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The Corporate Monitor: The New Corporate Czar?

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THE CORPORATE MONITOR: THE NEW CORPORATE CZAR?†

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*Timothy L. Dickinson***

Following the recent spate of corporate scandals, government enforcement authorities have increasingly relied upon corporate monitors to help ensure law compliance and reduce the number of future violations. These monitors also permit enforcement authorities, such as the Securities & Exchange Commission and others, to leverage their enforcement resources in overseeing corporate behavior. However, there are few descriptive or normative analyses of the role and scope of corporate monitors. This paper provides such an analysis. After sketching out the historical development of corporate monitors, the paper examines the most common features of the current set of monitor appointments supplemented by interviews with monitors. This is followed by a normative analysis that examines when it is desirable to appoint monitors and what powers and obligations they should have. Based on this analysis, we provide a number of recommendations for enhancing the potential of corporate monitors to serve a useful deterrent and law enforcement function without being unduly burdensome on corporations. This involves, among other things, discussion of the kinds of powers monitors should have and the fiduciary duties monitors should owe to the shareholders whose businesses they are monitoring.

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INTRODUCTION

Following the recent spate of corporate scandals, government enforcement authorities have increasingly relied upon corporate monitors to help ensure law compliance and reduce the number of future violations.[1] These monitors also permit enforcement authorities, such as the Securities & Exchange Commission ("SEC") and others, to leverage their enforcement resources in overseeing corporate behavior. However, there are few descriptive or normative analyses of the role and scope of corporate monitors.[2] This paper provides such an analysis.

We begin with an operative definition of corporate monitors—people appointed to supervise a firm for a certain period of time as part of a Deferred Prosecution Agreement ("DPA") or a NonProsecution Agreement ("NPA"). Such agreements are entered into by government regulators and the firms that are the subject of enforcement actions. If the firm satisfies the terms of this agreement, then prosecution can be avoided.[3] The monitor's range of influence in these agreements may be limited to only compliance issues or may extend more broadly to many (or all) aspects of the firm's operations. Further, the monitor's compensation is paid for by the firm.

With this definition in mind, we move on to Part I where we sketch the historical development of corporate monitors in order to better understand the enforcement background against which they developed. Part II then examines the most common features of the current set of monitor

1. *See* Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. (forthcoming June 2007), *available at* http://ssrn.com/abstract=930240; Benjamin M. Greenblum, Note, *What Happens To A Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1867 (2005); CORPORATE CRIME REPORTER, CRIME WITHOUT CONVICTION: THE RISE OF DEFERRED AND NON PROSECUTION AGREEMENTS (2005), http://www.corporatecrimereporter.com/deferredreport.htm (last visited Feb. 16, 2007).

2. The papers cited in note 1 examine corporate monitors from the perspective of criminal law, whereas we examine it from the perspective of its impact on corporate governance. For a discussion on some corporate governance perspectives, see John C. Coffee Jr., *Deferred Prosecution: Has it gone too far?*, NAT'L L.J., July 25, 2005, at 13.

3. *See* Garrett, *supra* note 1 (manuscript at 26); Greenblum, *supra* note 1, at 1863.

appointments providing us with an overview of this new enforcement mechanism. The details of these arrangements are supplemented by interviews with monitors to provide a deeper sense of how these mechanisms work. Part III follows with a normative analysis that examines when it is desirable to appoint monitors and what powers and obligations they should have. Based on this analysis, we provide a number of recommendations for enhancing the potential of corporate monitors to serve a useful deterrent and law enforcement function without being unduly burdensome on corporations. We conclude with recommendations and observations on the potential growth of the corporate monitor.

I. From Master to Monitor

Although corporate monitors are relatively recent law-enforcement innovations, they have long and deep historical roots. We begin by discussing the antecedents of the corporate monitor in order to better understand the context in which the monitor developed.

A. *Historical Underpinnings*

The corporate monitor of today can be traced to the special masters of the past.[4] Special masters originated in the use of adjuncts to the judiciary in English Chancery practices dating back to the early sixteenth century.[5] Thus, the use of outside supervisory resources has a lengthy historical pedigree. Moreover, the evolution of the corporate monitor follows in a somewhat logical progression from a court's use of "outside" resources to leverage its own supervisory objectives. We begin by examining how these special masters operated and how the corporate monitor sprung from them.

A number of scholars have analyzed the appointment authority and duties of special masters.[6] Indeed, it seems courts have often turned to outside parties for assistance, both with prejudgment adjudicatory activities such as the course of discovery and with postjudgment duties such as calculation of damages and implementation and monitoring of consent decrees, particularly in employment discrimination class actions.[7]

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4. *See* Linda J. Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U. L. Rev. 1297, 1321–22 (1975).

5. *Id.* at 1322 n.149 ("Masters were used and appointed by the chancery from at least the reign of Henry VIII on." (citing 1 W. Holdsworth, A History of English Law 416–18 (A.L. Goodhart & H.G. Hanbury eds., 7th ed. rev., Sweet & Maxwell 1956))).

6. *See e.g.*, Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?* 53 U. Chi. L. Rev. 394 (1986); David I. Levine, *The Authority for the Appointment of Remedial Special Masters in Federal Institutional Reform Litigation: The History Reconsidered*, 17 U.C. Davis L. Rev. 753 (1984).

7. *See* Thomas E. Willging et al., Fed. Judicial Ctr., Special Masters' Incidence and Activity: Report to the Judicial Conference's Advisory Committee on Civil Rules and Its Subcommittee on Special Masters 25 (2000), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/SpecMast.pdf/$file/SpecMast.pdf.

The power to appoint such outside parties appears to stem from at least two sources. First, as Justice Brandeis succinctly said in 1920:

> Courts have . . . inherent power to provide themselves with appropriate instruments required for the performance of their duties. This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause.[8]

Second, Rule 53 of the Federal Rules of Civil Procedure specifically authorizes special masters (unless a statute provides otherwise) to perform duties consented to by the parties, hold trial proceedings, make or recommend findings of fact on issues in certain circumstances, and address pretrial and post-trial matters that cannot be attended to effectively and in a timely manner by an available district or magistrate judge.[9]

Although special masters provide a template on which to build corporate monitors, they do not provide the strict legal bases for the appointment of monitors. Neither Rule 53 nor the court's inherent powers are the basis for the appointment of monitors.[10] Corporate monitors are appointed as part of a negotiated settlement before judgment between a firm and a government enforcement agency.[11] These settlements are termed Deferred Prosecution Agreements or Non-Prosecution Agreements.[12] The monitor is then a condition of the DPA or NPA (much like a monetary penalty). We discuss how this negotiated entity developed below.

B. *RICO and Beyond*

The closest recent ancestors of the modern corporate monitor appeared roughly twenty-five years ago with the implementation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Between 1982 and 2004, the Department of Justice ("DOJ") filed at least twenty civil cases asserting RICO violations and, in virtually every case, won the appointment of a trustee, monitor, or other form of court-appointed overseer.[13] Thus, there was an increase in the appointment of people who had some kind of continuing oversight responsibilities for a corporation. However, these people were appointed as a result of a *postjudgment action*, whereas the corporate

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8. *In re Peterson*, 253 U.S. 300, 312 (1920) (citation omitted).

9. FED. R. CIV. P. 53(a). Perhaps most striking from a historical context is the lack of debate, until relatively recent times, about the authority of courts to make such appointments. *See* Levine, *supra* note 6.

10. *See* FED. R. CIV. P. 53(a); Levine, *supra* note 6.

11. *See* James Fanto, *Paternalistic Regulation of Public Company Management: Lessons from Bank Regulation*, 58 FLA. L. REV. 859, 910 (2006).

12. *See* CORPORATE CRIME REPORTER, *supra* note 1; James K. Robinson et al., *Deferred prosecutions and the independent monitor*, 2 INT'L J. DISCLOSURE & GOVERNANCE 325, 326–27 (2005).

13. James B. Jacobs et al., *The RICO Trusteeships after Twenty Years: A Progress Report*, 19 LAB. LAW. 419, 452 (2004).

monitor is primarily a creation of DPAs and NPAs (i.e., settlements) between regulators and firms *before* any court verdict is announced.

Settlements were also increasingly used by enforcement authorities. We can see this in the cease-and-desist orders that the SEC used as part of its consent decrees.[14] These orders permitted the SEC to hold companies in contempt if they violated the terms of the cease-and-desist order which was part of the negotiated settlement (i.e., consent decree).[15] Such settlements did not, however, include any ongoing supervisory function by an outside party.[16]

Thus, RICO provides the modern antecedents for ongoing supervisors or monitors after a court judgment, and the SEC's cease-and-desist orders to police settlements regulators reached with firms are examples of negotiated prejudgment settlements (i.e., consent decrees). The corporate monitor reflects the confluence of these two streams—ongoing supervision á la RICO and supervision of a negotiated settlement with a government regulator á la SEC cease-and-desist orders.

C. *Prudential and DOJ Memoranda*

As these enforcement methods developed, regulators began to experiment with various types of settlements leading to the landmark 1994 *Prudential Securities* case in which the government provided for the first modern appointment of an independent expert whose role was to monitor compliance of the company as per a DPA.[17] Unlike more contemporary DPAs and NPAs, the *Prudential* arrangement was reached through a series of letters from the company's counsel to the U.S. Attorney for the Southern District of New York[18]

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14. BellSouth Corp., Exchange Act Release No. 45,279, 2002 WL 47167 (Jan. 15, 2002), *available at* http://www.sec.gov/litigation/admin/34-45279.htm; Chiquita Brands Int'l Inc., Exchange Act Release No. 44,902, 75 SEC Docket 2308 (Oct. 3, 2001); Am. Bank Note Holographics, 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).

15. *See, e.g.*, Vanessa Blum, *Justice Deferred*, LEGAL TIMES, Mar. 21, 2005, at 8; Press Release, SEC, SEC charges Time Warner with Fraud, Aiding and Abetting Frauds by Others, and Violating a Prior Cease-and-Desist Order (March 21, 2005), *available at* http://www.sec.gov/news/press/2005-38.htm.

16. *See supra* note 14.

17. *See* Deferred Prosecution Agreement, United States v. Prudential Sec., Inc., No. 94-2189 (S.D.N.Y. Oct. 27, 1994), *available at* http://www.corporatecrimereporter.com/documents/prudential.pdf; *see also* SEC v. Prudential Sec., Inc., No. 93 Civ. 2164, 1993 WL 473189, at *2–3 (D.D.C. Oct. 21, 1993).

18. Letter from Scott W. Muller & Carey R. Dunne, Davis Polk & Wardwell, counsel to Prudential Sec., Inc., to Kenneth J. Vianale & Baruch Weiss, Assistant U.S. Attorneys for the S. Dist. of N.Y., U.S. Dep't of Justice (Oct. 13, 1994), *available at* http://www.corporatecrimereporter.com/documents/prudential.pdf [hereinafter Letter from PSI].

and a response from the Department of Justice,[19] along with a complaint that set out the alleged violations.[20]

Of particular note in this case are the factors raised by Prudential as reasons why a criminal prosecution of Prudential Securities Incorporated ("PSI," the Prudential subsidiary implicated in the wrongdoing) would be inappropriate. The government adopted this reasoning to justify why a deferral of prosecution was eventually chosen. These factors included (1) the time of the alleged misconduct (i.e. during the tenure of prior management); (2) the time lag from the alleged conduct to the prosecution; (3) the fact that PSI had spent over $1 billion to fund and administer claims of investors; (4) the fact that PSI accepted responsibility for all valid investor claims (including, according to PSI, $330 million in its settlement with the SEC, $41 million to state and federal regulators, $490 million in settlements with investors, and $195 million in expenses and legal fees); and (5) that PSI cooperated extensively with government investigators and enhanced its compliance efforts.[21]

Following *Prudential*, the DOJ and SEC increasingly relied on the corporate "monitor" or independent expert in settlements. For example, two years after *Prudential*, Coopers & Lybrand settled charges of bid rigging, concealing information, and lying during grand jury testimony.[22] This resulted in a corporate monitor with even more authority than that of the monitor overseeing Prudential.[23] Thus, even before the corporate scandals of Enron and Worldcom and the brave new world of Sarbanes-Oxley, this relatively new form of enforcement tool was coming to life.[24]

However, there was a lack of understanding—some might say outright confusion—as to when monitors might be appointed as part of a DPA or NPA and, more generally, when corporations themselves might be charged criminally. Such uncertainty was eventually recognized and partially addressed by the government with the publication in 1999 of the "Federal

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19. Letter from Kenneth J. Vianale & Baruch Weiss, Assistant U.S. Attorneys for the S. Dist. of N.Y., U.S. Dep't of Justice, to Scott W. Muller & Carey R. Dunne, Davis Polk & Wardwell, counsel to Prudential Sec., Inc. (October 27, 1994), *available at* http://www.corporatecrimereporter.com/documents/prudential.pdf.

20. *See* Complaint at 1, United States v. Prudential Sec., Inc., No. 94-2189 (S.D.N.Y. October 27, 1994). This includes a long list of violations, such as 15 U.S.C. §§ 78j(b), 78ff; 17 C.F.R. 240.10b-5; and 18 U.S.C. § 2.

21. *See* Letter from PSI, *supra* note 18, at 9 ("[Prudential will] cooperate with the Government and let 'the chips fall as they may.'").

22. CORPORATE CRIME REPORTER, *supra* note 1.

23. For a comparison of monitoring assignments, see *infra* Appendix.

24. While some scholars refer to this evolution as having a genesis in the mandate of the pretrial-services agencies as early as the 1970s, it was not until *Prudential* that the modern-day concept of an outside independent expert paid for by the offending company was put into effect, with the Coopers & Lybrand case soon following suit. *See* Greenblum, *supra* note 1, at 1867 (crediting the inclusion of deferrals in pretrial-services practices for their wide use).

