
ARTICLE
PUBLIC REPORTING OF MONITORSHIP OUTCOMES

Veronica Root Martinez

CONTENTS

INTRODUCTION	758
I. THE ROLE OF MONITORS TODAY	768
A. <i>Monitorships Generally</i>	768
B. <i>Monitorship Types</i>	774
II. THE PROBLEMS OF DISCLOSURE AND OVERSIGHT	778
A. <i>Limited Information Disclosure</i>	779
B. <i>Elusive Oversight</i>	786
III. REQUIRING A PUBLIC REPORT	789
A. <i>The Public Report: A Proposal</i>	790
B. <i>The Benefits of a Public Reporting Mandate</i>	800
C. <i>An Opportunity to Create an Ethical Floor and Greater Personal Responsibility</i>	809
IV. ADDITIONAL CONSIDERATIONS	814
A. <i>Why Not Make Current Monitors' Reports Public?</i>	814
B. <i>Will Greater Transparency Deter Firms from Agreeing to Monitorships?</i>	817
C. <i>Will Involvement from Shareholders Deter Firms from Entering into Monitorships?</i>	819
D. <i>What About Government Responsibility or Capture?</i>	820
CONCLUSION	822

PUBLIC REPORTING OF MONITORSHIP OUTCOMES

*Veronica Root Martinez**

When a corporation engages in misconduct that is widespread or pervasive, courts, regulators, or prosecutors often insist that the firm obtain assistance from an independent third party — a monitor — to oversee the firm’s remediation effort. The largest firms in the world — from Deutsche Bank, to Volkswagen, to Carnival Cruise Lines — have found themselves having to retain a monitor for corporate misconduct, despite attempts to avoid a monitorship entirely. Traditionally, monitors, or their special master forebearers, were utilized by courts to assist in overseeing compliance with court orders, and their work was both accessible and transparent. As corporate monitorships have evolved over the past fifteen to twenty years, however, the transparency norm has receded, even when the success or failure of the underlying remediation effort invokes issues of public concern.

This lack of transparency would, potentially, be of little concern if the courts, regulators, and prosecutors that are party to monitorships were fully able and willing to ensure the monitorship achieved its goals. The reality, however, is that these governmental actors have demonstrated their own susceptibility to concerns related to cronyism, capture, and, perhaps, competence. Because the governmental actors involved in monitorships have proven to, understandably, lack perfection in their supervision capabilities, the lack of transparency and oversight over monitors and monitorships has prompted public critique, academic debate, and litigation. And yet, it has proven next to impossible to identify a comprehensive manner in which to regulate monitorships.

This Article suggests a novel path forward through a mix of federal interventions. The Article argues that at the conclusion of all monitorships, the public should receive an accounting that details whether the firm has or has not engaged in a successful remediation effort. This Article suggests two paths for the public to receive this information: (i) a securities disclosure and (ii) the adoption of a new policy regarding the use of monitors via the Office of Management and Budget. The result of these interventions will be greatly increased public access to information about the conclusion of a firm’s monitorship. All monitors, regardless of type, gather, assess, analyze, and disseminate information, yet this information is often kept outside of the public sphere. This Article presents a piecemeal set of interventions that would help generate the move toward greater public reporting of monitorship outcomes.

INTRODUCTION

In 2020, the United Auto Workers (UAW) union entered into a settlement with the Department of Justice (DOJ) to resolve allegations of

* Professor of Law, Duke University School of Law. Many thanks to Atinuke Adediran, Matthew Adler, Lisa Bernstein, Guy-Uriel Charles, John Coates, Kevin E. Davis, Deborah DeMott, Lisa Fairfax, Gina-Gail S. Fletcher, Brandon L. Garrett, Sarah Haan, Bruce Huber, Daniel Kelly, Maria Macía, Cary Martin Shelby, Patricia O’Hara, Dave Owen, Elizabeth Pollman, Usha Rodrigues, Daria Roithmayr, Jay Tidmarsh, and to the participants of the SMU Dedman School of Law Faculty Colloquia, NDLS PEGI Disclosure Roundtable, Lutie A. Lytle Black Women Law Faculty Writing Workshop, the Brooklyn Law School White Collar Crime Semi-nar, the UC Hastings College of the Law Faculty Colloquia, the Touro Law Center Faculty Colloquia, the 2016 Culp Colloquium sponsored by Duke Law School, and the 2015 Legal Ethics Schmooze sponsored by Stanford Law School for helpful comments and conversations. Thanks to Cait-lin-Jean Juricic, Nathaniel Hall, Shelby Dedo, Lucas Mears, Veronica Meffe, Marissa (Wahl) Huffman, and Quinn Kane for invaluable research assistance.

corruption and fraud within the organization.¹ The DOJ brought both civil and criminal proceedings against the UAW and its members.² In particular, the government's investigation "revealed an extensive and long-lasting effort by two former UAW presidents and their underlings to embezzle over \$1.5 million in UAW money for their personal benefit through a series of fraud schemes."³ Additionally, the investigation "uncovered a scheme by one former UAW vice president and two other high-level UAW officers to demand and accept over \$2 million in kick-backs from contractors."⁴ On the civil side, UAW officials received bribes from and embezzled money with executives at Fiat Chrysler — in the amount of over \$3.5 million.⁵ In short, the DOJ uncovered a culture of corruption and fraud within and throughout the UAW.

When misconduct is pervasive and widespread, as was found at the UAW, a question that often arises is whether the organization has the competence to remedy and respond to the misconduct on its own. If a determination is made — either by the court, regulator, or prosecutor — that oversight over the remediation effort⁶ would be helpful, a monitor is often tasked with responsibility for overseeing that process. A monitor is "(i) an independent, private outsider, (ii) employed after an institution is found to have engaged in wrongdoing, (iii) who effectuates remediation of the institution's misconduct, and (iv) provides information to outside actors about the status of the institution's remediation efforts."⁷ Perhaps unsurprisingly given the sweeping nature of the misconduct uncovered at the UAW, a monitor was appointed to oversee operations at the UAW for a period of six years and assist it in rooting out the corrupt culture that permeated the organization.⁸

Monitors are utilized by courts, the DOJ, the Department of Health and Human Services, the Federal Trade Commission (FTC), the Securities and Exchange Commission (SEC), and a plethora of other governmental

¹ See Press Release, U.S. Dep't of Just., The United States Reaches a Settlement with the United Auto Workers Union to Reform the Union and End Corruption and Fraud (Dec. 14, 2020) [hereinafter UAW Press Release], <https://www.justice.gov/usao-edmi/pr/united-states-reaches-settlement-united-auto-workers-union-reform-union-and-end> [https://perma.cc/7QDZ-5WQS].

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Remediation efforts vary depending upon the type of underlying misconduct and the scope of injury to the firm or the public, but the success of a company's remediation effort is essential to ensuring its long-term compliance with legal and regulatory mandates. See Veronica Root, *The Compliance Process*, 94 IND. L.J. 203, 226–27 (2019).

