O'Hare, *supra* note 6, at 89, 90, 93; Barnard, *supra* note 6.

16. Morrissey, *supra* note 9, at 444-45; *see* O'Hare, *supra* note 6, at 89, 92-93.

17. Barnard, *supra* note 6.

18. *Id.* at 795-96.

19. Sarbanes-Oxley Act of 2002 (codified as amended at 15 U.S.C. § 78u(d)(5) (2006)); *see* O'Hare, *supra* note 6, at 89, 93.

20. Exchange Act § 21(d)(5), 15 U.S.C. § 78u(d)(5) (2006).

In the same vein, the appointment of trustees in proceedings pursuant to remedial power in the Racketeer Influenced and Corrupt Organizations Act ("RICO")[21] is now viewed as a conceptual precursor to corporate monitorships.[22] The same concept has resulted in the appointment of trustees by federal bankruptcy courts;[23] Independent Review Organizations ("IROs") by the Office of the Inspector General of the United States Department of Health and Human Services (the "OIG") in negotiated Corporate Integrity Agreements ("CIAs"); and stipulations and agreements by the United States Department of Labor (the "DOL"), and in enforcement proceedings brought under the Occupational Safety and Health Act ("OSHA").[24]

Without question, the most influential force in the development of private sector oversight of corporate organizations has been the application of criminal law to business organizations, building on the initial recognition of corporate liability in 1909.[25] In 1991, the United States Sentencing Commission (the "Sentencing Commission") promulgated Guidelines that focused on companies and firms.[26] The

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21. 18 U.S.C. §§ 1961-68 (2006).

22. *See* Ford & Hess, *supra* note 3, at 683; Khanna & Dickinson, *supra* note 3, at 1716-17. Still another recognized predicate to corporate monitorships, public law litigation aimed at restructuring and reforming public institutions, like RICO actions, often entails consent decrees that require a third party to oversee the implementation of remedial efforts. *See* Ford & Hess, *supra* note 3, at 683; U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL p. 186 (2007), *available at* http://www.justice.gov /usao/eousa/foia_reading_room/usam/title9/civrico.pdf ("[C]ourts are vested with broad equitable powers to impose highly intrusive remedies to redress unlawful conduct, especially in institutional reform cases.").

23. The authority to appoint a bankruptcy examiner is found in 11 U.S.C. 1104(c) (2010). Bankruptcy examiners are empowered to investigate the debtor and any matters relevant to the case or formation of a plan, and often do when it would be in the best interests of the creditors, equity stockholders or the estate. Statements of the investigation are then filed with the court. *See* 11 U.S.C. § 1106(b) (2010); *see also* Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery, 330 F.3d 548 (3d Cir. 2003) (en banc).

24. 18 U.S.C. §§ 1961 *et seq.*

25. *See* New York Cent. & Hudson R.R. Co. v. United States, 212 U.S. 481, 493 (1909); *see also* James R. Copland, *Regulation by Prosecution: The Problems with Treating Corporations as Criminals*, MANHATTAN INSTITUTE FOR POLICY RESEARCH, (Dec. 14, 2010), http://www.manhattan-institute.org/pdf/press_release_cjr13.pdf.

26. Though initially deemed mandatory, the United States Supreme Court's decisions in *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005), rendered the Sentencing Guidelines advisory in nature.

Sentencing Guidelines have been amended since, most recently in 2010, to, among other things, include in an application note specific reference to the use of third party, professional "advisors" as a remedial step in furtherance of the implementation or enhancement of an organization's compliance and ethics program.[27]

Beginning in the early 1990s, federal prosecutors increasingly used non- and deferred prosecution agreements ("NPAs" and "DPAs") as resolution vehicles in corporate investigations.[28] Since 1993, the United States Department of Justice (the "DOJ" or the "Department") has entered into at least 170 such agreements.[29] As the DOJ has refined its approach to addressing corporate misconduct through measures short of criminal convictions, corporate monitors have become a mainstay component of resolution models.[30]

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27. AMENDMENTS TO THE SENTENCING GUIDELINES, 31, 34-35 (May 3, 2010). Officials within the DOJ have acknowledged the role of "independent compliance monitors" in transforming corporate cultures in the wake of wrongdoing. *See Wall Street Fraud and Fiduciary Duties: Can Jail Time Serve as an Adequate Detterrent for Willful Violations? Hearing Before the U.S. Senate Comm. on the Judiciary Subcomm. on Crime and Drugs*, 111th Cong. (2010) 13 [hereinafter *Breuer Testimony*] (statement of Lanny A. Breuer, Assistant Attorney Gen., Criminal Division, U.S. Dep't of Justice).

28. *See* Greenblum, *supra* note 6; *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, Director, Homeland Security and Justice, Government Accountability Office).

29. *Larence Testimony*, *supra* note 28 (first resolution agreements executed in 1993). The Department does not maintain statistics concerning the number of NPAs and DPAs it has executed that are immediately accessible to the public, and the GAO's study, which identified 152 such agreements combined, is the latest government survey of such figures. More recently, private sector practitioners have undertaken a review of publicly available NPAs and DPAs entered into in the past decade, compiling statistics that align generally with those of the GAO reports and indicate a continuing trend in their use, raising the total number of such agreements through 2010 well over 170. *See* Melissa Aguilar, *DPA-NPA Tally Marks Decade's Second Highest*, COMPLIANCE WEEK, Jan. 10, 2011.

30. Ford & Hess, *supra* note 3, at 682; Khanna & Dickinson, *supra* note 3, at 1721. Although not discussed in depth, the authors recognize that the histories of corporate compliance and ethics programs and criminal and quasi-criminal resolution agreements have been the subject of significant scholarship. Writers have traced the evolution of corporate compliance programs from antitrust prosecutions in the 1960s to the enactment of the Foreign Corrupt Practices Act in 1977 (which is coming full circle with the recent DOJ focus on violations of the Foreign Corrupt Practices Act). *See* Mark Brzezinski, *Obama Administration Gets Tough on Business Corruption Overseas*,

Over the past several decades in both Democratic and Republican administrations, the Department has focused decisively on corporate malfeasance at home and abroad. In particular, the DOJ has emphasized the importance of corporate compliance and ethics programs and, as a means of establishing or implementing them, the use of resolution agreements and corporate monitors.[31] For instance, in response to a rash of high-profile acts of corporate deceit, in 2002, President George W. Bush created the Corporate Fraud Task Force (the "Task Force"), which remains active today and draws on the talents and resources of more than a dozen combined federal departments, agencies, U.S. Attorneys' Offices and divisions of the Department. To date, the Task Force has obtained over a thousand corporate fraud convictions of corporations and senior executives, including hundreds of chief executive and financial officers, and vice presidents.[32] Likewise, the DOJ has identified the prosecution of foreign corrupt practices as a top enforcement priority, bringing more Foreign Corrupt Practices Act (the "FCPA") cases in the past five years than in the balance of the statute's history since its passage in 1977.[33] In all of these complex cases, recognizing that a criminal conviction, particularly in a highly regulated industrial sector, can be the catalyst for the demise of an organization,

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WASH. POST, May 28, 2010, (reflecting on Lanny Breuer's, Chief of DOJ Criminal Division, speech at the Council on Foreign Relations May 4, 2010, in which he expressed the Obama administration's goal of creating "'a global consensus that corruption is unacceptable . . . .'"). This continued in defense industry reform in the 1980s and the specific reference to compliance and ethics programs in the Guidelines in the 1990s, which were formally recorded in 2004 and revised in 2010. For a perspective on the evolution of corporate compliance programs, *see, e.g.*, , Ford & Hess, *supra* note 3, at 689-92. For a discussion of the evolution of deferred prosecution agreements, *see, e.g.*, , Benjamin M. Greenblum, *supra* note 6, at 1866-71.

31. Brzezinski, *supra* note 30; OFFICE OF THE ATTORNEY GEN., THE ACCOMPLISHMENTS OF THE U.S. DEPARTMENT OF JUSTICE 2001-2009, 30 (2009); *The President's Corporate Fraud Task Force*, JUSTICE.GOV, http://www.justice.gov/archive/dag/cftf (last visited Feb. 24, 2012) [hereinafter *The President's Corporate Fraud Task Force*]; *see also* AMENDMENTS TO THE SENTENCING GUIDELINES, *supra* note 27, at 31, 34-35.

32. *See* OFFICE OF THE ATTORNEY GEN., *supra* note 31, at 30; *see also The President's Corporate Fraud Task Force*, *supra* note 31.

33. *See* OFFICE OF THE ATTORNEY GEN., *supra* note 31, at 31; *see also The President's Corporate Fraud Task Force*, *supra* note 31.

the DOJ has publicly endorsed the use of independent corporate monitors in resolution agreements with companies and firms.[34]

A decade into the new millennium, there is no question that enforcement authorities and regulators now embrace the notion of independent private sector oversight in both the boardroom and the C-Suite.[35] As this Article discusses, the corporate monitor and its counterpart in analogous proceedings, when properly selected and deployed, promotes detection, prevention, and remediation of corporate misconduct, due in large part to the ability of the appointed individual to impart expertise and resources to the oversight of a corporation's affairs.[36]

2. Key American Agencies

a. The United States Department of Justice

i. Sentencing Guidelines

A meaningful review of the evolution of the appointment of corporate monitors in federal criminal investigations necessarily begins with the Sentencing Commission. Created by Congress in 1984 as part of the Sentencing Reform Act, it serves as "an independent commission

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34. *Breuer Testimony*, *supra* note 27, at 12-13 (noting that as part of a resolution agreement, the DOJ may require that corporations retain "independent compliance monitors in appropriate cases"). Mr. Breuer further explained that the DOJ "believes that corporate guilty pleas and DPAs, corporate fines, and the imposition of independent compliance monitors serve the important criminal enforcement goals of specific deterrence, general deterrence, and rehabilitation." *Id.* at 36. Later that month, Mr. Breuer again endorsed the use of independent compliance monitors in appropriate cases. Prepared remarks to *Compliance Week* 2010 – 5th Annual Conference for Corporate Financial, Legal, Risk, Audit & Compliance Officers, (May 26, 2010) (statement of Lanny A. Breuer, Assistant Attorney Gen.).

35. *See* Barry A. Bohrer & Barbara L. Trencher, *Prosecution Deferred: Exploring the Unintended Consequences and Future of Corporate Cooperation*, 44 AM. CRIM. L. REV. 1481, 1486 n. 17 (2007). Of the 152 resolution agreements the DOJ entered into since 1993, 94 were executed between 2004 and 2009; *Corporate Crime: DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-Prosecution Agreements, But Should Evaluate Effectiveness*, U.S. GOV'T ACCOUNTABILITY OFFICE, 5, 16 (2009), http://www.gao.gov/products/GAO-10-110 (last visited Mar. 12, 2011).

36. Ford & Hess, *supra* note 3, at 692; U.S. SENTENCING GUIDELINES MANUAL (Nov. 1, 2010); *Breuer Testimony*, *supra* note 27.

in the judicial branch of the United States."[37] The Sentencing Commission is charged with establishing "sentencing policies and practices for the Federal criminal justice system"[38] and developing a "means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing" as described in the Federal Code of Criminal Procedure.[39] To this end, the Sentencing Commission is responsible for, among other things, creating and distributing to the federal courts guidelines, and related application notes and policy statements, for determining the sentences in criminal cases.[40]

Initially, Congress required judges to calculate sentences pursuant to the *United States Sentencing Guidelines Manual* (the "Guidelines").[41] In the wake of their promulgation over a period of two decades, the precepts and provisions of the Guidelines were litigated extensively.[42] In 2005, the United States Supreme Court's decision in *United States v. Booker* rendered the Guidelines advisory in nature.[43]

Today, when imposing a sentence in a criminal case, a federal district judge must "consider," inter alia, the Guidelines and their supporting application notes and policy statements.[44] The Guidelines establish the presumptive parameters of a sentence "unless the [district] court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the

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37. 28 U.S.C. § 991(a) (2006). Today, the Commission is comprised of seven voting members and one nonvoting member. The President appoints the Commission's seven voting members, with the advice and consent of the Senate; the Attorney General or the Attorney General's designee is the nonvoting member. At most, three federal judges serve on the Commission, and, as a measure of political balance, no more than four members may be from the same political party. *Id.*

38. 28 U.S.C. § 991(b)(1).

39. *Id.*; *see, e.g.,* 18 U.S.C. § 3553(a)(4).

40. 28 U.S.C. § 994(a)(1)-(2).

41. Mistretta v. United States, 488 U.S. 361, 367 (1989).

42. *See* Harris v. United States, 536 U.S. 545, 569 (2002); United States v. Watts, 519 U.S. 148, 149 (1997); Witte v. United States, 515 U.S. 389 (1995); United States v. Dunnigan, 507 U.S. 87, 88-89 (1993); *Mistretta*, 488 U.S. at 372.

43. 543 U.S. 220 (2005).

44. 18 U.S.C. § 3553(a)(4). For purposes of appellate review, sentences calculated in accordance with the Guidelines are presumed reasonable. *See* United States v. Rita, 551 U.S. 338, 347-48 (2007); United States v. Booker, 543 U.S. 220, 264 (2005); *see also* Gall v. United States, 552 U.S. 38, 49 (2007) (explaining that "the Guidelines should be the starting point and the initial benchmark").

[Sentencing Commission] . . . ."[45] Judges may, for instance, deviate below a statutory minimum sentence "upon motion of the Government . . . so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who committed an offense."[46] In the absence of a governing Guideline, the federal courts have license to impose such other sentences, as they deem appropriate under the circumstances presented.[47]

Effective November 1, 1991, Chapter 8 of the Guidelines[48] is designed to advance the dual prerogatives of "just punishment" and "deterrence."[49] The key provisions of the current version of the Organizational Guidelines have been in place, with only slight revisions, since 2004.[50] Although no longer binding on the courts,[51] the Guidelines are the presumptive rubric under which criminal punishment is imposed; they enunciate criteria for good corporate citizenship and serve as a framework for best practices in the area of ethics and compliance.[52]

In part, the Organizational Guidelines are designed to create meaningful incentives for corporations to develop compliance and ethics programs that are tailored to the realities of their industrial sector and their particular organizations. These compliance and ethics programs should include the following components, among others: (1) the development of policies and procedures that prevent and detect criminal activity; (2) overall responsibility for the program seated in senior

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45. 18 U.S.C. § 3553(b)(1).

46. *Id.* § 3553(e).

47. *Id.* § 3553(b)(1).

48. Hereinafter, the Chapter 8 Sentencing Guidelines shall be referred to as the "Organizational Guidelines."

49. PAULA DESIO, DEPUTY GENERAL COUNSEL, U.S. SENTENCING COMMISSION, AN OVERVIEW OF THE ORGANIZATIONAL GUIDELINES (2010); U.S. SENTENCING GUIDELINES MANUAL § 8, introductory cmt. (2009). When the Organizational Guidelines were promulgated, they were mandatory. *See* Mistretta v. United States, 488 U.S. 361, 367 (1989).

50. U.S. SENTENCING GUIDELINES MANUAL § 8, historical note (Nov. 1, 2010). The provisions are applicable to business organizations convicted of felony and Class A misdemeanor offenses, which, through the principle of vicarious liability, may be held criminally responsible for the acts of their agents. *Id.* § 8, introductory cmt. In this regard, an organization's agents (e.g., individual employees) may be sentenced in accordance with other chapters of the Guidelines, alongside the organization. *Id.*

51. United States v. Booker, 543 U.S. 220, 264 (2005).

52. Win Swenson & Joe Murphy, *Changes Coming in Company Compliance Programs: The U.S. Sentencing Commission Adjusts the Rules,* WHITE COLLAR CRIME REPORT, 10 May 7, 2010 at 1.

personnel supported by adequate resources and operational authority who report to the organization's board of directors or appropriate controlling authority charged with the oversight of the program; (3) a mechanism to exclude from senior-level, operational or authority functions of the corporation anyone who has participated in an activity contrary to the interests of, or espoused by, an effective compliance and ethics program; (4) periodic, effective training on, and communication of, the corporation's policies and procedures throughout all levels of the enterprise, including, as appropriate, its agents; (5) reasonable steps towards achieving compliance, including monitoring and auditing activity to detect misconduct, periodic assessment of risks and the program's efficacy and implementation of a system to report suspected or actual wrongdoing without fear of retaliation; (6) consistent enforcement of compliance standards and disciplinary mechanisms; and (7) reasonable steps to respond to and prevent similar wrongdoing in the future, including program modifications.[53]

Part 8A of the Organizational Guidelines covers their application requiring first a determination under Part B of the "requirements and options relating to restitution, remedial orders, community service, and notice to victims,"[54] before addressing the imposition of a fine,[55] and then an evaluation under Parts D and E, respectively, of the "requirements and options relating to probation"[56] and "special assessments, forfeitures, and costs."[57]

Part B provides for restitution, remediation, community service and notice to victims, as appropriate under the facts of the case. Remedial orders "may require the organization to remedy the harm caused by the

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53. U.S. SENTENCING GUIDELINES MANUAL, *supra* note 36, § 8B2.1(b)(1)-(7), introductory cmt; *see* DESIO, *supra* note 49. As discussed *infra* § I.A.2.c.1, these components differ slightly from guidance promulgated by the OIG. In particular, the OIG, as part of its "seven elements" of an effective compliance program, advocates the institution of a hotline for reporting anonymously suspected instances of non-compliance, but is silent as to efforts to avoid delegating authority for the compliance program to individuals who exhibit a propensity toward unethical, or non-compliant or illegal conduct. *Compare* U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(1)-(7) (Nov. 1, 2010) *with, e.g.,* Compliance Program Guidance for Pharmaceutical Manufacturers, 68 Fed. Reg. 23731, 23732-33 (May 5, 2003).

54. U.S. SENTENCING GUIDELINES MANUAL, § 8A1.2(a) (Nov. 1, 2010).

55. *Id.* § 8A1.2(b).

56. *Id.* § 8A1.2(c).

57. *Id.* § 8A1.2(d).

offense and to eliminate or reduce the risk that the instant offense will cause future harm."[58] As the commentary to this subpart explains, such orders may require "corrective action by the organization" in order to "prevent future injury from the instant offense."[59] In some cases, a judicial mandate may not be necessary, and should, instead, issue from an appropriate governmental regulatory agency and be "coordinated with any administrative or civil actions taken by the appropriate governmental regulatory agency."[60] This case-specific flexibility provides the foundation for sentences requiring, among other things, the prompt development of an effective compliance and ethics program, if one was not in place at the time of the offense.[61]

Part B also creates a framework for the assessment of an existing compliance and ethics program, or, if one was not in place at the time of the offense, guidance for the creation and adoption of one.[62] Credit in the determination of an organization's culpability score is available only if the enterprise did not "unreasonably delay[] reporting the offense to appropriate governmental authorities."[63] Likewise, the credit will not be given if "high-level personnel . . . participated in, condoned, or [were] willfully ignorant of the offense."[64] If an effective compliance and ethics program did not exist at the time of the offense, the Guidelines recommend the implementation of one as a condition of probation.[65] The

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58. *Id.* § 8B1.2(a).
59. *Id.* § 8B1.2 cmt.
60. *Id.*
61. *Id.* § 8D1.4(b)(1).
62. *See generally id*. § 8B2.1.
63. *Id.* § 8C2.5(f)(2).
64. *Id.* § 8C2.5(f)(3). Commentary regarding these restrictions was robust prior to the adoption of a related proposed amendment which became effective November 1, 2010. *See* PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES 39-41 (May 3, 2010), *available at* http://www.ussc.gov/Legal/Amendments/Reader-Friendly/201005 03_RFP_Amendments.pdf.
65. *Id.* § 8D1.4(b)(1). Institutional integrity, sound values and an appropriate "tone at the top," individual and organizational acceptance of responsibility, effective self-policing, and transparency with key stakeholders are the tenets of any such program. To wit, the core components of an effective ethics and compliance program include:

1. Appointment of a "high-level" executive to serve as the focal point and have operational responsibility for the organization's compliance activities. *Id.* § 8B2.1(b)(2)(A-B);
2. Effective reporting channels to the organization's "governing authority" or appropriate subgroup thereof, usually the board of directors or a committee of the board;

appointment of a corporate monitor can ensure, *inter alia*, that a robust compliance program be developed and adopted.[66]

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3. Adequate resources and recognized authority throughout the organization to be effective. *Id.* § 8B2.1(b)(2)(C);
4. Standards and procedures to prevent and detect criminal conduct that are widely disseminated throughout the organization and about which the organization's governing authority must be knowledgeable and the implementation of which it must oversee. *Id.* § 8B2.1(b)(1)-(2);
5. Mandatory, periodic training and the dissemination of information throughout the organization. *Id.* § 8B2.1(b)(4)(A);
6. Monitoring and assessment to test the validity of the program's practices and ability to detect misconduct. *Id.* § 8B2.1(b)(5)(A)-(C);
7. Periodic evaluation of the program's efficacy, combined with organizational risk assessments. *Id.* § 8B2.1(c);
8. A publicized, anonymous and non-retaliatory system that allows employees to report and/or seek guidance confidentially with respect to suspected misconduct. *Id.* § 8B2.1 (b)(5)(A)-(C);
9. Consistent promotion and enforcement of the ethics and compliance program in a way that encourages compliance and publicizes disciplinary measures for engaging in misconduct or failing to prevent or report misconduct. *Id.* § 8B2.1 (b)(6); and
10. Once detected, swift, responsive action to investigate and prevent recurrence of the misconduct.

Id. at § 8B2.1 (b)(7).

