Global Investigations Review

The Guide to Monitorships

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

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GIR

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Publisher's Note

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

It aims to fill a gap in the literature – the need for an in-depth guide to every aspect of the institution known as the 'monitorship', an arrangement that can be challenging for all concerned: company, monitor and appointing government agency. This guide covers all the issues commonly raised, from all the key perspectives.

As such, it is a companion to GIR's larger reference work – *The Practitioner's Guide to Global Investigations* (now in its third edition), which walks readers through the issues raised, and the risks to consider, at every stage in the life cycle of a corporate investigation, from discovery to resolution.

We suggest that both books be part of your library: *The Practitioner's Guide* for the whole picture and *The Guide to Monitorships* as the close-up.

The Guide to Monitorships is supplied to all GIR subscribers as a benefit of their subscription. It is available to non-subscribers in online form only, at www.globalinvestigationsreview.com.

The Publisher would like to thank the editors of this guide for their energy and vision. We collectively welcome any comments or suggestions on how to improve it. Please write to us at insight@globalinvestigationsreview.com.

Preface

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

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

Nicholas Goldin and Mark Stein of Simpson Thacher & Bartlett – both former prosecutors with extensive experience in conducting investigations across the globe – examine the unique challenges of monitorships arising under the Foreign Corrupt Practices Act (FCPA). FCPA monitorships, by their nature, involve US laws regulating conduct carried out abroad, and so Goldin and Stein examine the difficulties that may arise from this situation, including potential cultural differences that may affect the relationship between the monitor and the company. Additionally, Alex Lipman, a former federal prosecutor and branch chief in the Enforcement Division of the Securities and Exchange Commission (SEC), and Ashley Baynham, fellow partner at Brown Rudnick LLP, explore how monitorships are used in resolutions with the SEC. Further, Bart M Schwartz of Guidepost Solutions LLC – former Chief of the

Criminal Division in the Southern District of New York, who later served as independent monitor for General Motors – explores how enforcement agencies decide whether to appoint a monitor and how that monitor is selected. Schwartz provides an overview of different types of monitorships, the various agencies that have appointed monitors in the past, and the various considerations that go into the decisions to use and select a monitor.

Part II contains three chapters that offer experts' perspectives on monitorships: that of an academic, an in-house attorney and forensic accountants at Forensic Risk Alliance. Professor Mihailis E Diamantis of the University of Iowa provides an academic perspective, describing the unique criminal justice advantages and vulnerabilities of monitorships, as well as the implications that the appointment of a monitor could have for other types of criminal sanctions. Jeffrey A Taylor, a former US Attorney for the District of Columbia and chief compliance officer of General Motors, who is now executive vice president and chief litigation counsel of Fox Corporation, provides an in-house perspective, examining what issues a company must confront when faced with a monitor and suggesting strategies that corporations can follow to navigate a monitorship. Finally, Frances McLeod and her co-authors at Forensic Risk Alliance explore the role of forensic firms in monitorships, examining how these firms can use data analytics and transaction testing to identify relevant issues and risk in a monitored financial institution.

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

Part IV includes five chapters that provide subject-matter and sector-specific analyses of different kinds of monitorships. For example, with their co-authors at Wilmer Cutler Pickering Hale and Dorr LLP, former Deputy Attorney General David Ogden and former US Attorney for the District of Columbia Ron Machen, co-monitors in a DOJ-led healthcare fraud monitorship, explore the appointment of monitors in cases alleging violations of healthcare law. Günter Degitz and Richard Kando of AlixPartners, both former monitors in the financial services industry, examine the use of monitorships in that field. Along with his co-authors at Kirkland & Ellis LLP, former US District Court Judge, Deputy Attorney General and Acting Attorney General Mark Filip, who returned to private practice and represented BP in the aftermath of the Deepwater Horizon explosion and the company's subsequent monitorship, explores issues unique to environmental and energy monitorships. Glen McGorty, a former federal prosecutor who now serves as the monitor of the New York City District Council of Carpenters and related Taft-Hartley benefit funds, and Joanne Oleksyk of Crowell & Moring

LLP lend their perspectives to an examination of union monitorships. Michael J Bresnick of Venable LLP, who served as independent monitor of the residential mortgage-backed securities consumer relief settlement with Deutsche Bank AG, examines consumer-relief fund monitorships.

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

Acknowledgements

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

Anthony S Barkow, Neil M Barofsky and Thomas J Perrelli
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Key Issues

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Privilege and Confidentiality

Daniel W Levy and Doreen Klein[1]

Privileges are generally conceived of as the principle-based reason for information to remain available to only those possessing the privilege and, conversely, immune from outsiders to the relationships recognised by the applicable privilege. It is well established that there is no attorney–client privilege between a monitor and a monitoree. Virtually every recently documented resolution that has resulted in a monitorship confirms the parties' agreement to that principle. Further, the legal area of privilege as it bears on monitorships is relatively underdeveloped and it is uncommon for a circumstance to arise where it could be developed, such as where an outsider to the monitorship seeks to obtain a report written by a monitor. From the broader perspective of confidentiality, however, there is quite a bit to consider.

Knowing that no attorney–client relationship exists between the monitor and monitoree, parties invested in a successful monitorship typically seek to preserve confidentiality to the greatest extent possible. Confidentiality concerns are at the forefront of every monitorship.

For example, the monitor will want to robustly investigate the compliance programme of a financial institution with an eye towards its improvement. To do so, it needs the freedom to communicate with the financial institution, its employees and its regulator without fearing that information about newly discovered compliance problems, let alone information about their solutions, will be made available to those who could exploit that information. Further, the prosecutor or regulator that installed the monitor may have an institutional interest in ensuring the confidentiality of reports generated by the monitor, such as a newly discovered activity that requires follow-up investigation or enforcement.

1 Daniel W Levy is a principal and Doreen Klein is a senior counsel at McKool Smith. This chapter specifically concerns monitorships in the United States.