⁷ Veronica Root, *Modern-Day Monitorships*, 33 YALE J. ON REGUL. 109, 111 (2016) [hereinafter Root, *Modern-Day*].

⁸ See Press Release, U.S. Dep't of Just., U.S. District Court Appoints Neil Barofsky to Be the Independent Monitor over the United Auto Workers Union (May 12, 2021), <https://www.justice.gov/usao-edmi/pr/us-district-court-appoints-neil-barofsky-be-independent-monitor-over-united-auto> [https://perma.cc/7CVJ-ERRG].

actors to ensure that firms engage in effective remediation efforts.⁹ Remediation can take a variety of forms, from effectuating detailed mandates from a court or government regulator to creating a new compliance program, and remediation efforts are often overseen by monitors. Indeed, even as the use of monitors ebbs and flows as administrations change,¹⁰ monitors continue to provide an incredibly important function in industries of all types across the nation. The monitor is charged with (i) ensuring that the remediation effort is successful or (ii) alerting those involved in the agreement giving rise to the monitorship that the firm failed to meet its remediation obligations. The monitor has access to a wide range of nonpublic information within and throughout the firm and uses that information to evaluate the progress the firm is making toward remedying the underlying misconduct. Whether it is Volkswagen's dodging of U.S. emissions standards,¹¹ HSBC's failure to prevent money laundering by drug cartels,¹² ZTE's

⁹ See *Compliance Monitors: Everything You Wanted to Know but Were Too Afraid to Ask*, GIBSON DUNN LLP (Nov. 3, 2021), <https://www.gibsondunn.com/wp-content/uploads/2021/11/WebcastSlides-Compliance-Monitors-Everything-that-you-wanted-to-know-but-were-afraid-to-ask-03-NOV-2021.pdf> [<https://perma.cc/HB4W-NWKN>]; see, e.g., Corporate Integrity Agreement Between the Office of Inspector General of the Department of Health and Human Services and Exactech, Inc. (Dec. 7, 2010), <https://www.sec.gov/Archives/edgar/data/913165/000119312510276734/dex103.htm> [<https://perma.cc/NHY6-EPF3>].

¹⁰ The use of monitors by the DOJ tends to wane in Republican administrations as corporate enforcement activities decrease and ramp up again in Democratic administrations as corporate enforcement activities increase. We seem to be currently in an era of increase, but the reality is that these enforcement trends are cyclical and tend to be tied to administrative priorities. Compare Press Release, U.S. Dep't of Just., Assistant Attorney General Brian A. Benczkowski Delivers Remarks at NYU School of Law Program on Corporate Compliance and Enforcement Conference on Achieving Effective Compliance (Oct. 12, 2018), <https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-nyu-school-law-program> [<https://perma.cc/YW7K-4H8K>] (DOJ official in Trump Administration declaring that DOJ's "longstanding practice of imposing corporate monitors [is] the exception, not the rule"), with Press Release, U.S. Dep't of Just., Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime (Oct. 28, 2021) [hereinafter Monaco Press Release], <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute> [<https://perma.cc/9MHL-4WYR>] (DOJ official in Biden Administration announcing: "In recent years, some have suggested that monitors would be the exception and not the rule. To the extent that prior Justice Department guidance suggested that monitorships are disfavored or are the exception, I am rescinding that guidance."). That said, because different federal and state agencies refer to what this Article defines as a monitor by a variety of names (for example, "compliance consultant," "independent compliance consultant," and so on), it has proven to be challenging to understand the full number of monitors being utilized at any given time.

¹¹ See Press Release, U.S. Dep't of Just., Volkswagen AG Agrees to Plead Guilty and Pay \$4.3 Billion in Criminal and Civil Penalties; Six Volkswagen Executives and Employees Are Indicted in Connection with Conspiracy to Cheat U.S. Emissions Tests (Jan. 11, 2017) [hereinafter Volkswagen Press Release], <https://www.justice.gov/opa/pr/volkswagen-ag-agrees-plead-guilty-and-pay-43-billion-criminal-and-civil-penalties-six> [<https://perma.cc/ZS6W-WJ37>].

¹² See Press Release, U.S. Dep't of Just., HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit \$1.256 Billion in Deferred Prosecution Agreement (Dec. 11, 2012) [hereinafter HSBC Press Release], <https://www.justice.gov/opa/pr/hsbc-holdings-plc-and-hsbc-bank-usa-na-admit-anti-money-laundering-and-sanctions-violations> [<https://perma.cc/HGA5-L75F>].

delivery of U.S. goods to Iran in contravention of U.S. export control and sanctions laws,¹³ or Carnival Cruise Line's continual violation of environmental laws and requirements,¹⁴ corruption is uncovered at sophisticated organizations time after time. And when this misconduct is significant, widespread, or pervasive, the courts, regulators, or prosecutors often require the firm to retain (and pay the fees for) a monitor to oversee its remediation process targeted at resolving and responding to that misconduct.

Take Carnival Cruise Lines. In April 2017, a subsidiary of Carnival Cruise Lines, Princess Cruise Lines Ltd., pleaded "guilty to felony charges stemming from its deliberate dumping of oil-contaminated waste from one of its vessels and intentional acts to cover it up."¹⁵ A \$40 million criminal penalty and five-year probationary period were imposed, during which "all Carnival related cruise lines vessels eligible to trade in U.S. ports were required to comply with a court approved and supervised environmental compliance plan . . . including audits by an independent company and oversight by a Court Appointed Monitor."¹⁶ During the first two years of the probationary period, the monitor identified numerous additional violations ongoing at the company, including purposeful actions taken by Carnival to conceal violations of the environmental compliance plan.¹⁷ The discovery of these violations led to additional monetary penalties in the amount of \$20 million and even more enhanced supervision.¹⁸ The monitor in the Carnival case is a traditional, court-ordered monitor. The monitor files his reports with the court — making them publicly accessible — and plays an integral role in conveying information about the status of Carnival's remediation efforts to the government, the prosecutor, the court, and the public.¹⁹ And yet, most corporate monitorships today, unlike the Carnival monitorship, occur without meaningful, or any, court supervision and its accompanying high levels of transparency.

Indeed, many corporate monitors perform their work without much, if any, public accounting regarding their efforts or findings, or the firm's

¹³ See Press Release, U.S. Dep't of Just., ZTE Corporation Agrees to Plead Guilty and Pay Over \$430.4 Million for Violating U.S. Sanctions by Sending U.S.-Origin Items to Iran (Mar. 7, 2017), <https://www.justice.gov/opa/pr/zte-corporation-agrees-plead-guilty-and-pay-over-4304-million-violating-us-sanctions-sending> [https://perma.cc/7W9D-X85S].