While federal enforcement officials have taken the lead in developing these key components of an effective ethics and compliance program, a growing number of their state-level counterparts also have done so. *See, e.g.,* James G. Sheehan, *Lessons from Mandatory Compliance: Integrity Through Compliance Measurement*, OFFICE OF THE INSPECTOR GEN. (Sept. 24, 2010), http://www.omig.state.ny.us/data/images/stories/presentations/4182010_hcca.pdf; *see also, e.g.*, 64 Fed. Reg. 61895 n.13 (Nov. 15, 1999) (corporate integrity agreements "require many of the elements included in this compliance program guidance"); *infra* note 254 and accompanying text.

The efficacy of the organization's compliance and ethics program, as evaluated in accordance with the guidance of § 8B2.1, affects the determination of the organization's culpability under § 8C2.5 and, therefore, the fine to be levied, if any. Among others, key factors that influence the amount of the fine are whether the organization self-reported the offense, cooperated in the investigation or accepted responsibility, all hallmarks of a compliant and ethical culture. *See* U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 (b)-(g) (Nov. 1, 2010).

66. Probation orders may also require periodic reports, regular or unannounced inspections of books and records or business operations, as well as interviews of knowledgeable individuals, conducted by a probation officer or an appointed expert whose fees must be paid by the corporation. *Id.* §§ 8D1.1(a)(1)-(2), 8D1.4(b)(3).

In April 2010, the Sentencing Commission promulgated amendments to the Organizational Guidelines and proposed them to Congress; they became effective on November 1, 2010.[67] Aside from technical modifications, the amendments clarify the guidance under § 8B2.1.[68] In addition to taking reasonable steps to remediate the criminal conduct, the current Guidelines call on organizations to undertake measures that deter and prevent the recurrence of known misconduct.[69] Companies and firms, in short, are expected to evaluate periodically their compliance and ethics programs to ensure efficacy, through risk assessments and validation exercises,[70] which may reveal weaknesses or shortcomings that need to be addressed. The Guidelines suggest that an organization "may . . . use . . . an outside professional advisor to ensure adequate assessment and implementation of any modifications."[71] After public comment, the Sentencing Commission retracted its proposal for the retention of a corporate monitor as an appropriate remediation step, opting instead to provide guidance that reasonable corrective efforts may include, among other actions, enlisting the services of an advisor to identify weaknesses in an organization's compliance and ethics program and assist in the implementation of solutions to fortify such a program.[72]

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67. *Id*. at app. C, amend. 744.

68. The amendments provide meaningful guidance as to what constitutes a reasonable response to detected criminal conduct as required in subsection (b)(7), and revise § 8C2.5 (Culpability Score) to increase the availability of the sentencing credit for having an effective compliance and ethics program in place. *See* PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES, *supra* note 64, at 31.

69. *See* U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (Nov. 1, 2010).

70. *Id.* § 8B2.1(c).

71. *See id.* § 8B2.1(b)(7), cmt. 6.; *see also* PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES, *supra* note 64, § 8B2.1 app. n.6. As scholars have observed, there exists a tension between the prerogatives of the organization and the desired behavior, emanating from the requirement of self-reporting undetected offenses in order for the organization to avail itself of the culpability score credit. The Sentencing Commission has incorporated the recommended conditions of probation requiring the development, court approval, implementation, publication, reporting and testing of a compliance and ethics program described in former § 8D1.4(c) into the revised § 8D1.4(b). Still operative is the requirement that the periodic reports, called for now under the proposed § 8D1.4(b)(3), be shared with "any governmental regulatory body that oversees conduct of the organization relating to the instant offense."

72. U.S. SENTENCING GUIDELINES MANUAL, § 8B2.1(b)(7), cmt. 6. (Nov. 1, 2010); *see also* PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES, *supra* note 64, § 8B2.1 app. n.6; *see also* Swenson & Murphy, *supra* note 52, at 4.

The Sentencing Commission considered comments from, among others, the Practitioners Advisory Group (the "PAG") and Association of Corporate Counsel, before declining to include an explicit reference to corporate monitors in the application notes to § 8B2.1(b)(7).[73] Practitioners and in-house counsel expressed concerns regarding the potential costs to a corporation, the inability to constrain the monitor's scope of work[74] and the presumption that would arise from an explicit reference to monitors in all resolutions of corporate investigations (even when conduct is detected that does not warrant prosecution).[75] They also argued that corporations and probation departments can, in many cases, effectively remediate the circumstances that led to the criminal conduct at issue.[76]

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73. *See* Testimony of David Debold, Chair, Practitioners Advisory Grp. (the "PAG"), before the U.S. Sentencing Comm'n 1 (Mar. 17, 2010), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20100317/Debold%20_PAG_testimony.pdf [hereinafter *Debold Testimony*]; Testimony of Susan Hackett, Assoc. of Corporate Counsel, before the U.S. Sentencing Comm'n 3 (Mar. 17, 2010), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs /Public_Hearings_and_Meetings/20100317/Hackett_ACC_Testimony.pdf [hereinfter *Hackett Testimony*]. The Ethics and Compliance Officers Association joined the recommendation against specific mention of monitors in the proposed Guidelines, favoring language describing an "independent, qualified, third party" as evincing a voluntary decision to "engage an independent verifier" over what it perceived to be "a court-ordered mandate to hire a monitor." Testimony of Tim C. Mazur, Chief Operating Officer of the Ethics and Compliance Officer Assoc., before the U.S. Sentencing Comm'n 2 (Mar. 17, 2010), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20100317/Mazur_testimony.pdf.

The Sentencing Commission retreated from proposed language that would have suggested that organizations engage an "independent monitor," opting instead to suggest the retention of an "outside professional" to assess and advise with respect to corporate compliance functions. Although the corporate community resisted the initially proposed "monitor" language, some commentators attach little significance to the decision to replace "monitor" with reference to an unspecified, outside expert. *See* Swenson & Murphy, *supra* note 52, at 4.

74. *Debold Testimony*, *supra* note 73 at 2. PAG suggested instead a requirement that the company pay an expert to assist the probation department in its supervision of the company's compliance with the terms of probation. *Id*.

75. *Id.*

76. *Id.* The Association of Corporate Counsel agreed with PAG's comments and recommendation to remove what it termed the "monitor option," noting its fear that judges would take the inclusion of the reference to monitors as a best practice that should be routinely considered, "rather than the nuclear option that most folks who've

ii. DOJ Guidance

The United States Attorneys' Manual (the "USAM") provides internal guidance on a broad array of topics to United States Attorneys, Assistant United States Attorneys and DOJ prosecutors.[77] Among other things, the USAM provides parameters for exercising prosecutorial discretion in resolving investigations involving corporate targets.[78] To amplify and clarify this guidance, the Department has also issued a series of memoranda over the past decade. Beginning in June 1999 with a memorandum entitled *The Federal Prosecution of Corporations*, by then-Deputy Attorney General Eric Holder (the "Holder Memorandum"),[79] and continuing most recently with the issuance of a memorandum by Deputy Attorney General Mark Filip in August 2008 (the "Filip Memorandum"),[80] a total of four memoranda have enunciated principles for deciding whether to investigate or charge business organizations, and the appropriateness of available alternatives to prosecution.[81] This guidance seeks to inject consistency and a certain degree of fairness into the pursuit and resolution of corporate criminal investigations and promotes the Department's goals of punishing, deterring, and remediating such violations.[82]

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ever worked in a monitor situation perceive it to be." *Hackett Testimony*, *supra* note 73, at 3.

77. USAM, 1-1.100. The USAM is a comprehensive resource tool that preempts DOJ statements, except those of the Attorney General. USAM, 1-1.200.

78. *See, e.g.,* USAM 9-16.325; USAM 9-27.600-.750; USAM 9-28.100, *et seq*.

79. "Federal Prosecution of Corporations" Memorandum from Eric H. Holder, Jr., Deputy Attorney Gen., to All Component Heads and United States Attorneys (June 16, 1999), *available at* http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF [hereinafter Holder Memorandum].

80. "Principles of Federal Prosecution of Business Organizations," Memorandum from Mark R. Filip, Deputy Attorney General, to Heads of Department Components and United States Attorneys (Aug. 28, 2008), *available at* http://www.justice.gov/dag/readingroom/dag-memo-08282008.pdf [hereinafter Filip Memorandum]. Unlike its predecessor memoranda, the Filip Memorandum was incorporated directly into the *United States Attorneys' Manual* as USAM 9-28.100, *et seq.* Accordingly, throughout the remainder of this article, citations to the Filip Memorandum are expressed as citations to the pertinent sections of USAM 9-28.100, *et seq.*

81. Department officials have issued related guidance, discussed *infra* § II.A.2.a.3, concerning the criteria for the selection and use of monitors in resolution agreements.

82. *See Breuer Testimony*, *supra* note 27 (discussing generally the DOJ's goals of deterrence and rehabilitation with respect to corporate misconduct and noting that as part of a resolution agreement, the DOJ may require that corporations retain

A. Corporate Resolution Mechanisms

1. Historical Overview

As demonstrated in several cases, most notably, the prosecution of Arthur Andersen LLP by the DOJ Criminal Division's Enron Task Force, the decision to charge a business organization with criminal violations can have profound and irreparable adverse consequences.[83] A company or firm in a highly regulated industry can be thrust into a tailspin resulting in its demise by mandatory or permissive exclusions from publicly-funded programs or revocation or rescission of licenses or contracts, or through disqualification from future procurements. In the wake of a criminal conviction, moreover, an organization competing in any sector will face a very real prospect of loss of customers and key employees. Hence, the decision to charge business organizations with criminal misconduct is among the most complex determinations a prosecutor may face.

While the prosecution of business organizations in the United States dates back to 1909,[84] the Holder Memorandum was the first formal guidance issued by the DOJ. It set forth certain considerations or principles regarding a decision to criminally charge a business organization:[85]

1. the nature and seriousness of the offense, including the risk of harm to the public;
2. the pervasiveness of the wrongdoing within the corporation;
3. the corporation's history of similar conduct;

"independent compliance monitors in appropriate cases"). *See also* Prepared remarks to *Compliance Week* 2010 – 5th Annual Conference for Corporate Financial, Legal, Risk, Audit & Compliance Officers (May 26, 2010) (statement of Lanny A. Breuer, Assistant Attorney Gen.).

83. *See, e.g.*, P.J. Meitle, *Who's the Boss? Prosecutorial Involvement in Corporate America*, 34 N. KY. L. REV. 1, 2, 4-5 (2007); Leonard Orland, *The Transformation of Corporate Criminal Law*, 1 BROOK. J. CORP. FIN. & COM. L. 45, 52-53 (2007); F. Joseph Warin, Peter E. Jaffe, *The Deferred Prosecution Jigsaw Puzzle: A Modest Proposal for Reform*, 19 Andrews Litigation Rep. 1 (Sept. 2005); Greenblum, *supra* note 6, at 1865-69.

84. New York Cent. & Hudson R.R. Co. v. United States, 212 U.S. 481 (1909).

85. Holder Memorandum, *supra* note 79.

4. the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation;
5. the existence and adequacy of the corporation's compliance program;
6. the corporation's remedial actions;
7. the collateral consequences, including disproportionate harm to shareholders and others; and
8. the adequacy of non-criminal remedies.[86]

These principles and supporting commentary have evolved through a series of memoranda drafted by successive administrations, culminating in the Filip Memorandum.[87]

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86. *See id*. at 2-3.

87. Briefly, then-Deputy Attorney General Larry D. Thompson issued a superseding memorandum on January 20, 2003. Principles of Federal Prosecution of Business Organizations, Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components and United States Attorneys (Jan. 20, 2003), *available at* http://www.justice.gov/dag/cftf/corporate_guidelines.htm (last visited Jan. 23, 2011) [hereinafter Thompson Memorandum]. The Thompson Memorandum added another consideration to the Holder Memorandum: the adequacy of the prosecution of individuals responsible for the organization's malfeasance. *See* Thompson Memorandum, at 3. It also observed that in evaluating the adequacy of the corporation's cooperation in the investigation, the prosecutor could consider whether the corporation was willing to waive the attorney-client and work product privilege. *See* Thompson Memorandum, at 5. The suggestion that a corporation may waive its attorney-client and work product privileges in order to avoid indictment proved to be controversial. Mark J. Stein & Joshua A. Levine, *The Filip Memorandum: Does It Go Far Enough?*, CORPORATE COUNSEL (Sept. 11, 2008); *see also* United States. v. Stein, 435 F. Supp. 2d 330 (S.D.N.Y. 2006).

On December 12, 2006 then-Deputy Attorney General Paul J. McNulty issued yet another revision of the "Principles of Federal Prosecution of Business Organizations" that superseded the Thompson Memorandum. Principles of Federal Prosecution of Business Organizations, Memorandum from Paul J. McNulty, Deputy Attorney General, to Heads of Department Components and United States Attorneys (Dec. 12, 2006), *available at* http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf (last visited Jan. 23, 2011) [hereinafter McNulty Memorandum].

The McNulty Memorandum attempted to limit a prosecutor's ability to request a waiver of the corporation's attorney-client or work product privileges and removed the waiver of these protections from the list of factors that U.S. Attorneys should consider when deciding whether to charge an organization. *Compare* Thompson Memorandum, Principle II, Factor No. 4 *with* McNulty Memorandum, Principle III, Factor No. 4. The McNulty Memorandum also modified one of the previously articulated principles; specifically, it provided that a prosecutor should only consider

The Filip Memorandum acknowledges, but rejects, the popular understanding that cooperation impliedly meant waiving the corporation's attorney-client privilege or attorney work product protection.[88] Instead, it clarifies that the mitigating cooperation credit central to the prosecutive analysis, which ranges in outcome along a spectrum from prosecution to declining prosecution, turns on a target corporation's willingness to disclose facts relevant to the government's inquiry.[89] This disclosure, in turn, entails consideration of whether the corporation decides to pay the legal fees of its officers or employees who are implicated in the government's investigation or whether it participates in a joint defense agreement.[90] In this vein, the Filip Memorandum acknowledges the utility of NPAs and deferred prosecution agreements DPAs as a middle ground that balances the collateral consequences of prosecuting corporations—harm to innocent third parties (employees, vendors and shareholders who knew nothing of the alleged misconduct), harm to the communities in which the corporation operates, and risk to economic markets, to name but a few—against the likelihood of obtaining restitution, rehabilitating the corporation and engendering respect for the law and trust and confidence in enforcement authorities. At the same time, NPAs and DPAs preserve the government's ability to prosecute noncompliant corporations that, nonetheless, materially breach the resolution agreement.[91]

2. NPAs

As its name suggests, a NPA memorializes the government's agreement not to prosecute a target corporation for violations of federal

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pre-existing compliance programs in deciding whether to bring criminal charges against a corporation.

88. Filip Memorandum, *supra* note 80.

89. *Id.* While significant for its stance against compulsory waiver, some criticize that the Filip Memorandum does not go far enough, appearing to suggest grades of protected information and forbidding requests for "core" privileged material, while saying nothing of "non-core" privileged materials, which may remain subject to prosecutors' requests. *See* Stein & Levine, *supra* note 87.

90. *See* USAM 9-28.730 n.6.

91. *See id.* at 9-28.1000

law.[92] A NPA is an appropriate resolution mechanism only when other means of obtaining cooperation are unavailable or would be ineffective, and the company's cooperation is needed to advance the public's interest.[93] Before offering a business organization a NPA, prosecutors are expected to consider the significance of the investigation or prosecution to a law enforcement program, the value and history of the company's cooperation to the investigation or prosecution, and the organization's culpability and criminal record.[94] The prosecutor's supervisor must approve a NPA.[95] Multi-district NPAs require the approval of each implicated USAO.[96]

NPAs must be drafted carefully and with particularity, limiting their scope to the specific offenses committed.[97] A properly drafted NPA "leaves no doubt as to the obligations of the parties to the agreement."[98]

3. DPAs

Akin to NPAs, DPAs memorialize the government's agreement to defer prosecution of a defendant for a certain temporal period, contingent on the corporate defendant's fulfillment of a litany of commitments and obligations.[99] In contrast to a NPA, a DPA is predicated on a charging document—typically a Criminal Information[100]—and often an uncontested Statement of Facts, both of which are filed with the court.[101] The Statement of Facts is sufficiently

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92. *See* USAM 9-27.600(A) and (B)(1)(d). Thompson Memorandum, *supra* note 87, at 5. Unlike DPAs, NPAs are not predicated upon the filing of a formal charging document and the court is not involved. *See* Memorandum from Craig S. Morford, Acting Deputy Attorney Gen., U.S. Dep't of Justice, to Heads of Dep't. Components, U.S. Attorneys 1 n. 2 (Mar. 7, 2008), *available at* http://www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf [hereinafter *Morford Memorandum*].

93. *See* USAM 9-27.600(B)(2)-(4).

94. *See id.* at 9-27.620(A), 9-27.620 (B)(3), 9-28-1000(B).

95. *Id.* at 9-27.600(B)(4).

96. *Id.* at 9-27.641(A).

97. *See id.* at 9-27.630(A)(1)-(2).

98. *Id.* at 9-27.650 (B).

99. The Speedy Trial Act permits courts to defer prosecutions pursuant to written agreements between the government and the defendant, as a means of allowing the defendant to exhibit conduct that would excuse the need for prosecution. 18 U.S.C. § 3161(h)(2) (2006).

100. A Criminal Information is filed by the United States Attorney upon a waiver of a target's right to be indicted by a Grand Jury.

101. Morford Memorandum, *supra* note 92, at 1 n.2.

detailed to demonstrate both that the agreement is beneficial and that the defendant's guilt is readily provable. The corporation usually agrees not to make any public statement that contradicts, or is inconsistent with, the Statement of Facts.

The prosecution of corporate crimes has long been a high priority for the Department.[102] When warranted, it promotes "critical public interests," such as protecting the integrity of the marketplace, market participants and citizens from misconduct and safeguarding the environment, to name a few.[103] The DOJ advises its attorneys to consider the shared and common interests of the government and private businesses. In consideration of these interests, attorneys should conduct themselves with professionalism, civility and diligence to achieve their mission and engender the public trust.[104] In this regard, the Department views its role as effectuating positive changes in corporate culture and detecting, remedying and preventing serious crimes.[105]

The artificial nature of a corporation is irrelevant in determining whether it should be prosecuted.[106] NPAs and DPAs are now well-accepted mechanisms for resolving allegations of criminal misconduct short of convictions.[107] They provide a "middle ground between declining prosecution and obtaining the conviction of a corporation."[108] The use of NPAs and DPAs is in line with the prosecutor's broad discretion to determine "when, whom, how, and even whether to prosecute [organizations] for violations of federal criminal law."[109] These decisions are applied consistently with the guidance set out in the Holder Memorandum and in the Filip Memorandum.[110] The policy considerations of an administrative agency affected by the company's misconduct may also be relevant. These may include, in certain circumstances, the corporation's pre-indictment conduct, *e.g.*, voluntary disclosure, cooperation, remediation or restitution,[111] as well as whether the organization faces other regulatory sanctions based on the same

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102. *See* USAM 9-28.100.
103. *Id.*
104. *See id; cf.* McNulty Memorandum, *supra* note 87, at 2.
105. *See* USAM 9-28.200(A).
106. *See id.*
107. *See id.* at 9-28.200 (B).
108. *See id.*
109. *Id.* at 9-28.300(B).
110. *Id.* at 9-28.300(A); *see also id.* at 9-28.400-28.1100.
111. *See id.* at 9-28.400(B).

operative facts, such as suspension or debarment from participating in a federal program.[112]

Perhaps the most significant of these considerations is the corporation's cooperation. As the USAM recognizes:

> [C]ooperation can be a favorable course for both the government and the corporation. Cooperation benefits the government—and ultimately shareholders, employees, and other often blameless victims—by allowing prosecutors and federal agents, for example, to avoid protracted delays, which compromise their ability to quickly uncover and address the full extent of widespread corporate crimes. With cooperation by the corporation, the government may be able to reduce tangible losses, limit damage to reputation, and preserve assets for restitution. At the same time, cooperation may benefit the corporation by enabling the government to focus its investigative resources in a manner that will not unduly disrupt the corporation's legitimate business operations. In addition, and critically, cooperation may benefit the corporation by presenting it with the opportunity to earn credit for its efforts.[113]

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112. *See id.* at 9-28.1000.

113. *Id.* at 9-28.700(B). The DOJ does not require waiver of the attorney-client privilege or attorney work product protection as a condition or factor necessary for a corporation to be viewed as cooperative, although this was not always the case. *See id.* at 9-28.710.