But it is not always clear from whom information should remain confidential and when recognised interests in confidentiality should be overridden by other interests. For example:

- Under what circumstances does the public have a First Amendment right to obtain the reports of a monitor that are the result of a judicially supervised resolution?
- When should the monitor's discovery of new or ongoing criminal activity be brought to the attention of the prosecutor or regulator that installed the monitorship, but kept confidential from the monitoree?
- When should a private litigant be able to obtain by subpoena otherwise non-privileged information developed by the monitor and summarised in a written report to the prosecutor or regulator that installed the monitorship?
- If the confidentiality of a monitor's report cannot be guaranteed under US law, how might foreign regulators be persuaded to allow a monitor access to an entity under a US monitorship that is also subject to the jurisdiction of a foreign regulator?

This chapter seeks to explore these questions and the nature of privilege and the broader issue of confidentiality in connection with monitorships.

No privilege between monitor and monitoree

The common theme underlying monitorships arising from deferred prosecution agreements, non-prosecution agreements,[2] and other similar types of resolutions, for example, resolutions with the Securities and Exchange Commission (SEC) that require retention of a consultant as a result of a resolution of a civil suit or administrative proceeding, is that the monitor or consultant must be independent of both the government and the corporation it is tasked with monitoring.

The requirement of independence assures, among other things, that the monitor will act neutrally in pursuit of the facts and in otherwise satisfying the mandate of the monitorship to which the monitoree and the government have agreed. Independence is typically ensured as part of the monitor-selection process[3] and in the frequent requirement that the monitor not enter into any employment, consulting or attorney–client relationships for a period of time after completion of the monitorship or consulting arrangement.

This independence predominantly drives the answer to the question of whether the information that the monitor obtains, and the work product that it generates in carrying out its responsibilities, can be deemed privileged or otherwise protected from disclosure.

In guidance issued by the Department of Justice (DOJ) concerning the use of monitors in deferred prosecution agreements and non-prosecution agreements with corporations, then-Acting Deputy Attorney General Craig Morford stressed the principle that a

2 In the federal context, deferred prosecution agreements are filed in federal court, are predicated on the filing of a charging document, and are subject to some limited court approval. Non-prosecution agreements are agreements between the DOJ and the corporation. There are no charges filed and the agreement is not reviewed by a court. Craig S Morford, Acting Deputy Attorney General, 'Memorandum Regarding Selection and Use of Monitors in Deferred Prosecution Agreement and Non-Prosecution Agreements With Corporations' (7 March 2008) (the Morford Memorandum).

3 See generally Brian A Benczkowski, Assistant Attorney General, 'Memorandum Regarding Selection of Monitors in Criminal Division Matters' (11 October 2018).

monitor 'is an independent third-party, not an employee or agent of the corporation or of the Government'. Because '[t]he monitor is not the corporation's attorney . . . the corporation may not seek to obtain or obtain legal advice from the monitor. Conversely, a monitor also is not an agent or employee of the Government.'[4] The American Bar Association agrees.[5]

Consistent with this policy view, virtually every resolution providing for a monitorship explicitly indicates that '[t]he parties agree that no attorney-client relationship shall be formed between the Company and the Monitor'.[6] Non-DOJ resolutions, such as one with the Department of Commerce, are similar:

> *No attorney–client relationship shall be formed between [the entity] and the [special compliance coordinator]. No documents or information created, generated, or produced by the [special compliance coordinator] will be considered privileged from disclosure to [the US Department of Commerce, Bureau of Industry and Security] or other US federal government agencies, nor shall [the entity] assert such a claim of privilege.*[7]

The ABA Criminal Justice Standards on Monitors notes, however, that '[i]t is clear under these Standards that the [m]onitor should not treat the [corporation] as its client, and therefore, for example, the [m]onitor does not have a duty of zealous representation or a duty to maintain most confidences.'[8] Moreover, to carry out his or her responsibilities, the monitor must have the discretion and, where authorised by the settlement agreement, the obligation, to report to the court, the government, or both, concerning the corporation's conduct.[9]

Resolutions with the SEC that require the installation of an independent compliance consultant also do not create an attorney–client relationship between the compliance consultant and the entity agreeing to the resolution.

Typically, such resolutions with the SEC require the entity to retain a consultant to review the entity's policies and procedures in a particular area, make recommendations for changes and improvements, and conduct periodic reviews. To ensure independence of the consultant, the entity is frequently precluded from terminating the consultant without the approval of the SEC.

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4 Morford Memorandum at 4–5.

5 See ABA Criminal Justice Standards on Monitors at 2 (noting that monitors serve various functions, but 'have certain central features in common, including being independent of both the Government and the [corporation]') (ABA Standards).

6 See, e.g., *United States v. Sociedad Química y Minera de Chile, SA*, Case No. 17 Cr. 13, Deferred Prosecution Agreement, Attach. D at Paragraph 5 (DDC 13 January 2017).

7 See, e.g., *In the Matter of Zhongxing Telecom. Equip. Corp.*, Superseding Order at 7 (8 June 2018).

8 ABA Standards at 35.

9 See Morford Memorandum at 6 ('The monitor must also have the discretion to communicate with the Government as he or she deems appropriate', including 'issues arising from the drafting and implementation of an ethics and compliance program'; moreover, 'it may be appropriate for the monitor to make periodic written reports to both the Government and the corporation regarding' inter alia 'whether the corporation is complying with the terms of the agreement' and 'any changes that are necessary to foster the corporation's compliance with the terms of the agreement'); ABA Standards at 2 (the monitor has 'obligation to report to the court, the Government, or both, concerning the [corporation's] conduct').

Such resolutions foreclose, at the outset, invocation of the attorney–client privilege or even the attorney work-product protection:[10] 'Respondent shall not invoke the attorney–client privilege or any other doctrine or privilege to prevent the Consultant from transmitting any information, reports, or documents to the Commission staff.'[11]

It is important to distinguish monitors and independent consultants retained as part of a resolution from those that are pre-emptively retained by an entity or an entity's counsel during an investigation. Frequently, entities under investigation hire outside subject matter experts, often through counsel, to implement an effective compliance programme in an effort to pre-empt the need for a monitor. The DOJ has noted that, under some circumstances, a monitor may not be required as part of a resolution 'if a company has, at the time of resolution, implemented an effective compliance program'.[12] Similarly, the SEC has cited early remedial actions undertaken by an entity as reasons for a particular resolution.[13] On the flip side, regulators have noted in some instances that institutions had, prior to the resolution, failed to effectively remediate problems after an external consultant was retained to assist.[14] Such pre-resolution arrangements, and arrangements by which an entity is permitted to monitor itself,[15] may be protected by attorney–client and attorney work-product privilege.