¹⁴ See Press Release, U.S. Dep't of Just., Princess Cruise Lines and Its Parent Company Plead Guilty to Environmental Probation Violations, Ordered to Pay \$20 Million Criminal Penalty (June 3, 2019) [hereinafter Carnival Press Release], <https://www.justice.gov/opa/pr/princess-cruise-lines-and-its-parent-company-plead-guilty-environmental-probation-violations> [https://perma.cc/9LEN-6GV4].

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See *id.*

¹⁸ *Id.*

¹⁹ See, e.g., Quarterly Report of the Court Appointed Monitor (December 2019), United States v. Princess Cruise Lines, Ltd., No. 16-20897-CR (S.D. Fla. Jan. 7, 2020), ECF No. 172 [hereinafter Carnival Monitor Quarterly Report].

success or failure in its remediation effort. Take the monitoring of HSBC. In 2012, HSBC Bank USA N.A. and HSBC Holdings plc (collectively, “HSBC”) entered into a deferred prosecution agreement with the DOJ after admitting that HSBC failed to “maintain an effective anti-money laundering program” and to “conduct appropriate due diligence on its foreign correspondent account holders.”²⁰ Through this agreement, HSBC entered into a corporate compliance monitorship for a period of five years.²¹ In addition to ensuring that HSBC complied with the agreement’s requirements, the monitor was also tasked with providing yearly reports and assessments to — among others — HSBC’s Board of Directors and the DOJ.²² Importantly, the HSBC monitor’s reports, unlike those in the cases of the UAW and Carnival, were kept secret.²³

To limit access to the monitor’s reports, the government moved to have the first report placed under seal.²⁴ The district court, however, rejected this motion and entered an order that would have permitted the public dissemination of the monitor’s report with redactions for sensitive information.²⁵ HSBC, the DOJ, and the monitor all objected to the release of information, stating that it would impede the monitor’s effectiveness²⁶ and that the report at issue was an interim, not a final, report.²⁷ Moreover, the monitor expressed concerns that releasing the interim report might create a “chilling effect” on his ability to work with

²⁰ HSBC Press Release, *supra* note 12.

²¹ Deferred Prosecution Agreement at 15, 17, *United States v. HSBC Bank USA, N.A.*, Cr. No. 12-763 (E.D.N.Y. Dec. 11, 2012), ECF No. 3-2.

²² Deferred Prosecution Agreement attach. B, at B-1 to -2, B-6, B-8, *HSBC Bank USA*, Cr. No. 12-763, ECF No. 3-4.

²³ *See id.* attach. B, at B-11.

²⁴ Letter from Kelly T. Currie, Acting U.S. Att’y, E. Dist. of N.Y., & M. Kendall Day, Chief, Asset Forfeiture & Money Laundering Section, U.S. Dep’t of Just., to Judge John Gleeson 13, *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763, 2016 WL 347670 (E.D.N.Y. Jan. 28, 2016), *rev’d*, 863 F.3d 125 (2d Cir. 2017), ECF No. 35.

²⁵ *HSBC Bank USA*, 2016 WL 347670, at *7; *see also* Rachel Louise Ensign, *Judge Rules HSBC’s Outside Monitor’s Secret Report Should Be Made Public*, WALL ST. J. (Jan. 29, 2016, 11:46 AM), <https://www.wsj.com/articles/judge-rules-hsbcs-outside-monitors-secret-report-should-be-made-public-1454086003> [<https://perma.cc/9GM4-3Q5Z>].

²⁶ *Second Circuit Rules that Compliance Monitor’s Report Is Not a Judicial Document, Rejecting District Court’s Supervisory Power over Deferred Prosecution Agreement*, PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP (July 18, 2017), <https://www.paulweiss.com/media/3977189/18jul17-hsbc.pdf> [<https://perma.cc/8JKP-8THT>].

²⁷ Brief for Defendants-Appellants at 49, *HSBC Bank USA*, 863 F.3d 125 (2d Cir. 2017) (No. 16-308(L)), ECF No. 123-1; *see also* Letter from Kelly T. Currie, Acting U.S. Att’y, E. Dist. of N.Y., & M. Kendall Day, Chief, Asset Forfeiture & Money Laundering Section, U.S. Dep’t of Just., to Judge John Gleeson, *supra* note 24, at 5.

HSBC employees.²⁸ Ultimately, the Second Circuit reversed the district court's order, effectively blocking public access to the monitor's report.²⁹

Scholars have long debated whether monitors' key deliverables — their reports generated during, and at the conclusion of, the monitorship — should be disclosed to the public³⁰ or kept confidential.³¹ Many believe the reports prepared and turned over to the government and firm should simultaneously be turned over to the public, as has been the case for decades for traditional, court-ordered monitorships. Others, myself included, believe that because there has been a norm of secrecy for many corporate monitorships since around 2004, a push toward full transparency of existing monitor reports would likely result in material changes to the information contained therein. There is no legal requirement for corporate monitors to issue a written report; it is a custom. As a result, there is nothing stopping the monitor from providing a different method of disseminating information to the firm and governmental actor that required the retention of the monitor.³²

²⁸ Affidavit of Michael G. Cherkasky ¶ 11, *HSBC Bank USA*, No. 12-CR-763, ECF No. 35-1 [hereinafter Cherkasky Affidavit].

²⁹ *HSBC Bank USA*, 863 F.3d at 129; see also Jonathan Stempel, *U.S. Appeals Court Blocks Release of HSBC Money Laundering Report*, REUTERS (July 12, 2017, 10:12 AM), <https://www.reuters.com/article/us-hsbc-moneylaundering/u-s-appeals-court-blocks-release-of-hsbc-money-laundering-report-idUSKBN19X1VS> [<https://perma.cc/5YAR-LTDL>].

³⁰ Compare Brief for Amicus Curiae Professor Brandon L. Garrett in Support of Appellee, *HSBC Bank USA* (No. 16-308(L)) (arguing that reports of HSBC's monitor should be made public), and Brandon L. Garrett, *The Public Interest in Corporate Settlements*, 58 B.C. L. REV. 1483, 1529–30 (2017) [hereinafter Garrett, *Corporate Settlements*] (“[T]he reports of monitors should be made public, so affected parties have enough information to know whether to intervene if compliance is lacking. . . . I hope the practice changes and that prosecutors and corporations make it a policy to routinely make portions of these monitors reports public.”), and Brandon L. Garrett, *The Public Interest in Corporate Monitorships: The HSBC Case*, OXFORD BUS. L. BLOG (Nov. 16, 2016), <https://www.law.ox.ac.uk/business-law-blog/blog/2016/11/public-interest-corporate-monitorships-hsbc-case> [<https://perma.cc/6HDF-GR3L>] (“Keeping implementation of corporate deals in the dark itself harms the process immeasurably. . . . [A]s a matter of policy, the DoJ should insist that [monitors'] reports be made public.”), with Root, *Modern-Day*, *supra* note 7, at 150 (noting that relations between the government, the corporation, and corporate compliance monitors would benefit from greater confidentiality as it may “achieve greater cooperation . . . and . . . more effective monitorships”).