Over the past decade, many commentators and scholars have criticized the Department, suggesting that its policies, either in practice or perception, wittingly or not, have been developed and applied in such a way to coerce business organizations into waiving evidentiary protections such as the attorney-client privilege or attorney work product doctrine. *Id.*; *see also* George A. Stamboulidis & Lauren J. Resnick, *Dos and Don'ts for Managing a Monitor: Worried That a Compliance Issue May Result in a Government-Imposed Monitor in Your Midst? Be Proactive to Help . . .*, 33 DIRS. & BDS. 1, 36, Sept. 22, 2008; John Pacenti, *Wielding Sticks When Carrots Would Do*, MIAMI DAILY BUS. REV. Vol. 82, Issue 164 (Feb. 4, 2008); Earl J. Silbert and Demme Doufekias Joannou, *Under Pressure to Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System*, 43 AM. CRIM. L. REV. 1225 (2006); Mary Jo White, *Corporate Criminal Liability: What Has Gone Wrong?*, Practicing Law Institute, 1517 PLI Corp. 815, 818 (Nov. 2005); David B. Oitofsky, *Monitor/Examiner's Role Under Deferred Prosecution Agreements*, 234 N.Y.L.J. 4, col. 4, Sept. 14, 2005. Affirming the sanctity of the evidentiary privileges in question, the DOJ has now made clear that what is needed to advance the Department's mission is not a waiver of its protections, but the factual predicate of the misconduct under investigation, which the organization is often in a unique position to know. USAM 9-28.710. At bottom, "prosecutors should not ask for such waivers and are directed not to

Cooperation does not guarantee any particular level of leniency.[114] However, certain government agencies and departments, such as the SEC and the EPA "have formal voluntary disclosure programs in which self-reporting, coupled with remediation and additional criteria, may qualify the corporation for amnesty or reduced sanctions."[115] The DOJ's Antitrust Division, for instance, extends amnesty only to the first corporation to voluntarily report unlawful price-fixing.[116]

The organization's operational realities dictate the scope of the resolution agreement, which in the case of national or multi-national organizations, requires multi-district approval and perhaps the approval, or assistance and cooperation, of foreign enforcement officials.[117] Key components of the resolution agreement include terms designed to punish and deter the recurrence of the offense, rehabilitate the organization and ensure compliance with the agreement.[118] To these ends, the company typically agrees to:

- fully cooperate, including the timely disclosure of relevant facts;[119]
- comply with all provisions of the NPA/DPA and all statutes and regulations applying to the corporation's business;
- pay a fine;
- establish/continue a comprehensive compliance program;[120]
- draft and adopt certain policies and procedures;
- in the case of a DPA, not contradict an agreed upon Statement of Facts;
- waive defenses; and
- retain a monitor.[121]

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do so. The critical factor is whether the corporation has provided the facts about the events, as explained further herein." *Id.*

"Accordingly, a corporation should receive the same credit for disclosing facts contained in materials that are not protected by the attorney-client privilege or attorney work product as it would for disclosing identical facts contained in materials that are so protected." USAM 9-28.720.

114. *Id.* at 9-28.740.

115. *See id.* at 9-28.750; *see also infra* §§ (II)(A)(2)(b) & (d).

116. USAM 9-28.750; *cf.* Thompson Memorandum, *supra* note 87, Principle VI; McNulty Memorandum, *supra* note 87, Principle VII.

117. USAM 9-28.1000 (B) n.8.

118. *See id.* at 9-28.1300 (A); Morford Memorandum, *supra* note 92, at 1 n.2.

119. *See* USAM 9-28.720.

120. *See id.* at 9-28.800.

B. The Charter and Selection of a Monitor

Over the past decade, with varying degrees of success, the DOJ and the companies involved have grappled with the challenges of defining and adhering to the scope and duration of a monitor's responsibilities. Additional quandries have included creating a mechanism for resolving disagreements between a monitor and an organization, and ensuring that the selection process is free of conflicts of interest, instills public confidence and results in the retention of a monitor who is both qualified and well-respected. Partly in response to some high profile monitorships involving perceived conflicts of interest, "scope creep" and excessive fees, on March 7, 2008, the DOJ, through the Office of the Deputy Attorney General, released a Memorandum to Heads of Department Components and United States Attorneys authored by then-Acting Deputy Attorney General Craig S. Morford (the "Morford Memorandum") to "present a series of principles for drafting provisions pertaining to the use of monitors in connection with deferred prosecution and non-prosecution agreements" with business organizations.[122] The Morford Memorandum sets forth the following guiding principles for the DOJ and U.S. Attorneys to follow in crafting monitorships and selecting monitors:

1. prior to selection, the government and company should address the qualifications desired of a monitor, in light of the circumstances, in order to select someone who is highly qualified, well respected and free of conflicts of interest and to instill public confidence in the selection process;[123]
2. the monitor must be independent; she is neither an employee of the organization nor of the government;[124]
3. the primary charge of the monitor should be to "assess and monitor a corporation's compliance" with the terms of the NPA or DPA that are "specifically designed to address and

121. *See, e.g.*, Deferred Prosecution Agreement, United States v. Willbros Grp., Inc., et al., No. 4:08-cr-00287, (S.D. Tex. May 14, 2008) [hereinafter Willbros Deferred Prosecution Agreement]; Deferred Prosecution Agreement, United States v. Technip S.A., No. 4:10-cr-00439 (S.D. Tex. June 28, 2010) [hereinafter Technip Deferred Prosecution Agreement].

122. *See* Morford Memorandum, *supra* note 92, at 2.

123. *Id.* at Principle 1.

124. *Id.* at Principle 2.

reduce the risk of recurrence of the corporation's misconduct;"[125]

4. in furtherance of this charge, the monitor needs to "understand the full scope of the corporation's misconduct," but should constrain her work and the discharge of her responsibilities accordingly;[126]
5. provide periodic reports assessing the corporation's compliance with the terms of the DPA and the monitor's recommendations;[127]
6. require the monitor to identify and report new or previously undisclosed misconduct of the corporation;[128]
7. the duration of the DPA and the monitorship should be tailored to the specific problems of the corporation to be monitored;[129] and
8. the DPA should provide for extensions or early terminations of the monitorship under appropriate circumstances.[130]

On May 25, 2010, the DOJ, through then-Acting Deputy Attorney General Gary G. Grindler, issued a new Memorandum to Heads of Department Components and United States Attorneys (the "Grindler Memorandum") that supplemented the Morford principles.[131] The Grindler Memorandum adds an additional element favoring the inclusion of a provision in resolution agreements involving the appointment of a monitor that clarifies the role the DOJ may play in resolving disputes between the corporation and the monitor.[132] The Grindler Memorandum observes that the Department's role in resolving these disputes should be limited to "questions relating to whether the

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125. *Id.* at Principle 3.
126. *Id.* at Principle 4.
127. *Id.* at Principle 5.
128. *Id*. at Principle 7.
129. *Id.* at Principle 8.
130. *Id.* at Principle 9.
131. Memorandum from Gary G. Grindler, Acting Deputy Attorney General, "Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations," § I, (May 25, 2010), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00166.htm [hereinafter Grindler Memorandum].
132. *Id.*

company has complied with the terms of the agreement."[133] It includes two model provisions for reference by federal prosecutors.[134]

iii. Case Studies

As previously noted, between 1993 and 2009, the DOJ negotiated over 140 corporate NPAs and DPAs.[135] As the Department's guidance has evolved during that time, so too have the terms of the resolution agreements.[136] Two recent DPAs entered in the Southern District of Texas are illustrative of current practices in federal corporate investigations.

A. United States v. Willbros Group, Inc.

An epicenter of the energy sector in the United States, the Southern District of Texas is home to a number of multi-national oil and gas corporations and the District's prosecutors and enforcement officials have developed a heightened sensitivity to compliance with the Foreign Corrupt Practices Act of 1977, as amended.[137] The FCPA contains,

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133. *Id*. § II.

134. An organization's performance obligations under the terms of a resolution agreement may also implicate the attorney-client privilege and the work product doctrine in unique ways that test the bounds of the organizations' protections against the compelled disclosure of sensitive information. The USAM cautions prosecutors that organizations are encouraged to report perceived violations of these well-settled protections, which the Department may separately investigate and, where appropriate, discipline its attorneys. *See* USAM 9-28.760.

135. *See Corporate Crime: Preliminary Observations on DOJ's Use and Oversight of Deferred Prosecution and Non-Prosecution Agreements*: *Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 11 (2009) (statement of Eileen R. Larence, Director, Homeland Security and Justice, Government Accountability Office), *available at* http://www.gao.gov/new.items/d09636t.pdf.

136. For in depth discussions of key features of select DPAs, *see, e.g.,* Matt Senko, *Prosecutorial Overreaching in Deferred Prosecution Agreements*, 19 S. CAL. INTERDISC. L.J. 163 (2009); Khanna & Dickinson, *supra* note 3, at 1744-55; Bohrer & Trencher, *supra* note 35, at 1492-94, 1500-02; Warin & Jaffe, *supra* note 83; Greenblum, *supra* note 6, at 1871-80, 89-94.

137. 15 U.S.C. §§ 78dd-1 (2006). Since 1998, the DOJ increasingly has used NPAs and DPAs to resolve corporate violations of the FCPA. *See* Response of the United States Questions Concerning Phase 3 OECD Working Group on Bribery, Appendix B –

among other elements, anti-bribery provisions designed to combat corrupt payments to foreign officials in exchange for preferential treatment in business dealings.[138]

In the case of *Willbros Group, Inc.* and *Willbros International, Inc.* (collectively, "*Willbros*"), the DOJ brought charges, between 2006 and 2008, against Willbros, a provider of construction and engineering-related services to the oil and gas industry, and three of its former executives, for violating the FCPA.[139] Following a series of investigations, the DOJ found Willbros to be in violation of FCPA's anti-bribery provisions in relation to separate transactions between the Willbros, Nigerian government officials and officials of Ecuador's state-run petroleum company involving contracts in connection with the replacement of pipelines and other projects in those countries.[140] In addition, Willbros was found to have engaged in a tax fraud scheme in Bolivia, through which the Company wired funds to fraudulently claim Bolivian state tax credits. [141]

Executed in May 2008, the DPA negotiated with Willbros Group, Inc. and Willbros International, Inc. emphasized Willbros' voluntary and full cooperation throughout the inquiry.[142] Most notably, it highlighted the internal investigation conducted by the Audit Committee of the Board of Directors, the voluntary disclosure of the findings, and conclusions thereof, and the companies' limited waiver of the attorney-client privilege as to the DOJ.[143] As part of the negotiated resolution, Willbros agreed to pay a monetary penalty of $22 million,[144] continue its implementation of a corporate compliance and ethics program, refine its internal controls and policies to enhance FCPA compliance and engage

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Chart 5, "Sanctions Imposed Upon Legal Persons for FCPA Violations Since 1998" (May 3, 2010), http://www.justice.gov/criminal/fraud/fcpa/docs/response3-appx-b.pdf.

138. 15 U.S.C. §§ 78dd-1.

139. *See* Willbros Deferred Prosecution Agreement, *supra* note 121, Attachment A, Statement of Facts; Press Release, Department of Justice, Former Willbros International Consultant Pleads Guilty to $6 Million Foreign Bribery Scheme (Nov. 12, 2009) (on file with author), *available at* http://www.bloomberg.com/apps/news?pid=conewsstory&tkr=WG:US&sid=aNgHsMsp4qmI.

140. *See* Willbros Deferred Prosecution Agreement, *supra* note 121, Attachment A, Statement of Facts.

141. *See id*.

142. *Id.* ¶ 5.

143. *Id.* ¶¶ 5(a)-(e).

144. *Id.* ¶ 7.

a corporate monitor.[145] Among other things, the DPA described the mechanism by which the company would propose monitor candidates for the DOJ's acceptance, the required qualifications of the monitor and the monitor's term of engagement.[146] Moreover, the DPA incorporated, by reference, Attachment D, which explained "the Monitor's duties and authority, and the obligations of [the company] with respect to the Monitor and the Department."[147] The document detailing the scope of the Monitor's authority included a mechanism by which the company could withhold from the Monitor documents and information on the grounds of evidentiary protections, such as the attorney-client privilege or attorney work product doctrine, with prompt notice to the Monitor and the DOJ.[148] The DPA, however, allowed the DOJ to consider the company's decision to withhold such information in determining whether it had fully cooperated with the Department under the agreement.[149]

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145. *Id.* ¶¶ 10-12.
146. *Id.* ¶¶ 12-13.
147. *Id.* ¶ 13. Under the Willbros DPA, the monitor's term was three years, which the DOJ could extend for an additional one-year period. *See* Willbros Defered Prosecution Agreement, *supra* note 121, Attachment D, ¶¶ 1, 3. Willbros was empowered to propose monitor candidates for the DOJ's approval. The Monitor candidates had to have FCPA expertise; experience designing and implementing compliance programs and policies and procedures; the ability to access and deploy resources as necessary and appropriate to discharge her duties; and independence from Willbros. *Id.* ¶ 1(a)-(d). The monitor was required to issue three reports to the DOJ after preparing in advance of each report a workplan that was subject to comment from both Willbros and the DOJ. *Id.* ¶ 7(e). The initial report was required to be filed within 120 days of the monitor's retention, and the two follow-up reports were to be issued at one year intervals thereafter. The reports were to be served contemporaneously on the DOJ and Willbros. *Id*. Within sixty days of receipt of the monitor's report, Willbros was required to object in writing to any of the monitor's recommendations it found impracticable with an alternative proposal or, within 120 days, adopt and implement the monitor's recommendations. *Id.* ¶ 7(e)(iii). To the extent Willbros disagreed with the monitor's recommendation, the Department would consider its written response and alternative proposal in determining whether Willbros had fully complied with the terms of the DPA. *Id.* If the monitor uncovered a suspected or actual violation of law, the DPA empowered her to report the matter to Willbros' General Counsel, Audit Committee and its outside counsel for investigation or, if warranted, directly to the DOJ. *Id.* ¶ 9. If the monitor reported such a matter to the company, Willbros was, in turn, required to disclose the matter to the Department within ten days. *Id.*
148. *Id*. ¶ 6(b).
149. *Id*. ¶ 6(a).

B. United States v. Technip S.A.

Similarly, between 2009 and 2010 the DOJ charged Technip, S.A. ("Technip"), a French company that provides engineering, procurement and construction services to the oil and gas industry, and several of its senior level employees, with violations of the FCPA's anti-bribery provisions; the charges stemmed from the Company's payment of bribes to Nigerian officials to obtain contracts for the design and development of a liquefied natural gas plant.[150] On June 28, 2010, the Criminal Division, Fraud Section of the DOJ resolved two counts of alleged violations of the FCPA involving Technip.[151] The charges against Technip were premised on its purported participation in a conspiracy by which a Technip-affiliated joint venture, of which it was a part, was claimed to have bribed high-level foreign officials in an effort to secure engineering contracts in connection with the development of a liquefied natural gas plant in Nigeria.[152]

In broad strokes, the DPA required Technip's continued cooperation with the Government, payment of a monetary penalty of $240 million and the engagement of a corporate monitor with an initial two-year and seven day term, subject to an extension of up to one year.[153] The DPA recognized that Technip had "fully cooperated in the investigation and clearly demonstrated recognition and affirmative

150. *See* Technip Deffered Prosecution Agreement, *supra* note 121, Attachment A, Statement of Facts.

151. *Id*. at attachment A, ¶ 1. While the French government was not a party to the agreement, the DPA is notable for its requirement that the monitor review and report on Tecnhip's compliance with both American and French anti-corruption laws and report suspected or actual violations to the appropriate sovereign authority. Just as sovereign powers are increasingly cooperating in the investigation and resolution of anti-corruption laws, domestically, federal and state governments are collaborating in corporate investigations. *See, e.g.,* Deferred Prosecution Agreement, United States v. WellCare Health Plans, Inc., No. 8:09-cr-00203, (M.D. Fla. May 5, 2009), http://www.wellcare.com/WCAssets/corporate/assets/00_dpa_complete.pdf. (DPA between the U.S. Attorney's Office for the Middle District of Florida, the Florida Attorney General's Office and Wellcare Health Plans Inc., and its Affiliates and Subsidiaries). One of the authors of this article, Mr. O'Neil, was appointed Senior Vice President, General Counsel and Secretary of WellCare in April 2008, after the investigation of the Company became public. He executed the DPA on behalf of WellCare and was later named Executive Vice Chairman.

152. *Id*. ¶¶ 2-22.

153. *See* Technip Deferred Prosecution Agreement, *supra* note 121, ¶¶ 3,11.

acceptance of responsibility for criminal conduct," for which it received a two-point credit in the calculation of its culpability score.[154] It also described Technip's obligation to continue its implementation and refinement of a corporate compliance and ethics program, as well as to conduct a review of its internal controls, policies and procedures in an effort to bolster FCPA compliance.[155]

To assist the company with these obligations, the DPA included a document detailing the mechanism by which the Company would propose and retain the monitor, as well as the scope of the monitor's duties.[156] The DPA was required to be attached to and incorporated into the retention agreement between Technip and the Monitor.[157] Furthermore, the "parties agree[d] that the Monitor is an independent third-party, not an employee or agent of [Technip] or the Department, and that no attorney-client relationship shall be formed between Technip and the Monitor."[158] The DPA described the process and frequency by which the Monitor would conduct reviews and issue reports,[159] required the Monitor to develop a work plan subject to the parties' review and

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154. *Id.* ¶ 6(C).
155. *Id.* ¶¶ 8-9.
156. *Id.* ¶ 10. The monitor's term was two years. *Id*. at Attachment D ¶ 2.
157. *Id.* ¶ 4.
158. *Id.* ¶ 5(a).
159. *Id.* ¶¶ 6-11. In advance of each report, the Monitor was required to submit a workplan that was subject to review and comment by Technip and the Department, but the Monitor was empowered to resolve any disagreement with Technip or the Department relating to the workplan. *Id.* ¶ 6. The Monitor's first report was due within 120 days of her engagement, and it was to be served simultaneously on Technip and the Department. *Id*. ¶ 7. The Monitor was then required to issue two follow-up reports. *Id.* ¶ 9. Within sixty days of receipt of one of the Monitor's reports, Technip was required to object, in writing, to any recommendation it considered impracticable; if not, Technip was to adopt and implement the Monitor's recommendations within 120 days of receipt of the report. *Id.* ¶ 8. In the event of a disagreement concerning one of the Monitor's recommendations, Technip and the Monitor were to seek guidance from French authorities in an effort to resolve the dispute. Ultimately, however, the Monitor's decision was binding as to whether Technip should adopt her, or an alternative, proposal. *Id.* ¶ 8. In the event the Monitor uncovered suspected or actual violations of law, the DPA empowered her to refer the matter to Technip's Ethics and Compliance Committee, Ethics and Governance Committee and Technip's Chairman, and recommend that Technip pursue an investigation. *Id.* ¶ 11. If Technip failed to report the matter to French authorities or the Department, the Monitor was empowered to do so. *Id.*

comment prior to commencing its work,[160] and described a mechanism through which future violations would be referred to the company's ethics and compliance committee for further investigation or reporting to the Government at the direction of the Monitor.[161]

b. The United States Securities and Exchange Commission

i. Regulatory Initiatives

In 2002, Congress formalized the SEC's power to seek equitable relief when settling securities enforcement actions. Enacted in the wake of a series of cataclysmic corporate scandals, SOX might be more appropriately referred to as "the Enron/WorldCom Response Act."[162] While the Enron demise triggered the initiative, "it took the WorldCom collapse to bring it to fruition."[163] Section 305(b) of SOX amended the Securities Exchange Act of 1934 (the "1934 Act") to add that "[i]n any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, *any equitable relief* that may be appropriate or necessary for the benefit of investors."[164] This express legislative authorization buttressed long-standing statutory provisions and judicial decisions construing and applying them.[165] Under the 1934 Act and the 1933 Securities Act (the "1933 Act"), the Commission, through its Enforcement Division, was authorized to initiate civil, administrative, and cease-and-desist actions seeking, *inter alia*,[166] permanent and temporary injunctions, money damages, and orders prohibiting individuals from participating in the offering of stocks.[167] In connection with cease-and-desist orders, both the 1933 and 1934 Acts authorized the SEC to ensure ongoing compliance with federal securities laws:

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160. *Id.* ¶ 6.
161. *Id.* ¶ 11.
162. Harold S. Bloomenthal, SARBANES-OXLEY ACT IN PERSPECTIVE § 1:1 (2010).
163. *Id.*
164. Sarbanes-Oxley Act of 2002, Pub. L. No.107-204, Title III, §305(b), 116 Stat. 745 (July 30, 2002) (codified as amended at 15 U.S.C. § 78u(d)(5) (2006)).
165. James Fanto, *Directors' & Officers' Liability*, PLIREF-DIRLIAB § 7:5.4 at *7-45 (2011).
166. 1934 Act § 21; 1933 Act § 8A.
167. 1934 Act § 21; 1933 Act § 8A.

> Such order may, in addition to requiring a person to cease and desist from committing or causing a violation, require such person to comply, or to take steps to effect compliance, with such provision, rule, or regulation, upon such terms and conditions and within such time as the Commission may specify in such order. Any such order may, as the Commission deems appropriate, require future compliance or steps to effect future compliance, either permanently or for such period of time as the Commission may specify, with such provision, rule, or regulation with respect to any security, any issuer, or any other person.[168]

Hence, long before the advent of SOX, the SEC had asserted authority to ensure continuing compliance with its regulations, rules and enforcement policies.[169]

As far back as the 1960s, the SEC was imposing outside receiverships on corporations as part of its enforcement actions.[170] At first, the Commission's primary goal was to ensure the preservation of assets whenever fraud or waste seemed likely. Soon, however, outside receivers were tasked with ensuring long-term compliance with federal securities laws and regulations.[171] In cases in which securities laws had been willfully violated but receivers were unnecessary, the duty to ensure compliance was delegated to independent directors, special counsel, or outside advisors appointed pursuant to settlement agreements.[172] These individuals, often in conjunction with court-appointed directors, served a remedial function that presaged modern-day independent consultants and monitors.

Against this backdrop, in 1994, a corporate monitor with an unprecedented mandate was appointed in the landmark *Prudential*

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168. 1933 Act § 8A(a); 1934 Act § 21C(a).

169. Ford & Hess, *supra* note 3, at 684-86; *see also* Khanna & Dickinson, supra note 3, at 1717 (citing BellSouth Corp., Exchange Act Release No. 45,279, 2002 WL 47 167 (Jan. 15, 2002), http://www.sec.gov/litigation/admin/34-45279; Chiquita Brands Int'I Inc., Exchange Act Release No. 44,902, 75 SEC Docket 2308 (Oct. 3, 2001); Am. Bank Note Holographies, Inc., Securities Act Release No. 7994, Exchange Act Release No. 44,563, 75 SEC Docket 912 (July 18, 2001); KPMG Peat Marwick LLP, Exchange Act Release No. 44,050, 74 SEC Docket 1351 (Mar. 8, 2001); Int'l Bus. Machs. Corp., Exchange Act Release No. 43,761, 73 SEC Docket 2987 (Dec. 21, 2000).