Prosecution of Corporations," which soon became known as the "Holder Memo."[25]

The Holder Memo set out eight factors for prosecutors to consider in their deliberations as to whether a criminal case should be brought for corporate malfeasance: (1) the nature and seriousness of the offense, (2) the pervasiveness of the wrongdoing, (3) the prior conduct of the company, (4) whether the company voluntarily disclosed the wrongdoing and its willingness to cooperate in the investigation of its agents, (5) the adequacy of the company's compliance program, (6) the remedial actions taken by the company to deal with the wrongdoing, (7) the impact a prosecution might have on innocent third parties, and (8) the alternative mechanisms prosecutors might choose to punish the company.[26] Thus, the Holder Memo provided parties with greater insight into what prosecutors were going to consider when determining whether and what enforcements actions would be taken. This encouraged companies to take steps such as beefing up compliance programs in order to enhance their chances for a lesser sanction or avoiding prosecution altogether.

However, the Holder Memo provides little guidance on the factors to be considered in appointing a monitor as part of a DPA or NPA. As a result, some cite the addition of a ninth factor, the cooperation of the company, which was added in the now-famous "Thompson Memo" (issued by then Deputy Attorney General Larry Thompson in 2003), as the primary factor that has led to the modern-day monitor/independent expert.[27] The difference between this ninth factor and the Holder Memo's fourth factor may be that in the Thompson memo, cooperation increasingly meant waiving attorney-client privilege. Following the issuance of the Thompson Memo, government authorities appear to have put monitors into action in a wide range of cases, including securities fraud,[28] tax fraud,[29]

25. Memorandum from Eric Holder, Jr., Deputy Attorney Gen., U.S. Dep't of Justice, to All Component Heads and U.S. Attorneys (June 16, 1999), *available at* http://www.usdoj.gov/criminal/fraud/policy/chargingcorps.html.

26. *Id.*

27. *See* Greenblum, *supra* note 1, at 1875 n.84 ("There is consensus, however, that the Thompson Memo was ultimately a catalyst for an increase in corporate deferrals.").

28. *See, e.g.*, Deferred Prosecution Agreement, United States v. Bristol-Myers Squibb Co., Mag. No. 05-6076 (RJH) (D.N.J. June 15, 2005); Deferred Prosecution Agreement, United States v. Am. Online, Inc., No. 1:04 M 1133 (E.D. Va. Dec. 15, 2004); Deferred Prosecution Agreement, United States v. Computer Assocs. Int'l, Inc., Mag. No. 04-837 (ILG) (E.D.N.Y. Sept. 22, 2004); Letter from Andrew J. Coremey & Bonnie Jones, Assistant U.S. Attorneys for the S. Dist. of N.Y., U.S. Dep't of Justice, to John T. Montgomery, Ropes & Gray LLP, counsel to Aurora Foods, Inc. (Jan. 22, 2001), *available at* http://www.corporatecrimereporter.com/documents/aurora.pdf.

29. *See e.g.*, Letter from Michael J. Garcia, U.S. Attorney for the S. Dist. of N.Y., U.S. Dep't of Justice, to Christopher S. Rizek & Schott D. Michel, Caplin & Drysdale, Chartered, counsel to HVB Risk Mgmt. Prods. Inc., HVB U.S. Fin. Inc., and HVB Am., Inc. (Feb. 13, 2006), *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/files/hvb_deferred_prosecution_agreement.pdf [hereinafter HVB Letter]; Letter from David N. Kelly, U.S. Attorney for the S. Dist. of N.Y., U.S. Dep't of Justice, to Robert S. Bennett, Skadden, Arps, Slate, Meagher & Flom LLP, counsel to KPMG LLP (Aug. 25, 2005), *available at* http://www.corporatecrimereporter.com/documents/kpmgdeferred_000.pdf.

and at least six cases involving charges under the Foreign Corrupt Practices Act ("FCPA").[30]

While each of these cases involves different circumstances, and in each case the monitor has different duties and obligations, it appears that the scope of the monitor's powers is increasing. For example, the recent dismissal of both the CEO and general counsel of Bristol-Myers Squibb as a result of recommendations by Bristol's monitor underscores this increasing power.[31] This was further articulated by Judge Rakoff in his final judgment in the *WorldCom* case:

> While the Corporate Monitor's efforts were initially directed at preventing corporate looting and document destruction, his role and duties have steadily expanded, with the parties' full consent, to the point where he now acts not only as financial watchdog (in which capacity he has saved the company tens of millions of dollars) but also as an overseer who has initiated vast improvements in the company's internal controls and corporate governance.[32]

Through this brief historical sketch, we can see that these various oversight institutions developed and morphed over time. However, the presence and increasing power of monitors raises a number of questions. For example, when is it appropriate to appoint an outside supervisor like a monitor, and should monitors have fiduciary duties or other obligations to shareholders? These and other questions must be examined and resolved before we can adequately assess whether monitors are accomplishing their goals. In the next Part we lay out the process of appointing corporate monitors and their powers, followed in Part III with an analysis of the questions noted above.

II. The Process of Appointing Corporate Monitors and Their Powers

The underlying investigation into alleged wrongdoing is the starting point for our inquiry. Once an investigation is started, the government gathers information and decides whether it will investigate further, pursue charges, or drop the investigation. If the investigation is not dropped, then the issue becomes whether the case will proceed to charging and adjudication or settle before then.

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30. *See, e.g.*, Diagnostic Prod. Corp., Exchange Act Release No. 51,724, 85 SEC Docket 1319 (May 20, 2005); Deferred Prosecution Agreement, United States v. SSI Int'l Far East, LTD, No. CR 06-398 (D. Or. Oct. 16, 2006), *available at* http://www.secinfo.com/d1znFa.v22t.d.htm#1stPage; Deferred Prosecution Agreement, United States v. Monsanto Co., No. 1:05-cr-008-ESH-ALL (D.D.C. Jan. 6, 2005) [hereinafter Monsanto Agreement]; Agreement between Criminal Div., Fraud Section, U.S. Dep't of Justice, and InVision Techs., Inc. (Dec. 3, 2004), *available at* http://www.corporatecrimereporter.com/documents/invision1.pdf; Agreement between Criminal Div., Fraud Section, U.S. Dep't of Justice, and Micrus Corp. and Micrus S.A. (Feb. 28, 2005), *available at* http://www.corporatecrimereporter.com/documents/micrus.pdf.

31. Brooke A. Masters, *Bristol-Myers Ousts Its Chief at Monitor's Urging*, Wash. Post, Sept. 13, 2006, at D1.

32. SEC v. WorldCom, Inc., 273 F. Supp. 2d 431, 432 (S.D.N.Y. 2003).

Both the government and the firm have strong incentives to settle the case. For the government, corporate crime cases are difficult, complex, and expensive cases to prosecute and tend to use a great deal of resources.[33] In addition, corporations normally have access to greater resources than the average criminal defendant, which increases the likelihood of a vigorous defense and potential appeals. Thus, from the government's perspective, it might be better to obtain something certain through a settlement rather than to take its chances with a lengthy, complex, and expensive trial.

For the firm and its executives, the advantages of settling early or avoiding charges can be significant.[34] The avoidance of severe reputational losses may be significant enough to motivate firms and executives to settle. In particular, executives who may face the threat of prison might be strongly inclined to settle their own charges, as well as the corporation's. Thus, both parties have strong incentives to settle, leading to many DPAs and NPAs.[35]

As part of the DPA or NPA, the government frequently seeks to have a monitor appointed with ongoing supervisory responsibility over the firm or some aspect of its operations. This helps to leverage enforcement resources but also may be useful in some other instances that we discuss below. The powers of monitors can vary—and increasingly they have extensive powers—but they are normally appointed for limited terms.[36] It is important to note that if a monitor is not satisfied with the firm's efforts, then, in certain cases, the monitor can recommend to the enforcement agency that the DPA be removed and a prosecution be restarted. This might have disastrous consequences for the firm and its executives. Indeed, some suggest that Bristol-Myers may have fired their CEO and general counsel to induce their monitor not to seek removal of the DPA.[37]

To obtain a better sense of what monitoring arrangements are like, we discuss the kinds of cases in which monitors have been appointed, who are the most likely monitors, and what has been the scope of their powers to date. We examined twenty-five cases in which DPAs or NPAs required the appointment of someone with ongoing supervisory responsibility.[38] In these cases, we found that eleven were primarily securities fraud cases, three were primarily tax evasion and fraud cases, six were primarily bribery and FCPA cases, two were primarily related to suspicious activity reports, two related to healthcare fraud, and one related to unauthorized exports of defense

33. *Cf.*, Greenblum, *supra* note 1, at 1884–89 (discussing corporate incentives to settle); *Cost of Litigation Haunts U.S. Corporations More Than Winning Cases*, INS. J., Nov. 7, 2005, *available at* http://www.insurancejournal.com/magazines/east/2005/11/07/features/62312.htm (discussing costs of corporate litigation); *Litigation Trends Continue to Mount Worldwide; Insurers Face Five Times the Average Number of Lawsuits*, INS. J., Oct. 11, 2006, *available at* http://www.insurancejournal.com/news/national/2006/10/11/73220.htm (same).

34. *See* Robinson et al., *supra* note 12, at 327 (comparing the repercussions of KPMG's acceptance of a DPA with Arthur Andersen's rejection of a DPA).

35. *See* CORPORATE CRIME REPORTER, *supra* note 1.

36. *See infra* Appendix.

37. *See* Masters, *supra* note 31.

38. For a fuller description, see *infra* Appendix.

articles.[39] These categories overlap somewhat because the SEC has required monitors in some FCPA cases where it found a fundamental breakdown in financial controls (which may be correlated with increased chances for financial restatements and securities fraud).[40]

From our perspective, the importance of this is that the practice of using monitors is not isolated to one particular area of regulation but rather seems to be used with increasing frequency in a number of areas.[41] Thus, the SEC, the DOJ, the IRS, and others have all used monitors. Although the use of monitors has not reached endemic proportions just yet, it may be likely in the future. For example, the World Bank is now considering how to impose this feature in their projects and disciplinary actions.[42] Moreover, it has been rumored that the government's insistence on a monitor was one of the key elements causing the collapse of negotiations and subsequent indictment of the law firm of Milberg Weiss.[43]

Although monitors have been appointed in a number of different areas, the identities of monitors have tended to be fairly uniform. Of the thirteen DPAs for which monitor identity and experience is available, the vast majority are former judges, prosecutors, or SEC attorneys.[44] But a more fundamental issue lies in the question of who actually selects the monitor: the firm or the government agency? In some cases, the agency provides an approved list of candidates from which to choose, and in others, the agency simply retains veto power over the appointment.[45] In any case, it is clear that

39. For DPAs/NPAs involving AIG-FP Pagic Equity Holding Corp., AmSouth Bancorporation, America Online Inc., Aurora Foods, Inc., Bank of New York, Bristol-Myers Squibb Co., Canadian Imperial Bank of Commerce, Computer Assocs. Int'l, Inc., InVision Techs., Inc., KPMG, Merrill Lynch & Co., Micrus Corp. & Micrus S.A., Monsanto Co., N.Y. Racing Ass'n, Prudential Sec. Inc., and Symbol Tech., see CORPORATE CRIME REPORTER, *supra* note 1.

For the DPAs/NPAs of additional companies, see Deferred Prosecution Agreement, United States v. Roger Williams Med. Ctr., No. 06-02T (D.R.I. Jan. 30, 2006), *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/files/roger_williams_deferred_sentence_agreement.pdf; Agreement between U.S. Attorneys for the Cent. Dist. of Cal. and the E. Dist. of Va., U.S. Dep't of Justice, and Boeing Co. (June 30, 2006), *available at* http://www.corporatecrimereporter.com/documents/boeing2.pdf; Agreement between U.S. Attorney for the Dist. of N.J., U.S. Dep't of Justice, and the Univ. of Med. & Dentistry of N.J. (Dec. 31, 2005), *available at* http://www.usdoj.gov/usao/nj/press/files/pdffiles/UMDNJFINALDPA.pdf; HVB Letter *supra* note 29; Letter from Alice H. Martin, U.S. Attorney for the N. Dist. of Ala., U.S. Dep't of Justice, to Robert S. Bennett, Skadden, Arps, Slate, Meagher & Flom LLP, counsel to HealthSouth Corp. (May 17, 2006), *available at* http://www.usdoj.gov/usao/aln/Docs/May%202006/healthsouthnonpros2.pdf.

40. *See* Monsanto Agreement, *supra* note 30. The trend is clear that in most FCPA cases in which inadequate financial controls are the cause of an FCPA books and records or financial controls violations, a monitor will result.

41. *See* CORPORATE CRIME REPORTER, *supra* note 1.

42. *See* DEP'T OF INSTITUTIONAL INTEGRITY, WORLD BANK, VOLUNTARY DISCLOSURE PROGRAM (VDP) GUIDELINES FOR PARTICIPANTS 12-13 (2006), *available at* http://siteresources.worldbank.org/INTVOLDISPRO/Resources/VDPGuidelinesforParticipants.pdf.

43. *See* Justin Scheck, *Milberg Weiss Weighs Non-Prosecution Deal*, RECORDER, May 16, 2006, http://www.law.com/jsp/ca/PubArticleFriendlyCA.jsp?id=1147696533653.

44. Several monitors were both former judges and prosecutors or former prosecutors and SEC attorneys.

45. *See* Robinson et al., *supra* note 12, at 332.

the agency has tremendous bargaining power given the weight of potential criminal penalties and imprisonment for the executives. It is perhaps not a stretch to say that the agency, in effect, chooses the monitor, even though it is the firm that pays for the monitor's services.

Finally, it becomes imperative to discuss the powers that monitors seem to possess. The process of determining their powers is a negotiation between the firm and the government resulting in a DPA or NPA.[46] The more detail provided in the DPA or NPA, the more smoothly the negotiation might proceed. Table 1 provides a quick sketch of the most common terms of monitoring arrangements based on the DPAs or NPAs we examined listed in Appendix A.