³¹ I have previously argued that corporate compliance monitor reports should be kept confidential to ensure candor by firm employees and have expressed support for the passage of a statutory privilege that protects communications amongst the monitor, government, and monitored corporation. See Veronica Root, *The Monitor-“Client” Relationship*, 100 VA. L. REV. 523, 564–67, 571–72 (2014) [hereinafter Root, *Monitor-“Client”*]. The HSBC monitor also expressed concern regarding a potential “chilling effect” on his ability to obtain information from employees if the reports were made public. Cherkasky Affidavit, *supra* note 28, ¶ 11. I continue to believe that different types of monitorships should be governed by different transparency and confidentiality norms. One contribution of this Article, however, is to demonstrate that one could allow the current customs for monitorships to generally continue as they have, while adding in a separate, standardized public reporting requirement.

³² See, e.g., *NFL Fines Washington Football Team \$10 Million After Investigation into Workplace Culture*, ESPN (July 1, 2021), https://www.espn.com/nfl/story/_/id/31745729/nfl-fines-washington-

If the court, regulator, or prosecutor that is party to the monitorship were able to supervise the monitor's work perfectly in each instance of a monitorship, one might have a strong argument that there should be minimal concerns about keeping the monitor's work from the public. Unfortunately, the governmental actors that are parties to the creation of monitorships are not, in fact, perfect. Whether the reasons are (i) concerns about cronyism in the monitor-selection process,³³ (ii) objections related to improper relationships between the monitor and the government,³⁴ (iii) fears of potential capture by the firm of regulators or prosecutors,³⁵ or (iv) doubts about the ability of the court or government to supervise actively all aspects of the work performed by a monitor — particularly when that work is outside of the expertise of a court, regulator, or prosecutor³⁶ — there are many grounds for believing that despite their best efforts, these governmental actors are unable to engage in perfect supervision of the work undertaken by monitors.³⁷ Indeed, in a review conducted by the Deputy Attorney General that was discussed publicly in September 2022, it was determined “that some monitors were

football-team-10m-culture-investigation [https://perma.cc/34AP-BR8F] (noting that attorneys representing “40 former employees . . . had wanted the report to be made public, but attorney Beth Wilkinson, who conducted the investigation, orally submitted her findings and recommendations to the league”).

³³ See Terry Frieden, *Deals for Corporate Monitors Reined In by Justice Department*, CNN POL. (Mar. 10, 2008, 2:41 AM), <http://edition.cnn.com/2008/POLITICS/03/10/ashcroft.corporate.monitor/index.html> [https://perma.cc/AX4R-ELAL]. There have also been allegations of the appointment of monitors who are “friends” with the judges overseeing the case. See, e.g., Alex Shephard, *As Expected, Judge Cote Refuses to Remove Meddling Monitor Michael Bromwich from the Apple Case*, MELVILLE HOUSE (Jan. 17, 2014), <https://www.mhpbooks.com/as-expected-judge-cote-refuses-to-remove-meddling-monitor-michael-bromwich-from-the-apple-case> [https://perma.cc/QFD8-K49E].

³⁴ See, e.g., *United States v. Apple Inc.*, 787 F.3d 131, 138 (2d Cir. 2015) (“It is certainly remarkable that an arm of the court would litigate on the side of a party in connection with an application to the court he serves.”).

³⁵ Root, *Monitor-“Client,”* *supra* note 31, at 579–80.

³⁶ Monitors engage in a variety of activities that a judge may or may not have experience with, like performing cultural surveys or assessing the efficacy of a firm's compliance program. See, e.g., Closing Letter of the Court Appointed Monitor (April 19, 2017–April 18, 2022) at 4–5, *United States v. Princess Cruise Lines, Ltd.*, No. 16-20897-CR (S.D. Fla. Apr. 6, 2022), ECF No. 276 [hereinafter *Carnival Monitor Closing Letter*]. The reality, however, is that one of the reasons a monitor is appointed is that the complex nature of the oversight required would not be an efficient use of the government's resources. See Root, *Modern-Day*, *supra* note 7, at 118–19.

³⁷ For example, the DOJ recently concluded a review of its use of monitorships in civil settlement agreements and consent decrees with state and local governmental entities, in the wake of complaints regarding insufficient supervision by the courts and DOJ over monitors, with a particular focus on the decision about when a monitorship should conclude. See Press Release, U.S. Dep't of Just., Attorney General Merrick B. Garland Announces Results of Monitor Review (Sept. 13, 2021), <https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-announces-results-monitor-review> [https://perma.cc/7SEN-T7XM].

not properly vetted for conflicts of interest or overseen to make sure they stayed on budget or task and that they did not always have a plan.”³⁸

Given this reality, scholars and practitioners have debated two particularly important questions on the issue of monitors today. First, scholars and practitioners ask what amount of public disclosure is appropriate for the work undertaken by monitors. As demonstrated by the HSBC example, the public often has very little access to much detail surrounding the corporate monitor’s work or the remediation efforts of the monitored corporation. Indeed, even in instances where the public was told that a corporation’s conduct was so concerning that it necessitated the retention of a monitor to oversee its remediation effort, the DOJ has opposed having the monitor’s identity and the monitor’s assessments publicly disclosed.³⁹ The upshot is that for most monitorships that take place without meaningful court involvement, very little information is disclosed about the ultimate success of the remediation effort the monitor was responsible for overseeing.

Second, scholars and practitioners inquire about the lack of oversight over monitors themselves. With regard to oversight, it is important to remember that monitors are not members of a recognized profession.⁴⁰ Many monitors are lawyers or accountants by education and training, but, when undertaking engagements as monitors, they fall outside of the professional oversight that traditionally governs members of these professions.⁴¹ Additionally, there is no requirement that a monitor be a member of a recognized profession.⁴² Therefore, even if the professional regulation of lawyers and accountants were revised to capture conduct undertaken as a monitor, there would still be a class of individuals serving as monitors who would remain outside these traditional oversight mechanisms. Consequently, monitors exist in a regulatory vacuum — a vacuum that has proven quite difficult to fill via congressional action⁴³ or court supervision.⁴⁴

This Article argues that at the conclusion of all monitorships, the public should receive an accounting that details whether the firm has or

³⁸ Ephrat Livni, *Justice Department Seeks to Entice Companies to Be Better Corporate Citizens*, N.Y. TIMES (Sept. 15, 2022), <https://www.nytimes.com/2022/09/15/business/justice-department-corporate-compliance.html> [<https://perma.cc/H7UA-UTQP>].

³⁹ See, e.g., Tokar v. U.S. Dep’t of Just., 304 F. Supp. 3d 81, 88–89 (D.D.C. 2018).