Confidentiality

Despite the lack of a recognised attorney–client privilege between the monitor and monitoree, there is a high level of interest of all concerned in maintaining confidentiality. For example, the monitoree wants to ensure that its trade secrets remain as tightly protected as can reasonably be accomplished. The monitor has a great interest in ensuring that employees

10 The attorney work-product doctrine protects materials prepared in anticipation of litigation. However, monitorships are typically imposed after the threat of litigation has ended and as part of a resolution. And the mandate of a monitorship is typically to ensure compliance with the terms of a resolution and investigative in nature, efforts that, without more, do not comfortably fit into the category of efforts in anticipation of litigation. As such, in the typical situation, there is little basis to protect information gathered and work done under the rubric of the attorney work-product doctrine.

11 *In the Matter of Yucaipa Master Manager LLC*, Order Instituting Cease-and-Desist Proceedings Paragraphs 37(1-5), Admin. Proceeding File No. 3-18930 (13 December 2018).

12 DOJ, Fraud Section, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance at 8 (5 April 2016). The converse is also true: a company may agree to a monitorship if its previously undertaken remedial measures were incomplete. *Sociedad Química y Minera de Chile, SA*, Deferred Prosecution Agreement Paragraph 4(d) ('Although the Company has taken a number of remedial measures, the Company is still in the process of implementing its enhanced compliance program, which has not had an opportunity to be tested, and thus the Company has agreed to the imposition of an independent compliance monitor for a term of two years to diminish the risk of reoccurrence [sic] of the misconduct').

13 *In the Matter of Barclays Capital Inc,* Order Instituting Administrative and Cease-and-Desist Proceedings Paragraphs 62, 65, Admin. Proceeding File No 3-17077 (31 January 2016).

14 *In the Matter of Mashreqbank, PSC*, New York State Dept. of Fin. Servs., Consent Order (10 October 2018) ('Transaction monitoring remained a significant challenge for the Branch. The New York Branch's system at that time was generating nearly 2,000 transaction monitoring alerts monthly. Although the Bank had engaged third-party consultants to help implement a more effective transaction monitoring system, substantial deficiencies persisted.')

15 *United States v. SBM Offshore N.V.*, Case No. 17 Cr. 686, Deferred Prosecution Agreement, Attach. C, D (S.D. Tex. 29 November 2017) (requiring defendant to engage in ongoing monitoring and reporting on implementation of agreed-upon procedures).

have a mechanism to be candid and self-critical so as to allow real improvements in the entity's culture of compliance. Finally, the prosecutor or regulator has institutional concerns about ensuring that compliance programmes are assessed, and improvements identified and implemented, out of the view of those who might exploit compliance blind spots.

Contractual confidentiality

There are mechanisms for improving the chances that documents generated by the monitor, including its reports to the monitoree and the government, and communications with the monitor, remain confidential.

One mechanism is purely contractual, with typical language of a deferred prosecution agreement being:

> *The reports [generated by the monitor] will likely include proprietary, financial, confidential, and competitive business information. Moreover, public disclosure of the reports could discourage cooperation, or impede pending or potential government investigations and thus undermine the objectives of the monitorship. For these reasons, among others, the reports and the contents thereof are intended to remain and shall remain non-public, except as otherwise agreed to by the parties in writing, or except to the extent that the Department determines in its sole discretion that disclosure would be in furtherance of the Department's discharge of its duties and responsibilities or is otherwise required by law.*[16]

In instances where an entity is permitted to, in essence, self-monitor by retaining a consultant pursuant to a non-prosecution or deferred prosecution agreement, even a component of the government that did not specifically require the self-monitoring is included within those to whom monitor-generated documents may be provided. Typical language provides that:

> *For the duration of this Agreement, the Office, as it deems necessary and upon request to [the entity], shall: (a) be provided by [the entity] with access to any and all non-privileged books, records, accounts, correspondence, files, and any and all other documents or other electronic records, including e-mails, of [the entity] and its representatives, agents, affiliates that it controls, and employees, relating to any matters described or identified in the [reports generated pursuant to related settlements with other governmental authorities] and (b) have the right to interview any officer, employee, agent, consultant, or representative of [the entity] concerning any non-privileged matter described or identified in the [reports generated pursuant to related settlements with other governmental authorities].*[17]

16 *United States v. Odebrecht SA*, Case No. 16-643, Plea Agreement, Attach. D, Paragraph 23 (EDNY 21 December 2016).

17 *United States v. Société Générale SA*, Case No. 18-cv-10783, Deferred Prosecution Agreement Paragraphs 21–22 (SDNY 18 November 2018) (filed in connection with civil forfeiture complaint).

Limited confidentiality in select cases

There is some precedent for the enforcement of these types of confidentiality provisions in the context of consent decrees where the material comes into existence because the consent decree requires it to be generated.

In *United States v. Bleznak*, defendants were required to implement a compliance programme that included recording and monitoring the telephone conversations of its stock traders pursuant to a consent decree. The Second Circuit shielded the material from disclosure to third parties on the strength of a confidentiality provision stating that tapes made pursuant to the agreement would not be subject to civil process, except for a request by the government and certain regulatory agencies and self-regulatory organisations.[18] However, the court introduced a cautionary note, stating that it did not 'quarrel with the principle asserted by [the requesting third-party plaintiffs] that parties may not use a consent decree to limit non-party rights that would otherwise prevail'.[19]

Similarly, where a defendant created training materials and policies required by its consent decree, the court shielded that material from disclosure to third parties, but held that the defendant was required to produce any similar materials that predated the consent decree, notwithstanding the broad terms of a confidentiality provision.[20] Moreover, because the consent decree merely allowed, but did not require, the defendant to conduct an internal investigation into complaints similar to those that originally gave rise to the consent decree, the court ordered the defendant to produce documents that it sent to the government concerning the results of that investigation.[21]

The ABA Standards envision the monitor's ability to allow individuals to speak confidentially or anonymously to increase the flow of information to the Monitor: '[i]f the flow of information includes proprietary or confidential information, the Monitor is under a duty to safeguard that information.'[22] However, it is not certain that even an explicit expression of the parties' intent to keep the information confidential will be honoured by the courts.