TABLE 1
SUMMARY OF DPA/NPA CHARACTERISTICS

CHARACTERISTIC	DESCRIPTION
Charges	Securities Fraud: 11 Tax Evasion: 3 FCPA or Bribery: 6 Suspicious Activity: 2 Healthcare Fraud: 2 Unauthorized Export of Defense Articles: 1
Fines and Restitution	Fine Range (where known): $450,000 to $428 Million Restitution (where known): $7 Million to $839 Million
Duration/Term (Months)	12 to 36 is the norm with 60 months as the upper end
Extension of Duration	About half provide for some kind of extension
Background of Monitor	Large majority of known monitors are former government enforcement agents (SEC or Prosecutor) or Judges
Selection Bases	Large majority selected by mutual agreement
Reports to	Primarily audit committee and appointing government agency
Powers	Greatly vary ranging from important advisor on aspects of compliance to considerably greater say in the operation of the firm (e.g., firing/dismissing employees) Roughly one-third (7) of DPAs/NPAs provide broad ranging powers to monitor The broader cases are becoming more common (e.g., KPMG, WorldCom, RWMC)
Remuneration	Firm usually pays monitor hourly rate along with assistants, office space, and so forth
Addressing Disputes Between Monitor and Firm	Monitor essentially decides what happens (if firm does not comply the DPA may be withdrawn or a fraud charge initiated) Sometimes firm can ask for review by agency
Replace Monitor	No DPA/NPA explicitly provides firm with a way to replace a monitor In about 3 or 4 instances the firm can choose a successor for a monitor if that monitor leaves on his/her own
Postmonitoring Obligations	Majority (15) expect this in some measure

46. We will occasionally refer to the firm as a "monitee," a term we have coined.

It appears that monitors are granted wide powers and considerable latitude, while government agencies obtain quite favorable terms for potential future actions. For example, attorney-client privilege is often waived (indeed, this is often required before a DPA or NPA will be considered); monitors are granted substantial power to oversee what the firm is doing; monitors cannot be easily replaced (indeed, even selling the firm does not necessarily terminate the monitoring obligation); monitors may be entrusted with making both important and day-to-day decisions; monitors may have the power to restructure a corporation's internal processes; and monitors' work may be protected by attorney work-product doctrine; among many other powers. Furthermore, the extent of the monitor's powers seems to be expanding, and these powers are often not defined with great precision in DPAs and NPAs.[47]

At some level, it is surprising that corporations have ceded so much power to the monitor in these negotiated DPAs and NPAs. One explanation may be that, to date, corporations and government agencies do not appear to negotiate the details of a monitor's assignments early on in the DPA process. Based on our interviews to date, our sense is that the parties appear to consider the concerns in the following order: first, the charges asserted by the government; second, the size of the fine imposed; third, the ability to obtain an NPA or DPA; and fourth, toward the end of the predisposition process, the terms of the appointment of a monitor. Although this is certainly understandable at times (e.g., the American International Group ("AIG") case, which involved a fine of $1.6 billion and a serious possibility of criminal indictment),[48] one might expect increasing attention would be paid to the identity of the monitor and the terms of the monitor's engagement given the increasing power of the monitor. After all, many companies may be in a position where, once the initial shock of criminal fines and charges has worn off, they are left wondering what to do with their new "best friend."

Further, the lack of clarity early on may also reflect the fact that there will be some matters that may be difficult to define fully at the beginning of the process.[49] This means that for the agreement to work, certain matters may need to be left a little vague at the beginning. Thus, some flexibility is

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47. The recent firings of both the CEO and general counsel of Bristol-Myers Squibb based on the monitor's recommendations underscore their increasing power. *See* Masters, *supra* note 31.

48. *See* Press Release, SEC, SEC Charges AIG with Securities Fraud (Feb. 9, 2006), *available at* http://www.sec.gov/litigation/litreleases/lr19560.htm; *see also* Vikas Bajaj, *AIG to Pay $1.6 Billion in Settlement of Fraud Charges*, INT'L HERALD TRIB., Feb. 9, 2006, Finance, at 14, *available at* http://www.iht.com/articles/2006/02/09/business/aig.php.

49. One unavoidable major problem that illustrates the difficulty for both parties in this entire undertaking is the simple fact that until the engagement letter is signed, the monitor can only speculate as to what he or she must undertake to fulfill his or her obligations. After the engagement letter is fully executed, however, the monitor is unlikely to get permission by the monitee to expand work scope. As a result, the agreement must almost certainly be prepared with provisos such as "The monitor shall undertake such investigation and review as necessary to certify to the [SEC] that the company's compliance program fulfills article X of matter Y." This, of course, still leaves open the question of what is "necessary."

necessary, but so is guidance. Maintaining the balance is not easy and is something we address a little later in Part III.

Once the DPA or NPA is in place, the monitor takes a more active role. This usually begins with the monitor getting to know the company, its business, and its people, including its board.[50] The monitor then develops a work plan, which generally involves discussing her potential activities with the firm and government and addressing likely disputes over what documents should be produced, whom to interview, and how much authority the monitor has to impose changes.[51] The less precise the initial language in the DPA or NPA, the more room there is for both sides (government and firm) to try to push that language in their desired direction.

Once the monitor's general scope of activity is set in place, then the task of monitoring begins. This can involve quite frequent visits to the firm and a number of mid-stream adjustments for both the firm and the monitor. An increasingly common issue is "scope creep," where the monitor and the firm disagree about the extent of the monitor's role and purview (e.g., because the DPA may be unclear on the details). Although our sense is that monitors usually get what they want, firms seem to be getting more concerned about the perceived level of interference from monitors. Perhaps this will lead to more careful negotiating at the time of the DPA or NPA.

Finally, even after the period of monitoring is complete, there is the possibility of longer-lasting consequences ensuing from a monitor's work. Monitors almost always file reports with regulators that detail the execution of their duties and may contain significant changes in corporate processes and procedures.[52] Moreover, some DPAs include ongoing obligations for the company even after the monitor has completed her tenure.[53] Thus, the effects of the monitoring system are likely to persist past the official end date of the DPA. Scholars and practitioners alike will be watching closely to see what long-lasting effects result from a monitor versus the simple imposition of a large fine.[54]

Given the increasing power and frequency of monitors and their potentially large impact on firms, it becomes important to examine when they are desirable and what powers and duties they should have. Part III engages in that inquiry. However, before leaving our description of monitors, it may prove illustrative to compare the monitor to other kinds of ongoing supervisors so that one can further place the monitor in context.

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50. *See* Robinson et al., *supra* note 12, at 335–37.

51. *See id.*

52. *See id.* at 333–34. We consider this a potentially underappreciated aspect of the monitor mechanism. The reports may prove useful to the firm and form part of the monitor's postmonitoring legacy, but these reports also may be useful for other firms in similar situations or markets to help reduce their likelihood of violating laws and potentially improve their internal processes.

53. *See supra* note 39.

54. For an example of a settlement whose results will be closely monitored, see *supra* note 48 (regarding the AIG settlement).

Table 2 below provides a thumbnail comparison between corporate monitors, corporate probation officers, trustees in bankruptcy, and special masters. It would appear that the corporate monitor combines aspects of the other supervisory mechanisms. For example, some monitors may have the powers of a trustee but have longer-lasting effects (i.e., the postmonitoring legacy) and apparently less stringent fiduciary duties.[55] Moreover, monitors have both considerably more-frequent contact with the firm and, at times, a broader scope of involvement than probation officers or special masters; therefore, monitors may have more information on the firm. The combination of features represented by the monitor and the flexibility in designing the scope of the monitor's involvement provides the basis for an increasing and potentially significant enforcement role for monitors.[56]

TABLE 2
COMPARING DIFFERENT KINDS OF ONGOING SUPERVISORS

	Basis of Appointment	Frequency of Monitoring	Powers	Duties	Duration
Corporate Monitor	Prejudgment as part of Deferred Prosecution Agreement or No Prosecution Agreement	Very frequent	Considerable variation—narrow to broad	Unclear—sometimes same duties that a lawyer owes to client	1 year to 5 years, but with increasing potential for long lasting effects (legacy)
Corporate Probation Officer	Usually postjudgment and court appointed	Frequent	Narrow usually (e.g., on wrong forming basis of conviction)	Duties to court	Term of sanction
Trustee in Bankruptcy	Usually court appointed as part of bankruptcy proceedings	Very frequent	Broad—essentially running the entity	Duties to estate	Until entity is no longer in bankruptcy
Special Master	Usually court appointed post judgment	Frequent	Narrow (usually	Duties to court	Term of sanction or court appointment

55. Monitoring arrangements come to an end with the end of the period noted in the DPA or NPA, and in that respect they are different than consent decrees, which may not have a set end date.

56. In Table 2, we have not focused on the elements that are common among these supervisors (e.g., difficulty of removing them from the firm).

III. Analysis of the New Corporate Czars

From this description, it appears that the corporate monitor is an increasingly common feature of enforcement actions and possesses wide ranging and often very significant powers. The increasing presence of monitors raises a number of important questions that require attention, including the circumstances under which it is desirable to appoint a monitor, the extent of the monitors' powers, the scope of their duties, if any, and many others. We commence our inquiry into some of these questions in this Part.

A. *Cash Fines versus Noncash, Monitor-Like Penalties*

Let us begin with the most basic question—when is it optimal to require a firm to have a corporate monitor? This depends in some measure on what we expect the monitor to do. The discussion in Part II suggests that the monitor's powers range along a continuum from those of an advisor on compliance matters to a person who can essentially run the firm. Our analysis is likely to differ based on the extent of the monitor's powers. However, for expositional ease we will examine the optimality of the more extreme ends of the continuum—the highly influential monitors and the advisor-like monitors. As we shall see, the analysis for the advisor-like monitors is qualitatively similar to the analysis for the more influential monitors.

1. *More Influential Monitors*

This could be approached in at least two different ways. First, we could treat the imposition of the more influential monitor as a sanction and examine when such a sanction is optimal or desirable.[57] Second, we could treat the monitor as a gatekeeper and examine when such a gatekeeper is desirable.[58] In reality, these are just different ways of assessing the overall desirability of monitors. We approach it first as a sanction because most of the gatekeeper literature treats the gatekeeper as being an entity that is utilized even for those who acted *legally*,[59] whereas a monitor is only used in cases where an indication of wrongdoing is present—where there is some hint, if not proof, of illegality. Of course, the desirable formulation and operation of the monitor sanction may benefit from the gatekeeper literature. Thus, we approach the issue as one of sanctioning informed by the insights from the gatekeeper literature.

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57. For discussion of optimal sanctions, see Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169 (1968), and A. Mitchell Polinsky & Steven Shavell, *The Optimal Use of Fines and Imprisonment*, 24 J. Pub. Econ. 89 (1984).

58. For discussions of gatekeepers, see John C. Coffee, Jr., Gatekeepers: The Professions and Corporate Governance (2006), and Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. Econ. & Org. 53 (1986).

59. *See* Kraakman, *supra* note 58, at 55–59; *see also* Coffee, *supra* note 58, at 1–5.

Analyzing the monitor as a type of sanction requires a formulation of what the optimal sanctions would be and where a monitor fits in that scheme. We focus on deterrence concerns as the primary goal of optimal sanctions for our analysis, although we do discuss potential incapacitation arguments a little later. Generally, it is desirable to use the socially least expensive sanction to obtain deterrence first and then rely on the socially more expensive sanctions only if more deterrence is necessary and the deterrent effect of the less expensive sanctions has been exhausted.[60] In this manner one can obtain the desired level of deterrence in the socially least expensive manner.

As a general matter, the least expensive sanctions are those that simply transfer assets from one party to another (e.g., a cash judgment), whereas the more expensive sanctions are those that require expenditure by the state or others that produces some deadweight loss.[61] The quintessential example would be prison. Prisons are costly to maintain and impose other kinds of losses on society.[62] Thus, if one has the choice between obtaining the same level of deterrence from a cash fine of $1,000 (which has few social costs except those associated with transferring the cash) and a prison sentence of one year (which has prison maintenance and other costs), then it would be better to use the cash fine as we obtain the desired deterrence at lesser cost.

In the context of corporate defendants, prison is not an option, but cash fines are not the only kind of sanction available. We could impose greater than compensatory damages (e.g., punitive damages), deny the corporation a license to engage in certain businesses, or even impose ongoing supervision (e.g., a probation officer or a monitor).[63] These latter remedies generally carry higher social costs than a cash fine. This is because they have ongoing supervision costs (as compared to the one time cost of a cash fine) and greater costs associated with calculating their impact (e.g., determining the losses of being denied a license requires greater effort than determining the losses of a cash fine).[64] Moreover, these penalties are generally not as precise as cash fines and hence can result in both over- and underdeterrence.[65] Further, ongoing supervisory penalties suffer from a particular form of information weakness. Government agencies and monitors probably have less knowledge than a corporation's management about the firm and hence may

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60. Polinsky & Shavell, *supra* note 57, at 95.

61. *Id.* at 90, 95, 98; Becker, *supra* note 57, at 193–98

62. Becker, *supra* note 57, at 193–98; Polinsky & Shavell, *supra* note 57, at 90, 95, 98. Monitor-like sanctions have potential incapacitation benefits as well as deterrence benefits, but we do not discuss those incapacitation benefits and costs in detail in this paper. For discussion of this in the context of corporate probation officers, see Christopher A. Wray, Note, *Corporate Probation Under the New Organizational Sentencing Guidelines*, 101 YALE L.J. 2017, 2033–34 (1992).

63. V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1497–98 (1996).

64. *See id.*

65. *Cf. id.* at 1503–04.

make less profit-maximizing decisions than these corporate managers.[66] In light of this, one may prefer to exhaust the deterrent effects of cash fines and then, if needed, consider imposing these other, more-expensive options.

Before exploring the deterrent effect of cash fines, we hasten to add that monitor sanctions are not simply all cost. Monitors often have more expertise than management on compliance matters (indeed, this is an important raison d'etre for a monitor), and this results in benefits for the firm to balance against the costs of a monitor. However, we do not need a monitor sanction to obtain this benefit. A large cash fine could induce a firm to hire an expert to consult on compliance issues (like a monitor), thereby reducing wrongdoing and avoiding the large cash fines. Thus, this advantage of a monitor could be obtained with appropriately set cash fines without having to rely on an explicit monitor sanction.[67]

Let us then return to the deterrent effects of cash fines. The deterrent effect of cash fines might be exhausted for a number of reasons, including that the corporation has no more assets that can be attached or that the sanction desired for deterrence purposes is so high that it is politically or morally unacceptable and hence cannot be imposed.[68] When the highest-imposable cash fine does not generate the desired level of deterrence, other sanctions, such as corporate monitors, merit consideration. In such situations, a monitor may be desirable if the net gains of having a monitor are greater than the net gains of other kinds of sanctions. The net gains are the additional deterrence gains from having a monitor less the costs of requiring a monitor.