170. Ford & Hess, *supra* note 3, at 684.

171. *Id*.

172. *Id*. at 685.

Securities case,[173] which involved an investigation of alleged securities fraud arising in the sale of oil and gas limited partnerships. Prudential's counsel and the United States Attorney's Office for the Southern District of New York negotiated a DPA through a series of meetings and letters.[174] Among other things, defense counsel argued that criminal prosecution was unnecessary and proposed the imposition of an outside monitor at the company's expense.[175] The DPA reinforced the settlement Prudential had already reached with the SEC by requiring the company to "retain a mutually acceptable outside counsel within 30 days of the filing of this Agreement to review [Prudential's] policies and procedures in order to ensure that [Prudential] has adopted all of the compliance-related directives" mandated by the SEC.[176] Thereafter, both agencies began requiring the appointment of independent monitors in connection with the resolutions of their investigations.[177] With the passage of SOX, the SEC gained Congressional approval of the agreements first pioneered in *Prudential Securities* and implemented by courts repeatedly in similar cases that followed.[178]

In February 2009, the Commission announced that Robert S. Khuzami, a former federal prosecutor who had served as the Chief of the Securities and Commodities Fraud Task Force of the United States Attorney's Office for the Southern District of New York, had been named the Director of the Division of Enforcement (the "Division").[179] Under Mr. Khuzami's leadership, the Division undertook a "rigorous

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173. *See* SEC v. Prudential Sec., Inc., No. 93 Civ. 2164, 1993 WL 473189, at *2-3 (D.D.C. Oct. 21, 1993); *see also* Khanna & Dickinson, *supra* note 3, at 1717 (citing Deferred Prosecution Agreement, United Stales v. Prudential Sec., Inc., No. 94-2189 (S.D.N.Y. Oct. 27, 1994)).

174. *See* Khanna & Dickinson, *supra* note 3, at 1717-18.

175. *See* Correspondence between the United States Department of Justice and Prudential Securities Inc. dated October 27, 1994 and October 13, 1994 (advocating for, and memorializing, terms of a deferred prosecution agreement), *available at* http://www.corporatecrimereporter.com/documents/prudential.pdf (last visited Sept. 30, 2011. *See also* Khanna & Dickinson, *supra* note 3, at 1717-18 (citing Deferred Prosecution Agreement, United States v. Prudential Sec., Inc., No. 94-2189 (S.D.N.Y. Oct. 27, 1994)).

176. Deferred Prosecution Agreement at 3, United States v. Prudential Sec., Inc., No. 94-2189 (S.D.N.Y. Oct. 27, 1994).

177. Khanna & Dickinson, *supra* note 3, at 1718.

178. *Id.*

179. *See* Press Release, SEC, Robert Khuzami Named SEC Director of Enforcement (Feb. 19, 2009), http://www.sec.gov/news/press/2009/2009-31.htm.

self-assessment" as part of its effort to become stronger, more swift and strategic in its enforcement initiatives and priorities.[180] Less than a year after his appointment, on January 13, 2010, Mr. Khuzami held a press conference to announce five new specialized enforcement units, along with an arsenal of new investigative tools, including the empowerment of senior staff to issue subpoenas and the introduction of cooperation agreements and non- and deferred prosecution agreements.[181] Mr. Khuzami's announcement expressed unequivocally the Division's intention to create concrete, meaningful incentives for individuals or companies with knowledge of securities fraud or other violations to self-report in a timely fashion and fully cooperate thereafter.[182] This initiative appears to signal the beginning of a new phase in SEC enforcement efforts in which the Commission expects greater self-monitoring by corporations.

In December 2010, following prompt and extensive self-reporting, the Commission entered into its first unilateral NPA with Carter's Inc., a children's clothing retailer.[183] Carter's Inc. discovered that a now-former executive had perpetrated a scheme of financial fraud against it, which caused the company to overstate its income for a period of five years preceding the agreement, while the former executive used inside information to exercise stock options worth more than $4 million.[184] Once the executive's conduct was discovered, the Audit Committee of Carter's Inc.'s Board of Directors, with the assistance of outside counsel, conducted a thorough internal investigation and promptly self-reported its findings to the Commission, and took remedial measures and cooperated extensively with the Commission's own investigation,

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180. Robert Khuzami, Remarks at News Conference Announcing Enforcement Cooperation Initiative and New Senior Leaders (Jan. 13, 2010), http://www.sec.gov /news/speech/2010/spch011310rsk.htm [hereinafter *Khuzami Speech*].

181. *Id.*

182. *See* Press Release, SEC, SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations (Jan. 13, 2010), http://www.sec.gov/news/press/2010/2010-6.htm [hereinafter *SEC Cooperation Initiative Press Release*]; *Khuzami Speech*, *supra* note 180.

183. *See* Press Release, SEC, SEC Charges Former Carter's Executive with Fraud and Insider Trading SEC (Dec. 20, 2010), http://www.sec.gov/news/press/2010/2010-252.htm [hereinafter *SEC Charges Former Carter's Executive*].

184. Complaint, SEC v. Elles, No. 1:10-cv-4118 (N.D. Ga. Dec. 20, 2010); *see SEC Charges Former Carter's Executive*, *supra* note 183.

for which the company "received the benefits of a non-prosecution agreement."[185]

Continuing on this trajectory, in May 2011, the SEC executed its first unilateral DPA with Tenaris, S.A.[186] This agreement resolved allegations that Tenaris had violated the FCPA by making payments to foreign officials and utilizing improper accounting methods from 2006 through 2008 to secure service contracts with the government of Uzbekistan.[187] In March 2009, a customer informed Tenaris that it had knowledge of improper payments by Tenaris that may have benefited the third party's employees.[188] In response, the Audit Committee of Tenaris's Board of Directors retained outside counsel and conducted an internal investigation.[189] Tenaris disclosed to the Commission and the DOJ the preliminary findings of its internal investigation, and it pledged to expand its investigation and share its findings with the Government.[190] A year later, Tenaris's counsel shared with the SEC and DOJ the facts learned from its world-wide, detailed internal investigation, which included the revelation of improper payments to Uzbekistani officials and accounting for the same, which enabled the company to secure contracts in Uzbekistan, as well as facts unrelated to the third-party information that gave rise to the internal investigation and initial disclosure to the Commission and the DOJ.[191] Given the company's self-disclosure to, and forthright cooperation with, the SEC, following an internal investigation by outside counsel to the Audit

185. SEC Charges Former Carter's Executive, *supra* note 179. *See Non-Prosecution Agreement between Carter's Inc. and the SEC,* SEC (Dec. 17, 2010), http://www.sec.gov/litigation/cooperation/2010/carters1210.pdf.

186. *See* Jaclyn Jaeger, *SEC Gets into the Non-Prosecution Agreement Act,* COMPLIANCE WEEK, Jan. 25, 2011; *Non-Prosecution Agreement between Carter's Inc. and the SEC*, SEC (Dec. 17, 2010), http://www.sec.gov/litigation/cooperation/2010/carters1210.pdf.

187. *See* Deferred Prosecution Agreement between Tenaris, S.A. and the SEC, SEC (May 17, 2011), http://www.sec.gov/news/press/2011/2011-112-dpa.pdf.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* ¶ 6bb. (stating that Tenaris conducted "a world-wide [internal] investigation of its business operations and controls" and "provided extensive, thorough, real-time cooperation with the staff of the Division and DOJ which included timely, voluntary and complete disclosure of certain conduct" to the government).

Committee of its Board of Directors, Tenaris secured the Commission's first-ever DPA.[192]

The Tenaris DPA requires the company to disgorge approximately $5.4 million and forgo taxes paid on revenue received from improperly obtained service contracts; certify to the Commission its compliance with the terms of the DPA; revamp its Code of Conduct and commit to annual updates and revisions of the same; require all directors, officers and management level employees to certify annually compliance with the Code of Conduct; and effectively train all officers, managers and employees with financial, accounting or government relations responsibilities and anyone else within the company involved in activities that implicate Tenaris's anti-corruption policies.[193] Notably, Tenaris executed a NPA with the DOJ related to the same alleged facts that gave rise to the DPA with the Commission.[194]

Neither the Carter's Inc. NPA nor the Tenaris DPA required the companies to retain an independent consultant. As with the DOJ, the SEC may view incentivizing companies to police themselves – while simultaneously making examples of non-cooperators – as a more effective use of its resources than traditional enforcement efforts.[195] The extent and frequency with which the Commission will continue using NPAs and DPAs remains to be seen, but judging by the DOJ's use of such agreements, NPAs are less likely to draw a monitor than are DPAs.[196]

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192. *See id; see also* Press Release, SEC, Tenaris to Pay $5.4 Million in SEC's First-Ever Deferred Prosecution Agreement (May 17, 2011), http://www.sec.gov/news/press/2011/2011-112.htm.

193. *See* Deferred Prosecution Agreement between Tenaris, S.A. and the SEC, SEC (May 17, 2011), http://www.sec.gov/news/press/2011/2011-112-dpa.pdf (paraphrasing the terms of Tenaris's agreement with SEC).

194. *See* Press Release, U.S. Dep't of Justice, Tenaris S.A. Agrees to Pay $3.5 Million Criminal Penalty to Resolve Violations of the Foreign Corrupt Practices Act (May 17, 2011), http://www.justice.gov/opa/pr/2011/May/11-crm-629.html.

195. *See SEC Cooperation Initiiative Press Release*, *supra* note 182; *Khuzami Speech*, *supra* note 180.

196. Of the DOJ's ten agreements requiring a monitor in 2010, three were NPAs and seven were DPAs. *See* Jaclyn Jaeger, *SEC Gets into the Non-Prosecution Agreement Act*, COMPLIANCE WEEK, Jan. 25, 2011.

ii. Independent Consultants and Monitors

The Division of the SEC pursues civil lawsuits, and quasi-criminal causes of action and remedies in federal district court and in administrative proceedings.[197] In those proceedings, the Commission seeks monetary penalties; injunctions, which subject violators to fines or imprisonment for contempt; disgorgement of illegal profits; and suspension from service as a corporate officer or director.[198] The vast majority of civil enforcement actions are resolved before trial.[199]

In the post-SOX era, the SEC has imposed a variety of governance reforms. Broadly labeled "corporate therapeutics,"[200] these initiatives have ranged in intrusiveness and have included cease-and-desist orders; new management structures; new compliance positions; new board-level committees; and new procedures for board-level decision-making.[201] Generally, corporate monitors have been reserved for the most egregious cases, particularly those involving criminal misconduct and jointly prosecuted by the DOJ.[202]

The Commission has often required the appointment of independent consultants. They have been empowered to conduct investigations into compliance practices, to report their findings to the SEC, and to make recommendations for future compliance programs.[203] The corporation may not withhold any information from the Commission based on evidentiary privileges, and it must adopt the consultant's recommendation.[204] The target company, moreover, cannot dismiss the consultant without prior approval from the Commission.[205]

Independent consultants have been praised for their ability to create a "temporal, structural, and dialogical space" in which stubborn cultural

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197. *See* SEC, *About the Division Enforcement*, http://www.sec.gov/divisions/enforce/about.htm.

198. *See id*.

199. *See* Jayne W. Barnard, *Evolutionary Enforcement at the Securities and Exchange Commission*, 71 U. PITT. L. REV. 403, 429 (2010) ("The vast majority of the SEC's civil enforcement actions result in settlement.").

200. *See* Barnard, *supra* note 6, at 798.

201. *See id*.

202. *See id*. at 801 ("Typically . . . full-service monitors are appointed only in cases involving concurrent criminal charges brought by the Department of Justice.").

203. *Id*. at 806-08.

204. *Id*. at 809.

205. *Id*.

and compliance issues can be addressed.[206] Settlement agreements have often provided that the company review all preliminary recommendations by the consultant before they are finalized, thereby providing the firm with an opportunity to be heard. In a 2003 case involving Akorn, Inc., for example, the SEC required the corporation to engage an independent consultant to review the company's "material internal accounting controls, practices, and policies related to accounts receivable."[207] The consultant was given 180 days to complete its review and submit a report documenting its findings and recommending improvements.[208] Akorn then had 30 days to review the recommendations and propose alternate procedures designed to achieve the same goals.[209] The consultant was required to evaluate Akorn's proposals and make a final determination on the recommended course of action.[210] Akorn was bound by the consultant's final decisions and had to report to the staff of the Commission the decisions made and actions taken as a result of the consultant's recommendations.[211] Because Akorn was entitled to comment on the consultant's findings and propose alternate methods, the final recommendations could not be made without a dialogue between the consultant and the company.[212]

In addition to accounting programs, independent consultants have been charged with designing policies for:

- foreign payments under the Foreign Corrupt Practices Act;
- use and misuse of non-public information;
- travel and entertainment expenses;
- receipt and retention of e-mail communications; and
- pricing policies.[213]

The SEC views the use of independent consultants as an extension of its enforcement authority and a way to leverage its limited enforcement resources.[214]

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206. *See* Barnard, *supra* note 6, at 807 (citing Hess & Ford, *Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem*, 41 CORNELL INT'L L.J. 307, 336 (2008)).

207. *Id*. (citing *In re* Akorn, Inc., Exchange Act Release No. 48,546, 2003 SEC LEXIS 2276, at *13 (Sept. 25, 2003)).

208. *In re Akorn,* No. 48,546, 2003 SEC LEXIS 2276, at *13-16.

209. *Id.*

210. *Id.*

211. *Id.*

212. *See id.*

213. Barnard, *supra* note 6, at 808.

iii. SEC Guidance

The SEC has not enunciated policies or procedures for selecting and appointing independent consultants or corporate monitors.[215] Because corporate monitors are reserved for those cases in which the DOJ is simultaneously pursuing criminal sanctions, the Morford and Grindler Memoranda provide the best guidance in joint enforcement actions.[216] In civil cases, the following three criteria have been identified as crucial to the SEC's decision to impose an independent consultant:

1. whether better internal controls would have prevented the incident;
2. the nature and extent of the remedial steps taken by the company since discovering the matter/problem/concern; and
3. the pace of the settlement discussions—in protracted situations, a company has more time to address and rectify compliance issues, possibly rendering unnecessary the appointment of an independent consultant.[217]

If the Commission decides to require the retention of an independent consultant, a staff lawyer typically drafts the initial proposed scope of the consultant's duties and responsibilities. The parties then negotiate those provisions.[218]

For their part, companies seek carefully to delineate the charter of the consultant and retain maximum flexibility in considering and implementing the consultant's recommendations.[219] Sometimes, the SEC defers the question of the scope of the consultant's work to negotiations between the company and the consultant. In these instances, the SEC specifies only certain regulatory objectives that the consultant must achieve, and the parties develop the plan and processes.[220]

Although the ultimate responsibility for approving the independent consultant lies with the court, the judiciary has often sought a

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214. *See id*. at 814-15.

215. *See* Barnard, *supra* note 6, at 798; *see generally* Press Release, SEC, Statement from the SEC Concerning Financial Penalties (Jan. 4, 2006), *available at* http://www.sec.gov/news/press/2006-4.htm.

216. *See* Grindler Memorandum, *supra* note 131.

217. Barnard, *supra* note 6, at 815.

218. *See id.* at 816-17.

219. *See id.*

220. *Id.* at 811.

recommendation from the Commission following a careful consideration of the candidates proposed by the target company.[221] The SEC staff interviews the candidate(s) to assess their independence and perspective on enforcement actions.[222] Nominated candidates with the requisite expertise and background are rarely contested.

From the company's perspective, the most important elements of an independent consultant's charter are the scope of her responsibilities, her ability to understand the compliance challenges of the industrial sector, her willingness to consider objectively the company's realties and, of course, her fees and expenses.[223] At the same time, to be successful, the consultant must garner the confidence of the SEC staff.[224] An even-keeled temperament with a commitment to fundamental fairness and the development of a constructive dialogue with the board of directors and the senior management team are also helpful attributes.[225] Quite appropriately, settlement agreements stipulate that the consultant cannot do any work for the company for a period of two years following the consultancy. Consequently, candidates are very particular about which appointments they accept.[226]

iv. Case Study: *WorldCom, Inc.*

Following a voluntary disclosure of egregious accounting misconduct to the SEC staff and other enforcement agencies, the Commission filed its initial complaint against WorldCom, Inc. in late June 2002.[227] The SEC charged WorldCom with having inflated its income by approximately $3.8 billion through an illegal scheme, and the Staff sought the immediate appointment of a corporate monitor, injunctive relief, and a civil monetary penalty.[228] The initial justification for the corporate monitor was to "ensure compliance" with any court-

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221. O'Hare, *supra* note 6, at 108.
222. Barnard, *supra* note 6, at 820-21.
223. *See id*.
224. *See id*.
225. *See id.*
226. *Id*. at 823.
227. SEC, ADDITIONAL INFORMATION FOR INVESTORS REGARDING THE POTENTIAL DISTRIBUTION OF THE SEC'S CIVIL PENALTY JUDGMENT AGAINST WORLDCOM, INC. IN THE SEC V. WORLDCOM CASE, *available at* http://www.sec.gov/spotlight/worldcom/wcominfo111103.htm.
228. *Id*.

ordered evidentiary rulings, protect against spoliation, and prevent over-compensation of WorldCom's executives.[229] Following the entry of a Rule 21 Order on June 28, 2002, United States District Judge Jed Rakoff gave the parties five days to submit a roster of proposed corporate monitors.[230] The SEC and WorldCom nominated three individuals and Judge Rakoff selected Richard C. Breeden, former Chairman of the SEC.[231]

Although the initial role of WorldCom's corporate monitor was limited to preserving evidence and preventing excessive compensation, Mr. Breeden's responsibilities quickly expanded. First, on July 15, 2002, the court issued an order redefining "compensation" to include not only payments made to WorldCom executives, but also payments made to outside advisors, investment bankers, restructuring specialists, and other consultants.[232] On August 1, 2002, Judge Rakoff ordered that he be kept apprised of "every aspect of the business he deems relevant to his assessments" in order to facilitate Mr. Breeden's task in addressing compensation issues.[233] In addition, Judge Rakoff ordered that the corporate monitor be granted access to all employees and to meetings of the board of directors and committees thereof.[234]

On November 26, 2002, WorldCom entered into a partial settlement with the SEC.[235] This resolution did not address civil penalties, but it cost WorldCom $500 million in cash and $250 million in stock.[236] The settlement authorized Mr. Breeden to undertake a comprehensive review of WorldCom's corporate governance standards and make recommendations to the board for improvements.[237] In June 2003, WorldCom agreed to adopt each of Mr. Breeden's recommendations.[238] This transformation of Mr. Breeden's mission was

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229. O'Hare, *supra* note 6, at 94.
230. *Id*. at 95.
231. *Id*.
232. *Id*. at 96.
233. *Id*. at 97 (quoting SEC v. WorldCom, Inc., No. 02 Civ. 4963, 2002 U.S. Dist. LEXIS 14201, at *4 (S.D.N.Y. Aug. 1, 2002)).
234. *Id* at 97-98.
235. *Id.* at 98 (citing Judgment of Permanent Injunction Against Defendant WorldCom, Inc., SEC v. WorldCom, Inc. No 02 Civ. 4963 (S.D.N.Y. Nov. 26, 2002)).
236. *Id.* at 98 n.40.
237. *Id* at 98.
238. *Id*. at 98-99

remarkable and has been the subject of considerable discussion by scholars and practitioners.[239]

Even after Mr. Breeden submitted his much-anticipated recommendations, a 147-page report entitled *Restoring Trust*, he continued to play an integral role at the company.[240] He determined compensation packages for WorldCom's new management team, attended all board meetings, played a material role in the development of the company's monthly budget, participated in the appointment of new directors, forced at least one shareholder-elected board member to resign over an alleged conflict of interest, led the talks with the Government to restore WorldCom's ability to bid on government contracts, and ultimately was involved in negotiations with companies seeking to acquire WorldCom some three years after his appointment.[241] Mr. Breeden's mandate was to be the District Court's eyes and ears thereby elevating the monitor's stature to that of a federal judge.[242] Under such circumstances, the company was left without the sort of recourse now envisioned by the Grindler Memorandum, namely a means by which the DOJ may play a role in resolving disputes between the corporation and the monitor.

c. The United States Department of Health and Human Services

i. Regulatory Initiatives

The United States Department of Health and Human Services ("HHS") oversees the enforcement of federal health care laws and the administration of health care programs, including Medicare and Medicaid.[243] HHS is required to work closely with state and local governments, as many HHS-funded services are provided at the local level, by state and county agencies, and through private sector grants.[244] The OIG, in turn, is responsible for audits, evaluations, investigations,

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239. *See, e.g.*, O'Hare, *supra* note 6, at 99; Hess & Ford*, supra* note 206; Khanna & Dickinson, *supra* note 3, at 1713.

240. O'Hare, *supra* note 6, at 99.

241. *Id*. at 101-02.

242. *See id*. at 103.

243. *See About HHS*, HHS.GOV, http://www.hhs.gov/about/ (last visited Feb. 23, 2011).

244. *Id.*

and law enforcement efforts related to HHS programs and operations.[245] Charged with protecting the integrity of HHS programs, as well as the health and welfare of the beneficiaries of those programs,[246] the OIG is required to report both to the Secretary of HHS and to Congress regarding general compliance and management problems within programs subject to HHS oversight. The OIG must also offer recommendations regarding correction of any such issues.

In collaboration initially with the Health Care Financing Administration[247] and with reference to the Federal Sentencing Guidelines and input from the private health care sector, the OIG has developed, and continuously updated and refined, segment-specific compliance program guidance premised on the core elements of an effective compliance program.[248] First published in 1997,[249] what became the "seven elements"[250] of a comprehensive health care compliance program include:

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245. *Office of the Inspector Gen.*, HHS.GOV, http://www.hhs.gov/open/contacts/oig.html (last visited Mar. 12, 2012).