⁴⁰ See Veronica Root, *Constraining Monitors*, 85 FORDHAM L. REV. 2227, 2235 (2017) [hereinafter Root, *Constraining Monitors*].

⁴¹ See *id.* at 2237.

⁴² See Root, *Monitor-“Client,” supra* note 31, at 531.

⁴³ See *infra* section III.A.1.a, pp. 790–91. See generally Accountability in Deferred Prosecution Act of 2009, H.R. 1947, 111th Cong. (2009); Accountability in Deferred Prosecution Act of 2008, H.R. 6492, 110th Cong. (2008).

⁴⁴ *But see, e.g.,* United States v. HSBC Bank USA, N.A., No. 12-CR-763, 2013 WL 3306161, at *1 (E.D.N.Y. July 1, 2013) (“The Court will maintain supervisory power over the implementation of the [deferred prosecution agreement] and directs the government to file quarterly reports with the Court while the case is pending.”); SEC v. Am. Int’l Grp., Inc., 854 F. Supp. 2d 75, 83 (D.D.C. 2012), *rev’d*, 712 F.3d 1 (D.C. Cir. 2013).

has not engaged in a successful remediation effort. Requiring greater transparency of the work done during monitorships would create a backstop to the imperfect supervision undertaken by governmental actors who are parties to monitorships today by addressing the dual problems of a lack of information disclosure by, and oversight for, monitors. Increased transparency regarding the results of monitorships will provide the public an opportunity to know (i) whether a monitored corporation has successfully completed its remediation effort and (ii) whether the monitor has accomplished the goals of the monitorship. This Article proceeds in four parts.

Part I provides a primer on the use and role of monitors and monitorships. Part I defines the term “monitor” and illustrates how monitorships have evolved over time, resulting in different categories of monitorships — (i) traditional, court-ordered monitorships, (ii) enforcement monitorships, (iii) corporate compliance monitorships, and (iv) modern, court-ordered monitorships.⁴⁵

Part II discusses the problems of attempting to create disclosure and oversight norms for modern-day monitorships. Since the 1999 issuance of the Holder Memorandum⁴⁶ — which laid the foundation for current corporate enforcement policy⁴⁷ — many corporations that agree to enter into monitorships do so (i) without formal or robust court involvement⁴⁸ and (ii) with an assurance of limited public disclosure of the monitor’s

⁴⁵ See generally Root, *Modern-Day*, *supra* note 7.

⁴⁶ The Holder Memorandum sparked the beginning of corporate prosecutions as we know them today. Memorandum from Eric H. Holder, Jr., Deputy Att’y Gen., U.S. Dep’t of Just., to All Component Heads & U.S. Att’ys (June 16, 1999) [hereinafter Holder Memorandum], <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF> [<https://perma.cc/X5JB-9AEN>]. That said, there was not a significant ramp-up of corporate prosecutions that began utilizing monitors until around 2004. See F. Joseph Warin, Michael S. Diamant & Veronica S. Root, *Somebody’s Watching Me: FCPA Monitorships and How They Can Work Better*, 13 U. PA. J. BUS. L. 321, 325 (2011) (noting that “federal authorities brought only five enforcement actions in 2004” under the Foreign Corrupt Practices Act (FCPA) before “enforcement exploded” in later years).

⁴⁷ See Veronica Root Martinez, *The Government’s Prioritization of Information over Sanction: Implications for Compliance*, 83 LAW & CONTEMP. PROBS. 85, 89–92 (2020) [hereinafter Martinez, *Government’s Prioritization*] (“Much progress has been made within compliance efforts since the release of the Holder Memorandum in 1999, which invigorated the prosecution of corporations for white collar crimes . . .” *Id.* at 92.); Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191, 198 n.25 (2016) (“Since 2003, prosecutors have increasingly used [deferred prosecution or nonprosecution agreements] to retain jurisdiction over, and impose sanctions on, firms that avoid formal indictment and/or conviction.”).

⁴⁸ See, e.g., Agreement Containing Consent Order at 1, Intel Corp., No. 9288 (F.T.C. Mar. 17, 1999), 1999 WL 164046 (“Respondent waives . . . all rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this Agreement . . .”); see also Jennifer O’Hare, *The Use of the Corporate Monitor in SEC Enforcement Actions*, 1 BROOK. J. CORP. FIN. & COM. L. 89, 108–09 (2006) (discussing the degree of power the SEC has in selecting a corporate monitor compared to that of the courts); Root, *Modern-Day*, *supra* note 7, at 120 (“Specialized governmental units . . . often enter into agreements resolving allegations of organizational wrongdoing without formal court involvement.”).

reports and assessments.⁴⁹ Additionally, corporations, monitors, and the DOJ have all resisted attempts to turn over more information regarding monitorships to the public. Thus, there is very limited information disclosure about the ultimate results of monitorships. At the same time, monitors operate in a regulatory vacuum. Congress, courts, policymakers, academics, and the legal profession have all noted this lack of oversight and have engaged in activities to attempt to create boundaries to govern the behavior of monitors.⁵⁰ These attempts, however, have largely failed, resulting in the absence of formal oversight governing today's monitorships.⁵¹

Part III puts forth the thesis of this Article. It argues that at the conclusion of all monitorships, the public should receive an accounting that details the work completed by the monitor and the firm. The creation of a public report detailing the work done during the monitorship would help to address the problems of a lack of information disclosure and oversight for monitors by providing the public an opportunity to know (i) whether a monitored corporation has successfully completed its remediation effort and (ii) whether the monitor has accomplished the goals of the monitorship.

Part III begins by describing two potential, complementary interventions for creating such a mandate: (i) a securities disclosure and (ii) the adoption of a new policy regarding the use of monitorships via the Office of Management and Budget (OMB). The Part goes on to outline the standardized terms that should be considered in crafting a public reporting mandate. The Part then turns to securities literature and analyzes why public companies should be required to provide information about monitorships, whether that information is deemed material or nonmaterial, to both shareholders and stakeholders.⁵² Drawing on white-collar corporate crime literature, it explains that the general public has an interest in obtaining information about monitorships. It

⁴⁹ See, e.g., Deferred Prosecution Agreement attach. D, at D-2, United States v. Herbalife Nutrition Ltd., No. 20-CR-00443 (S.D.N.Y. Sept. 1, 2020), ECF No. 4-1 (“[P]ublic disclosure of the reports could discourage cooperation, impede pending or potential government investigations, and thus undermine the objectives of the reporting requirement. For these reasons, among others, the reports and the contents thereof are intended to remain and shall remain non-public . . .”); Rule 11 Plea Agreement at Exh. 3-14, United States v. Volkswagen AG, No. 16-CR-20394 (E.D. Mich. Mar. 10, 2017), ECF No. 68 [hereinafter Volkswagen Plea Agreement] (noting that the monitor’s “reports and the contents thereof are intended to remain and shall remain non-public”).