When might these conditions hold? Let us begin with trying to ascertain when deterrence might require such a large cash fine that it is unlikely to be imposed. This seems more likely for wrongdoing that causes a great deal of harm because then it is more likely that the highest imposable cash fine may not suffice for deterrence. Corporate monitors and other kinds of ongoing supervisors seem more justifiable for wrongdoing that causes a great deal of harm.[69]

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66. *See* Wray, *supra* note 62, at 2020 (discussing this and citing Jeffrey S. Parker, *Criminal Sentencing Policy for Organizations: The Unifying Approach of Optimal Penalties*, 26 AM. CRIM. L. REV. 513, 572 (1989)). Of course, monitors are not usually appointed to run the firm in a more profit-maximizing manner than management but probably to run the firm in a more law-compliant manner.

67. This argument raises an interesting question: if monitors help to reduce law violations (which we think they do) and reduce the substantial penalties firms face, then we would expect firms to hire these monitors themselves without a DPA or NPA being needed to impose monitors on them. The question is why firms are not doing this themselves. There could be a number of reasons for this: (1) fines are not large enough to make it worthwhile to voluntarily hire monitors, (2) the firms are unaware of the advantages of having someone like a monitor, or (3) the monitor may not be that valuable for all firms. The first reason leads us to enhance corporate sanctions and the second to advertise the benefits of compliance officers rather than force a monitor on the firm.

68. *See* John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 390 (1981); Khanna, *supra* note 63, at 1498–99.

69. To be precise, monitors are probably more desirable when the harm caused is large relative to the assets of the firm causing the harm. However, a good proxy is simply when great harm is caused because when the harm is great, fewer firms will have assets sufficient to pay for it.

Another situation in which ongoing supervision may be considered is when the corporation is a recidivist.[70] When a corporation violates the same law more than once, one might surmise that fines are not a sufficient deterrent to this corporation. This may be, but it does not mean that one should resort to monitor-like sanctions. The fine may be insufficient simply because it is too low. A natural response might be to try to increase the fine. If we have reached the limit for the maximum imposable fine, then the rationale for going to monitor-like sanctions is really that the deterrent effect of fines is exhausted (as noted above). Another reason why a defendant may be recidivist is that the defendant receives large gains from the activity that exceed the fines (even the larger ones). This, by itself, may also not be enough to justify abandoning fines. For example, if someone regularly double parks for an important reason (e.g., emergency room doctors), should we impose monitors on them? On the other hand, if they double park for socially unacceptable reasons (e.g., to annoy parking officials), then we may want some greater measures like monitors.[71] Our point is not that recidivism is not *sometimes* a reason to opt for monitor-like sanctions but rather that by itself recidivism may not be enough without further inquiry. An additional complication in the corporate context is that sometimes recidivist behavior is the result of errant management, in which case it might be better to impose sanctions directly on management rather than on the firm.[72]

Another rationale for imposing monitors might be that they save enforcement resources for the government. Enforcement agencies may be able to reduce their expenditures on enforcement and supervision by essentially subcontracting out the supervisory task to monitors. Enforcement resources are saved because the government does not pay for the monitor; the corporation does. This might be treated as a desirable division of labor, given its costs, if it frees up enough government enforcement resources that more cases can be brought and more deterrence achieved.[73]

Which of these justifications is in play has important implications for when it is optimal to impose a monitor-like sanction. If our justification is that monitors might be desirable when cash fines are not high enough, then monitors are preferred in cases of great harm or where firms are insolvent. If our justification is saving enforcement resources, then monitors are preferred when the costs of having a monitor are less than the enforcement advantages gained when the government economizes on enforcement resources. This justification may not be tied to the amount of harm from the wrongdoing. Finally, recidivist corporations provide a more nuanced under-

70. Wray, *supra* note 62, at 2021.

71. *See* Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1236–38 (1985).

72. We assume in this paragraph that the management present at the time of the last wrong and this wrong are the same. If they are not, then different concerns also arise. *See* Khanna, *supra* note 63, at 1509–12.

73. In a sense, the payment to the monitor can be seen as an additional cash sanction (paid over time) on the firm along with the costs of having the monitor influencing decisions.

standing of when monitors are preferred. Outside of these instances, however, the appointment of a monitor may not be desirable on deterrence grounds.

However, one might also view the monitor as a way to incapacitate a corporation from committing future wrongdoing.[74] Although certainly plausible, it is not clear that this rationale motivates government agencies in imposing a monitor. Monitors are appointed as part of DPAs or NPAs and one of the critical conditions before the government agrees for such agreements is that the firm cooperate with law enforcement (e.g., by waiving attorney-client privilege). This arrangement is more consistent with a corporation that is trying not to violate the law in the future and probably less in need of incapacitation.

Moreover, even if incapacitation is important in some of the monitoring cases, that does not by itself change the foregoing analysis.[75] Incapacitation is presumably an important consideration when we think the defendant is unlikely to be deterred from future wrongdoing by a cash fine or other penalty.[76] If so, then incapacitation arguments become more compelling when deterrence has failed, which is consistent with the analysis in this section.

2. *Monitors More Akin To Advisors*

So far the analysis has focused only on the influential monitors who are more similar to the top management of a firm. However, a number of monitoring assignments position the monitor as being an advisor whom the firm cannot easily ignore. Thus, monitors may inform management that certain plans are not compliant with the law and others are. The monitor in these assignments cannot force the firm to adopt a particular plan but rather can tell the firm not to follow certain plans or the DPA may be revoked and prosecution initiated.

If this is the scope of the monitoring assignment, the conceptual framework described above still applies, but the margins are somewhat different. For example, the monitor-advisor is less costly to the firm than the influential monitor, and hence the social cost is less (though still higher than cash fines). However, for recidivist corporations, the monitor-advisor may be less valuable than the influential monitor. In any case, the critical point is that the conceptual framework above would apply but with a lesser cost for the monitor-advisor and fewer benefits than the influential monitor.

Before moving on to examine the scope of the monitor's powers and duties, we wish to address one potential argument. That is, sometimes we want companies to change how they do business and the most direct method of

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74. On incapacitation generally, see Robinson, et al., *supra* note 12, and Shavell, *supra* note 71.

75. Some of the cases in the Appendix, *infra*, involve firms that are insolvent or near to it. In such cases, incapacitating remedies may have greater impact than cash fines, which we know the firm cannot pay. Even so, the majority of the cases in the Appendix do not involve insolvent firms.

76. *See* Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1201–05 (1985); Shavell, *supra* note 71, at 1237–38.

doing this is to appoint someone to oversee these changes. We do not consider this a fully persuasive reason to appoint a monitor. If imposing a cash fine would prod such a company (and other similar companies) to make these changes to behavior, then there is no need to use a socially more costly monitor remedy. If the cash fine is insufficient to induce these changes, and we still want these changes, then a monitor becomes potentially desirable—however, this is just another way to say that when the deterrent effect of a cash fine is insufficient we may consider other more costly sanctions (e.g., monitors).[77]

B. *Monitor-Like Sanctions*

If after careful thought it appears that monitor-like sanctions might be desirable, then we face further questions about how to structure the arrangement. The first thing to note is that monitor-like sanctions refer to a variety of ongoing supervisory mechanisms, including corporate monitors, special masters, probation officers, and others. This is more than a question of labels; rather, it is a question of which combination of features (powers) we want in the entity responsible for ongoing supervision.

Although an exhaustive analysis of monitor powers is outside the scope of this paper, some important criteria can be identified that would assist in making these determinations. We suggest that the type of wrongdoing, the type of firm, and the desirability of having access to great amounts of information are critical.

First, the different types of supervisors tend to have differing access to information. Because some corporate monitors play a fairly active role in the firm, they are likely to have access to more current and detailed information than special masters or probation officers who have less frequent and perhaps less interventionist contact with the firm. In light of this, corporate monitors may be desirable when this level of information access is desirable. This is more likely for certain wrongs than others. For example, if the wrong can be spotted and deterred by occasional oversight, then the detailed access and powers of corporate monitors would not be necessary. However, for other kinds of wrongdoing, a more continuous supervisory function may be needed to deter future wrongdoing (e.g., securities fraud or misreporting). Further, the monitor's greater access to information also implies that among the various supervisors it is the least likely to make inefficient decisions. This is more valuable when the costs of making wrong decisions are substantial.[78]

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77. Another argument might be that for the period of the monitoring assignment, it is acceptable for the corporation to make fewer profits as an additional penalty for wrongdoing. Our response is that if such a penalty is desired, it is better that it be imposed explicitly because then at least its magnitude can be calculated. Relying on monitors not to run the corporation with a profit-maximizing focus (legally) as well as management seems a rather imprecise way of penalizing a firm and is likely to lead to either over- or underdeterrence.

78. *See* Kraakman, *supra* note 58, at 62–66 (providing an analogous discussion for gatekeepers who act as "bouncers" and "chaperones").

Finally, certain firms may benefit more from a closer supervisory relationship than others. This may be the case for firms that have a history of law violation or for firms in industries where, without closer supervision, wrongdoing is quite likely.

We hasten to note that monitor assignments can be drafted to achieve the desired combination of effects. For example, if the wrongdoing does not require constant oversight, we could draft the monitor arrangement to essentially mimic a probation arrangement. The flexibility of the monitor and the negotiated nature of its existence provide a great deal more scope for tailoring than perhaps other arrangements. This is one of its advantages.

C. *Duties for Monitors?*

Having discussed when monitor-like sanctions may be desirable and what factors may lead us to choose corporate monitors over other kinds of supervisors, we now move on to consider what duties, if any, monitors should owe to the corporation and its shareholders. This greatly depends on the monitor's powers. As we saw in Part II, the powers of monitors differ, with some being important advisors (like attorneys) and others having more operational control of the firm (like management). The duties of these different kinds of monitors may likewise differ. Let us begin with the more powerful species of monitor.

1. *More Influential Monitors*

For monitors wielding a great deal of power over the firm and its profitability, it would appear that, at first cut, some duties to the shareholders should exist. This is consistent with other areas of law where those who have control over other people's assets owe duties to those people. For example, managers of a firm owe fiduciary duties to the corporation and shareholders whose assets they control.[79] To examine this in more detail, we lay out the standard case for why fiduciary duties attach to managers and then examine how those arguments may apply in the context of more influential monitors.

a. *The Standard Case for Fiduciary Duties for Managers*

A well-known feature of modern corporations is that the incentives of managers and shareholders may diverge.[80] This increases the agency costs of

79. WILLIAM T. ALLEN & REINIER KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 239–40 (2003); FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 90–92 (1991).

80. *E.g.*, EASTERBROOK & FISCHEL, *supra* note 79, at 91–92. For example, if a particular investment required $100 of management effort to produce $500 in profits for the firm, then shareholders would prefer that management make that expenditure. However, if managers are paid 10% of firm profits, then they will be unwilling to expend $100 worth of their effort unless the firm profits by at least $1,000. This sort of example can be generated for many other kinds of corporate decisions as well (e.g., perquisites).

the manager-shareholder relationship. Absent some method of containing these costs, some of these relationships may not be formed, and the gains from them would be lost.[81] Both market forces and the law serve in some measure to reduce these agency costs enough to make it profitable for the parties to enter into this relationship.

Market forces are reflected in the pressures management faces from both the market for its services (the managerial-labor market) and the market for the firm's products or services (the product market).[82] Managers compete with each other for obtaining higher positions and salaries within a firm and between firms. If managers are slack on the job or are taking too many perquisites, then the market for their services may penalize them by retarding their career growth, providing them with smaller salaries and power and perhaps even resulting in their dismissal.[83] The threat of these negative consequences might help to provide managers with additional incentives to work hard.

Similarly, the product market acts as a constraint on managers. If managers are slack, then their firms' products are likely to be inferior and may lose out to other competing products, thereby making their firm less profitable. Such firms may then pay their managers less or dismiss them from their jobs (e.g., as a result of a takeover triggered by dropping share prices).[84] Both the labor and product markets "incentivize" managers to work hard by relying on future opportunities (e.g., for managerial positions and promotions) as a prize that managers chase after. However, there may be certain instances of managerial misbehavior in which (1) the gains are so substantial that managers are willing to sacrifice future opportunities, (2) the markets do not register certain kinds of slack, or (3) that slack is commonplace.[85] In these instances something more may be needed to constrain managerial behavior.

One option is to align the incentives of management and shareholders by adjusting their contract (e.g., increase management's share of profits to twenty-five percent). However, one can only go so far in adding contractual details. The reason is that contracting is not costless, and the parties may not be able to foresee every future contingency.[86] Thus, it will be efficient for

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81. *See id.*; *see also* ALLEN & KRAAKMAN, *supra* note 79, at 3–12.

82. *See* EASTERBROOK & FISCHEL, *supra* note 79, at 94–98. For a discussion in the context of a specific case, see Krishna Palepu & Tarun Khanna, *Product and Labor Market Globalization & Convergence of Corporate Governance: Evidence from Infosys and the Indian Software Industry*, (Harvard Univ. Negotiation, Org. & Mkts., Working Paper No. 02-30, 2001), *available at* http://ssrn.com/abstract=323142.

83. *See* EASTERBROOK & FISCHEL, *supra* note 79, at 94–98.

84. *See id.*

85. *See id.* Concerns with end-of-period frauds are well known. *See* Cindy R. Alexander et al., *Regulating Corporate Criminal Sanctions: Federal Guidelines and the Sentencing of Public Firms*, 42 J.L. & ECON. 393, 395, 404 (1999).