Judicial action in monitorships created by deferred prosecution agreements[23]

The judiciary has been active in scrutinising confidentiality provisions and one additional avenue to buttress the confidentiality of monitor-related materials is to enlist the aid of the judiciary itself. Accordingly, where a corporation enters into a deferred prosecution agreement,

18 *United States v. Bleznak*, 153 F. 3d 16 (2d Cir. 1998). The Second Circuit endorsed the view of the district court that, without the consent decree, 'there would be no tapes to discover or use as evidence'. id., at 19.

19 id.

20 *McCoo v. Denny's Inc,* 192 F.R.D. 675 (D. Kan. 2000). The provision stated that information that was 'generated, maintained, produced or preserved' pursuant to the agreement would be kept confidential, and would not be disclosed to anyone not a party to the agreement, including any person seeking the information in other litigation.

21 Pursuant to the consent decree, Denny's obtained the monitor's permission to conduct an internal investigation of a discrimination complaint, and subsequently wrote to the Kansas Human Rights Commission with the results of that investigation. The court ordered Denny's to produce the letters. id., at 682.

22 ABA Standards at 38.

23 See 'Judicial Scrutiny of DPAs and NPAs' in the guide for more information.

which is filed with the court, the parties can request that the court issue a protective order directing that such materials are protected from discovery.[24]

In *United States v. Computer Associates Int'l, Inc,* where the court appointed an independent examiner pursuant to a deferred prosecution agreement, the parties did just that. In their joint application, the government, the defendant and the independent examiner cited the need to 'encourage a free flow of information to and from the Independent Examiner, without threat that such information will be discoverable'.[25]

The application argued as a basis for the proposed order the 'quasi-judicial immunity frequently accorded court-appointed examiners for the protection of testimony, documents and other information obtained by examiners through their court-ordered powers', relying upon cases concerning bankruptcy examiners.[26] The court then entered a sweeping protective order providing not only that information and material provided to, and generated by, the independent examiner would be protected from disclosure, but also that the independent examiner and his agents were not subject to deposition or other discovery requests.[27]

As an outgrowth of the protective order permitted in *Computer Associates*, an additional, albeit untested, mechanism that may protect from disclosure information provided to a monitor appointed pursuant to the judicially supervised deferred prosecuted agreement is Federal Rule of Evidence 502(d–e), a provision added to the Federal Rules of Evidence only in 2008. In general, under Rule 502(d), the court may issue an order providing that a party's disclosure of documents protected by the attorney–client privilege or work product protection does not waive the privilege. Under Rule 502(e), if an agreement between the parties to that effect is embodied in a court order, it can bind persons other than the litigants that entered into the order (unless there was an intent to waive the privilege).[28]

Without benefit of a prospective court order, the parties are left to argue the issue of confidentiality before the court, with high stakes and uncertain results.[29] The courts have struggled with how to evaluate the work of persons acting in a monitor-like capacity in the context

24 Parties can also seek clarification from the court where agreements are silent on the issue of disclosure. See *SEC v. Am. Int'l Group*, 712 F. 3d 1 (DC Cir. 2013) (parties filed joint motion to clarify that the independent consultant's reports were intended to be confidential); see also *United States v. Philip Morris USA, Inc,* 793 F. Supp. 2d 164 (DDC 2011) (collecting cases where parties sought clarification of consent orders from the court).

25 See *United States v. Computer Associates Int'l, Inc,* Case No. 04 Cr. 837, Pitofsky Letter (19 April 2005).

26 id.

27 The court entered a jointly filed Stipulated and Agreed Protective Order providing that all information obtained by the independent examiner, as well as the independent examiner's 'files, notes and mental processes' were protected from disclosure to third parties, and the independent examiner and his 'agents, counsel, accountants and other experts shall not be required to answer any subpoena seeking materials referenced in paragraphs one and two of this Order and shall not be subject to any depositions or other discovery requests'. See *United States v. Computer Associates Int'l, Inc,* Case No. 04 Cr. 837, Stipulated and Agreed Protective Order (19 April 2005).

28 See Fed. R. Evid 502(d-e).

29 The ABA Standards note that 'there are . . . compelling reasons for keeping Monitor reports confidential', including the release of proprietary, confidential or competitive business information that may harm the corporation; the monitor's inability to promise confidentiality may inhibit the free flow of information; individuals named or easily identifiable in the report may not be able to challenge what they perceive as unfair denigration; other entities may be deterred from cooperating; and disclosure of the report may dissuade other entities from agreeing to the engagement of a monitor. ABA Standards at 40. Even disclosure of the monitor's fees might be seen by an entity as concerning, for fear that high monitor costs will be seen by others as evidence that the entity engaged in serious misconduct. id., at 33.

of traditional privileges designed to protect information from public access. Some courts have refused to find that existing protections extend to the work of the monitor, adhering to the traditional contours of the cited privilege.[30] Other courts have had to finesse the issue of where precisely the authority to protect these materials from disclosure derives.