⁵⁰ See Root, *Constraining Monitors*, *supra* note 40, at 2233–34 (describing failed statutory attempts and limited prosecutorial guidance seeking to constrain monitorships).

⁵¹ *Id.*

⁵² See generally Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REGUL. 499, 535 (2020); Hillary A. Sale, *Public Governance*, 81 GEO. WASH. L. REV. 1012, 1020–21 (2013); Allison Herren Lee, Comm’r, U.S. Sec. & Exch. Comm’n, Keynote Remarks at the 2021 ESG Disclosure Priorities Event: Living in a Material World: Myths and Misconceptions About “Materiality” (May 24, 2021), <https://www.sec.gov/news/speech/lee-living-material-world-052421> [<https://perma.cc/J5M4-G4GG>].

concludes by discussing how a public reporting mandate might also address the oversight problem plaguing monitorships.

Part IV turns to some additional considerations raised by this Article's argument and proposal. In particular, it addresses why the problems of disclosure and oversight are unlikely to be resolved by requiring the reports that monitors currently generate to be turned over to the public. A supplementary report is necessary. The Part then addresses whether the Article's proposal will lead to a decrease in the number of monitorships entered into between organizations and governmental actors. It next discusses how a public reporting mandate might increase shareholder activism and potential liability concerns for public corporations. Finally, the Part discusses whether a public reporting mandate might exacerbate concerns about the government abdicating its oversight responsibility through its use of monitorships.

The Article then concludes.

I. THE ROLE OF MONITORS TODAY

When a company engages in wrongdoing, it will sometimes enter into a monitorship as part of its efforts to remediate the underlying misconduct.⁵³ Monitorships are used by a variety of actors — including courts, regulators, prosecutors, and others — to help oversee these firms' remediation efforts.⁵⁴ This Part begins by providing a definition of the term “monitor” that enables monitors to be identified even when they are referred to by different terminology such as “consultant” or “corporate compliance consultant.” The Part next outlines how monitorships typically arise, how the monitor is selected, and how the monitor is compensated. The Part then explains how monitorships, whose origins rest in the special masters utilized by courts, have evolved significantly over time, resulting in distinct types of monitorships being used today. Despite the diversity across the different types of monitorships, however, all monitors, regardless of monitorship type, work to move information across various groups. The Part concludes by explaining the role of monitors in creating connections between different groups.

A. *Monitorships Generally*

This section outlines the basic characteristics of monitorships. It begins by defining the term “monitor” and then details the various circumstances that prompt firms to enter into monitorships: namely some sort of court, prosecutorial, or regulatory agreement or order.⁵⁵ It then

⁵³ See generally Root, *Modern-Day*, *supra* note 7, at 123–42 (providing a typology of monitorships).

⁵⁴ *Id.* at 123.

⁵⁵ *But see id.* at 137 (discussing the voluntary retention of a public relations monitor).

discusses common selection practices for monitorships, as well as typical compensation structures.

I. Defining the Term “Monitor.” — Because monitors are utilized in a variety of civil and criminal matters and are referred to by a variety of terms, it is important to specify which actors fall within the category of monitor. As is the case in my previous work on monitorships, I define the term “monitor” as “(i) an independent, private outsider, (ii) employed after an institution is found to have engaged in wrongdoing, (iii) who effectuates remediation of the institution’s misconduct, and (iv) provides information to outside actors about the status of the institution’s remediation efforts.”⁵⁶ Some agreements explicitly refer to this “outsider” as a monitor, but some agreements refer to the individual by other terms, like “independent compliance consultant.”⁵⁷ The definition laid out here allows monitors to be easily identified regardless of the term used in the agreement that gave birth to the monitorship.

(a) An Independent, Private Outsider. — Monitors are employed when the organization’s ability to instill trust that it can effectively maintain responsibility over its own compliance efforts has been diminished by the misconduct discovered. The monitor’s status as an independent outsider has become a crucial component when structuring all categories of monitorships. Indeed, this independent status is linked to the monitor’s ability to provide an initial step toward rehabilitating the reputation of the monitored institution with outsiders. The monitor is also an exclusively private actor. The monitor is distinguishable from the true governmental employee, whose concrete responsibility is to assist in enforcement efforts.⁵⁸

(b) Retained Post-Compliance Failure. — The monitor is appointed or retained after wrongdoing within the institution is discovered. The retention of the monitor after misconduct has occurred distinguishes the monitor from other actors, like gatekeepers, within compliance frameworks. Gatekeepers are engaged “prior to wrongdoing” as “an assurance [to] investors and the public . . . that the corporation being assessed is acting within appropriate ethical, regulatory, and legal bounds.”⁵⁹ The monitor, unlike the gatekeeper, is not charged with preventing misconduct.⁶⁰ Instead, the monitor assists in an organization’s efforts to respond to misconduct.⁶¹ The engagement of the monitor only after the misconduct is discovered adds legitimacy to the monitor’s efforts and findings since monitors typically do not have a prior relationship with

⁵⁶ *Id.* at 111.

⁵⁷ Root, *Monitor-“Client,”* *supra* note 31, at 524 n.1.

⁵⁸ *But see* Rory Van Loo, *Regulatory Monitors: Policing Firms in the Compliance Era*, 119 COLUM. L. REV. 369, 381 (2019). Professor Rory Van Loo’s use of the term “monitor” is distinct from my own, as he is referring to governmental actors. *Id.*

⁵⁹ Root, *Monitor-“Client,”* *supra* note 31, at 526.

⁶⁰ *Id.*

⁶¹ *See id.*

the monitored institution. This also provides outsiders with an impression of monitor independence.

(c) *Effectuates Remediation Efforts.* — The monitor's purpose is to oversee or assist the monitored institution in its efforts to remediate the misconduct that occurred. While these efforts differ depending upon the underlying facts giving rise to the monitorship, typical remediation efforts include (i) ensuring compliance with court orders or enforcement authority mandates, (ii) addressing any harms resulting from the offense, and (iii) ensuring similar misconduct does not occur in the future.⁶² In some monitorships, the monitor is engaged in an effort to ensure specific performance with a court or governmental order or requirement.⁶³ In others, the monitor assists the institution in developing new policies and procedures and actively recommends changes that the institution can adopt.⁶⁴ But in all instances, the monitor's charge is to oversee a remediation effort at the monitored organization through supervision or direct assistance.

(d) *Provides Information to Third Parties.* — The monitor then provides information regarding the institution's efforts toward achieving the monitorship's goals. The information provided by the monitor has greater legitimacy than if the same information were provided by the institution itself due to the diminished trust in the monitored institution from its previous wrongdoing. In light of this reputational damage, the institution greatly benefits from a respected monitor's opinion that the institution has successfully engaged in remediation efforts. Thus, an organization found to have effectively engaged in remediation efforts may also appear to be "borrowing" some of the monitor's reputational capital, though the extent to which it harnesses that capital varies. The firm may attempt to utilize a small amount of capital targeted at only a few select parties, like the court or a particular agency, to assure compliance with the necessary remediation effort. The reliance on capital may, however, also be quite large when a well-known individual is selected to serve as the monitor and that monitorship appointment is publicized.⁶⁵ In either case, the monitor is able to transmit information across various groups, including the court, the government, the company itself, potential victims, and, for the most transparent monitorships, the public more generally.