86. EASTERBROOK & FISCHEL, *supra* note 79, at 90–92; *see* Oliver Hart & John Moore, *Foundations of Incomplete Contracts* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 6726, 1998), *available at* http://ssrn.com/abstract=226378.

there to be some gaps in the contract between the parties. In this situation, fiduciary duties, such as the duty of loyalty, duty of care, and duty of good faith, can be particularly valuable as gap-filling mechanisms.[87] The question then becomes, what might the literature on managerial duties tell us about the kinds of duties, if any, that should attach to corporate monitors?

b. *Fiduciary Duties for Monitors?*

To examine the potential duties for influential monitors, we utilize the following hypothetical. Assume that monitors do not receive a share of the firm's profits but are paid in some more fixed manner. Indeed, this is the norm given that the raison d'etre for monitors is usually to ensure the firm complies with the law rather than to ensure the firm makes profits. Second, assume that there are a number of business projects or strategies that a firm can choose to follow and they have differing likelihoods of violating the law and differing levels of profitability. To stylize the example further, assume a company is considering two strategies—A (generating $10 million in profits) and B (generating $50 million in profits). Third, assume that in fact both strategies have little risk of violating the law, but it is costly to determine this—assume it requires $2 million of effort to determine A's compliance risk and $4 million to determine B's compliance risk. This may be due to uncertainty in the law or simply due to difficulty in understanding what the strategy entails. Shareholders will clearly prefer B, but what will the monitor prefer?

If the monitor is paid a fixed fee per year, then he will prefer the strategy that is lower cost to him (e.g., the strategy for which ascertaining its legality and/or payoffs is cheaper for the monitor). In our example, the monitor will prefer A (because it is less costly to determine its legality) even though shareholders (and social welfare) would prefer B. If, on the other hand, the monitor's cost of inquiry are covered by the firm, then he will investigate both A and B. This could lead him to choose B, which is desirable. However, when the monitor bears none of the costs of his inquiry, he may engage in too much inquiry (e.g., spend $100 million inquiring into A, B, and other

87. *See* EASTERBROOK & FISCHEL, *supra* note 79, at 90–92. Indeed, fiduciary duties were conceived of as gap-filling measures in the early economic literature. *See id.* More recently, a greater focus has developed on notions of trust and fiduciary duty. *See* Tamar Frankel, *Trusting and Non-Trusting: Comparing Benefits, Cost and Risk* (Boston Univ. Sch. of Law, Law & Econ. Working Paper Series, Paper No. 99-12, 1999), *available at* http://ssrn.com/abstract=214588; Edward L. Glaeser et al., *What is Social Capital? The Determinants of Trust and Trustworthiness* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 7216, 1999), *available at* http://ssrn.com/abstract=171073. However, for our purposes the standard gap-filling account will suffice. This is because the standard account is probably less likely to provide fiduciary duty protection than trust-based accounts. If we can show that fiduciary duties are desired even under the more miserly gap-filling account, then it will probably be relatively easy to show that such duties are desired under a trust-based account.

strategies that do not generate commensurate profits).[88] His incentives are still not optimal.

Indeed, one expects that hourly rate or fixed fee compensation structures are likely to lead to a divergence in the incentives of monitors and shareholders. One could try more creative compensation structures (e.g., options or hybrid hourly rates), but as we have seen in the recent past, that is also wrought with its own problems.[89] One could also attempt to address the incentive divergence through the use of fiduciary duties, but before doing that, let us examine whether there are market forces (i.e., labor and product markets) that could at least partially address our concerns.

The influential monitors may not face the same kinds of labor market forces as managers. First, monitors do not appear to be appointed because of a belief in their ability to generate great profits (through legal means) but rather the perception that they can help the firm prevent future law violations. Second, monitors cannot be easily replaced (as suggested by most DPAs), which implies that the penalty for poor performance is unlikely to be dismissal. Thus, monitors face considerably less ongoing labor market pressures as compared to managers.[90]

The other primary market force would be product market competition, but the same factors that reduced the effects of the labor market reduce the effects of the product market. For example, even if the firm is failing, monitors cannot be easily replaced. Indeed, even if the firm is taken over by another entity, that may not terminate the monitoring arrangement. Of course, it is easy to understand why most DPAs or NPAs do not permit an acquisition to terminate the monitoring arrangement because otherwise that would provide the firm with a reason to sell itself—to get around the monitor.[91] Nonetheless, a corollary of this is that it is more difficult to displace monitors than managers, and hence they face lesser incentives than managers to maximize profits.

Finally, one might argue that the possibility of future monitoring assignments, which are valuable to monitors, may induce monitors to focus on maximizing profits. This depends both on what factors drive the choice of a monitor and on the efficacy of the reputational market for monitors' services. Given that monitors (even the influential ones) are chosen primarily for their expertise in law compliance, one would not expect their ability to

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88. *Cf.* Lucian A. Bebchuk, *The Case for Facilitating Competing Tender Offers*, 95 HARV. L. REV. 1028, 1046–48 (1982) (discussing how there may be too much search activity in certain contexts).

89. There is a vast literature on this. For an overview, see Lucian A. Bebchuk & Jesse M. Fried, *Pay without Performance: Overview of the Issues*, 30 J. CORP. L. 647 (2005).

90. Of course, it is possible that the selection method for monitors tends to select those people who have good incentives and hence will probably perform well. However, this depends on one's confidence in the selection method. If it is based on agencies screening for those people with considerable business and legal experience, then we might have faith in the choice, but if it is based on prior connections to the agency, then one may view things differently. Indeed, if all monitors appear to have government connections, then the system risks a criticism of cronyism. Currently, almost all monitors have prior agency connections.

91. If this were not the case, it would be an obvious loophole for firms to exploit.

generate profits to significantly influence their chances at receiving future monitoring assignments. Thus, it is not clear that the market will focus much on the profit-maximizing aspect of a monitor.[92] Second, if monitoring assignments are limited primarily to former government officials, then one might be concerned that the reputational market may not be driven so much by ability to ensure compliance as prior connections to the agency bringing the enforcement action.

Given that market forces may not induce influential monitors to focus on maximizing profits, there appears to be a role for some supplementary measures such as fiduciary duties.[93] There are a number of options one might consider. First, one could develop fiduciary duties for monitors. Second, one could draft DPAs more carefully—specifying what the monitor's duties and powers are. Third, the appointing agency could have some supervisory role over monitors. Of course, one could rely on some combination of these features as well. Indeed, it is a combination that we think in the end may best suit the goals of having monitors involved, as each option has strengths and weaknesses and together they may complement each other.

c. *Suggestions for Reform for Influential Monitors*

We begin with recommending greater specificity in the DPA about the tasks and powers of monitors. Greater specificity will aid in guiding monitors in determining how they, and the monitee, should act. Indeed, a number of the monitors we spoke to (and our own assessment of the DPAs) suggested that greater specificity would be very desirable. Second, more clarity in the DPA will help in evaluating how monitors are performing. After all, when there are clearer and more verifiable goals, assessment becomes easier. Additional clarity will also help in developing a reputational market for monitors that will consider profitability as a factor and will aid in allowing people to compare how monitors performed. Both of these help to incentivize monitors and reduce the need for further judicial oversight (such as

92. This might simply be a temporary phenomenon. If more monitoring assignments involve the influential type of monitor, then a reputational market may develop to address profit maximizing ability, too. However, one has not yet developed, and even if it did, monitors would still face lesser market pressures than managers who could be fired as well as face reputational losses.

93. It is noteworthy that the foregoing discussion suggests that monitors face even less market pressure than managers to maximize profits (e.g., it is so difficult to replace a monitor). This may lead one to impose additional scrutiny on monitors relative to managers (i.e., even stronger fiduciary duties on monitors than managers). However, we must be careful at this juncture. It may be that the pressure to maximize profits in part led management to consider the illegal acts in the first place (depending on the type of illegal act). *See* Cindy R. Alexander & Marc A. Cohen, *New Evidence on the Origins of Corporate Crime*, 17 MANAGERIAL & DECISION ECON. 421 (1996). After all, *some* management may be trying so hard to maximize profits that they "push the envelope" too far. We stress "some" management because "pushing the envelope" does not describe the more recent kinds of fraud which smack more of outright theft (e.g., WorldCom). If this is correct, then one way to reduce the amount of illegal behavior is to remove (or reduce) the pressure to maximize profits. Difficult-to-displace monitors assessed on their law compliance abilities may achieve that aim. However, that does not mean we should do nothing to motivate monitors to make profit-maximizing decisions (legally) for the firm. In light of this, we are inclined to suggest that some supplement to market forces is necessary (e.g., fiduciary duties).

fiduciary duties). Of course, more careful DPA drafting cannot eradicate all concerns (because a completely contingent contract is unlikely), but it will prove useful to reduce some concerns. In light of that, we consider the following to be features that should be carefully considered and clearly delineated in a DPA: (1) the scope of the monitor's duties, written in a manner that minimizes interpretation, and the goals of their assignment; (2) the authority granted to and the roles to be played by each party; (3) the reporting chain between the monitor and, for example, the monitee, its board, its audit committee, its general counsel, the government, etc., as well as between the monitee and the government; (4) the expectations among the parties regarding whether the monitor's work is to be privileged; (5) the termination of the monitoring arrangement and what happens in case of acquisition; and (6) for more influential monitors, the liability of monitors to third parties for certain business decisions (e.g., corporate torts or crimes). However, even with these terms, we still expect there to be considerable room for dispute and negotiation (and renegotiation).[94] In light of this, we also recommend that there be a mechanism for referral back to the appointing agency to resolve certain key disputes between the monitor and the firm.

If there is still some slack (as we expect there will be), then we suggest a combination of fiduciary duties and a little more monitoring by the appointing agency. This is in essence a question of which arm of the government should monitor the monitors. Reliance on fiduciary duty places courts as the monitor of monitors, whereas agency monitoring places the agency as the monitor of monitors. Both have certain advantages—agencies have expertise in the area where the wrongdoing occurred and in crafting rules and regulations, but courts have more experience with fiduciary duties and ex post standard-based decision-making.[95] Thus, if one is monitoring the monitor to ensure that the firm is complying with the law, perhaps the agency may be more useful. However, if one is trying to ensure that monitors are at least attempting to make profit-maximizing decisions for the corporation and its shareholders (as is the case with standard fiduciary duty analysis), then the courts may be better positioned.

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94. This is when it becomes imperative that the monitor possess the requisite expertise to render his or her own independent judgment as to what is required, no more and no less, to fulfill the mandate set out in the disposition, and be able and willing to exercise that judgment in the face of criticism by both the firm and the government. For the process to work with its greatest integrity, discussions of work scope should be left to the monitor with an open door for either the government or the firm to complain to the judge if things get totally out of hand. Fortunately for the monitor, he or she can withdraw if necessary to protect his or her own integrity, but chances are that the monitor's wishes will, in the end, be honored. No monitor has been replaced as yet, and the occasional challenges to the monitor's authority are usually resolved in favor of the monitor by the agency.

95. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992) (discussing optimal choice between rules and standards); Edward L Glaeser & Andrei Shleifer, *The Rise of the Regulatory State* (Harvard Inst. of Econ. Research, Discussion Paper No. 1934, 2001), *available at* http://ssrn.com/abstract=290287 (comparing and analyzing court and agency enforcement; Vikramaditya S. Khanna, *Corporate Defendants and the Protections of Criminal Procedure: An Economic Analysis* (Univ. of Mich. John M. Olin Ctr. for Law & Econ., Paper No. 04-015, 2004), *available at* http://ssrn.com/abstract=657441 (discussing concerns with agency enforcement).

Even if agencies might do a tolerably good job of watching monitors to maximize profits, we may have a few further concerns with solely relying on agencies.[96] First, one of the reasons for having monitors might be to reduce enforcement burdens and costs for agencies so that they can focus their resources on bringing enforcement actions rather than monitoring firms. This places something of a constraint on how much monitoring the agency can sensibly undertake without sacrificing one of the benefits of having monitors.[97] Second, given that most of the monitors are former enforcement officials (no doubt capitalizing on their considerable law compliance experience), it might prove advantageous to have a nonagency official with some oversight to help provide a broader view of the functioning of the more influential monitors.

In light of this, we suggest some oversight by the appointing agency for most monitors. For more influential monitors, we suggest additional oversight through fiduciary duty analysis by courts. As with managers, we would suggest duties of loyalty, care, and good faith. These duties could be enforced by shareholder suits, but, given the concerns with frivolous suits,[98] we would suggest tight limits on them (e.g., by requiring the largest willing shareholder to choose counsel and post bonds), application of the business-judgment rule for monitor's business decisions,[99] the purchase of directors' and officers' insurance policies, and indemnification for monitors.[100]

2. *Monitors More Akin to Advisors*

The discussion so far has focused on the more influential monitors,[101] but many monitors have more limited roles. To the extent that monitors occupy a more limited role (e.g., those without the ability to fire employees or make

96. Government agencies have been placed as the monitors of private businesses in other countries and to an extent in the United States, too (for corporate probation officers). These have not been failures nor have they necessarily been complete successes. *See* John C. Coffee, Jr., *Privatization and Corporate Governance: The Lessons from Securities Market Failure*, 25 J. CORP. L. 1 (1999) (discussing securities markets regulation in Poland and the Czech Republic and use of government monitors); Wray, *supra* note 62, at 2039.

97. Thus, agency monitoring may not occupy more than de minimis oversight of monitors.

98. *See* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986).

99. We believe many of the concerns animating the business judgment rule apply in the context of monitors—risk aversion on directors' behalf and judicial-hindsight bias in particular. *See* ALLEN & KRAAKMAN, *supra* note 79, at 251–53. Another matter supporting the business judgment rule for managers is that managers (compared to shareholders) are less able to diversify their firm-specific risk because they cannot work at many different firms at once, whereas shareholders can invest in different firms. We consider monitors better able than managers to diversify firm-specific risk because they can take on more than one monitoring assignment at a time and often have other jobs with which they are involved. However, we still consider their ability to diversify risk to be less than that of shareholders and hence consider the business judgment rule to be the appropriate liability screen.

100. The monitor might negotiate with the government or the firm for either insurance or, if the monitor is an attorney, additional malpractice insurance.

101. *See supra* notes 45–47 and accompanying text.

operational decisions), we do not think the analysis in Section 1 applies in full.