246. Inspector General Act of 1978, Pub. L. 95-452, 92 Stat. 1101 § 2 (1978) (codified as amended 5 U.S.C. App. §§ 1-12).

247. In 2001, the Health Care Financing Administration became the Centers for Medicare and Medicaid Services. *See* http://www.socialsecurity-disability.org/glossary/health-care-financing-administration (last visited Jan. 11, 2012); *see* 68 Fed. Reg. 23731 (May 5, 2003).

248. OIG Compliance Program Guidance for Clinical Laboratories, 62 Fed. Reg. 9435 (Mar. 3, 1997); *see also* OIG Supplemental Compliance Program Guidance for Hospitals, 70 Fed. Reg. 4858 (Jan. 31, 2005); OIG Compliance Program Guidance for Pharmaceutical Manufacturers, 68 Fed. Reg. 23731 (May 5, 2003); OIG Compliance Program Guidance for Medicare+Choice Organizations, 64 Fed. Reg. 61893 (Nov. 15, 1999); OIG Compliance Program Guidance for the Durable Medical Equipment, Prosthetics, Orthotics and Supply Industry, 64 Fed. Reg. 36368 (July 6, 1999); OIG Compliance Program Guidance for Hospitals, 63 Fed. Reg. 8987 (Feb. 23, 1998).

249. OIG Compliance Program Guidance for Clinical Laboratories, 62 Fed. Reg. 9435 (Mar. 3, 1997).

250. The first compliance program guidance, issued in March 1997, identified eleven elements. 62 Fed. Reg. 9435, 9436 (Mar. 3, 1997). The second compliance program guidance, issued in February 1998 and addressing hospitals, articulated seven elements of a "comprehensive compliance program," 63 Fed. Reg. 8987, 8989 (Feb. 23, 1998), which have been repeated with slight variation in each successive compliance program guidance that the OIG has issued. *See* OIG Supplemental Compliance Program Guidance for Hospitals, 70 Fed. Reg. 4858, 4874 n.83 (Jan. 31, 2005); OIG Compliance Program Guidance for Pharmaceutical Manufacturers, 68 Fed. Reg. 23731, 23732-33 (May 5, 2003); OIG Compliance Program Guidance for Medicare+Choice

1. the designation of a chief compliance officer who reports directly to the board of directors or other governing body of the organization, is invested with authority to develop and oversee a compliance program and is instrumental in the institution and operation of a management compliance committee;[251]

Organizations, 64 Fed. Reg. 61893, 61896 (Nov. 15, 1999); OIG Compliance Program Guidance for the Durable Medical Equipment, Prosthetics, Orthotics and Supply Industry, 64 Fed. Reg. 36368, 36371 (July 6, 1999).

251. The Sentencing Commission, commenting on the application of the Guidelines, has long advocated the implementation of "standards and procedures" and the vesting in a specific "high-level" employee of "overall responsibility" for the organization's compliance with them, as two of seven suggested minimum due diligence steps towards creating an "effective program to prevent and detect violations of law." *See* U.S. SENTENCING COMMISSION GUIDELINES MANUAL, § 8A1.2 App. Note 3(k) (Nov. 1, 1994). Differing slightly from the OIG's "seven elements," *see* U.S. SENTENCING GUIDELINES MANUAL (Nov. 1, 2010), the Sentencing Commission did not propose the "seven minimum steps for a compliance program" for inclusion as an official Guideline until 2004; they were articulated previously as Application Note 3(k) to §8A1.2. *See, e.g.,* U.S. SENTENCING COMMISSION GUIDELINES MANUAL, § 8A1.2 App. Note 3(k) (Nov. 30, 2003). Those "seven minimum steps," moreover, did not mandate that the employee charged with oversight of the compliance function have direct access to the organization's "governing body"; that requirement came with the elevation of the Application Note to a Guideline. *Compare* U.S. SENTENCING COMMISSION GUIDELINES MANUAL, § 8A1.2 App. Note 3(k) (Nov. 30, 2003) *with* PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES § 8B2.1(b)(2) (Jan. 13, 2004), http://www.ussc.gov/Legal/Amendments/Reader-Friendly/20040114_RFP_Amendments.pdf (last visited Jan. 7, 2012), *also available at* 69 Fed. Reg. 2169 (Jan. 14, 2004), http://www.federalregister.gov/articles/2004/01/14/04-806/sentencing-guidelines-for-united-states-courts (last visited Jan. 7, 2012).

There is, then, an apparent corporate governance divergence between the Guidelines and the OIG Guidance. Unlike the Guidelines, the OIG generally has opined that the compliance officer should not be subordinate to the organization's legal or finance functions. *Compare, e.g.,* 68 Fed. Reg. 23731 n.13 (May 5, 2003) ("The OIG believes it is generally not advisable for the compliance function to be subordinate to the [organization's] general counsel or comptroller or similar financial officer."), *and* 64 Fed. Reg. 36368 n.135 (July 6, 1999) (same), *with* U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(2)(C) (Nov. 1, 2010) (calling for the delegation of "day-to-day operational responsibility" for the compliance and ethics program in a specific person who reports "periodically to high-level personnel and, as appropriate, to the governing authority" of the organization, or subgroup thereof). The OIG acknowledges, however, that this suggested corporate governance framework, as with other recommended elements of an effective compliance program, may not be feasible or appropriate given the resources available to, or circumstances confronting, all organizations operating in

2. the development and dissemination of written standards of conduct and policies and procedures that serve to guide and foster compliant, ethical behavior;
3. the implementation of a training program;
4. the establishment and maintenance of a hotline to receive anonymously compliance complaints and concerns;
5. the creation of a framework for responding to reported incidents of non-compliance and the enforcement of disciplinary action that explicitly prohibits retaliation;
6. the use of audits and other devices to identify, measure and address compliance concerns; and
7. a mechanism for investigating and remediating systemic compliance problems.[252]

While it is well-settled that the OIG's compliance program guidance does not purport to be mandatory,[253] if an organization enters into a corporate integrity agreement, aspects of it will become so; most notably, by way of example, in virtually every CIA, the OIG requires the separation of the compliance and legal functions within the C-suite and a direct reporting line from the chief compliance officer to the Board of Directors.[254]

In discharging its enforcement duties, HHS is authorized to levy both fiscal and exclusionary penalties and does so, typically, through the

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the health care sector. *See, e.g.,* 68 Fed. Reg. 23731, 23732. As discussed in notes 253-54 and their accompanying text, the OIG's flexibility in this regard evaporates if an organization becomes subject to a corporate integrity agreement; the compliance officer will be required to be independent from the offices of the General Counsel and Chief Financial Officer.

252. *See, e.g.,* 63 Fed. Reg. 8987, 8989 (Feb. 23, 1998) (OIG Compliance Program Guidance for Hospitals).

253. *See* 68 Fed. Reg. 23731 ("The contents of this guidance should not be viewed as mandatory or as an exclusive discussion of the advisable elements of a compliance program. The document is intended to present voluntary guidance to the industry and not to represent binding standards for pharmaceutical manufacturers."); *see also id.* at 23732.

254. *See* 64 Fed. Reg. 61893, 61895 n.13 (Nov. 15, 1999) (corporate integrity agreements "require many of the elements included in this compliance program guidance"); *see*, *e.g.*, *Corporate Integrity Agreement Between Office of Inspector Gen. & Bayer Healthcare*, LLC, OFFICE OF INSPECTOR GEN., http://oig.hhs.gov/fraud/cia/agreements/fully_executed_bayer_cia_112508.pdf (mandating that the "Compliance Officer not be or be subordinate to the General Counsel or Chief Financial Officer").

OIG.[255] The sanctions in the OIG's arsenal include civil monetary penalties ("CMPs") and exclusion from participation in federal health care programs.[256] If a health care company is excluded from participation, it may no longer bill any federal health care program for services over the period of exclusion.[257] The Civil Monetary Penalties Law (the "CMPL") grants such authority, as does the Social Security Act, by reference to many of the provisions of the CMPL.[258]

A. Corporate Integrity Agreements

OIG often enters into settlement agreements with parties against whom it has sought or is seeking CMPs and/or exclusion from participation in federal health care programs.[259] While the resolutions and corresponding compliance obligations often contain common elements or themes, these resolutions and compliance obligations, over the past 20 years, have become increasingly sophisticated and holistic.

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255. The Social Security Act, 42 U.S.C. ch. 7, authorizes the Secretary of HHS to seek civil monetary penalties and assessments (CMPs). *See Civil Monetary Penalties and Affirmative Exclusions*, HHS.GOV, http://oig.hhs.gov/fraud/enforcement/cmp /index.asp (last visited Aug. 12, 2010) [hereinafter *Civil Monetary Penalties*]. The Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7 (2006), notes additional direct authority to levy CMPs for a wide variety of conduct that violates federal health care laws. *Id*. The OIG is authorized to seek different amounts of civil monetary penalties and assessments based on the type of violation at issue. 42 CFR § 1003.103 (2009). For instance, in a case of false or fraudulent claims, OIG may seek a penalty of up to $10,000 for each item or service improperly claimed, and an assessment of up to three times the amount improperly claimed. 42 U.S.C. § 1320a-7a(a)(1)(B) (2006). In a kickback case, OIG may seek a penalty of up to $50,000 for each improper act and damages of up to three times the amount of the remuneration at issue. 42 U.S.C. § 1320a-7a(a)(7) (2006).

256. CAROL E. BOWEN, THE LEGAL IMPACT OF MEDICARE AND MEDICAID LEADING LAWYERS ON THE ROLE OF STATE AND FEDERAL AGENCIES, EFFECTIVE COMPLIANCE PROGRAMS, AND ENFORCEMENT TRENDS 2009 WL 534744, at *4; *Civil Monetary Penalties*, *supra* note 255.

257. BOWEN*, supra* note 256, at *4.

258. *Id.*

259. *Civil Monetary Penalties*, *supra* note 255; Sharon Finegan, *The False Claims Act and Corporate Criminal Liability: Qui Tam Actions, Corporate Integrity Agreements and the Overlap of Criminal and Civil Law*, 111 PENN ST. L. REV. 625, 651 (2007).

These resolutions address the target company's governance, culture, and specific conduct.[260]

Compliance expectations and requirements are usually memorialized in CIAs,[261] which include negotiated protocols designed to ensure a company's compliance with applicable federal and state statutes, regulations, and program requirements.[262] They typically require a compliance program to have certain components and operational features, including board-level oversight. To that end, the OIG has required, through CIAs, that an organization's Board of Directors, or Compliance Committee thereof, retain an independent health care compliance advisor to assist in the performance of its compliance program obligations.[263] CIAs also generally impose comprehensive and rigorous periodic certification and reporting requirements.[264]

In determining the propriety and scope of a CIA, the OIG will consider all factors involved in the underlying investigation, including the misconduct at issue and remedial measures undertaken by the targeted company.[265] Given the oversight powers of HHS over the industry, as a practical matter, "health care providers have little choice but to agree to CIAs containing even the most onerous of terms in their settlement of suits."[266] The ultimate terms and provisions of a CIA are informed by a number of considerations, including, among others:

- whether the company self-reported the alleged misdeeds;
- any adverse economic impact to a federal health care program;
- the obligations of a successor-in-interest to the offending entity;

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260. *Corporate Integrity Agreements*, HHS.GOV, http://oig.hhs.gov/fraud/cias.asp (last visited Feb. 25, 2012).

261. *Id.*; Finegan, *supra* note 259, at 657.

262. ROBERT FABRIKANT ET AL., HEALTH CARE FRAUD: CRIMINAL CIVIL AND ADMINISTRATIVE LAW § 9.05, (2009).

263. *See, e.g., Corporate Integrity Agreement Between OIG and Novartis Pharmaceuticals Corporation, § III.A.3.c,* OFFICE OF INSPECTOR GEN., 6, http://oig.hhs.gov/fraud/cia/agreements/Novartis_Pharmaceuticals_Corporation_09292010.pdf.

264. *Id.* at §§ III.A.3.c-d.

265. *See* Finegan, *supra* note 259, at 658.

266. *See id.*

- the organization's continued participation in federal health care programs or the type of business that fostered the alleged fraud;
- the likely repetition of the alleged behavior;
- the amount of time that has passed since the conduct occurred; and
- the existence of an effective compliance program and the organization's willingness to implement compliance measures and certification obligations.[267]

The presumptive term of a CIA is now five years.[268] Some CIAs have included longer or even indefinite time periods, whereas others have provided for early termination upon the fulfillment of certain contingencies or obligations.[269]

All CIAs require the company to establish a formal compliance program.[270] This will almost always "require the corporation to implement improved internal controls[,] . . . appoint a compliance officer, [and] conduct employee training . . . ."[271] Key features of CIA-mandated compliance programs usually include:

- the appointment of a compliance committee;
- the development of written standards and policies;
- the retention of an Independent Review Organization ("IRO");
- the establishment of a confidential disclosure program;
- prohibitions regarding ineligible persons;
- prompt reporting of overpayments and ongoing investigations/legal proceedings; and
- the creation and submission of comprehensive, certified implementation and annual reports to OIG.[272]

CIAs often require the target company to relinquish cognizable claims to evidentiary privileges or doctrines with respect to legal and

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267. *Id*.
268. *Corporate Integrity Agreements*, *supra* note 260; *Finegan*, *supra* note 259, at 663.
269. FABRIKANT ET AL., *supra* note 262, at 2.
270. Finegan, supra note 259, at 659; FABRIKANT ET AL., *supra* note 262, at 3.
271. Ford & Hess, *supra* note 3, at 686.
272. *Corporate Integrity Agreements*, *supra* note 260; *see also* Richard M. Cooper, *The Need for Oversight of Agency Policies for Settling Enforcement Actions*, 59 ADMIN. L. REV. 835, 842 (2007).

compliance advice the company receives in relation to the CIA and federal health care programs.[273]

CIAs also work to ensure that the OIG is aware of fundamental changes in the subject corporation.[274] For instance, in the event of a divestiture, sale or acquisition, the corporation will be required to notify the OIG. Furthermore, the CIA is not extinguished by such a transaction but travels to the new corporate entity.[275] CIAs generally require notice of changes to the corporation's compliance function, including changes in the position of Chief Compliance Officer, the composition of the Compliance Committee, and office status, *i.e.*, whether an office remains open or has been closed.[276]

B. Independent Review Organizations

CIAs almost always require the company to retain an IRO to evaluate and report on the facets of the company's operations which were implicated by, or involved in, the allegations or claims that have been resolved.[277] IROs, historically, have been accounting, auditing, or consulting firms, and typically they are tasked with evaluating and creating reports regarding the effectiveness of the company's compliance program.[278]

IROs must be independent and, over the years, the OIG has adopted standards set forth in the *Government Auditing Standards* of the Government Accountability Office ("GAO") to ensure that independence.[279] Among other things, IROs may not perform

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273. FABRIKANT ET AL., *supra* note 262, at 3.

274. *See, e.g.*, *Corporate Integrity Agreement Between Office of Inspector Gen. and Bayer LLC*, *supra* note 254; *Corporate Integrity Agreement Between Office of Inspector Gen. & Eli Lilly & Co.*, OFFICE OF INSPECTOR GEN., http://oig.hhs.gov/fraud/cia/agreements/eli_lilly_and_company_01142009.pdf.

275. *Corporate Integrity Agreements*, *supra* note 260; *see also* FABRIKANT ET AL., 262 note 263, at 3; Cooper, *supra* note 272, at 842.

276. *Corporate Integrity Agreements*, *supra* note 260; *see also* FABRIKANT ET AL., *supra* note 262, at 3; Cooper, *supra* note 272, at 842.

277. Ford & Hess, *supra* note 3, at 686.

278. FABRIKANT ET AL., *supra* note 262, at 5.

279. *See* ALICE G. GOSFIELD, HEALTH LAW HANDBOOK § 7:12 (2009); GOVERNMENT AUDITING STANDARDS: 2010 EXPOSURE DRAFT, *available at* http://www.gao.gov/new.items/d10853g.pdf (last visited Feb. 25, 2011).

management functions or make management decisions and should not audit their own work.[280]

The OIG has addressed independence in several publications,[281] and in 2010, issued additional guidelines regarding IRO independence.[282] Therein, the OIG reiterated that the GAO's *Government Auditing Standards* guide any IRO selection and appointment and noted lists of services that would and would not impair an IRO's independence and

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280. GOVERNMENT AUDITING STANDARDS, *supra* note 279; *see also* Gosfield, *supra* note 275, § 7:12.

281. For instance, the OIG addressed IRO independence in detail in a 2004 publication titled *Frequently Asked Questions Related to IRO Independence*. Noting "the Sarbanes-Oxley Act and an increased focus on issues relating to auditor independence," OIG issued a series of "relevant principles" to be used in assessing the independence of IROs. The following "relevant principles" were among those discussed:

- <u>Financial Audits</u>: An organization that serves as an entity's financial auditor may nonetheless also serve as the entity's IRO.
- <u>Bookkeeping and Tax Services</u>: An organization that provides bookkeeping and tax services may also serve as the entity's IRO, although this depends on the nature of the bookkeeping and tax services.
- <u>Compliance Review</u>: An organization that conducts a compliance review for the entity prior to execution of the CIA will generally be allowed to serve as IRO, unless it has been involved in implementing the recommendations of the review.
- <u>Training</u>: An organization that has provided general compliance training can also serve as an IRO. Where, however, the organization has provided general compliance training on coding and billing, it is unlikely to be sufficiently independent to serve as an IRO.
- <u>Hotline Operation</u>: An organization that assists an entity in operating its hotline will generally be able to serve as IRO, unless it has been involved in decision-making operations.
- <u>Policies and Procedures</u>: An organization that assists an entity in developing policies pursuant to the CIA will most likely be prohibited from serving as IRO.
- <u>Software</u>: An organization that has developed software used by an entity is likely to be precluded from serving as the entity's IRO, unless the entity has made substantive changes to the software.

U.S. DEP'T OF HEALTH & HUMAN SERVICES, OFFICE OF INSPECTOR GEN., FREQUENTLY ASKED QUESTIONS RELATED TO IRO INDEPENDENCE (on file with author); *see also* Gosfield, *supra* note 279, § 7:12.

282. U.S. DEP'T OF HEALTH & HUMAN SERVICES, OFFICE OF INSPECTOR GEN., OFFICE OF INSPECTOR GEN. GUIDANCE ON IRO INDEPENDENCE AND OBJECTIVITY 3-4, *available at* http://oig.hhs.gov/fraud/cia/docs/OIG_guidance_on_IRO_independence_2010.pdf.

objectivity.[283] The following were services deemed not to impair IRO independence:

- furnishing general compliance training to address CIA requirements and employee responsibilities;
- performing routine tasks related to the company's confidential disclosure programs, such as answering a confidential hotline;
- performing screening for ineligible persons by entering employee names into an exclusion database;
- evaluating and presenting conclusions and recommendations regarding the company's compliance program prior to the company's CIA being executed;
- providing personnel to perform work plan procedures that are developed by the company's internal audit department, so long as they are not related to subject matter of CIA review;
- furnishing consulting services to the company under an engagement that is completed prior to the start of the CIA review and (1) that is unrelated to the subject matter of the CIA review and (2) that does not involve performance of management functions; and
- performing an assessment of the strengths and weaknesses of the company's internal controls, even if those controls relate to the subject matter of the CIA review, so long as the IRO is not responsible for designing or implementing corrective action.[284]

By contrast, any of the following scenarios suggest a lack of independence:

- the company utilizing a billing system or coding software that was developed or designed by the IRO and the IRO being engaged to perform a claims review thereof;
- IRO personnel furnishing specific training that addresses the subject matter of the CIA review;
- the IRO developing the company's policies, procedures, or internal control systems;

283. *See id.*
284. *Id.*

- the IRO participating in decision making functions related to the confidential disclosure program, such as determining which allegations warrant further investigation or corrective action;
- the IRO performing an assessment of the strengths and weaknesses of the company's internal controls associated with specific risk areas addressed in the CIA and implementing new processes or internal controls relating thereto;
- the company outsourcing its internal audit function to the IRO; and/or
- the IRO being engaged to provide consulting services to the company during the term of the CIA on a matter related to the subject matter thereof.[285]

ii. The Retention of Monitors

Some CIAs also require the retention of an independent monitor to conduct the oversight mandated by DOJ and SEC resolutions.[286] Typically, these monitors evaluate internal quality control systems and corporate infrastructure.[287] In addition, the monitor often has broad access to the company's facilities, data, records, and staff.[288] Like their counterparts in other enforcement proceedings, they must submit periodic reports to the OIG and the company.[289]

The OIG generally selects the independent monitor, with some input from the target company. The company pays the monitor's fees and related expenses.[290] Monitors appointed pursuant to a CIA do, however, "typically serve at the behest of the OIG and may be removed solely at the discretion of the OIG."[291]

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285. *Id.*

286. These independent monitors are distinct from both IROs and from OIG lawyers who serve as OIG's internal monitors of the CIA. FABRIKANT ET AL., *supra* note 262, at 5; *see also* Finegan*,* supra note 259, at 659.