⁶² In some instances, preventing recidivism can be as simple as implementing step-by-step procedures to ensure compliance with the law. However, other times, a monitor may need to identify more fluid issues within the monitored organization, such as the company's culture of noncompliance toward the law. In such an instance, even if a monitor establishes internal safeguard provisions that theoretically will prevent misconduct, such mechanisms will remain ineffective until the company's culture of indifference is addressed and rectified.

⁶³ Root, *Modern-Day*, *supra* note 7, at 116.

⁶⁴ *See id.* at 127–28.

⁶⁵ *See id.* at 141, 162; *see, e.g., Former FBI Director Freeh to Conduct Independent Investigation*, PA. STATE UNIV. (May 24, 2019), <https://news.psu.edu/story/153530/2011/11/21/administration/former-fbi-director-freeh-conduct-independent-investigation> [<https://perma.cc/7SSC-R5R9>].

2. *Common Monitorship Details.* — Though multiple types of monitorships exist, they share a few key characteristics in how they are set up.

(a) *The Creation of the Monitorship.* — The typical monitorship arises out of some sort of court order, negotiated settlement agreement with a regulator or prosecutor, or a consent decree with an administrative agency. The court order, agreement, or decree outlines the requirements regarding the firm retaining the monitor, the scope of the monitor's responsibilities, and other important aspects of the monitorship. For example, many deferred and nonprosecution agreements between the DOJ and firms state that if the monitor is an attorney, there will be no attorney-client relationship formed between the monitor and the firm.⁶⁶ Additionally, many agreements require a cooling-off period after the monitorship ends that prevents the monitor from working for the company in a new capacity.⁶⁷ Thus, the court order or agreement creates the boundaries and expectations of the monitorship and serves as the basic blueprint of the monitor's work plan.

(b) *Monitor Selection.* — One of the more controversial areas within monitorships has been the issue of monitor selection. Indeed, the monitor-selection process has been fraught with scandals⁶⁸ and concerns of cronyism.⁶⁹ Today, monitor selection tends to follow one of two basic models. One approach, which is typically used by Main Justice, allows

⁶⁶ Warin, Diamant & Root, *supra* note 46, at 353–54 (discussing attorney-client relationships within the context of monitorships).

⁶⁷ See, e.g., Memorandum from Brian A. Benczkowski, Assistant Att'y Gen., U.S. Dep't of Just., to All Personnel, Crim. Div., U.S. Dep't of Just. 5 (Oct. 11, 2018), <https://www.justice.gov/opa/speech/file/1100531/download> [<https://perma.cc/C5EU-BGSS>] (requiring that there be "a written certification by the Company that it will not employ or be affiliated with the monitor for a period of not less than two years from the date of the termination of the monitorship"); see also Warin, Diamant & Root, *supra* note 46, at 355 ("Only five companies entered into agreements without this cooling-off-period language between 2004 and 2010.").

⁶⁸ See, e.g., *Deferred Prosecution: Should Corporate Settlement Agreements Be Without Guidelines?: Hearing Before the Subcomm. on Com. & Admin. L. of the H. Comm. on the Judiciary*, 110th Cong. 18 (2008) (statement of Rep. Conyers, Chairman, H. Comm. on the Judiciary); Philip Shenon, *Ashcroft Deal Brings Scrutiny in Justice Dept.*, N.Y. TIMES (Jan. 14, 2008), <https://www.nytimes.com/2008/01/10/washington/10justice.html> [<https://perma.cc/ZDQ7-7V3J>].

⁶⁹ See Root, *Modern-Day*, *supra* note 7, at 113, 159. For example, after Apple was found to have colluded with major U.S. publishers to drive up the prices of ebooks, the company was ordered to enter into a monitorship. *United States v. Apple Inc.*, 992 F. Supp. 2d 263, 266 (S.D.N.Y. 2014), *aff'd*, 787 F.3d 131 (2d Cir. 2015). Apple objected to Michael Bromwich being its monitor when the government first proposed him to serve in this capacity, *id.* at 270, and later moved to have him removed once he was appointed monitor by the court, *id.* at 286. Apple argued that Bromwich was not a "disinterested prosecutor," Defendant Apple Inc.'s Objections to the Court's Order Filed on November 21, 2013, at 20, *Apple*, 992 F. Supp. 2d 263 (Nos. 12 Civ. 2826 & 12 Civ. 3394), 2013 WL 7134909 (citing *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249–50 (1980)), he had "a personal interest, financial or otherwise," *id.* (quoting *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 808 (1987)), and thus his appointment was a violation of the Due Process Clause, *id.* The district court judge disagreed and denied the motion, noting that Apple's "declaration provides no basis to find that the Monitor is acting out of personal bias or prejudice." *Apple*, 992 F. Supp. 2d at 286. Moreover, the judge noted that "[w]hile Apple would [have] prefer[red] to have no Monitor, it has failed to show that it is in the public interest to stop his work." *Id.* at 290.

the firm to submit an initial slate of individuals to the DOJ, from which the DOJ may select.⁷⁰ Because the firm compiling the slate is aware that the DOJ is not required to accept an individual from the slate presented, it is incentivized to choose a list of individuals that will likely be acceptable to the DOJ. Another approach, which has been utilized by the Southern District of New York⁷¹ as well as the FTC,⁷² is to take applications from the public to serve as a monitor. In September 2022, the DOJ outlined new guidelines for monitor selection, which include a requirement that monitor selection at the DOJ level be completed by a committee of DOJ officials.⁷³ Further, every committee must “include as a member an ethics official or professional responsibility officer from that office or component, who shall ensure that the other members of the committee do not have any conflicts of interest in selection of the monitor.”⁷⁴ Additionally, the “monitor selection processes shall be conducted in keeping with the Department’s commitment to diversity and inclusion.”⁷⁵ For court-appointed monitorships, the court selects the monitor, although there is often consultation with the parties to the litigation that is prompting the imposition of the monitorship — typically the firm and the government. In any event, for the types of monitorships outlined in this Article, the company does not typically get to select the person who will serve as the monitor without some sort of input or serious involvement from the court or government.

(c) *Compensation.* — While the government or court is often involved in monitor selection, the monitor’s compensation is generally paid exclusively by the monitored firm to the monitor⁷⁶ — an issue that has concerned many. For example, some are concerned that if the monitor is paid directly by the monitored firm, the firm might influence the

⁷⁰ See Memorandum from Craig S. Morford, Acting Deputy Att’y Gen., U.S. Dep’t of Just., to Heads of Dep’t Components & U.S. Att’ys 4 (Mar. 7, 2008) [hereinafter Morford Memorandum], <https://www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf> [<https://perma.cc/GK6C-KTBK>].