It is a core feature of fiduciary duty analysis that the extent of the duties depends on the extent of the vulnerability of the principal to the fiduciary.[102] When monitors are advisors, they have a much more indirect effect on profitability. They are more akin to attorneys or consultants advising the firm about various options the firm is considering. These kinds of monitors do not have as much of a say in firm profitability as the more influential monitors and hence cannot be analogized to managers as easily.

This does not, however, mean that no duties should be imposed on these monitors but simply that different kinds of fiduciary duties need to be considered. For these monitors, the concern is not that they will not maximize profits (they do not have the power to do so) but that they will not provide the best advice they can on compliance. Here market forces do provide greater assurances than they might for the more influential monitors. This is because the reputational market for monitors depends on how good the monitor is at ensuring compliance. If the monitor is not good at this task, then he is unlikely to receive future monitoring assignments. Indeed, given the currently small number of monitors, the reputational market may work rather well for the issue of compliance because it is easier to assign credit and blame, and the players may know each other better than if there were many more monitors in the market. Indeed, one advantage of appointing former enforcement officials as monitors is that the agencies already have experience with these officials, making a reputational assessment somewhat easier.

Although the reputational market works better for these monitors, the labor and product markets face the same concerns—the inability to replace a monitor hampers both. However, for these more limited monitors, the market for their regular professions (e.g., legal services) may operate as a check. If someone considered an expert on securities fraud provides poor advice to a firm he is monitoring, then that person's market prospects for advising others on securities fraud (as an attorney) would suffer.

For these reasons as well as the monitor's inability to directly influence profits, we do not think that a fiduciary duty to maximize profits would be optimal here. Instead, we would suggest a fiduciary duty akin to that of attorneys or any professional to their client. Indeed, monitors currently are treated essentially as attorneys for the firms they are monitoring. This simply reflects the primary role that monitors have played until now as advisors. In addition to these kinds of fiduciary duties, we would suggest that better drafting of the DPA or NPA and somewhat greater agency oversight may prove helpful in aligning interests and clarifying the scope of the monitoring assignment.

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102. *See* EASTERBROOK & FISCHEL, *supra* note 79, at 90–92.

D. *Back to the Past?: Comparison with Professional Director Recommendations*

Although corporate monitors are a relatively new part of enforcement, they bear considerable similarity to reform suggestions proffered in the past. In particular, Professors Gilson and Kraakman have suggested the creation of a market for professional, independent directors who could serve as monitors of corporate performance.[103] Their idea was that professional, independent directors might be elected by institutional investors to monitor management at firms.[104] These directors would be essentially full-time directors at half a dozen or so firms and could be selected from a pool of directors through a central clearinghouse.[105] Because these directors would be selected by institutional investors, they would be both independent of management and dependent on shareholders.[106] When this practice is combined with the presence of a market for their services, one would expect there to be good incentives to monitor.[107] Further, as these directors would serve full time on a handful of boards, we would expect them to have more time to monitor and perhaps to have better access to information about the firm than most current outside directors.[108]

Although their proposal has not yet led to the creation of such a market through any organized means, we are struck by some of the parallels to the "organic" development of corporate monitors.[109] In particular, monitors are independent of management, have considerable time to monitor the firm, and have access to considerable information. Indeed, monitors frequently have considerably greater access to information (and the power to compel more) than professional directors might under the Gilson and Kraakman proposal.[110] All these features make corporate monitors rather good monitors. Moreover, they are not appointed or nominated by management.

The primary differences we see are that monitors (1) are not currently beholden to shareholders, (2) are appointed by a government agency rather than shareholders, and (3) are appointed only when some alleged wrongdoing has occurred (as opposed to always being present as in the Gilson and Kraakman proposal). However, if our reform proposals are accepted, then monitors would owe some fiduciary duties to shareholders. Thus, the pri-

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103. *See* Ronald J. Gilson & Reinier Kraakman, *Reinventing the Outside Director: An Agenda for Institutional Investors*, 43 STAN. L. REV. 863, 883–92 (1991).

104. *Id.* at 879–92.

105. *Id.* at 885–87.

106. *Id.* at 886.

107. *Id.* at 889–90.

108. *Id.* at 885, 890.

109. We use the term "organic" to capture the idea that monitors were not implemented through any organized means but rather came about through a series of settlements.

110. This was a concern that Gilson and Kraakman address in some measure. Gilson & Kraakman, *supra* note 103, at 889–90.

mary differences remaining are who appoints the monitor (government versus shareholders) and the trigger for their appointment.

One might view the government agency as akin to a central clearinghouse of sorts for monitors as they become the repositories for information on the monitor and their effectiveness. Of course, the government agency's incentives and those of a central clearinghouse may not be the same, but one can conceptualize the agency as serving a similar information-gathering or information-disseminating role.[111]

However, the comparison to professional directors provides yet another potential reform. One way to align the interests of the influential monitors with those of shareholders is to give shareholders a greater say in who is appointed to be the monitor. Perhaps institutional investors could have some greater, explicit voice in this process by, for example, being consulted by the government agency before appointing a monitor. This would not only make monitors more responsive to shareholder concerns but also would make addressing shareholder concerns something that is reflected in the reputation of monitors and in the market for their services. This would further help to align monitors' and shareholders' interests in those cases in which monitors could exercise considerable influence over firm profitability.

Finally, monitors are currently limited only to situations where some alleged wrongdoing has occurred.[112] Although this is different from the proposal suggested by Gilson and Kraakman, one might still conceive of it as a first step in the general direction towards such professional directors. Indeed, monitors could be viewed as a test case for a core of professional directors. Although we do not speculate about the likely future development of monitors and how it may dovetail with a market for professional directors, we find the parallels both striking and instructive. We await future developments with bated breath.

Conclusion

Over the last decade, enforcement authorities have increasingly relied upon corporate monitors to help ensure law compliance and reduce the number of future violations. In this paper we describe the development and common features of corporate monitors as well as examine when monitors are desirable and what obligations they should bear.

We find that monitoring arrangements are becoming more common and their powers are expanding. Monitors possess a wide range of powers that can be aligned along a continuum of being very influential (almost running the firm) to being significant advisors. In light of this, our analysis examines the desirability of monitors along this continuum. We conclude that monitors should be used only in certain instances (e.g., when socially cheaper sanctions are not sufficient for deterrence). When they are used, some fidu-

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111. In particular, one might be concerned about the factors that go into a government agency's decision to appoint monitors (especially if most are former government officials).

112. *See supra* Part III.

ciary duties should apply to them. The extent and nature of these fiduciary duties should vary to reflect the degree of vulnerability of shareholders to the monitor's decisions. Thus, for the more influential monitors, we suggest broader fiduciary duties than for the more advisor-like monitors. We also provide a number of recommendations that should help to enhance the performance of monitors. In some respects, if influential monitors do not owe some duties to the shareholders whose assets they are monitoring, then they become like czars—people with considerable, but largely unfettered, power.

Finally, we compare the corporate monitor to a reform proposal for creating a core of professional directors and find a number of similarities. It appears that government enforcement authorities have been creating, in a piecemeal and organic manner, something like a market for professional supervisors. The experiences with monitors may then be quite instructive for future governance developments. Whether the development of monitors will morph over time into a market for professional directors is something that corporate governance scholars and practitioners will likely be anxiously watching.

APPENDIX
CRITICAL FEATURES OF DEFERRED PROSECUTION AND NO PROSECUTION AGREEMENTS AT THE FEDERAL LEVEL SINCE 1993‡

	AIG (2004)	AmSouth (2004)	AOL (2004)
Charges	Aiding and abetting securities fraud.	Failing to file suspicious activity reports in a timely, complete, and accurate manner.	Aiding and abetting securities fraud.
Agency	U.S. Department of Justice, Criminal Division, Fraud Section.	U.S. Department of Justice, Criminal Division, U.S. Attorney's Office for the Southern District of Mississippi.	U.S. Department of Justice, Criminal Division, U.S. Attorney's Office for the Eastern District of Virginia.
Fines		$40 million in fines; silent as to restitution.	$60 million in fines; $150 million in restitution.
Duration	12 months	12 months	24 months
Extension Option	12 months comply and agreement expires after 24 months.		Monitor may extend period of review up to 6 months with DOJ approval.
Monitor	No.	No.	Name not publicly available.
How selected			Mutually agreed upon by the Department of Justice and AOL.
Supervised By			Makes a report to the Audit and Finance Committee, with a copy to DOJ; makes recommendations to Audit and Finance Committee.
Duties			• Special review of the effectiveness of AOL's internal control measures related to its accounting for advertising and related transactions, the training related to these internal control measures, AOL's deal sign-off and approval procedures, and AOL's corporate code of conduct.
Frequency of Reports to Government			On at least a semiannual basis as to cooperation from AOL.
Funding			Retained and paid by AOL; monitor has right to select and hire outside accounting expertise.
Resolution of disagreements/monitor's authority			
Replacement Provision			
Internal Changes Required			
Post-Monitor Obligations			¶ 4 survives indefinitely.

‡ This Appendix contains information from a number of sources. For citations to the DPAs/NPAs involving AIG-FP Pagic Equity Holding Corp.; AmSouth Bancorporation; America Online Inc.; Aurora Foods, Inc.; Bank of New York; Bristol-Myers Squibb Co.; Canadian Imperial Bank of Commerce; Computer Assocs. Int'l, Inc.; InVision Techs., Inc.; KPMG; Merrill Lynch & Co.; Micrus Corp. & Micrus S.A.; Monsanto Co.; N.Y. Racing Ass'n; Prudential Sec. Inc.; and Symbol Tech., see Corporate Crime Reporter, *supra* note 1. For citations to the other DPAs/NPAs see Consent Agreement between Bureau of Political-Military Affairs, U.S. Dep't of State and The Boeing Co. (March 28, 2006), *available at* http://www.corporatecrimereporter.com/documents/boeingsettle.pdf; Diagnostic Prod. Corp., *supra* note 30; Letter from Alice H. Martin, U.S. Attorney for the N. Dist. of Ala., U.S. Dep't of Justice, to Robert S. Bennett, Skadden, Arps, Slate, Meagher & Flom LLP, counsel to HealthSouth Corp., *supra* note 39; HVB Letter, *supra* note 29; Deferred Prosecution Agreement, United States v. Roger Williams Med. Ctr., *supra* note 39; Deferred Prosecution Agreement, United States v. SSI Int'l Far East, *supra* note 30; Deferred Prosecution Agreement, S.E.C. v. Titan Corp., No. 1:05cv00411 (D. D.C. March 30, 2005); Statoil, ASA, Exchange Act Release No. 54599 (Oct. 13, 2006), *available at* http://www.sec.gov/litigation/admin/2006/34-54599.pdf.

	Aurora Foods, Inc. (2001)	Bank of New York (2005)
Charges	Admission of false and misleading statements and omissions in connection with Aurora's financial statements and public filings with the SEC. DPA is silent on specific charges.	*U.S. Attorney's Office, Eastern District of New York* Aiding and abetting fraudulent activities of subsidiary by executing sham escrow agreements; willfully failing to file Suspicious Activity Reports in a timely manner; and failure to notify authorities as required by law. *U.S. Attorney's Office, Southern District of New York* Aiding and abetting the operation of an unlicensed money transmitting business; aiding and abetting the unlawful operation of a foreign bank; failure to implement an effective anti-money laundering program, as required by law; and engaging in money laundering.
Agency	U.S. Department of Justice, Criminal Division.	U.S. Department of Justice, U.S. Attorney's Offices for the Eastern and Southern Districts of New York with the Internal Revenue Service and Federal Bureau of Investigation.
Fines	Silent as to fines; silent as to restitution.	$26 million in fines; $12 million in restitution.
Duration		36 months
Extension Option		U.S. Attorney's Office may terminate if purposes of agreement have been fully achieved and further monitoring is no longer required. ¶¶ 6 and 7 are permanent with regard to conduct covered by DPA.
Monitor		George A. Stamboulidis, Baker Hostetler, New York, NY.
How selected	Aurora must retain a mutually acceptable outside consultant.	Applications submitted to U.S. Attorney's Office; after considering views of, *inter alia*, BNY, U.S. Attorney's Office will select monitor.
Supervised By		Delivers reports to General Counsel, who must present to Board and Audit Committee for review.
Duties	• Advise Aurora regarding an appropriate compliance program.	• Review BNY's SAR practices and procedures; anti-money laundering procedures; and BNY's implementation of and compliance with the DPA and the remedial actions prescribed in it.
Frequency of Reports to Government		Semi-annual basis; monitor may file additional reports with BNY's General Counsel or, without notice to BNY, with U.S. Attorney's Office.
Funding		"BNY agrees to pay all costs associated with the retention of [monitor] for these purposes." ¶ 12.
Resolution of disagreements/monitor's authority		Any refusal by BNY or its agents to render full cooperation to the monitor will constitute a breach of the DPA.
Replacement Provision		
Internal Changes Required	*Board* • Appoint two independent and outside directors, including one to serve on audit committee to oversee implementation of compliance program. *Management* • Appoint a compliance officer to oversee the implementation of the compliance program.	*Management* • New senior-level position in Legal Division called Head of Law Enforcement and Investigations. ¶ 10(b). • Creation of Suspicious Activity Response Team. ¶ 10(j). • New management committee headed by BNY's president to review actions of 67 involved employees. ¶ 10(a). *Internal investigations* • Hired Sullivan & Cromwell, results shared with U.S. Attorney's Office and attorney-client privilege waived with regard to report. ¶ 6.
Post-Monitor Obligations	*Board* • Appoint two independent and outside directors, including one to serve on audit committee to oversee implementation of compliance program. *Management* • Appoint a compliance officer to oversee the implementation of the compliance program.	*Management* • New senior-level position in Legal Division called Head of Law Enforcement and Investigations. ¶ 10(b). • Creation of Suspicious Activity Response Team. ¶ 10(j). • New management committee headed by BNY's president to review actions of 67 involved employees. ¶ 10(a).