287. FABRIKANT ET AL., *supra* note 262, at 5.

288. *Id.*

289. Finegan, *supra* note 259, at 659; FABRIKANT ET AL., *supra* note 258, at 5.

290. FABRIKANT ET AL., *supra* note 262, at 5.

291. *Id.*

iii. Case Studies: *Bayer* and *Eli Lilly*

Over the past several decades, the OIG has entered into numerous CIAs with health care providers, health insurers and managed care companies, clinical laboratories, medical device manufacturers, and research and generic pharmaceutical companies.[292] Among the most significant recent CIAs are those involving Bayer Health Care LLC ("Bayer")[293] and Eli Lilly and Company ("Eli Lilly").[294] These CIAs broke new ground in a number of respects, most notably creating clear enterprise-wide accountability in the executive ranks and the boardroom.[295]

The CIAs for both Bayer and Eli Lilly include sections regarding "Management Accountability and Certifications." Before the Bayer and Eli Lilly CIAs, a compliance officer possessed the sole responsibility for certifying that a company had: (1) complied with its obligations under the CIA; (2) fulfilled training requirements; (3) reviewed and updated compliance documents and policies; and (4) complied with federal health care program requirements.[296] The new "Management Accountability and Certifications" require additional representations not only from the compliance officer but also from extensive lists of executive-level and management personnel.[297] Both Bayer and Eli Lilly

292. *See Corporate Integrity Agreement Documents*, HHS.gov, http://oig.hhs .gov/fraud/cia/cia_list.asp (last visited Aug. 12, 2010).

293. Bayer entered into a CIA with OIG that became effective on November 25, 2008, as part of a broader civil settlement to resolve allegations that it paid kickbacks to certain diabetic suppliers between 1998 and 2007, thereby causing the suppliers to submit false Medicare claims. *Corporate Integrity Agreement Between Office of Inspector Gen. and Bayer LLC*, *supra* note 254. *See* Scott A. Memmott, *Recent Trends Involving CIAs Significantly Raise Stakes for Health Care Industry Participants*, 11 No. 2 J. HEALTH CARE COMPLIANCE 51 (2009).

294. As part of a global settlement resulting from its introduction of misbranded drugs, namely Zyprexa, into interstate commerce between 1999 and 2003; Eli Lilly entered into a CIA with OIG that became effective on January 14, 2009. *Corporate Integrity Agreement Between Office of Inspector Gen. and Eli Lilly & Co.*, *supra* note 274. Eli Lilly entered into the CIA. Memmott, *supra* note 293, at 51.

295. Memmott, *supra* note 293, at 51.

296. Memmott, *supra* note 293, at 53-54.

297. *See id.*

are, therefore, required to submit certifications from a broad array of individuals at multiple levels of the organization.[298]

The Bayer and Eli Lilly CIAs also addressed corporate governance; they imposed significant new requirements on the companies' respective boards of directors.[299] Both companies' boards are required to arrange for performance reviews of the effectiveness of their compliance programs for each reporting period.[300] Bayer was also required to create an additional panel of "three independent and objective individuals or entities with expertise in compliance with federal health care program and FDA requirements."[301] This panel must prepare and submit a written report addressing their review of the compliance program and include recommendations to the board regarding Bayer's compliance program.[302]

d. The United States Environmental Protection Agency

i. Regulatory Initiatives

In the late 1980s, the EPA began conducting enforcement and compliance investigations of corporations, municipalities and other organizations.[303] Today, those inquiries are performed by the National Enforcement Investigations Center (the "NEIC"), a unit of the EPA. If an inquiry reveals an incident or pattern of non-compliance, the NEIC works with the EPA Office of Enforcement and Compliance Assurance ("OECA") to develop a civil settlement agreement and to implement a Compliance-Focused Environmental Management System (the "CFEMS").[304] The CFEMS is comprised of twelve elements,[305] intended to bring the target of the EPA investigation back into compliance with

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298. This included, among others, the companies' chairmen; the chief executive officers; executive directors and vice presidents; chief medical officers; and directors of business units performing sales, pricing, marketing, contracting, promotions, medical affairs or medical information functions. *See id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. STEVEN SISK, COMPLIANCE-FOCUSED ENVIRONMENTAL MANAGEMENT SYSTEM - ENFORCEMENT AGREEMENT GUIDANCE 3 (5th ed. 2005).

304. *Id.* at 3.

305. *Id.* at 5-8.

the applicable environmental protection laws, regulations and administrative rules.

The twelve elements of a CFEMS are:

1. Environmental Policy—the actual adoption by the organization of an environmental management system;
2. Organization, Personnel, and Oversight—the CFEMS must identify and define the specific duties and responsibilities of the key employees who will implement the new system;
3. Accountability and Responsibility—includes both incentives for managers and employees to comply with the new CFEMS as well as the potential consequences for noncompliance;
4. Environmental Requirements—describes applicable environmental requirements and interprets their applicability to the overall system;
5. Assessment, Prevention, Control—describes ongoing process for identifying and assessing the organization's performance under the system as well as a system for documenting routine self-inspections;
6. Environmental Incident and Non-Compliance Investigations—establishes procedures for both internal and external reporting of incidents of non-compliance as well as identification of problems to assist in correction of noncompliance;
7. Environmental Training, Awareness and Competence—describes the organization's training to ensure personnel are aware of applicable requirements and procedures to follow to ensure compliance;
8. Environmental Planning and Organizational Decision-making—requires the organization to establish written targets and objectives for improving environmental performance on an annual basis;
9. Maintenance of Records and Documentation—identifies records necessary for support of an Environmental Management System ("EMS"), personnel responsible for maintaining all records and security measures necessary to prevent unauthorized disclosure of confidential information;

10. Pollution Prevention—describes the organization's internal process for preventing and/or minimizing waste and emissions;
11. Continuing Program Evaluation and Improvement—describes the schedule of periodic evaluation and auditing of the EMS; and
12. Public Involvement/Community Outreach—requires a program for ongoing community education regarding general environmental awareness.[306]

Since 1997, the EPA has consistently encouraged the use of independent third party auditors to conduct periodic examinations of the EMS.[307] Assuming a civil resolution is consummated, the auditor need not be appointed until the organization has had sufficient time to implement and refine the EMS.[308] However, within one to three years, depending on the size of the organization and the scope of the non-compliance issues, the EPA suggests that any settlement agreement should require at least one independent audit, and the agency recognizes that additional compliance audits may be warranted depending on the particular circumstances of that organization. Results of these assessments are to be reported to the organization and to the EPA.[309]

Guidance from the EPA suggests that the CFEMS should include provisions regarding the selection criteria for the independent auditor. She should not have been involved in the initial review of the CFEMS, but she should be qualified to conduct an audit under EPA Operating Procedure ISO 19011;[310] have expertise and competence in regulatory programs under both federal and state environmental laws; and have at least a bachelor's degree.[311] In addition, the independent auditor may not have any direct financial stake in the outcome of the EMS audit.[312] The company implementing the CFEMS should submit the identity of a potential auditor to the EPA for approval within one year of the effective date of the CFEMS. The EPA will notify the company whether the

306. *Id.*
307. Sisk, *supra* note 303, at 4; *see also* Guidance John P. Suarez, Assistant Administrator, Office of Enforcement & Compliance Assurance to Regional Administrators (I-X) & Regional Counsel (1-X) (June 12, 2003).
308. *See* Sisk, *supra* note 303, at 4.
309. *See id.*
310. *See id.* at Appendix A.
311. *Id.*
312. *Id.*

proposed independent auditor candidate is acceptable, and if so, the proposed candidate must be retained within ten days and conduct the audit within 60 days of the EPA's approval of her.[313]

The audit should be conducted in accordance with ISO 19011 and the auditor shall assess the following:

1. whether there is a defined system or planned program for the EMS;
2. to what extent the program has been implemented and is being maintained;
3. the adequacy of the company's internal self-assessment programs under the CFEMS;
4. whether the company is effectively communicating environmental requirements to its employees and those working on its behalf;
5. whether further improvements are necessary;
6. whether there are observed deviations from the company's written requirements and procedures; and
7. whether continual improvement is occurring.[314]

ii. Case Study: *Overseas Shipbuilding Group, Inc.*

While the EPA oversees all civil enforcement of environmental protection laws, and investigates alleged criminal violations of environmental protection laws, criminal prosecutions for violations of these laws are handled by the DOJ with assistance and input from the EPA's criminal enforcement program.[315] Accordingly, the same principles and DOJ memoranda that guide prosecutions of corporations for general corporate wrongdoing, inform the prosecution of corporations for criminal violations of environmental protection laws.[316] As has been the recent trend in the DOJ's handling of prosecution of

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313. *Id.* at Appendix A.

314. *Id.*

315. *See Enforcement,* EPA.GOV, http://www.epa.gov/compliance/index-e.html (last visited Mar. 12, 2012).

316. *See Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator* (July 1, 1991), JUSTICE.GOV, http://www.justice.gov/enrd/3058.htm (last visted Mar. 12, 2012).

corporations, monitors are also being used with greater frequency in criminal environmental cases.[317]

In December 2006, the DOJ issued a press release announcing that it had entered into a plea agreement with Overseas Shipholding Group, Inc. ("Overseas") under which Overseas pleaded guilty to thirty-three felony counts of violations to the Clean Water Act and Oil Pollution Act.[318] Pursuant to the resolution, Overseas was placed on organizational probation for three years and agreed to pay $37 million in fines and contributions to several environmental community service programs.[319] The fine was one of the largest fiscal penalties imposed for environmental violations in the history of the EPA. Overseas was also required to implement an Environmental Compliance Plan ("ECP") to ensure that future violations would not occur.

The ECP required the company to appoint an operational compliance officer.[320] This officer could not be an employee of the company, and though external to the company, was to be granted access to "all records, documents, facilities, and vessels throughout OSG's operational organization . . . ."[321] The operational compliance officer was charged with supplying reports to Overseas' Chief Executive Officer regarding the company's compliance with and implementation of the Environmental Compliance Plan and other environmental protection requirements.[322]

Overseas also was required to provide the DOJ with a list of proposed candidates for an external audit group within thirty days of the entry of the plea agreement.[323] The group would perform an initial audit of the company's operation to review and identify any aspects of Overseas' operations that could potentially impact the environment.[324]

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317. *See* SUMMARY OF CRIMINAL PROSECUTIONS, EPA.GOV, http://www.epa.gov/compliance/resources/cases/criminal/summary.html (last visited Mar. 12, 2012); *see also* Guidance John P. Suarez, *supra* note 307, at 2.

318. Press Release, U.S. Dep't of Justice, Overseas Shipholding Group Inc. Will Pay Largest-Ever Penalty for Concealing Vessel Pollution (Dec. 19, 2006), http://www.justice.gov/opa/pr/2006/December/06_opa_849.html.

319. *Id.*

320. Environmental Compliance Plan, United States v. Overseas Shipholding Group, Inc., No 06 Civ. 65, 163 (E.D. Tex. May 17, 2006), at 4.

321. *Id.* at 4; *see also* Press Release, U.S. Dep't of Justice, *supra* note 318.

322. Environmental Compliance Plan, *Overseas Shipholding Group, Inc.*, No 06 Civ. 65, 163, at 4-5.

323. *Id.* at 9.

324. *Id.*

The external audit group was also charged with evaluating the company's implementation of an EMS and other environmental training and compliance programs deemed necessary.[325]

Finally, within 18 months of the end of the three-year probationary period, Overseas was required to identify yet another candidate or candidates to serve as a third-party auditor for a final compliance audit[326] to determine whether Overseas had fully implemented its EMS and established complete compliance with the ECP included in the plea agreement.[327] The findings of this final audit were submitted to the DOJ and the company.[328]

The Overseas Environmental Compliance Program was one of the most comprehensive plea agreements in an environmental case in the history of the EPA's Criminal Investigation group.[329] Since the Overseas case, the DOJ has increasingly required independent auditors or corporate monitors to be a part of its plea agreements and ECPs.[330] In 2009 and 2010, monitors or independent auditors were installed in the majority of criminal cases for corporate environmental protection violations.[331]

e. The United States Department of Labor

i. Regulatory Initiatives

The DOL is responsible for promoting the welfare of job applicants, wage earners, and retirees through the improvement of working conditions.[332] In accordance with that mandate, the DOL enforces a variety of federal laws, including those that guarantee workers' rights to safe and healthful working conditions, a minimum

325. *Id.*
326. *Id*. at 18.
327. *Id.*
328. *Id.* at 19.
329. U.S. Dep't. of Justice Press Release, *supra* note 318.
330. *See Criminal Press Releases 2005/2006*, EPA.GOV, http://www.epa.gov/compliance/resources/cases/criminal/highlights/2006/index.html (last visited Feb. 26, 2012).
331. *See id.*
332. *Our Mission*, U.S. DEP'T OF LABOR, http://www.dol.gov/opa/aboutdol/mission.htm (last visited Aug. 25, 2010).

hourly wage and overtime pay, freedom from employment discrimination, unemployment insurance, and other income support.[333]

The Office of the Solicitor (the "SOL") of the DOL represents the agency in enforcement and defensive litigation, as well as alternative dispute resolution activities.[334] The SOL seeks to ensure equal treatment in hiring and employment practices, payment of wages and benefits, safe working conditions, standards of democracy and fiscal responsibility in labor organizations, and safeguards for the income security of retired workers.[335] In its enforcement capacity, the SOL has often used third party monitors to ensure that employers adhere to the terms of settlement agreements with the DOL.[336] What follows is a review of the key labor and employment statutes that have provided the basis and context for private sector oversight of corporate operations.

ii. The Occupational Safety and Health Act

OSHA "assure[s] so far as possible, every working man and woman in the Nation safe and healthful working conditions."[337] The DOL, through the Occupational Safety and Health Administration, a constituent body of the DOL, is responsible for enforcing OSHA.[338] The DOL often pursues civil and administrative actions against corporations accused of violating OSHA. The settlement of these actions generally includes significant oversight of the corporation accused of the underlying violation.[339]

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333. *Id.*

334. *Id.*

335. *Office of the Solicitor*, U.S. DEP'T OF LABOR, http://www.dol.gov/sol/media/brochure/sol.pdf (last visited Mar. 13, 2012).

336. *See* discussion *infra*, Part I.A.2.e (ii-iv).

337. 29 U.S.C. § 651(b) (2006).

338. *Id.* § 670(d)(3).

339. Pursuant to its authority under OSHA, the DOL is authorized to make reasonable workplace and worksite inspections to investigate "pertinent conditions, structures, machines, [etc.], and to question privately any . . . employer, owner, operator, agent or employee*."* *Id.* § 657(a). Where there is a reasonable belief that an employer has violated an OSHA standard, the DOL may issue a citation pursuant to OSHA's general duty clause, or any regulation issued under OSHA. *See id.* § 658(a). If such efforts fail, the DOL is authorized to utilize litigation as a means of enforcing OSHA. *See id.*; 29 CFR § 2200.33 (2009) *et seq.* OSHA specifically authorizes the DOL to "appear for and represent the Secretary in any civil action brought under [OSHA]" pursuant to the direction and control of the Attorney General. 29 U.S.C. §

Third-party monitoring has been a key dimension to ensuring corporate compliance with settlements resulting from OSHA violations. For example, the DOL has required independent oversight throughout its attempts to settle claims resulting from the 2005 explosion at BP Products North America, Inc.'s ("BP") Texas City, Texas refinery.[340] The DOL and the Occupational Safety and Health Administration initially reached a Stipulation and Agreement with BP on September 22, 2005.[341] The Stipulation and Agreement resulted in a $21 million fine, as well as third-party oversight through the retention of an independent firm to conduct a refinery-wide comprehensive audit and analysis of BP's process safety management; and the engagement of a third-party expert to assess and report on the implementation of safety practices and procedures.[342] Safety violations nonetheless continued at the refinery, and the DOL pursued additional claims against BP in October 2009.[343]

On August 12, 2010, the DOL announced a second Stipulation and Agreement with BP. That agreement resulted in a record $50.6 million fine against BP, in addition to BP's commitment to allocate an additional $500 million for remediation and abatement efforts at the refinery.[344] The second Stipulation and Agreement also included more robust oversight mechanisms, including additional third-party monitoring.[345] As DOL Secretary Hilda L. Solis then emphasized: "[T]his agreement provides an unprecedented level of oversight of BP's safety program including regular meetings with [the Occupational

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663. OSHA, therefore, contemplates a role for the DOJ in any OSHA enforcement action. The DOL does, however, possess significant discretion to settle such matters including the creation of oversight programs. *Id.*

340. *See* Press Release, U.S. Dep't of Labor, BP to pay $50.6 million to resolve US Labor Department litigation (Aug. 12, 2010), http://www.osha.gov/pls/oshaweb/owa disp.show_document?p_table=NEWS_RELEASES&p_id=18156.

341. *See* Press Release, U.S. Dep't of Labor, OSHA Fines BP Products North America More Than $21 Million Following Texas City Explosion (Sept. 22, 2005) http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_id=11589&p_table=NEWS_RELEASES.

342. *See* BP Products North America, Inc. Settlement Agreement*, available at* http://www.osha.gov/as/oc/BPSettlementAgreementFinalDoc.pdf (last visited Oct. 5, 2010).

343. *See* OSHA Fact Sheet, BP History Fact Sheet, *available at* http://www.osha.gov/dep/bp/bphistory.html, (last visited Oct. 5, 2010).

344. Press Release, U.S. Dep't of Labor, *supra* note 340.

345. *See id.*

Safety and Health Administration], frequent site inspections, and the submission of quarterly reports . . . ."[346]

Independent third-party experts, or "Independent Verifiers," play a key role in the resolution scheme and are responsible for reviewing and verifying that BP "is completing the required abatement actions . . . [and] properly documenting completion."[347] Each Independent Verifier is tasked with overseeing a separate aspect of the remediation and abatement efforts contemplated in the agreement. An individual Independent Verifier is not, however, prohibited from fulfilling more than one oversight role.[348]

The Independent Verifiers are granted liberal access to BP's corporate records and facilities, as BP is required to "make available all employees, including hourly and skilled (craft) employees, and contractors, and all information (*e.g.,* documents) requested to the Independent Verifiers."[349] In turn, the Independent Verifiers are to submit quarterly progress reports to the DOL, the Occupational Safety and Health Administration, and specified parties at BP.[350] The Stipulation and Agreement does contemplate a role for BP officials in the Independent Verifiers' tasks, stating that while the Independent Verifiers will "rely on their own skills, experience and professional judgment," they must "also give due deference to the reasonable judgments of BP Products . . . ."[351] The Stipulation and Agreement includes the following salient provisions with respect to the role of the Independent Verifier:

> Prior to each Independent Verifier's commencement of work under this Agreement, BP Products and [the Occupational Safety and Health Administration] shall collaborate regarding the scope of work described below to be performed by the Independent Verifiers, including review of the contracts and any amendments to be

346. Hilda L. Solis, Secretary, Occupational Safety & Health Administration, Remarks During Telephone Conference Call OSHA Announces BP Agrees to Record Penalty and Major Safety Improvements at Texas City, Texas Refinery, http://www.osha.gov/dep/bp/Final_Solis_Remarks_BP.html (last visited Oct. 5, 2010).

347. BP Products North America Inc., Stipulation and Agreement, § VIII(A), *available at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=CWSA&p_id=2002.

348. *See id.* § VIII(B)(1).

349. *See id*.

350. *See id.*

351. *Id.* § VIII(C).

> executed by the Independent Verifiers. Employees and their authorized employee representatives shall be consulted in describing and deciding on the scope of the work. BP Products, [the Occupational Safety and Health Administration], and the Independent Verifiers shall agree on the timing, nature and scope of the work to be performed by the Independent Verifiers before the Independent Verifiers begin work at the Refinery. In performing their duties under this Agreement, including when rendering their opinions . . . the Independent Verifiers will rely on their own skills, experience and professional judgment, and will also give due deference to the reasonable judgments of BP Products where allowed . . . .[352]

iii. The Racketeer Influenced and Corrupt Organizations Act

The DOL also oversees and regulates labor organizations.[353] In that context, the DOL plays a key role in investigating and prosecuting labor racketeering cases that implicate RICO.[354] While RICO actions are prosecuted almost exclusively by the DOJ, the DOL is heavily involved in monitoring and investigating labor organizations, typically in the wake of the DOJ proceedings.[355]

Congress expressly intended that RICO's remedial provisions be "liberally construed" to effectuate its "enhanced sanctions and new remedies" laying the groundwork for its reputation as a "'far-reaching civil enforcement scheme.'"[356] The DOJ has described an array of "potentially intrusive remedies" available to prosecutors under RICO's civil provisions including "injunctive relief, reasonable restrictions on defendants' future activities, disgorgement of unlawful proceeds, divestiture, dissolution, reorganization, removal from positions in an entity, and appointment of court officers to administer and supervise the affairs and operations of defendants' entities and to assist courts in

352. *Id.*

353. *See Office of Labor Management Standards*, *About OLMS*, DOL.GOV, http://www.dol.gov/olms/ (last visited Mar. 21, 2012).

354. James B. Jacobs & Eileen M. Cunningham, *The RICO Trusteeships After Twenty Years: A Progress Report*, 19 LAB. L. 419, 419-20 (2004) (discussing the magnitude of the DOL's involvement monitoring and investigating labor organizations).

355. *Id.*

356. U.S. DEP'T OF JUSTICE, CIVIL RICO: A MANUAL FOR FEDERAL ATTORNEYS (2007) [hereinafter CIVIL RICO].

monitoring compliance with courts' orders and in imposing sanctions for violations of courts' orders."[357]

Private sector third-party trustees have played an important role in the resolution of many civil RICO actions.[358] Trustees are generally appointed pursuant to the terms of a consent agreement between the DOJ and the labor union. Among other matters, the trustees "administer the affairs and operations of corrupted unions and related entities, and assist the courts in monitoring compliance with the courts' orders and in imposing sanctions for violations of the courts' orders."[359] In the lion's share of the cases, "formal selection of the trustee has been left up to the presiding judge, with both the government and the union making recommendations."[360] Appointed trustees have, for the most part, been former federal prosecutors with experience in investigating and prosecuting organized crime.[361]

iv. The Fair Labor Standards Act

The DOL also oversees and regulates wage standards, including those dictating the minimum wage and overtime rules.[362] The Fair Labor Standards Act (the "FLSA"), 29 U.S.C. §§ 201 *et seq.* provides the general parameters for these regulations.[363] Pursuant thereto, the DOL may bring an action in any court of competent jurisdiction to pursue equitable relief or to recover damages related to wages, salary, employment benefits, or other compensation denied or lost by an employee.[364] The FLSA allows for injunctive relief to restrain such violations and "other equitable relief as may be appropriate, including employment, reinstatement, and promotion."[365]

357. CIVIL RICO, *supra* note 356.
358. Jacobs & Cunningham, *supra* note 354, at 421-22.
359. CIVIL RICO, *supra* note 356.
360. Jacobs & Cunningham, *supra* note 354, at 424.
361. *Id.*
362. Victoria L. Bor et al., *The Law of Workplace Environment: Understanding and Complying with Employment, Environmental, Labor, Safety, and Whistleblower Laws*, SK043 ALI-ABA 53 (2004).
363. *See id.*
364. 29 U.S.C. §§ 2617(a)(1)(A), 2617(a)(1)(B), 2617(b)(2) (2006).
365. *Id.* § 2617(d).