In *In re LTV Sec. Litigation*, the court recognised a 'special officer privilege' where such an official had been appointed pursuant to a corporation's consent decree with the SEC.[31] The special officer was required to report to the SEC as well as to the corporation's audit committee. The court reasoned that his function was a 'hybrid of two roles, those of government investigator and privately retained counsel'; as such, because attorney–client and work-product privilege are 'reasonably flexible', and because the court must 'construe claims of privilege in their true factual context to ensure that the underlying policy justifications are served', the court refused to compel discovery of the special officer's work to shareholders in a class action brought against the corporation. The court specifically commented on the 'immediate adverse impact on the ongoing investigation' of the corporation, and focused on the concern that corporations would be less willing to engage in self-investigation were the special officer's reports to be disclosed. The court concluded that 'changing circumstances require courts constantly to review the need for and extent of existing privileges'.[32]

United States v. HSBC Bank USA, NA, represents a stark example of the high stakes involved when it comes to protecting the work of the monitor and the tenuous nature of those protections in the hands of an independent judiciary. In *HSBC*, the district court employed what it termed a 'novel' approach to its supervisory power, holding that it was authorised to monitor the execution and implementation of HSBC's deferred prosecution agreement with the government and directing the parties to file quarterly reports with the court.[33] Subsequently, the court received a letter from a *pro se* complainant, stating that

30 See *Osterneck v. E.T. Barwick Industries, Inc,* 82 F.R.D. 81 (N.D. Ga. 1979) (special counsel retained to assist in investigation and preparation of committee report to board of directors pursuant to consent agreement with SEC was not retained to give legal advice and work was neither privileged nor done in anticipation of litigation; court ordered special counsel to appear for depositions and produce documents concerning its work); see also *Litton Indus., Inc v. Lehman Bros. Kuhn Loeb, Inc,* 125 F.R.D. 51 (SDNY 1989) (receiver was an agent of the court and not the government and not entitled to common law deliberative process or law enforcement investigative privilege, nor work-product protection because interviews were not in anticipation of litigation and 'work product immunity requires a more immediate showing than the remote possibility of litigation').

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

32 In *Hofmann v. Schiavone Contr. Corp*, 630 Fed. Appx. 36 (2d Cir. 2015), the Second Circuit cited *LTV* in considering, but ultimately sidestepping, the concept of the 'special officer privilege'. In affirming the district court's grant of a motion to quash an application seeking materials from an ethical practice attorney, the Second Circuit noted that '[i]n our Circuit, we have not adopted a blanket "investigatory" or "special officer" privilege for consent decree monitors', but that under the facts of the case there was no need because '[t]he EPA was operating under continuous anticipation of litigation given his role under the consent decree'. Examination of the consent decree shows that the EPA had a mandate to investigate and eliminate corruption, with broad powers to interview union members, oversee and monitor the elections, issue subpoenas, take sworn testimony, commence disciplinary proceedings and recover assets that were dissipated or otherwise misappropriated. See *Hofmann v. Schiavone*, Case No. 11 Civ. 2346 (2d Cir.), Letter Motion, Ex. B (Consent Decree) (17 October 2012). Absent these broad powers, it is unclear whether the Court would have strained to find any privilege protection for the ethical practice attorney's work.

33 *United States v. HSBC Bank USA, NA*, Case No. 12 Cr. 763, 2013 U.S. Dist. LEXIS 92438 (EDNY 1 July 2013).

the monitor's report had a 'bearing' on a complaint he had filed against HSBC with the Consumer Financial Protection Bureau and that the report would validate his claims that HSBC was in violation of 'multiple sections of multiple Consent Decrees'.[34]

The district court reasoned that the report was a judicial document subject to a presumptive First Amendment right of access by the public, and that the *pro se* letter was a motion to unseal. The court directed the government to file the monitor's report itself, over the objection of both the government and HSBC, and despite the government's assurances that HSBC was acting in good faith to comply with the agreement.[35] The government argued that criminals could exploit the information[36] and HSBC argued separately that it was legally obliged to protect the confidential information it had provided the monitor.[37] Because HSBC had a global footprint and the monitorship's activities implicated various non-US jurisdictions, multiple interested parties advanced their views, including the Board of Governors of the Federal Reserve,[38] the United Kingdom's Financial Conduct Authority,[39] the Hong Kong Monetary Authority[40] and a Malaysian banking regulator.[41]

On appeal, the Second Circuit reversed.[42] The Court held that 'a federal court has no roving commission to monitor prosecutors' out-of-court activities just in case prosecutors might be engaging in misconduct', and had no 'freestanding supervisory power to monitor the implementation of a [deferred prosecution agreement]'. Accordingly, the Second Circuit held that the monitor's report was not relevant to the performance of the judicial function and, therefore, the district court abused its discretion in ordering it unsealed pursuant

34 See *United States v. HSBC Bank USA, NA*, Case No. 12 Cr. 763, Moore Letter (5 November 2015).

35 *United States v. HSBC Bank USA, NA*, Case No. 12 Cr. 763 2016 US Dist. LEXIS 11137 (EDNY. 2016).

36 See *United States v. HSBC Bank USA, NA*, Case No. 12 Cr. 763, Motion for Leave to File Monitor's Report Under Seal by USA (1 June 2015).

37 See *United States v. HSBC Bank USA, NA*, Case No. 12 Cr. 763, Letter in Support of the Motion for Leave to File Monitor's Report Under Seal by USA (1 June 2015).

38 See *United States v. HSBC Bank USA, NA*, No. 12 Cr. 763, Motion for Leave to File Monitor's Report Under Seal by USA, Exhibit 35-2 (1 June 2015) (letter stating that publication of the report would reduce the monitor's effectiveness because HSBC personnel would be less forthcoming, which could impact Federal Reserve examiners similarly, and because foreign regulators would be reluctant or unwilling to authorise the monitor to obtain information in their jurisdictions).

39 See *United States v. HSBC Bank USA, NA*, No. 12 Cr. 763, Motion for Leave to File Monitor's Report Under Seal by USA, Exhibit 35-3 (1 June 2015) (letter stating that it had a shared interest in regulating HSBC, the monitor was bound by confidentiality restrictions that applied to the FCA, publication of the monitor's report would risk foreign jurisdictions' refusal to allow the monitor to assess HSBC's operations throughout the remaining term of the deferred prosecution agreement, and would enable money launderers to evade sanctions.)

40 See *United States v. HSBC Bank USA, NA*, No. 12 Cr. 763, Motion for Leave to File Monitor's Report Under Seal by USA, Exhibit 35-4 (1 June 2015) (letter stating that it viewed the monitor's work as strong support for its own supervision of HSBC and the publication of the report may limit the extent to which whistleblowers and staff would come forward and candidly communicate with the monitor).

41 See *United States v. HSBC Bank USA, NA*, No. 12 Cr. 763, Motion for Leave to File Monitor's Report Under Seal by USA, Exhibit 35-5 (1 June 2015) (letter stating that it had previously granted approval for the monitor to access confidential information from HSBC Malaysia and its customers based on the assurance that the information would be kept confidential to evaluate internal controls).