	Boeing (2003)	Bristol-Myers Squibb Co. (2005)
Charges	Unauthorized exports of a defense article.	Conspiracy to commit securities fraud.
Agency	U.S. Department of State, Bureau of Political-Military Affairs; Directorate of Trade Controls, Office of Defense Trade Controls Compliance.	U.S. Department of Justice, U.S. Attorney's Office for the District of New Jersey.
Fines	$15 million ("civil penalty"); silent on restitution.	$100 million in fines; $839 million in restitution.
Duration	36 months	24 months
Extension Option	Minimum two years followed by an individual from inside corporation for 1 year and report to SVP, Office of Internal Governance, and DTCC.	
Monitor		Hon. Frederick B. Lacey, LeBoeuf Lamb, New York, NY.
How selected	Boeing to appoint a qualified individual from outside the corporation as monitor. Monitor forsakes for all time any future employment or representation. Subject to approval of DTCC.	Previously retained by BMS.
Supervised By	Senior officers receive copies of reports to DTCC, reports may include input or comments from Boeing's VP, Global Trade Controls.	No one. Monitor shall "have authority to require BMS to take any steps he believes are necessary to comply with . . . this Agreement." ¶ 12(a).
Duties	• Monitor Boeing's ITAR export compliance program, oversee implementation of DPA, and monitor all AECA/ITAR-regulated activities of Boeing.	• Continue the review, reforms, and other functions undertaken as Independent Advisor. • Cooperate with SEC, monitor BMS's compliance, and make recommendations necessary to ensure that the company complies with applicable securities laws. • Monitor BMS's compliance with agreements in other actions, and monitor information received by the confidential hotline and e-mail address. • Meet quarterly with CEO, non-executive Chairman, and General Counsel.
Frequency of Reports to Government	Reports every 90 days for first six months, semi-annually thereafter.	At least on a quarterly basis and between 30 and 45 days after filing of 10-K for FY2006. ¶ 12(c).
Funding	"[P]rofessional staff as are reasonably necessary . . . up to two full-time equivalents." ¶ 12(f) of annex.	
Resolution of disagreements/monitor's authority	May present any disagreement up through management chain from BCA to Boeing CEO and eventually DTCC.	"BMS shall adopt all recommendations contained in each report submitted by the Monitor to the [U.S. Attorney's] Office unless BMS objects . . . and the Office agrees . . . ." ¶ 14.
Replacement Provision	Boeing's SVP may recommend a successor; Boeings Corporate VP, Contracts & Pricing, may fill in on temporary basis.	"[I]f the Monitor resigns or is unable to serve for the balance of his term, a successor shall be selected by BMS and approved by the [U.S. Attorney's] Office within forty-five (45) days." ¶ 16.
Internal Changes Required	*Management* • Create a senior management position reporting to VP Global Trade Controls, Office of Internal Governance, with duties to include "ensuring application of best practices across the corporation [not limited to measures required by agreement]". ¶ 2 of annex. Also file annual reports with Directorate of Trade Controls. Meets quarterly with monitor for duration of DPA. *Internal investigations* • BCA to retain an outside firm to conduct audit of implementation of the DPA and assess the overall effectiveness of BCA's compliance programs no later than 18 months after signing order. • Required to audit of affiliates for three years prior to DPA. • Within 30 months, report from senior compliance manager on audit findings. DPA silent on who report goes to.	*Board* • Appoint an additional, non-executive Director acceptable to the U.S. Attorney's Office. • Establish the position of non-executive Chairman of the BMS Board of Directors, to be retained at least through the term of the agreement, who can require reports on any subject from any officer or employee of the Company. ¶ 10.
Post-Monitor Obligations	*Management* • As under "Internal Changes Required".	*Board* • Appoint an additional, non-executive Director acceptable to the U.S. Attorney's Office.

	Canadian Imperial Bank of Commerce (2003)	Computer Associates International, Inc. (2004)
Charges	DPA describes violations of Financial Accounting Standards, but does not name specific charges.	Securities fraud and obstruction of justice.
Agency	U.S. Department of Justice, Enron Task Force; Federal Reserve Bank of New York.	U.S. Department of Justice, U.S. Attorney's Office for the Eastern District of New York.
Fines	$80 million in fines; silent as to restitution.	Silent as to fines; $225 million in restitution; $163 million in stock to settle civil suits.
Duration	36 months	18 months
Extension Option		Longer of 18 months or until such time as reforms have been substantially implemented for two successive quarters.
Monitor	Michael G. Considine, Day Berry & Howard LLP, New York, NY.	Lee S. Richards III, Richards Kibbe & Orbe LLP, New York, NY.
How selected	Selected by DOJ and acceptable to CIBC.	Within 30 days, CA must submit list of five candidates, U.S. Attorney's Office will approve three candidates, and then court will pick one.
Supervised By	Primarily CIBC.	
Duties	*Enron Task Force Monitor* • Monitor CIBC's compliance with agreement, relying, where needed, on judgment of Monitor and outside Monitor named under agreement with CIBC, OSFI, and the Federal Reserve (FR). • Coordinate with SEC, FR, and OSFI. *Federal Reserve Auditor* • Assist in monitoring CIBS's compliance with, and effectiveness of, policies and procedures and any enhancements or revisions thereto. • Within 30 days of Agreement, submit a written plan detailing how Auditor intends to monitor CIBC's compliance with policies and procedures. • Report in writing any non-compliance by CIBC.	• Examine CA's compliance with agreement; make recommendations to the Board for review and implementation; and conduct comprehensive review of following areas: - CA's practices for the recognition of software license revenue; - CA's internal accounting controls and implementation of an improved ERP information technology system; - CA's internal audit department; - CA's ethics and compliance policies; and - CA's records management policies and procedures.
Frequency of Reports to Government	Semi-annual basis as to CIBC's compliance with agreement.	Quarterly. Within six months of appointment, issue report making recommendations on best practices for review areas.
Funding		
Resolution of disagreements/monitor's authority		
Replacement Provision		
Internal Changes Required	*Management* • CIBC must create a new Financial Transaction Oversight Committee to review quarter-end and year-end transactions. ¶ 5, Fed Agreement Appendix.	*Board* • Add Laura Unger and two more independent directors to the board and establish a Compliance Committee of the Board. ¶ 12. *Management:* • Appoint an independent, senior-level Chief Compliance Officer (CCO), after consultation with U.S. Attorney's Office, that will report directly to the Board Compliance Committee and General Counsel. ¶ 14. • Establish a new Disclosure Committee composed of CEO, COO, CFO, CCO, CAO, and General Counsel. • Reorganize Internal Audit Department, hiring at least five more internal auditors. ¶ 15. • Develop plan to ensure effectiveness of communications with governmental agencies engaged in inquiries on CA. ¶ 16. *Internal investigations* • Retained Sullivan & Cromwell LLP and Pricewaterhouse Coopers, ¶ 5, and shared findings with charging agencies. Investigation and expectation of shared results continuing.
Post-Monitor Obligations	*Management* • CIBC must create a new Financial Transaction Oversight Committee to review quarter-end and year-end transactions. Fed Agreement Appendix, ¶ 5.	Upon expiration of Agreement, CA will continue to fulfill the cooperation obligations in ¶ 6. Cooperation not required in proceedings where CA is a defendant. ¶ 7. *Board & Management* • As in "Internal Changes Required".

	Diagnostic Products Corp. (2005)	Healthsouth Corp. (2006)
Charges	Violations of the Foreign Corrupt Practices Act of 1977.	DPA silent on actual charges, but incorporates *SEC v. Healthsouth Corp.*, No. CV-03-J-0615-S (N.D. Ala.), which charges falsification of financial statements, false and misleading SEC filings, and violations of the FCPA.
Agency	Securities and Exchange Commission.	U.S. Department of Justice, Criminal Division, Fraud Section; U.S. Attorney's Office for the Northern District of Alabama.
Fines	$2.3 million in fines; silent as to restitution.	$103 million in fines; $445 million in restitution.
Duration	36 months	
Extension Option		Expires November 17, 2009
Monitor		
How selected	DPC shall retain a qualified independent compliance consultant not unacceptable to the SEC.	Selected by audit committee and "shall be licensed as a certified public accountant." ¶ 11.
Supervised By		Audit committee; audit committee also sets compensation.
Duties	• Review annually DPC's compliance with its FCPA policies and procedures, and make recommendations.	• Shall be charged with reporting any indications of violations of law or of HealthSouth's procedures, insofar as they are relevant to the duties of the Audit Committee, to the Audit Committee. Copies of these reports shall be submitted to the government for three years.
Frequency of Reports to Government	Annually, with first report within 90 days of appointment.	Only when reporting violations of law or procedures of audit.
Funding	"DPC . . . shall compensate the Compliance Consultant, and persons engaged to assist the Compliance Consultant, for services rendered . . . at their reasonable and customary rates . . . ." ¶ 3.	HealthSouth shall permit the Inspector General to hire a staff of at least five people.
Resolution of disagreements/ monitor's authority	The company is not required to adopt any of the changes contained in the monitor's report: "In the event a Report contains any recommendation for further action by DPC, within 90 days after receiving the Report, DPC's Board of Directors shall advise [the SEC], in writing, of all decisions and determinations it has made as a result of the Report." ¶ 1.	
Replacement Provision	"DPC (i) shall not have the authority to terminate the Compliance Consultant without the prior written approval of the majority of DPC's independent board members and the [SEC] . . . ." p. 4, ¶ 3.	
Internal Changes Required	None. The company is not required to adopt any of the changes contained in the monitor's report: "In the event a Report contains any recommendation for further action by DPC, within 90 days after receiving the Report, DPC's Board of Directors shall advise [the SEC], in writing, of all decisions and determinations it has made as a result of the Report." p. 4, ¶ 1.	*Board* • Adopted transition plan resulting in addition of nine new individuals to Board. • New charters for audit-related and governance-related committees of the board. *Management* • Cleaned house regarding upper management.
Post-Monitor Obligations		*Board* • Adopted transition plan resulting in addition of nine new individuals to Board. • New charters for audit-related and governance-related committees of the board.

	HVB Risk Management and HVB U.S. (2006)	InVision Technologies, Inc. (2004)
Charges	Conspiracy to defraud the U.S. and the IRS, tax evasion, and fraudulent tax returns.	Bribing foreign officials to retain business in Thailand, China, and the Philippines, and failure to monitor foreign sales activity for violations of the Foreign Corrupt Practices Act.
Agency	U.S. Department of Justice, U.S. Attorney's Office for the Southern District of New York.	U.S. Department of Justice, Criminal Division, Fraud Section.
Fines	$22,645,801 in fines; $6,989,324 in restitution to the IRS.	$800,000 and a fine to the SEC to be decided; silent as to restitution.
Duration	18 months	18 months
Extension Option		Monitorship lasts 18 months; agreement expires in 24 months. May be extended by an additional 6 months if DOJ deems necessary.
Monitor	No	Bill Pendergast, Paul Hastings, Washington, DC.
How selected		Selected and paid for by InVision and approved by DOJ.
Supervised By		
Duties		"The Monitor shall: (a) monitor InVision's compliance with this Agreement; (b) monitor InVision's implementation of and adherence to policies and procedures relating to FCPA compliance . . .; (c) ensure that the Policies and Procedues are appropriately designed to accomplish their goals; . . . and (e) coordinate with the SEC and provide information about InVision as requested by that agency." ¶ 12.
Frequency of Reports to Government		On at least a semi-annual basis and between 30 and 45 days before the end of Monitor's term.
Funding		
Resolution of disagreements/monitor's authority		No changes to FCPA compliance policies and procedures without monitor's approval. InVision's knowingly or wilfully failing to perform the duties imposed by Monitor permits U.S. Attorney's Office to terminate agreement.
Replacement Provision		
Internal Changes Required	*Management* • HVB shall maintain a permanent compliance office, and maintain a compliance and ethics program. • HVB shall take steps to audit the compliance and ethics program to ensure it is carrying out the duties and responsibilities set forth in this agreement.	
Post-Monitor Obligations	No monitor. However, after termination of agreement HVB's obligation to cooperate is not intended to apply in the event that a prosecution against HVB is pursued and not deferred. *Management* • HVB shall maintain a permanent compliance office, and maintain a compliance and ethics program.	

	KPMG (2005)	Merrill Lynch & Co., Inc. (2003)
Charges	Participating in a conspiracy to defraud the U.S. and IRS, tax evasion, and making fraudulent tax returns.	DPA is silent as to actual charges deferred, but prosecuting office agrees to "not prosecute Merrill Lynch for any crimes committed by its employees relating to the Year-End 1999 Transactions." ¶ 3.
Agency	U.S. Department of Justice, Criminal Division, Fraud Section, U.S. Attorney's Office for the Southern District of New York.	U.S. Department of Justice, Enron Task Force.
Fines	$228 million in fines; $228 million in restitution to IRS.	Silent as to fines; silent as to restitution. Contra CIBC DPA.
Duration	36 months	18 months
Extension Option	If KPMG fails to pay fines in timely manner, U.S. Attorney's Office can extend term for up to 18 months; any other breach can result in one year extension. DPA not exceed five years total.	Monitorship lasts 18 months. Agreement expires on June 30, 2005.
Monitor	Richard C Breeden & Co, 100 Northfield St., Greenwich, CT.	George A. Stamboulidis, Baker Hostetler, New York, NY.
How selected	U.S. Attorney's Office shall consult with KPMG to choose a mutually acceptable Monitor. If such a Monitor cannot be chosen, then the U.S. Attorney's Office has the sole right to select a monitor.	"Merril Lynch will also retain an individual attorney selected by the Department, who shall be acceptable to Merril Lynch." ¶ 9.
Supervised By	No one. The Agreement grants broad powers to the Monitor. Thus, "KPMG shall adopt all recommendations submitted by the Monitor unless KPMG objects . . . and the [U.S. Attorney's] Office agrees . . . ." ¶ 18(a).	General Counsel and Head of Corporate Audit.
Duties	• Review covered opinions issued 30 days prior to this agreement. • Review and monitor KPMG's compliance with this agreement and Compliance & Ethics Program, and make recommendations necessary to comply with agreement. • Review and monitor the implementation and execution of personnel decisions regarding individuals responsible for the illegal conduct.	Merrill Lynch must retain an auditing firm to review policies and procedures set forth in Exhibit A (training programs, review committees, etc.), and an attorney (monitor) to review the work of the auditing firm. The auditing firm and the attorney shall • Ensure that the policies and procedures [in Exhibit A] are appropriately designed to accomplish their goals; and • Monitor Merrill Lynch's implementation of and compliance with the Policies and Procedures
Frequency of Reports to Government	Not less often than every four months, whenever Monitor deems fit, and immediately upon violation of any law or any provision of DPA.	Semi-annual basis.
Funding	Authority to employ legal counsel, consultants, investigators, experts, and any other personnel necessary. Compensation and expenses paid by KPMG in accordance with typical hourly rates. Monitor receives office space, telephone service, and clerical assistance.	
Resolution of disagreements/monitor's authority	Monitor has "authority to take . . . actions . . . necessary to effectuate . . . oversight and monitoring responsibilities." ¶ 18(d). If a KPMG employee fails to cooperate with monitor then monitor may, at own discretion, "recommend dismissal or other disciplinary action." ¶ 18(e)(V).	No changes to policies and procedures without approval of auditing firm and monitor.
Replacement Provision		
Internal Changes Required	*Management* • KPMG to cease or curtail certain tax services including private tax practice and issuing "covered opinions" with respect to "listed transactions". • KPMG to maintain a permanent compliance office.	*Management* • Creation of the Special Structured Products Committee, whose approval is required for any offsetting transactions.
Post-Monitor Obligations	KPMG agrees that its obligations to cooperate will continue even after dismissal of charges, unless prosecution is pursued and not deferred.	*Management* • As in "Internal Changes Required".