Independent monitors have also been imposed as part of settlement agreements resolving FLSA-based actions.[366] This has occurred in a variety of contexts, but has been particularly prominent in the garment industry.[367] The DOL has long targeted such companies for violating worker rights provided under the FLSA and other laws. Resulting consent agreements between the DOL and such companies have often included third-party oversight.[368] Accordingly, many apparel companies have "agreed to use independent monitors from 'for-profit' auditing firms or [to] send inspectors into contract factories to audit the payroll records of their contractors."[369]

B. TRANSNATIONAL SETTINGS

1. Corporate Oversight Abroad

Prosecutions of, and enforcement proceedings against, business organizations historically has been viewed as a peculiarly American phenomenon, with most overseas inquiries focusing on the Foreign Corrupt Practices Act.[370] Over the past decade, however, the DOJ and the SEC have increasingly collaborated with their counterparts in Canada, Western Europe and elsewhere.

On November 15, 2006, Munich law enforcement officials searched the corporate offices of Siemens AG and certain of its high-level employees as part of an investigation into the bribery of foreign officials.[371] Shortly after the raid in Munich, Siemens self-reported possible FCPA violations to the SEC and the DOJ.[372] During the ensuing two years, the DOJ and the Commission worked together with the

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366. *See* Heidi S. Bloomfield, *"Sweating" the International Garment Industry: A Critique of the Presidential Task Force's Workplace Codes of Conduct and Monitoring System*, 22 HASTINGS INT'L & COMP. L. REV. 567 (1999).

367. *Id.* at 568.

368. *Id.* at 584.

369. *Id*.

370. *See, e.g.*, Deferred Prosecution Agreement, United States v. Willbros Grp., Inc., No. H-08-287 (S.D. Tex. May 14, 2008).

371. Gerhard Cromme, Chairman of the Audit Comm., Siemans AG, Statement at Annual Shareholders' Meeting of Siemens AG (Jan. 25, 2007), *available at* http://www.siemens.com/press/pool/en/events/hauptversammlung/sie_hv_speech_cromme_1430865.pdf.

372. *Id.*

German authorities to investigate thoroughly the company's activities.[373] In December 2008, Siemens resolved the DOJ's and the SEC's concerns through an agreement that imposed a corporate monitor and required the payment of $800 million in fines; $450 million of which the DOJ collected and the Commission received the remainder.[374] The company also resolved matters with the public prosecutor in Munich, agreeing to pay EUR 395 million (approximately $569 million).[375] Commenting on the investigation and resolution, then Director of the Enforcement Division of the SEC, Linda Thomsen, characterized the case as groundbreaking with respect to the coordinated law enforcement effort between the United States authorities and foreign prosecutors.[376]

The DOJ and the Commission now routinely pursue their corporate targets with the active assistance of foreign national and local authorities.[377]For example, the investigation of Hollinger International, Inc. was conducted and overseen by the SEC with "the assistance and cooperation" of the Ontario Securities Commission.[378] In that case, the Commission selected Mr. Breeden as the Special Monitor.

Similarly, in December 2010, the DOJ and SEC announced the resolution of a joint FCPA investigation that included the entry of a DPA and a payment of more than $137 million in fines to American authorities, and the appointment of a corporate monitor.[379] The case flowed from an investigation that Costa Rican authorities initiated into

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373. *Id.*

374. *Id.; Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines*, (Dec. 15, 2008), JUSTICE.GOV, http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html (last visited Mar. 12, 2012) [hereinafter *Seimens AG and Three Subsidiaries Plead Guilty*].

375. *Id; Seimens AG and Three Subsidiaries Plead Guilty, supra* note 374.

376. Press Release, U.S. 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).

377. *See id*.

378. *See* Press Release, SEC, SEC Files Fraud Charges Against Conrad Black, F. David Radler & Hollinger Inc. (Nov. 15, 2004), *available at* http://www.sec.gov/news/press/2004-155.htm.

379. *See* Press Release, U.S. Dep't Justice, Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay $92 Million to Resolve Foreign Corrupt Practices Act Investigation (Dec. 27, 2010), *available at* http://www.justice.gov/opa/pr/2010/December/10-crm-1481.html [hereinafter *DOJ Alcatel-Lucent FCPA Investigation Resolution Press Release*].

bribes that consultants of an Alcatel-Lucent affiliate allegedly had paid to public officials, political parties and representatives of the Costa Rican state-owned telephone company to gain procurement contracts there.[380] In a history-making settlement for the Costa Rican government, Alcatel-Lucent became the first foreign company to pay damages to resolve corruption charges.[381] French authorities also are investigating the company.[382]

The DOJ/SEC inquiry and the resulting DPA resolved charges of corrupt payments not only to Costa Rican officials, but also to authorities in Honduras, Taiwan and Malaysia, to secure business opportunities in those countries.[383] Alcatel-Lucent also admitted to FCPA violations in connection with third-parties it retained in Kenya, Nigeria, Bangladesh, Ecuador, Nicaragua, Ivory Coast, Angola, Uganda and Mali, that netted the company over $48 million in profits.[384] The DPA requires the imposition of a corporate monitor for a three-year term.[385] The monitor, who will oversee the company's continued

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380. *See id.*; *see also* Alcatel-Lucent, Condensed Consolidated Financial Statements, June 30, 2010, at 43.

381. *See DOJ Alcatel-Lucent FCPA Investigation Resolution Press Release*, *supra* note 379.

382. *Alcatel-Lucent, Corporate Responsibility Website – A Responsible Behaviour – Controversies*, ALCATEL-LUCENT.COM, (Mar. 2011), *available at* http://www.alcatel-lucent.com/csr/htm/en/pdf/(Controversies_Investigations_In_France_eng.pdf.

383. *See DOJ Alcatel-Lucent FCPA Investigation Resolution Press Release*, *supra* note 379; Deferred Prosecution Agreement, United States v. Alcatel-Lucent, S.A., No. 10-20907 (S.D. Fla. Dec. 20, 2010) [hereinafter Alcatel Deferred Prosecution Agreement].

384. *See DOJ Alcatel-Lucent FCPA Investigation Resolution Press Release*, *supra* note 379; Alcatel Deferred Prosecution Agreement, *supra* note 379.

385. Alcatel Deferred Prosecution Agreement, *supra* note 379, ¶¶ 3, 13. Under the DPA, Alcatel-Lucent is empowered to propose to the DOJ three monitor candidates, and to express its preference. The Department reserves the right to select the monitor from the candidates proposed by Alcatel-Lucent; the DOJ could also reject all of the nominees and require the company to propose additional candidates. *Id.* ¶¶ 10-11. The monitor candidates must have expertise on the FCPA and French anti-corruption laws, experience developing and implementing compliance policies, procedures, and internal control mechanisms, especially such as would be designed to address FCPA and anti-corruption issues; "the ability to access and deploy resources as necessary to discharge" her duties; and independence from Alcatel-Lucent. *Id.* ¶ 10. The DPA further requires the monitor to conduct three annual reviews of the company and issue a report, and each review shall be preceded by a written work plan which is submitted for review and comment to the company and the French authority selected by the DOJ. *Id.* attach. D ¶

implementation of a FCPA compliance program and review and make recommendations to bolster the company's internal controls, policies and procedures, must make annual reports to the Government.[386]

Coordinated complex transnational enforcement proceedings are now commonplace, and have resulted in the appointment of independent private sector monitors with substantial cross-border reporting lines.[387] For example, the monitor appointed in the Siemens case was, for the first time, a non-U.S. monitor—a former German finance minister.[388] While the monitor appointed in the Statoil case was an American, the deferred prosecution agreement required that the monitor's activities "not be contrary to Norwegian law" and that all confidential company business information be maintained "in conformity with Norwegian law."[389] In addition, where regulatory jurisdictions overlap, the

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3. The DOJ has the decision authority to resolve any dispute with respect to the work plan. *Id.* The initial report is due within 120 days of the monitor's initial review, which must start within 120 days of the monitor's engagement. The monitor's reports are to be issued simultaneously to both the company and the designated French authority, who would then transmit the report to the DOJ. *Id.* attach. D ¶ 4. Upon receipt of the monitor's report, Alcatel-Lucent is to adopt the recommendations within 120 days or, within 60 days, object in writing to the monitor concerning any recommendation it finds impracticable and propose an alternative course of action. In that event, the monitor and company must then negotiate the resolution of the disputed recommendation; if unable to do so, the DOJ is the final decision maker as to what recommendation to implement. *Id.* attach. D ¶ 5. In the event the monitor discovers misconduct, she may report the matter directly to Alcatel-Lucent's General Counsel or the Audit Committee of the company's Board of Directors. *Id.* attach. D ¶ 8. Depending on the circumstances, including implications for French law, the monitor is empowered to report misconduct directly to the DOJ, if not the designated French authority, who may then inform the Department. *Id*.

386. *Id.* attach. D ¶¶ 1, 4.

387. *See, e.g.*, *id.* attach. D ¶¶ 2(b) (requiring the company, at the request of the monitor, to notify the monitor and any French authority appointed by the U.S. Department of Justice, who then may report to the U.S. Department of Justice in accordance to French law); Deferred Prosecution Agreement, United States v. Technip S.A., No. 4:10-cr-00439 (S.D. Tex. June 28, 2010) [hereinafter Technip Deferred Prosecution Agreement] (urging consultation with France's Central Service for the Prevention of Corruption, an adjunct of the French Ministry of Justice, and consultation with French authorities, as appropriate).

388. BRUCE YANNETT, FOREIGN CORRUPT PRACTICES ACT: AN OVERVIEW, 1814 PLI/CORP 721, 755 (May 19, 2010).

389. Philip Urofsky & Danforth Newcomb, *Recent Trends and Patterns in FCPA Enforcement*, Shearman & Sterling, October 1, 2009; *see also* Technip Deferred

possibility of conflicting or competing regulations is much greater than in an investigation run by just one agency.[390] This increases the likelihood of conflicting demands on a corporate monitor as well.

2. The United Kingdom

a. Regulatory Initiatives

In the United Kingdom, the two agencies with primary responsibility for prevention and prosecution of corporate fraud and corruption are the Serious Fraud Office (the "SFO") and the Financial Services Authority (the "FSA").[391] The SFO prosecutes cases of corporate corruption occurring within the United Kingdom or overseas. Until 2008, the SFO was often criticized for its "lackluster" prosecution record.[392] In the past two years, however, the agency has adopted new guidelines for the prosecution of transnational bribery and corruption offenses and has achieved success with Civil Recovery Orders ("CRO"),

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Prosecution Agreement, *supra* note 387 (requiring certain aspects of the DPA and monitor's duties to comply with French law).

390. LINDA CHATMAN THOMSEN, DOMINICK D. BARBIERI & MATHEW S. MILLER, DEALING WITH MULTIPLE REGULATORS: REFLECTIONS ON PARALLEL INVESTIGATIONS, REGULATORS' DIFFERING ROLES, AND ISSUES TO CONSIDER IN REPRESENTING ORGANIZATIONAL CLIENTS, Practicing Law Institute Order No. 19278 (2009). The Alcatel-Lucent DPA provides a further example where the monitor was required to be a French national whose expertise included the anti-corruption provisions of French law who had reporting obligations to the DOJ that were to be facilitated by a "French Authority identified by the Department." Alcatel Deferred Prosecution Agreement, *supra* note 383, ¶ 10, attach. D ¶ 2(b).

391. *See* Sarah Cleary & Lucy Candey, Who's Watching You? Rise of Corporate Monitoring (2010), *available at* http://www.inhouselawyer.co.uk/index.php/fraud-and-corporate-crime/7981-whos-watching-you-rise-of-corporate-monitoring; *see also* SERIOUS FRAUD OFFICE, APPROACH OF THE SERIOUS FRAUD OFFICE TO DEALING WITH OVERSEAS CORRUPTION (2009), *available at* http://www.sfo.gov.uk/media/128701/approach%20of%20the%20serious%20fraud%20office%20v6.pdf [hereinafter SFO Approach].

392. RICHARD CRAIG SMITH ET AL., Recent International Anti-Corruption Enforcement Efforts & Compliance Guidance, FULBRIGHT BRIEFING (2009), *available at* http://www.fulbright.com/index.cfm?fuseaction=publications.detail&pub_id=4271&site_id=494 (last visited June 17, 2010); *see also* Lecture, ICID, *Talking Corruption With the SFO: Presentation by Richard Alderman, Director Serious Fraud Office* (Oct. 20, 2009), *available at* http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2009/talking-corruption-with-the-sfo.aspx.

resolutions which include various conditions.[393] They are modeled after the DOJ guidelines for prosecution of a corporation laid out in the Filip Memorandum.[394]

Adopted in 2009, the guidelines, titled "Approach of the Serious Fraud Office to Dealing with Overseas Corruption" (the "SFO Approach") and "Attorney General's Guidelines on Plea Discussions in Cases of Serious or Complex Fraud" (the "SFO Guidelines"), read very similarly to the Filip Memorandum and its predecessors.[395] Of primary importance in the SFO guidelines are corporate self-regulation, self-reporting if wrongdoing is uncovered, and continued monitoring. Voluntary disclosure is perhaps the most important consideration in the SFO's decision whether to resolve an inquiry through a civil agreement or a criminal plea.[396] The SFO may not appoint a monitor on its own. Any such appointment must be part of a civil agreement between the parties or through the criminal courts.[397] Under the guidelines, a monitor must be "an independent, well-qualified individual nominated by the corporate and accepted by [the SFO]."[398] The scope of a monitorship is set forth in the agreement between the corporation and the SFO; it must be "proportionate to the issues involved."[399]

b. Case Studies

i. Balfour Beatty, PLC

In *SFO v. Balfour Beatty PLC*, the SFO reached a civil resolution after the company self-reported payment "irregularities" and false accounting relating to the construction of the Alexandria Library in

393. *See generally* SFO Approach, *supra* note 391; Attorney General, *Attorney General's Guidelines on Plea Discussions in cases of Serious or Complex Fraud*, ATTORNEYGENERAL.GOV.UK, (Mar. 18, 2009), *available at* http://www.attorneygeneral.gov.uk/Publications/Documents/AG's%20Guidelines%20on%20Plea%20Discussions%20in%20Cases%20of%20Serious%20or%20Complex%20Fraud.pdf. [hereinafter, SFO Guidelines]

394. Cleary & Candey, *supra* note 391.

395. *See generally* SFO Approach, *supra* note 391; SFO Guidelines, *supra* note 393.

396. SFO Approach, *supra* note 391, ¶¶ 22, 24.

397. *See* SFO Approach ¶ 14.

398. *See* SFO Approach, *supra* note 391, ¶ 14.

399. *See* SFO Approach, *supra* note 391, ¶ 14.

Egypt in 2001.[400] Though Balfour Beatty denied that these payment "irregularities" were bribes, it did accept as part of the settlement agreement that the payments and false accounting were unlawful.[401] Balfour Beatty paid a £2.25 million civil settlement payment and agreed to contribute to the legal costs of the SFO proceeding.[402] It also agreed to submit to a period of external monitoring.[403]

ii. *Mabey & Johnson, Ltd*.

R. v. Mabey & Johnson Ltd. marked the SFO's first criminal conviction of an overseas corruption since the Anti-Terrorism, Crime and Security Act of 2001.[404] After pleading guilty to making corrupt payments in Ghana and Jamaica and to breaching the United Nations sanctions against trade with Iraq, the SFO and the company entered into a criminal plea agreement.[405] Part of the agreement, approved by the criminal court, required the appointment of a corporate monitor whose fee was £250,000 for a three-year monitorship.[406]

iii. *Innospec, Inc.*

In a suite of cases involving Innospec, Inc. and certain of its subsidiaries ("Innospec"), a cooperative, world-wide investigation by enforcement authorities in the United States and the United Kingdom culminated with Innospec pleading guilty in the United States to

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400. *See* Cleary & Candey, *supra* note 391; David Leigh & Rob Evans, *Balfour Beatty Agrees to Pay £2.25m over Allegations of Bribery in Egypt*, THE GUARDIAN, Oct. 7, 2008, *available at* http://www.guardian.co.uk/business/2008/oct/07/balfour beatty.egypt.

401. *See* Leigh and Evans, *supra* note 400.

402. *Id.*

403. *Id.*; *see also* Cleary & Candey, *supra* note 391.

404. *Id.*; *see also* Gary DiBianco et al., *Serious Fraud Office Begins to Achieve Concrete Results From Focus on Overseas Corruption*, Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates Client Alert, Oct. 8, 2009; Press Release, Serious Fraud Office, Mabey & Johnson Ltd. Sentencing (Sept. 25, 2009), http://www.sfo.gov/ uk/press-room/latest-press-releases/press-releases-2009/mabey—johnson-ltd-sentencing.aspx.

405. Press Release, Serious Fraud Office, Mabey & Johnson Ltd Sentencing (Sept. 25, 2009), http://www.sfo.gov/uk/press-room/latest-press-releases/press-releases-2009 /mabey—johnson-ltd-sentencing.aspx.

406. Cleary & Candey, *supra* note 391.

conspiracy to corrupt, violations of the FCPA and of the U.S. embargo against Cuba, and to defrauding the United Nations.[407] As part of its agreement to resolve charges brought by the DOJ, Innospec agreed to hire an independent monitor to review and evaluate its internal controls, record keeping and compliance practices.[408] In the United Kingdom, Innospec's British subsidiary, Innospec, Ltd., agreed to pay a criminal penalty and pleaded guilty to making corrupt payments to a foreign government official to resolve charges brought by the SFO.[409] As a result of the combined efforts of the SFO, the DOJ, the SEC and other agencies, the global settlement required Innospec to disgorge illicit profits, settle charges, and pay fines and penalties totaling $40.2 million.[410]

3. The Organisation for Economic Co-operation and Development

In 2008, the Organisation for Economic Co-operation and Development (the "OECD")[411] released "Guidelines for Multinational Enterprises" as a Supplement to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "Anti-Bribery Convention" or the "Convention").[412] The Convention,

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407. Press Release, U.S. 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), http://www.justice.gov/opa/pr/2010/March/10-crm-278.html.

408. *Id*.

409. *Id*.

410. *Id*.

411. The OECD is a forum of 30 countries which have joined to address the "economic, social and environmental challenges of globalization." Its member countries are: Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States.

412. ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS (2011), *available at* http://www.oecd.org/dataoecd/4/18/38028044.pdf (last visited Feb. 25, 2011) [hereinafter Anti-Bribery Convention]; ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2008), *available at* http://www.oecd.org/dataoecd/56/36/1922428.pdf (last visited Feb. 25, 2011) [hereinafter *OECD Guidelines*].

initially adopted on November 21, 1997, and updated on November 26, 2009, seeks to combat bribery in international business transactions through a cooperative process of reporting, monitoring and mutual legal assistance between member countries.[413] While the Anti-Bribery Convention does not expressly provide for the imposition of an independent corporate monitor, it does call for "company and business accounting, external audit, as well as internal controls, ethics, and compliance requirements and practices."[414] The Convention also requires each signatory to monitor and report its progress and level of success implementing the goals of the Convention.[415] The costs of this oversight are to be assessed and handled through the normal OECD budget process, with cost-sharing measures to be adopted for monitoring of non-members of the OECD.[416]

Whether the updated Anti-Bribery Convention and the OECD Guidelines for Multinational Enterprises will be successful in identifying and combating bribery and corrupt practices in international business transactions remains to be seen. The Obama Administration is undertaking to collaborate with the OECD.[417] On May 31, 2010, Attorney General Eric Holder delivered remarks to the OECD regarding the United States' continuing efforts to prosecute financial fraud, bribery offense and other corrupt practices around the world.[418] At the conclusion of his remarks, he invited prosecutors from all OECD member and signatory countries to gather at the June 14, 2010 meeting

413. *See* Anti-Bribery Convention, *supra* note 412.

414. *See* OECD Working Group in Bribery in International Business Transactions, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, (Nov. 26, 2009), *available at* http://www.justice.gov/criminal/fraud/fcpa/docs/oecd-recommendation.pdf (last visited Feb. 25, 2011); Anti-Bribery Convention, *supra* note 412.

415. *See* Anti-Bribery Convention, *supra* note 412, art. 12.

416. *Id.*

417. Mark Brzezinski, *Obama Administration Gets Tough on Business Corruption Overseas*, WASH. POST, May 28, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/05/27/AR2010052704154.html.

418. Eric Holder, Attorney General, U.S. Dep't of Justice, Remarks at the Organisation for Economic Co-operation and Development (May 31, 2010), *available at* http://www.justice.gov/ag/speeches/2010/ag-speech-100531.html (last visited Feb. 25, 2011) [hereinafter *Holder OECD Speech*].

of the Working Group to discuss appropriate next steps in furtherance of this goal.[419]

II. Independent Private Sector Oversight: Considerations and Ramifications

The imposition of independent private sector oversight raises a number of profound policy questions, along with practical considerations, regarding the charter for, and selection and deployment of, a monitor, a consultant or a review organization. Scholars and practitioners have thoughtfully explored some of these issues.[420] We discuss below those which we have concluded to be fundamental to the construct.