42 *United States v. HSBC Bank USA, NA*, 863 F. 3d 125 (2d Cir. 2017).

to the First Amendment objection.[43] Notwithstanding that the Second Circuit restrained the district court, the case remains an example of how significant the confidentiality concerns are in monitorships and the challenges in maintaining confidentiality in the face of legal uncertainty.

Federal and state banking law privilege

There are a handful of federal and state statutes and regulations that bear on privilege and confidentiality in connection with financial institutions. While a full discussion of these provisions and their intricacies is beyond the scope of this chapter, a basic introduction is important for an understanding of the manner in which monitorships of federal- and state-regulated financial institutions may implicate the protection of confidential and privileged information.

Federal bank examination privilege, confidential

Supervisory information and anti-waiver provision

Bank examinations are a regular and important part of the life cycle of a financial institution. The purpose, in general, is to assess the safety and soundness of the financial institution and to ensure its compliance with a host of requirements applicable to banks. These examinations, the reports regulators make of them, and other materials generated by bank regulators in the performance of their duties with respect to specific institutions, are non-public and are not easily obtained as a result of federal regulations that make them privileged.[44]

Beyond these specific regulations, there is a qualified common law privilege widely recognised by US courts: '[s]tated broadly, the bank examination privilege is a qualified privilege that protects communications between banks and their examiners in order to preserve absolute candor essential to the effective supervision of banks.'[45] It is not without its limits, however, and has frequently been held to be confined to opinions and recommendations, not factual material.[46] Indeed, in opposing the disclosure of the report of the monitor in *HSBC*, the Board of Governors of the Federal Reserve Board invoked the bank examination privilege

43 In a strongly worded concurrence, Judge Pooler urged Congress to consider legal reforms addressing more oversight over deferred prosecution agreements, writing, '[a]s the law governing [deferred prosecution agreements] stands now . . . the prosecution exercises the core judicial functions of adjudicating guilt and imposing sentence with no meaningful oversight from the courts.' In *United States v. Toyota Motor Corp.*, 278 F. Supp. 3d 811 (SDNY 2017), the court granted the government's motion to dismiss its prosecution on the basis that the defendant had complied with a deferred prosecution agreement, but endorsed Judge Pooler's views, noting that deferred prosecution agreements 'introduce opaqueness to criminal proceedings and have created a cottage industry of monitorships doled out by the Department of Justice', and urging Congress to 'step in to clarify the contours of a court's authority in connection with corporate prosecutions'.

44 See generally 12 C.F.R. Section 4.36 (Office of the Comptroller of the Currency); 12 C.F.R. Section 261.20 (Federal Reserve Board); 12 C.F.R. Section 309.6 (Federal Deposit Insurance Corporation); 12 C.F.R. Section 1070.41 (Consumer Financial Protection Bureau).

45 *Wultz v. Bank of China Ltd*, 61 F. Supp. 3d 272, 281 (SDNY 2013).

46 *Schreiber v. Soc'y for Sav. Bancorp, Inc,* 11 F.3d 217, 220 (DC Cir. 1993).

and, while not quite contending that it was applicable to the monitor of *HSBC*, noted the similarity between bank examinations and the monitor's endeavour.[47]

Finally, 12 U.S.C. Section 1828(x) of Title 12 permits a financial institution to disclose privileged information to a wide variety of federal, state and foreign banking authorities, without waiving the privilege as to third parties to whom the disclosure is not made. It is, in effect, a federal statute that permits selective waiver:

> *The submission by any person of any information to the Bureau of Consumer Financial Protection, any Federal banking agency, State bank supervisor, or foreign banking authority for any purpose in the course of any supervisory or regulatory process of such Bureau, agency, supervisor, or authority shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information under Federal or State law as to any person or entity other than such Bureau, agency, supervisor, or authority.*

New York Banking Law Section 36.10

There is a wide variety of state law relevant to the question of whether any privilege or confidentiality attaches to information and documents. Given its importance as a financial centre, the number of US and global banks with operations in New York, and the prominent role of its banking regulator, the most significant such state statute is Section 36.10 of the New York State Banking Law.[48]

Section 36.10 identifies a broad category of documents and materials that constitute 'confidential communications'. Such documents include '[a]ll reports of examinations and investigations, correspondence and memoranda concerning or arising out of such examination and investigations' held, in general, by entities supervised by the New York State Department of Financial Services (DFS). Section 36.10 provides that confidential communications 'shall not be subject to subpoena and shall not be made public'.

Indeed, Section 36.10 has become significant beyond the express purpose of shielding information from discovery and has been used, in effect, as a stand-alone enforcement mechanism. For example, in connection with concerns about the work done by consulting firms on behalf of entities supervised by DFS, the then-Superintendent of DFS noted that, under the resolution with one of those firms:

> *If [the firm] breaches this agreement, DFS could issue an order pursuant to New York Banking Law § 36.10 barring regulated financial institutions from sharing confidential supervisory information with [the firm]. Under New York Banking Law § 36.10, a statute that dates back to 1892, DFS can revoke a consultant's access to confidential supervisory information if continued access to that information would not serve 'the ends of justice and the public advantage . . .*

47 See *United States v. HSBC Bank USA, NA*, Case No. 12 Cr. 763, Letter from Jack Jennings, Senior Associate Director, Division of Banking Supervision and Regulation 2-4 (29 May 2015) (Docket Entry 35-2).

48 For a discussion of the laws of other states, which are similar, but by no means uniform, see generally Eric B Epstein, 'Why the Bank Examination Privilege Doesn't Work As Intended', 35 *Yale J. on Reg. Bull.* 17 (2017).

> *Regulators basically hold the keys to the kingdom for consultants in the form of access to confidential supervisory information. We have the power to shut off the spigot. Using that authority could be a way to impose accountability in an area that's seen precious little of it.*[49]

But Section 36.10 has been subjected to scant testing and has not always resulted in the maintenance of the confidentiality of monitor-generated documents. For example, in a False Claims Act case brought in Texas, the relator sought via subpoena documents generated by the monitor of a mortgage servicing company that had entered into a consent order with DFS. In the litigation, the monitoree and DFS opposed the subpoena and asserted, among other grounds, Section 36.10.