	Micrus Corp. and Micrus S.A. (2005)	Monsanto Co. (2005)
Charges	Bribing doctors in France, Spain, Germany, and Turkey.	Bribing an Indonesian Ministry of the Environment official and making false entries into its books and records.
Agency	U.S. Department of Justice, Criminal Division, Fraud Section.	U.S. Department of Justice, Criminal Division, Fraud Section.
Fines	$450,000 in fines; silent as to restitution.	$1 million in fines; silent as to restitution.
Duration	36 months	36 months
Extension Option	Monitorship for 36 months; deferral of prosecution for 24 months.	
Monitor		Tim Dickinson, Paul Hastings, Washington, DC.
How selected	Micrus must retain outside independent firm with 45 days of Effective Date.	Monsanto must retain an individual, partnership, or other entity acceptable to Department.
Supervised By		Corporate compliance officer.
Duties	"The monitor shall: (a) monitor Micrus' compliance with this Agreement; (b) monitor Micrus' implentation of and adherence to policies and procedures relating to FCPA compliance . . . ; (c) ensure that Policies and Procedures are appropriately designed to accomplish their goals; . . . and (e) coordinate with the SEC and provide information about Micrus as requested by that agency." ¶ 12.	• Certify that policies and procedures are appropriately designed. • Monitor implementation of a compliance with policies and procedures. • Report findings of special review (during first year) and follow-up audit (during third year) to corporate compliance officer as to effectiveness.
Frequency of Reports to Government	Semi-annual basis, and between 30 and 45 days before the end of 36 months.	Report findings of special review (during first year) and follow-up audit (in third year) to corporate compliance officer as to effectiveness.
Funding		
Resolution of disagreements/monitor's authority	No changes to policies and procedures without approval of monitor. Knowingly, willfully failing to perform duties imposed by monitor constitutes breach.	No modification of policies and procedures of Appendix B without approval of monitor. Monitor reports any lack of cooperation or failure to report fraud directly to U.S. Attorney's Office.
Replacement Provision		
Internal Changes Required		*Management* • Monsanto must implement a remedial compliance program as described in Exhibit B.
Post-Monitor Obligations		*Management* • As in "Internal Changes Required".

	New York Racing Association (2003)	Prudential Securities Inc. (1994)
Charges	Conspiracy to defraud the United States and aiding and abetting the filing of false tax returns.	Fraud in the sale of limited partnership interests.
Agency	U.S. Department of Justice, U.S. Attorney's Office for the Eastern District of New York.	U.S. Department of Justice, U.S. Attorney's Office for the Southern District of New York.
Fines	$3 million in fines; silent as to restitution.	Silent as to fines. According to letter to U.S. Attorney, $330 million paid into fund for restitution through settlement with SEC, and agreed to pay any restitution to any injured party, even in excess of $330 million. Claims to have paid more than $1 billion to date.
Duration	18 months	36 months
Extension Option		
Monitor	Neil V. Getnick and Judge Margaret J. Finerty, Getnick & Getnick, New York, NY NB: Investigative work on the monitorship by Hawthorne Investigations & Security, Inc. Auditing work by P. Scutero & Associates.	
How selected	Appointed by the court upon the recommendation of the U.S. Attorney's Office.	PSI must retain, within 30 days, mutually acceptable outside counsel.
Supervised By	No one: reports directly to and is directed by an agency to be designated by the U.S. Attorney's Office.	
Duties	• Monitor NYRA's compliance with the terms of the agreement.	• Review PSI's policies and procedures to ensure that PSI has adopted all the compliance-related directives in SEC agreement.
Frequency of Reports to Government		Every three months for duration of agreement.
Funding		
Resolution of disagreements/monitor's authority		
Replacement Provision		
Internal Changes Required	*Board* • Formation of a Special Oversight Committee of the Board to address any issues raised by law enforcement offices. *Management* • Creation of an Office of the Chairman to supervise all business areas and departments of NYRA. • Completion of management restructuring, including significant replacement of staff. • Must seek an advisory opinion from IRS. *Internal investigations* • Retained SafirRosetti, an investigation and security firm, reporting to Special Oversight Committee, to: - Conduct a thorough review of NYRA's operations; - Recommend revisions and improvements to NYRA's operations; and - Maintain a fulltime presence at NYRA to ensure proper implementation and follow-through on such recommended revisions and improvements. ¶ 5(g).	*Board* • Hire a mutually acceptable new outside director to serve on the board of PSG and the Compliance Committee of PSI. Director/ombudsman/monitor is also responsible for anonymous tips from employees.
Post-Monitor Obligations	*Board* • As in "Internal Changes Required".	*Board* • As in "Internal Changes Required".

	Roger Williams Medical Center (2006)	Schnitzer Steel Industries Inc. (2006)
Charges	Conspiracy to defraud the United States.	Violations of the Foreign Corrupt Practices Act of 1977.
Agency	U.S. Department of Justice, U.S. Attorney's Office for the District of Rhode Island.	Securities and Exchange Commission and U.S. Department of Justice, Criminal Division, Fraud Section.
Fines	In lieu of fines, must provide $4 million in free medical care to RI residents; silent as to restitution.	$7.5 million fine; silent as to restitution.
Duration	24 months	36 months
Extension Option	Two years and deferral of two years. Option to extend six months for first breach of agreement. Successive penalties of one-year extensions for further breaches may be applied, not to exceed five years. If warranted by level of cooperation, U.S. Attorney's Office may lessen duration of monitorship.	Schnitzer may extend the time period for retention of the Compliance Consultant with prior written approval of the Commission staff.
Monitor	Meg Curran (assisted by Leonard Henson), McCue, Lee & Greene, LLP, Boston, MA.	
How selected	Chosen and hired by RWMC with input and prior approval of the U.S. Attorney's Office.	Retained by Board of Directors and acceptable to the staff of the SEC.
Supervised By		
Duties	• Review and monitor RWMC's compliance with the agreement, and make such recommendations as the monitor believes are necessary to comply with agreement. • Review and monitor RWMC's maintenance and execution of the revised compliance and ethics program. • At option, may conduct investigations into any reported potentially illegal or unethical conduct, or refer to the Executive Ethics Officer or U.S. Attorney's Office.	• Review and evaluate Schnitzer's internal controls, record-keeping, and financial reporting policies and procedures as they relate to Schnitzer's compliance with the books and records, internal accounting controls, and anti-bribery provisions of the FCPA.
Frequency of Reports to Government	No less than every four months, and whenever monitor deems fit.	Annually, with first report due 120 days after retention.
Funding	Compensation and expenses of monitor and persons hired under his or her authority shall be paid by RWMC at typical hourly rates, but not more than $250 per hour. RWMC may not seek reimbursement from Medicaid/Medicare for this expense. Monitor gets private office space, telephone service and clerical assistance.	"The compensation and expenses of the Compliance Consultant and of the persons hired under his or her authority, shall be paid by Schnitzer." ¶ 9.
Resolution of disagreements/monitor's authority	"The Monitor [has] the authority to take any other actions that are necessary to effectuate the Monitor's responsibilities." ¶ 25. "All provisions in this Agreement regarding the Monitor's jurisdiction, powers, [etc] shall be broadly construed so that the Monitor can fully implement and review the necessary actions and programs required under this Agreement." ¶ 22.	Schnitzer must advise SEC and monitor of any recommendations in report that it disagrees with, and can suggest alternatives. If after 60 days of good faith negotiation parties are unable to agree, monitor's recommendations becoming binding.
Replacement Provision		None; "To ensure the independence of the Compliance Consultant, Schnitzer shall not terminate the Compliance Consultant without prior written approval" of the SEC and DOJ. ¶ 17.
Internal Changes Required	*Management* • Must revise compliance program to conform with U.S. Sentencing Guidelines. • Redesignate compliance officer to be Executive Ethics Officer reporting directly to Board.	*Management* • Must adopt procedure changes set forth in monitor's report within 120 days of receiving each report.
Post-Monitor Obligations	Obligation to cooperate continues even after the DPA terminates, as long as any individual or entity is subject to prosecution. *Management* • As in "Internal Changes Required".	

	Statoil, ASA (2006)	Symbol Technologies (2004)
Charges	Violations of the Foreign Corrupt Practices Act of 1977.	Falsification and manipulation of accounting and filing materially false and misleading financial statements and other documents with the SEC.
Agency	Securities and Exchange Commission and U.S. Department of Justice.	U.S. Department of Justice, U.S. Attorney's Office for the Eastern District of New York.
Fines	$3 million fine paid to Norwegian government; $10.5 million fine paid to U.S. government; silent as to restitution.	$3 million in fines; $139 million in restitution in the form of stock and cash.
Duration	36 months	36 months
Extension Option	Statoil may extend the time period for retention of the Compliance Consultant with prior written approval of the Commission staff.	
Monitor		
How selected	Retained by Board of Directors and acceptable to the staff of the SEC.	Retained by Symbol and acceptable to the U.S. Attorney's Office and SEC.
Supervised By		Reports to General Counsel with copies to U.S. Attorney's Office and SEC.
Duties	• Review and evaluate Statoil's internal controls, record-keeping, and financial reporting policies and procedures as they relate to Statoil's compliances with the FCPA.	• Monitor Symbol's internal controls and financial reporting. • Annually review Symbol's revenue recognition and accounting practices, internal accounting control structure and systems, Symbol's implementation of, and compliance with remedial actions taken, and policies and procedures implemented as a result of or relied upon this agreement.
Frequency of Reports to Government	Annually, with first report due 120 days after retention.	Annually.
Funding	"The compensation and expenses of the Compliance Consultant, and of the persons hired under his or her authority, shall be paid by Statoil." p. 8, ¶ 1.	
Resolution of disagreements/ monitor's authority	Statoil must advise SEC and Monitor of any recommendations in report that it disagrees with, and can suggest alternatives. If after 60 days of good faith negotiation parties cannot agree, monitor's recommendations becoming binding [if not conflict with Norwegian law].	
Replacement Provision	None; "To ensure the independence of the Compliance Consultant, Statoil shall not have the authority to terminate the Compliance Consultant without prior written approval" of the SEC and the DOJ. p. 12, ¶ 10.	
Internal Changes Required	*Board* • Retained outside counsel to conduct an investigation. • Created a corporate compliance officer and ethics committees. • Expanded role of Audit Committee (AC) to oversee compliance with the FCPA. • New ethics policies, an ethics hotline, and new reporting lines directly to the AC. *Management* • Must adopt procedure changes set forth in monitor's report within 120 days of receiving report.	*Board* • Restructuring of board, including splitting of Chairman and CEO functions and appointing a non-executive Chairman. • Revision of charter of Audit Committee to grant more responsibility and authority to the committee. *Management* • Formation of a disclosure committee composed of CEO, President, COO, CFO, SVP-Finance and Business Controller, CAP and General Counsel. *Internal investigations* • Symbol retained Swidler Berlin Shereff Friedman in March 2002 and waived attorney-client privilege with regard to the results of this investigation.
Post-Monitor Obligations		*Board & Management* • As in "Internal Changes Required".

Titan Corporation (2005)	
Charges	Violations of the Foreign Corrupt Practices Act of 1977.
Agency	Securities and Exchange Commission and U.S. Department of Justice, Criminal Division, Fraud Section.
Fines	$13 million in fines; $15.5 million in disgorged profits.
Duration	8 months
Extension Option	Timeline is extremely specific: monitor must be hired within 30 days, report to the DOJ within 90 days of appointment, Titan must adopt changes suggested in report within 90 days, and within 150 days of receipt of report Titan must submit affidavit certifying that it has adopted and implemented recommendations of monitor.
Monitor	
How selected	Hired by Board of Directors and not unacceptable to the staff of the SEC.
Supervised By	
Duties	"[T]he consultant shall complete [a] review and submit a report documenting findings . . . . The Report shall include, without limitation, recommendations concerning policies, procedures and practices necessary to remedy (i) the failures alleged in the complaint, and (ii) any further failures described in the report." p. 5 ¶ 1.
Frequency of Reports to Government	Within 90 days of appointment. Titan must submit affidavit of compliance within 150 days of receiving report from monitor.
Funding	Titan "shall compensate the Consultant, and persons engaged to assist the Consultant, for services rendered pursuant to this Final Judgment at their reasonable and customary rates." p. 6.
Resolution of disagreements/ monitor's authority	Titan may suggest alternative remedies to those set forth in monitor's report, and the two parties shall negotiate new solutions in good faith, but 60 days after report is submitted, monitor gets final say.
Replacement Provision	None; Titan "shall not have the authority to terminate the Consultant without prior written approval" of the SEC. p. 6.
Internal Changes Required	*Management* Must adopt procedure changes set forth in monitor's report within 90 days of receiving report.
Post-Monitor Obligations	