A. Defining the Role

In the resolution documents or the governing judicial order, enforcement officials, regulators and the company under investigation should make every effort to delineate carefully, and with particularity, the duties and responsibilities of the monitor, consultant or review organization. A certain degree of flexibility is warranted because of the substantial temporal duration of the ongoing oversight. At a minimum, however, the parties should make clear that the role is to monitor and not investigate the company's affairs.[421]

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419. *Id.*

420. *See, e.g.,* Khanna & Dickinson, *supra* note 3 at 1724-25; David M. Lagaie, *DPAs, NPAs Face Scrutiny As Their Numbers Increase*, The Legal Intelligencer, Feb. 27, 2008, at 1; James M. Keneally, *Draconian Consequences of the DPA*, 240 N.Y.L.J. 9, (2008); Matt Senko, Note, *Prosecutorial Overreaching in Deferred Prosecution Agreements*, 19 S. CAL. INTERDISC. L.J. 163, 178 (2009).

421. Without precise language that clearly and precisely defines the scope of the monitorship and the monitor's obligations with regard to the company, disputes between the company and monitor may arise and one or both parties may attempt to steer the scope of the monitorship in its desired direction. A common, but preventable, result when the monitor seeks to expand her role beyond the mandate expressed in the resolution documents is "scope creep." *See* Khanna & Dickinson, *supra* note 3, at 1724-25; Lagaie, *supra* note 420. Absent clear guidance in the operative documents, a monitor's duties may change over the course of the monitorship, making the endeavor much more costly for the company than originally intended or anticipated by the prosecuting document. *See* Khanna & Dickinson, *supra* note 3, at 1724-25. Aside from scope creep, the absence of clear guidance leads to a lack of uniformity from one monitorship to the next—while some monitors are granted very limited powers to

Typically, the focus of oversight correlates to the enforcement or regulatory concerns that gave rise to, or were discovered during, an internal or public sector investigation. When resolving the matter, the parties should discuss and reach a well-documented consensus regarding the role of the monitor or consultant in the day-to-day operations of the company. Unless there is a legitimate concern that existing members of management are conducting themselves unethically or unlawfully, or that corporate data, information or records are being destroyed, the oversight should consist of observation, inquiry and reporting. It should not, expressly or implicitly, include the authority to approve hiring or compensation decisions, commercial transactions, financial matters or strategic plans or initiatives.[422] Of course, was a company to consider seriously a merger, acquisition or divestiture during a monitor's tenure, she should be so advised before the operative agreement has been negotiated and executed.

In the same vein, the parties should create specific mechanisms for addressing compliance, legal, financial and operational concerns that might be identified by the company or by the monitor or consultant in the course of her work.[423] They should include rational reporting

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ensure compliance with the terms and conditions of the resolution, others are given very broad power, and may, in some circumstances, assume a *de facto* managerial role in the company. Lagaie, *supra* note 420. The government and company may avoid these pitfalls through more definite language delineating the scope of a monitor's role and authority at a company in the prosecuting documents.

422. Another byproduct of the monitor's imprecise scope is possible usurpation of corporate responsibilities. As one commentator has noted, "the chief problem with the implementation of an independent monitor is the unchecked authority the monitor has to alter corporate infrastructure and accumulate expenses without accountability." Senko, *supra* note 420, at 178. While the company may disagree with the monitor's recommendations or actions, where the government controls the monitor selection and appointment process the company may "have very little practical recourse for contesting perceived abuses or forcibly adopted policies." *Id.* Moreover, the government may weigh the company's decision to adopt the monitor's recommendations when assessing compliance with the prosecution agreement. *Id.* Thus, the company may feel compelled to comply with impracticable recommendations only to appear cooperative and satisfy its bargain. *Id.*

423. In drafting and negotiating NPAs, DPAs and analogous resolution agreements, corporations should analyze carefully proposed "non-contradiction" provisions mandating that the corporation not make any public statement contradicting any factual allegation or criminal charge filed by the enforcement agency. Keneally, *supra* note 420; *see, e.g.*, Deferred Prosecution Agreement, United States v. Alcatel-Lucent, S.A.,

obligations that flow from the nature of the concern or allegation, evaluated in light of the underlying transgressions. Alternate reporting channels should include the Board of Directors, the General Counsel and the Chief Compliance Officer, and under certain circumstances, appropriate enforcement officials or regulators. If a need to investigate a matter arises, the resolution documents should set forth criteria and a procedure for law enforcement officials to evaluate the allegations or report and determine whether they, the Board or the company will handle the inquiry.[424]

A critical and still unresolved question in this enforcement resolution model is how most effectively to supervise the work and resolve fairly disputes that may arise between the company and the consultant or monitor.[425] Commentators have explored the notions of judicial and independent private sector oversight; the former "would eliminate monetary and other incentives monitors have to extend their own stay or recommend indictment."[426] The DOJ has offered guidance through the Grindler Memorandum that the resolution agreements "should explain what role the Department could play in resolving disputes"[427] between the company and its monitor, leaving it to the parties, in the context of their specific circumstance, to collaborate towards a satisfactory outcome for all concerned.

No. 10-20907 (S.D. Fla. Dec. 20, 2010); Deferred Prosecution Agreement, United States v. Technip S.A., No. 4:10-cr-00439 (S.D. Tex. June 28, 2010); Deferred Prosecution Agreement, United States v. Willbros Grp., Inc., No. H-08-287 (S.D. Tex. May 14, 2008); Deferred Prosecution Agreement, United States v. WellCare Health Plans, Inc., No. 8:09-cr-00203 (M.D. Fla. May 5, 2009). A company's ability to defend itself in private sector lawsuits can be impaired by any such requirement that does not acknowledge the organization's rights in this regard. Keneally, *supra* note 420.

424. Khanna & Dickinson, *supra* note 3, at 1724-25.

425. As one commentator has noted, "the lack of judicial oversight of the monitor's jurisdiction and authority may result in excessive and unfair burdening of corporate entities. For example, "some suggest that Bristol-Myers may have fired their CEO and general counsel to induce their monitor not to seek removal of the DPA." Senko, *supra* note 420, at 178. In this respect, judicial monitoring could also allow the corporation to avoid less stringent enforcement of certain monitor recommendations. *Id.*

426. *See id.*

427. Grindler Memorandum, *supra* note 131.

B. SELECTION

The lynchpin of the private sector oversight model is qualified independence. It is axiomatic that the monitor or consultant must be a neutral third party,[428] and the integrity of the selection process has been perhaps the most highly publicized dimension of the scheme. In 2008, in response to a Congressional inquiry, the DOJ identified corporate monitor appointments over an eight-year period.[429] Not surprisingly, the majority of persons selected to serve as monitors were former federal government officials, including at least twenty-three former prosecutors.[430] One appointment became particularly controversial. In late 2007, the then United States Attorney for the District of New Jersey appointed the Attorney General under whom he had served, as the monitor for medical equipment manufacturer Zimmer Holdings.[431] The selection occurred apparently without consideration of other qualified individuals or firms, and over a period of eighteen months; the attendant fees and expenses reportedly reached $52 million.[432]

Congress thereafter initiated an inquiry into the Department's use of deferred prosecutions and the selection of corporate monitors.[433] Remedial legislation, the "Accountability in Deferred Prosecution Act," was introduced in the United States House of Representatives in both the 2008 and 2009 Congressional legislative sessions, but to date, no bill

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428. Bart M. Schwartz, *Becoming a Monitor and Getting the Job Done*, SM05 A.L.I. 425 (2006). As one author has observed, "red flags" include: "(a) any work that [has been] done for the parties previously, (b) requests from the monitored party . . . to do work that is not part of the agreement and (c) the use of the assignment to curry favor with one side or the other for future assignments." *Id.*

429. Eric Lichtblau & Kitty Bennett, *30 Ex-Government Officials Got Lucrative Posts as Corporate Monitors*, N.Y. TIMES, May 23, 2008, at A23.

430. *Id.*

431. Lisa Brennan, *Pols Seek Controls on Monitor Picks in Light of Reported $52M Fee to Ashcroft*, 190 N.J.L.J 895 (2007).

432. Philip Shenon, *Ashcroft Deal Brings Scrutiny in Justice Dept.*, N.Y. TIMES, Jan. 10, 2008, at A1; Eric Lichtblau & Kitty Bennett, *supra* note 429, at A23.

433. *See id.*; Christopher J. Gunther & Robert M. Pollak, *Scrutiny of Monitors is on the Rise: Pending Legislation and Recently Issued DOJ Guidelines Reflect a Concern Over Possible Conflicts*, NAT'L L.J., Mar. 24, 2008, at 1; Lisa Brennan, *Bill Would Place Judicial Constraints on Deferred Prosecution Agreements,* 191 N.J.L.J. 259, Nov. 28, 2008.

has been enacted. The DOJ responded by issuing the Morford and Grindler Memoranda in March 2008 and May 2010, respectively.[434]

One critical issue not addressed in the DOJ memoranda is the expertise and experience of the monitor. Enforcement officials, regulators, companies and monitor or consultant candidates must all recognize that to be effective, the oversight will require substantial expertise and that for years after the monitor has concluded her work, it might be scrutinized by legislators, the media and/or private sector litigants through their counsel. Monitors and independent consultants have been engaged by a broad array of companies including medical equipment manufacturers, health insurers, financial services firms, shipbuilders, and petroleum producers. Many former prosecutors who have been appointed as monitors have had little or no experience working in a corporation, much less the industry in question. It is in the interests of both the enforcement agency and the company, albeit for different reasons, to select a duly qualified monitor with the requisite personal expertise and experience or an assembled team that has the necessary capabilities.

Ideally, by the time a resolution has been negotiated and executed, the administrative enforcement agency will be comfortable including the company, to some extent, in the selection process, an approach that leverages the disproportionate resources available to the respective parties.[435] Through its General Counsel and/or its Chief Compliance Officer, a corporation or firm can develop, for the agency's consideration, proposed criteria and procedures for selecting the monitor. Consistent with the principles enunciated in the Morford and Grindler Memoranda, a company can designate representatives to elicit proposals from, and interview, candidates for the monitorship. A comprehensive synopsis of the process, together with a thoughtful assessment of the candidates and a "short list" of recommendations can assist the agency immeasurably as it identifies candidates to be interviewed and ultimately selected.[436]

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434. *See* Morford Memorandum, *supra* note 92; Grindler Memorandum, *supra* note 131.

435. *See, e.g.,* Deferred Prosecution Agreement ¶¶ 10-11, United States v. Alcatel-Lucent, S.A., No. 10-20907 (S.D. Fla. Dec. 20, 2010); Deferred Prosecution Agreement, United States v. Willbros Group, Inc., No. H-08-287 (S.D. Tex. May 14, 2008).

436. *See* Deferred Prosecution Agreement ¶¶ 10-11, United States v. Alcatel-Lucent, S.A., No. 10-20907 (S.D. Fla. Dec. 20, 2010); Deferred Prosecution

C. RETENTION

After a monitor or consultant has been selected, she and the company typically execute a retention agreement. If the monitor is a practicing lawyer, under applicable ethical rules, her receipt of fees from the company could be deemed to create an attorney-client relationship.[437] This is, of course, at odds with the notion of third-party independence and neutrality.[438] One possible solution is the creation of a trust with an independent trustee to administer the payments to the monitor.

D. DEPLOYMENT

Once a resolution has been negotiated and a monitor selected, she must begin the process of educating herself about the sector and the

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Agreement, United States v. Willbros Group, Inc., No. H-08-287 (S.D. Tex. May 14, 2008).

437. *See*, *e.g.,* State Bar of Arizona's Committee on the Rules of Professional Conduct, Ethics Opinion 02-04 (Sept. 2002) (payment of a fee to an attorney is one factor to consider in determining whether an attorney-client relationship exists (citing *In re* Pappas*,* 159 Ariz. 516, 522 (1988))); 48 AMJUR 2D *Proof of Facts* § 52 (proof of payment of fees to an attorney may be "conclusive" evidence of an attorney-client relationship). *But see* Mason Tenders Dist. Council Pension Fund v. Messera, 958 F. Supp. 869, 891 (S.D.N.Y. Mar. 26, 1997) (finding that trustee's lawyer did not also assume representation of fund absent "explicit undertaking," even though pension fund paid trustee's lawyer's fees). In the Alcatel-Lucent DPA, the parties addressed this ethical conundrum through specific agreement that "the retention of the Monitor does not establish an attorney-client, auditor-client, or similar relationship between Alcatel-Lucent and the Monitor that would otherwise prevent the Monitor from fulfilling its Mandate in accordance with this Agreement." Deferred Prosecution Agreement, Attachment D ¶ 2(a), United States v. Alcatel-Lucent, S.A., No. 10-20907 (S.D. Fla. Dec. 20, 2010).

438. Schwartz, *supra* note 428; *see also* Morford Memorandum, *supra* note 92, Principle II. The Morford Memorandum, for instance, states that a monitor is "by definition" independent of the company and the government. *Id*. at 4-5. Focusing primarily on confidentiality and evidentiary privileges and doctrines, enforcement and regulatory officials have taken the position that there is no attorney-client relationship between a lawyer and the subject corporation. This can leave the monitor and her law firm in an untenable position.

company. As expeditiously as is possible, she should develop a comprehensive work plan.[439]

For even the largest and most sophisticated companies, a monitorship is a significant burden on personnel. Few firms have in-house professionals who have worked with a monitor or an independent consultant. At the outset of the engagement, the company should designate a liaison, such as the General Counsel or the Chief Compliance Officer, to work directly with the monitor. A system for receiving and responding to requests for corporate records, site visits and interviews must be developed,[440] and adequate and capable personnel must be assigned to the team to support the liaison. A protocol for conducting interviews of current and former employees should be crafted before any such work is undertaken; it should address, for example, what background information will be provided to individuals and who will be permitted to attend the meetings.[441]

Corporate monitorships enable agencies to outsource a critical function at an attractive price; the company, rather than the government or the taxpayers, foots the bill.[442] The fees paid to a corporate monitor, moreover, are not generally made public,[443] and Congress and various

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439. *See* Khanna & Dickinson, *supra* note 3, at 1724-25; James K. Robinson, et al., *Deferred Prosecutions and the Independent Monitor,* 2 INT'L. J. DISCLOSURE & GUIDANCE 325, 326-27 (2005). *See, e.g.*, Deferred Prosecution Agreement Attachment D ¶ 3, United States v. Alcatel-Lucent, S.A., No. 10-20907 (S.D. Fla. Dec. 20, 2010); Deferred Prosecution Agreement, United States v. Willbros Grp., Inc., No. H-08-287, (S.D. Tex. May 14, 2008).

440. Materials should be processed through the legal or compliance department and they should be well-organized according to custodian and numbered, with an archive set maintained internally.

441. Counsel representing an individual in the underlying enforcement investigation should be notified promptly of a request for an interview by a monitor, and upon request, be permitted to attend. By contrast, in most cases, monitors and consultants can be expected to request that in-house or outside counsel to the company not participate in such sessions.

442. *See* Sue Reisinger, *Someone to Watch Over You*, CORP. COUNS., Sept. 20, 2007.

443. Because many corporations that have been subject to a monitorship are publicly traded, some argue that the corporation's shareholders have a right to know how much money is being paid to the monitor. In the case of AIG, members of Congress have recently argued that the taxpayers, by virtue of the government's equity stake in the company, have a right to review the fees paid to and reports prepared by James Cole to understand whether the fees paid to the monitor were properly spent. Thomas Brom, *Monitoring the Monitors*, Daily Journal Corp. (quoting letter from

stakeholders have repeatedly called for greater accountability and transparency in the selection of and fees paid to corporate monitors.[444]

Monitors usually are required to report periodically to enforcement officials on the company's compliance with the terms of the agreement and the underlying applicable statutes and regulations. The frequency of such submissions is typically quarterly or semi-annually.[445] Over the years, a number of approaches have been adopted with respect to informing the Board of Directors and the senior management team of the monitor's findings and observations. It is now common practice to require the monitor to submit her report simultaneously to the regulators and to the company.[446] The corporation is thereafter afforded an opportunity to respond to the submission. If a material disagreement crystallizes, the agency resolves it definitively with no right of appeal.[447]

Congress to SEC requesting disclosure of reports prepared by AIG monitor, James Cole); Sue Reisinger, *AIG's Fall Raises Questions About Corporate Monitoring*, CORP. COUNS., June 23, 2009 [hereinafter Reisinger, *AIG's Fall*]; Sue Reisinger, *It's Broken*, CORP. COUNS., July 1, 2009 [hereinafter Reisinger, *It's Broken*].

444. *Accountability, Transparency, and Uniformity in Corporate Deferrred and Non-Prosecution Agreements Before the H. Comm. on the Judiciary, Subcomm. on Commercial and Administrative Law*, 111th Cong. 2 (2009) (statement of Rep. Bill Pascrell, Jr.), *available at* http://judiciary.house.gov/hearings/pdf/Pascrell090625.pdf; Lisa Brennan, *supra* note 431, at 873; Reisinger, *AIG's Fall*, *supra* note 443; Reisinger, *It's Broken*, *supra* note 443. In fact, the proposed "Accountability in Deferred Prosecution Act of 2008" requires that a monitor be paid according to a pre-determined fee schedule set by the federal courts. *See* Brennan, *supra* note 433. Yet, proposals supporting predetermined budgets are not risk-free, as "[o]ften times . . . a budget is set in the monitoring agreement, yet [the monitor] had no input in the process to help the parties assess the cost and to ensure that the job can be done for the budget already agreed to." Bart M. Schwartz, Esq. *Becoming a Monitor and Getting the Job Done*, SM051 ALI-ABA 425 (2006).

445. *See* USAM 9-27.600(A) and (B)(1)(d); Thompson Memorandum, *supra* note 87, at 5. Unlike DPAs, NPAs are not predicated upon the filing of a formal charging document and the court is not involved. *See* Morford Memorandum, *supra* note 92, at n.2.

446. *See, e.g.,* Deferred Prosecution Agreement at Attachment D ¶ 4, United States v. Alcatel-Lucent, S.A., No. 10-20907 (S.D. Fla. Dec. 20, 2010); Deferred Prosecution Agreement at Attachment D ¶ 7, United States v. Willbros Group, Inc., No. H-08-287 (S.D. Tex. May 14, 2008); Deferred Prosecution Agreement at Attachment D ¶ 7, United States v. Technip S.A., No. 4:10-cr-00439 (S.D. Tex. June 28, 2010); Deferred Prosecution Agreement at 14, United States v. WellCare Health Plans, Inc., No. 8:09-cr-00203 (M.D. Fla. May 5, 2009).

447. Thomas Brom, *Monitoring the Monitors*, CAL. LAWYER, May 2006.

Public disclosure of a monitor's reports has typically not been required for a number of compelling reasons.[448] The parties to a criminal, or quasi-criminal, resolution seek to promote a complete and candid flow of information between the monitor and the Board and the company's employees. Both the ongoing dialogue and the monitor's report are likely to include highly confidential, commercially sensitive and proprietary data and information. In addition, corporations inevitably voluntarily disclose internal and external allegations of improper, illegal or unethical conduct, as well as the findings and conclusions of internal audits and investigations, to independent consultants and monitors. Public disclosure of such information could compromise the integrity of those processes and hinder the company's ability to defend its position in private sector litigation, such as putative securities class actions.[449] Equally important, a legitimate fear of an unfair collateral attack arising out of public disclosure could discourage highly qualified candidates from agreeing to serve as a monitor, an independent compliance consultant or an IRO; law firms faced with the prospect of even specious charges spawned by public disclosure could discourage or even prohibit partners from accepting appointments. As a matter of public policy, administrative and enforcement agencies should restrict access to the reports submitted by an independent consultant or monitor, and they should take the position that those documents, and the company's responses thereto, are exempt from public disclosure under the Freedom of Information Act or analogous state statutes.[450]

Finally, the consultant or monitor must adopt a cloistered public posture that is consistent with her quasi-judicial role. This concern arises primarily in the context of the monitor's interaction with the press and potential clients or customers of the corporation. The consultant or monitor should be aware that the corporation may "trumpet[] the presence of a [m]onitor as a way of satisfying customers that everything was on the up and up." [451] For all of these reasons, the consultant or monitor should decline to interact with outside parties absent prior consultation with, and direct approval by, the enforcement officials and

448. *Id.*

449. *Id.* Such public disclosure would certainly shed light onto the scope of the monitor's duties and reveal the troubles that gave rise to the monitorship.

450. *See* 5 U.S.C. § 552(b)(4) (2006). After discussing this issue with the enforcement officials, monitors and companies should mark all submitted materials accordingly.

451. Schwartz, *supra* note 428.

the corporation.[452] The veil of confidentiality should remain in place after the monitor has completed her work.

CONCLUSION

As fiscal pressures continue to mount on federal, state and local agencies in the United States and sovereign entities in other nations, enforcement officials will increasingly turn to independent private sector oversight as a means of ensuring that corporate transgressors are rehabilitated and become compliant and responsible citizens in commerce. The need to adopt this model will be acute in industrial sectors fueled by public funds. It is inconceivable that domestic or international regulators will, in the foreseeable future, develop either the expertise or the resources to perform this function effectively. As the approach continues to be refined, in design and implementation, and private sector experience deepens, a new group of professionals will emerge. They will develop both industrial and regulatory expertise, and the unique perspective and judgment that are required for this pivotal role. Ideally, over time, their performance should help improve the quality of the governance and compliance dialogue in both the boardroom and the C-suite.

452. *Id.*