The district court denied the motion to quash. The court found, first, that the monitor's report were not settlement communications protected by Federal Rule of Evidence 408[50] because they were generated long after the resolution with DFS. The court then applied a balancing test to determine whether Section 36.10 should be recognised under Federal Rule of Evidence 501[51] and considered a variety of factors:

> *(1) whether the communications originated in a confidence that they will not be disclosed; (2) whether confidentiality is essential to the full and satisfactory maintenance of the relation between the parties; (3) whether the relation is one in which the opinion of the community ought to be sedulously fostered; and (4) whether the injury that would inure to the relation by the disclosure of the communications is greater than the benefit gained for the correct disposal of litigation.*

Ultimately, the court rejected recognition of Section 36.10 under Federal Rule of Evidence 501 and ordered the monitor's reports to be produced.[52]

Additional monitor–monitoree considerations

Discovery of new or ongoing unlawful conduct

Monitorships are increasingly global in nature. More and more, the conduct that resulted in the monitorship and the work of the monitorship spans many areas of an institution's

49 New York State Department of Financial Services, Excerpts From Superintendent Lawsky's Remarks On Consulting Reform At American Bar Association Financial Services Regulatory Forum (24 June 2013) (available at https://www.dfs.ny.gov/reports_and_publications/press_releases/pr1306242); see also *In the Matter of Promontory Fin. Grp, LLC*, Agreement (18 August 2015) (available at https://www.dfs.ny.gov/docs/about/ea/ea150818.pdf).

50 Federal Rule of Evidence 408 precludes the use at trial of evidence of settlement communications, but only in certain circumstances and not for all purposes. Rule 408 does not, however, control the discoverability of settlement-related communications. See Fed. R. Evid. 408 advisory committee's 2006 and 1993 notes.

51 Federal Rule of Evidence 501 requires a district court, in the absence of a constitutional right, specific federal statutes, or federal rules, to apply the common law 'as interpreted by United States courts in the light of reason and experience' to questions of privilege. If state law provides the rule of decision for a claim or defence, state law governs.

52 *United States ex rel. Fisher v. Ocwen Loan Servicing LLC*, Case No. 12 Civ. 543, 2015 WL 3942900 (E.D. Tex. 26 June 2015); see also *Rouson ex rel. Estate of Rouson v. Eicoff*, Case No. 04 Civ. 2734, 2006 WL 2927161 (EDNY 11 October 2006).

operations and in different countries. As a result, there is frequently present the possibility that the monitor will uncover new or ongoing unlawful or problematic conduct. Recent deferred prosecution agreements provide the monitor significant discretion to determine how to proceed upon the discovery of such conduct, including immediate disclosure of actual misconduct to the DOJ, with the option to disclose the actual misconduct to the monitoree's general counsel, chief compliance officer or audit committee; immediate disclosure of possible misconduct to the DOJ, but not the company, under certain circumstances; and immediate disclosure of possible misconduct to the monitoree's general counsel, chief compliance officer or audit committee, with optional disclosure to the DOJ.[53]

Other monitorships have given the monitor more flexibility in determining how to respond to newly discovered conduct:

> *If potentially illegal or unethical conduct is reported to the Monitor, the Monitor may, at his or her option, conduct an investigation, and/or refer the matter to the Office.* ***The Monitor should, at his or her option, refer any potentially illegal or unethical conduct to [the entity]'s compliance office.*** *The Monitor may report to the Office whenever the Monitor deems fit but, in any event, shall file a written report not less often than every four months regarding: the Monitor's activities; whether [the entity] is complying with the terms of this Agreement; and any changes that are necessary to foster [the entity]'s compliance with any applicable laws, regulations and standards related to the Monitor's jurisdiction as set forth in [the agreement].*[54]

Whenever the company itself learns of the misconduct, it will typically conduct its own investigation, separately from the monitor, to preserve whatever privilege may attach to its findings. An additional consideration here is when the government has asked either the monitor or the company's counsel to defer to the other in looking into this misconduct as part of a deconfliction effort.[55]

Monitor's access to privileged monitoree information

Monitorships are typically governed by a written mandate setting out the scope of the monitor's work. Frequently, the mandate of the monitorship is forward-looking, that is, the monitor is tasked with ensuring that the monitoree complies with the terms of its resolution with the government going forward.

Often, the key component of the resolution is to ensure the robustness of the monitoree's current compliance programme so as to reduce of the risk of recurrence of the conduct that resulted in the enforcement effort that brought about the monitorship. As one resolution described the monitor's mandate:

53 *Odebrecht SA*, Plea Agreement, Attach. D, Paragraph 20(a-c).

54 *United States v. Toyota Motor Corp*, Case No. 14 Cr. 186, Deferred Prosecution Agreement at 9 (SDNY 19 March 2014) (emphasis added).

55 For a general discussion of deconfliction, see Lanny A Breuer and Mark T Finucane, DOJ 'Deconfliction' Requests: Considerations and Concerns, *Law360* (1 March 2017).

> *The Monitor's primary responsibility is to assess and monitor the Company's compliance with the terms of the Agreement, including the Corporate Compliance Program . . . so as to specifically address and reduce the risk of any recurrence of the Company's misconduct. During the Term of the Monitorship, the Monitor will evaluate, in the manner set forth below, the effectiveness of the internal accounting controls, record-keeping, and financial reporting policies and procedures of the Company as they relate to the Company's* ***current and ongoing compliance*** *with the [Foreign Corrupt Practices Act] and other applicable anti-corruption laws (collectively, the 'anti-corruption laws') and take such reasonable steps as, in his or her view, may be necessary to fulfill the foregoing mandate (the 'Mandate'). This Mandate shall include an assessment of the Board of Directors' and senior management's commitment to, and effective implementation of, the corporate compliance program described [elsewhere in] the Agreement.*[56]

There are, however, monitorships that have an historical or retrospective component that may require the monitor to investigate matters of the past. For example, one recent resolution required the monitor to review and report on various current compliance issues as well as '[t]he elements of the Bank's corporate governance that *contributed to or facilitated the improper conduct* discussed in this Consent Order and that permitted it to go on'.[57]

These types of monitorships, with both an historical and prospective component, can be uniquely challenging. Experienced corporate monitor Bart M Schwartz of Guidepost Solutions has expressed strong views of the difficulties of successfully completing monitorships having both backward- and forward-looking components. He has written:

> *[A] Monitor should be forward looking. It is NOT 'another investigation.' I have turned down assignments where a company asked me to investigate wrongdoing and help build a compliance program. You can do one or the other; but I believe doing both is difficult, if not impossible, and if undertaken will cause problems on both sides of the equation. Think about it, how can one assign blame on one day and then seek cooperation the next day? It will not work.*[58]

A contrary and perhaps equally valid view is that an investigation of historical practices may inform future improvements, particularly where management and line-level employees have remained in place between the time of the conduct that resulted in the monitorship and the present.

Whether Schwartz is correct or not in his view of the impossibility of contemporaneously 'investigat[ing] wrongdoing and help[ing] build a compliance program', dual historical and prospective monitorships do generate unique issues regarding privilege. Namely, if the mandate of the monitor is to 'investigate the investigation' that the entity undertook when it

56 *Sociedad Química y Minera de Chile, SA*, Deferred Prosecution Agreement, Attach. D, Paragraph 2 (emphasis added).

57 See *In the Matter of Commerzbank AG*, New York State Department of Financial Service, Consent Order Paragraph 49(a) (12 March 2015) (emphasis added).

58 See Bart M Schwartz, Guidepost Solutions LLC, 'Clarifying the Role of a Monitor' (24 February 2014) (available at http://www.guidepostsolutions.com/insight/clarifying-role-monitor).

became aware of the misconduct or when the government was investigating the misconduct, will the monitor by necessity be required to delve into information that may otherwise be protected by the attorney–client privilege and work-product protections?

If the answer to this question is yes, the monitorship may require a resolution of what are likely to be complicated questions of privilege. No easy solutions to the question of a monitor's access to company-privileged information are identifiable, even in solely prospective monitorships with no historical investigation required. Given the difficulties of solving these problems in advance, recent monitorships – including those with only a going-forward perspective – have directed the monitor and the monitoree to work cooperatively to solve these problems:

> *In the event that the Company seeks to withhold from the Monitor access to information, documents, records, facilities, or current or former employees of the Company that may be subject to a claim of attorney–client privilege or to the attorney work-product doctrine, or where the Company reasonably believes production would otherwise be inconsistent with applicable law, the Company shall work cooperatively with the Monitor to resolve the matter to the satisfaction of the Monitor.*[59]

The alternative to the monitor and monitoree's resolution on their own of thorny questions of privilege or, for that matter, complicated questions of access to material under foreign law, is to put the government in the unenviable position of mediating these disputes:

> *If the matter cannot be resolved, at the request of the Monitor, the Company shall promptly provide written notice to the Monitor and the Department. Such notice shall include a general description of the nature of the information, documents, records, facilities or current or former employees that are being withheld, as well as the legal basis for withholding access. The Department may then consider whether to make a further request for access to such information, documents, records, facilities, or employees.*[60]

It is notable that recent resolutions that employ this language do not provide that the government will resolve such disputes. The recent language provides simply that the dispute will be brought to the attention of the government for further action.

Conclusion

Everyone involved in a monitorship has a vested interest in its success. The monitoree has a desire to improve its compliance programme, prevent future unlawful conduct and allow the monitor to complete its work in as timely, efficient and cost-effective a manner as possible. The monitor seeks to drive real improvement in the monitoree's compliance programme and ensure lasting change so the problems of the past do not recur by completing its work within

59 *Odebrecht SA*, Plea Agreement, Attach. D, Paragraph 5; see also *Toyota Motor Corp.*, Deferred Prosecution Agreement at 7 ('To the extent that the Monitor seeks access to information contained within privileged documents or materials, [the entity] shall use its best efforts to provide the monitor with the information without compromising the asserted privilege.')

60 *Odebrecht SA*, Plea Agreement, Attach. D, Paragraph 6.

the time allotted by the monitoree's resolution with the government. And the government has an interest in preventing further unlawful conduct by leveraging the expertise and resources of an external party.

That said, each of the parties involved in a monitorship approaches the issues of privilege and confidentiality from very different perspectives. Given the unsettled nature of some important questions of privilege and confidentiality in the monitorship context, the most successful monitorships will frequently arise where there is a repository of trust, good faith and flexibility on the part of all concerned.

Appendix 1

About the Authors

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Daniel W Levy is a principal in McKool Smith's New York office. Prior to joining the firm, he served as an Assistant United States Attorney in the Southern District of New York for 11 years.

Mr Levy focuses on white-collar matters, trial practice, complex business disputes and internal investigations. He has served as lead counsel in more than a dozen cases that have gone to trial or been arbitrated. Mr Levy's work frequently involves a cross-border component and multiple regulatory agencies and prosecutors. He has briefed and argued more than 15 appeals before the United States Court of Appeals for the Second Circuit.

He was appointed by the New York State Department of Financial Services to serve as the monitor of a foreign financial institution.

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Doreen Klein is senior counsel in McKool Smith's New York office. She has represented clients in federal and state criminal and regulatory government investigations involving securities fraud, tax fraud, environmental crimes, and bribery and kickback schemes. She has conducted internal investigations for corporate clients in cases involving embezzlement, violations of internal processes, and SEC disclosures. She has represented clients in cross-border investigations, and was a member of the monitor's team appointed by the NYS Department of Financial Services to review the compliance function of an international bank.

Doreen previously spent 15 years with the New York County District Attorney's Office, where she served in the frauds, trial and appeals bureaus.

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Since *WorldCom*, the United States Department of Justice and other agencies have imposed more than 80 monitorships on a variety of companies, including some of the world's best-known names.

The terms of these monitorships and the industries in which they have been employed vary widely. Yet many of the legal issues they raise are the same. To date, there has been no in-depth work that examines them.

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

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