⁷¹ See, e.g., Press Release, U.S. Att’y’s Off. S. Dist. of N.Y., Manhattan U.S. Attorney Announces NYCHA Monitor Application Process (June 28, 2018), <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-nycha-monitor-application-process> [<https://perma.cc/8J8M-7FPA>].

⁷² Root, *Constraining Monitors*, *supra* note 40, at 2228.

⁷³ Memorandum from Lisa Monaco, Deputy Att’y Gen., U.S. Dep’t of Just., to Assistant Att’y Gen., Crim. Div., et al. 13–14 (Sept. 15, 2022), <https://www.justice.gov/opa/speech/file/1535301/download> [<https://perma.cc/NEU6-J9SL>]. But note, the impact of these changes has not had a meaningful chance to occur as of the printing of this Article.

⁷⁴ *Id.* at 13.

⁷⁵ *Id.*

⁷⁶ See, e.g., Letter from David N. Kelley, U.S. Att’y, S. Dist. of N.Y., to Robert S. Bennett, Counsel, Skadden, Arps, Slate, Meagher & Flom LLP 24 (Aug. 26, 2005), <https://corporate-prosecution-registry.s3.amazonaws.com/media/agreement/kpmg.pdf> [<https://perma.cc/N62J-EHDQ>] (“The compensation and expenses of the Monitor, and of the persons hired under his or her authority, shall be paid by KPMG.”).

monitor in a way that taints the monitor's independence.⁷⁷ Additionally, monitorships have proven to be very profitable engagements,⁷⁸ and many individuals who work as monitors attempt to obtain additional monitor engagements.⁷⁹ The compensation structure of monitorships has led some to question whether monitors can be truly independent when they are hoping to obtain repeat business, albeit across different firms due to the cooling-off period required by most agreements.⁸⁰ Despite these and other concerns related to monitor compensation, the monitor is expected to maintain independence from the monitored firm at all times, and a failure to do so can result in reputational damage to the monitor.⁸¹

⁷⁷ See Max H. Bazerman & Francesca Gino, *Behavioral Ethics: Toward a Deeper Understanding of Moral Judgment and Dishonesty*, 8 ANN. REV. L. & SOC. SCI. 85, 100 (2012); see also John C. Coffee, Jr., *The Acquiescent Gatekeeper: Reputational Intermediaries, Auditor Independence and the Governance of Accounting* (Columbia L. Sch. Ctr. for L. & Econ. Stud. Working Paper Series, Working Paper No. 191, 2001), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=270944 [<https://perma.cc/53VK-H4P9>].

⁷⁸ Root, *Constraining Monitors*, *supra* note 40, at 2228; see also *United States v. Apple Inc.*, 992 F. Supp. 2d 263, 272 (S.D.N.Y. 2014) ("Apple objected to the Monitor's fee of \$1,100 per hour . . ."), *aff'd*, 787 F.3d 131 (2d Cir. 2015).

⁷⁹ Indeed, monitorships have become so common and profitable that entire interdisciplinary firms have opened with the express purpose of providing monitoring- and compliance-consulting services. See, e.g., *Mandatory Environmental Compliance Auditing*, INDEP. MAR. CONSULTING LLC, <https://www.independentmaritime.com/mandatory-environmental-compliance> [<https://perma.cc/4WMK-489Y>] ("IMC delivers (as a Third Party Auditor or Court Appointed Monitor) environmental compliance audit services meeting Department of Justice requirements for owners/operators obliged to comply with an Environmental Compliance Program mandated by a US court."); *Monitorships*, KROLL, LLC, <https://www.kroll.com/en/services/business-intelligence-and-investigations/regulatory-and-compliance-risk/monitorships> [<https://perma.cc/DQ7Y-8Q49>] ("Kroll professionals serve as independent monitors and provide multidisciplinary professional services in support of monitors."); see also, e.g., *Monitorships & Independent Counsel*, CROWELL & MORING LLP, <https://www.crowell.com/Practices/White-Collar-Regulatory-Enforcement/Monitorships-Independent-Counsel> [<https://perma.cc/HWK4-HL4F>]; *Monitorship Practice*, JENNER & BLOCK LLP, <https://jenner.com/practices/444> [<https://perma.cc/TNC7-M5VY>].

⁸⁰ See, e.g., Cristie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 729 (2009) ("[B]ecause the monitor has an eye to her next appointment, she may be careful about implementing too onerous a monitorship.")

⁸¹ There have been occasions where a firm's failure to maintain independence when overseeing a remediation effort has resulted in significant sanctions. For example, following Promontory Financial Group's "whitewashing a report about sanctions compliance" and failing to maintain independence while working on a matter related to an investigation by the New York State Department of Financial Services into Standard Chartered Bank, Promontory "agreed to pay \$15 million to New York's banking regulator and refrain from certain new business with state-regulated banks for six months." Karen Freifeld, *Promontory to Pay \$15 Million to N.Y. over Work for Standard Chartered*, REUTERS (Aug. 18, 2015, 3:21 PM), <https://www.reuters.com/article/us-promontory-stanchart-settlement/promontory-to-pay-15-million-to-n-y-over-work-for-standard-chartered-idUSKCN0QN1ZO20150818> [<https://perma.cc/ZU6W-8FEM>]; see also N.Y. STATE DEP'T OF FIN. SERVS., REPORT ON INVESTIGATION OF PROMONTORY FINANCIAL GROUP, LLC (2015), https://www.dfs.ny.gov/system/files/documents/2020/03/promontory_inv_rpt_201508.pdf [<https://perma.cc/6MJ6-F4AD>].

B. Monitorship Types

The use of monitorships, particularly in the corporate context, has changed and shifted over time, with much of that evolution occurring over the past fifteen to twenty years. For example, in 1999, the Holder Memorandum announced new guidance to federal prosecutors about when and how corporations should be prosecuted and when mitigation credit or leniency should be awarded.⁸² In many ways, the Holder Memorandum marked the beginning of today's corporate criminal enforcement efforts and led to the regular use of monitors by the DOJ when entering into negotiated settlement agreements with corporate firms.⁸³ More recently, in October 2021, Deputy Attorney General Lisa Monaco released a statement outlining a number of policy shifts related to corporate criminal enforcement.⁸⁴ In particular, she sent a clear signal that the use of monitors would be more actively required by the DOJ. She explained:

[A]ny resolution with a company involves a significant amount of trust on the part of the government. Trust that a corporation will commit itself to improvement, change its corporate culture, and self-police its activities. But where the basis for that trust is limited or called into question, we have other options. Independent monitors have long been a tool to encourage and verify compliance.⁸⁵

The upshot is that as corporate enforcement actions increased, the DOJ and various regulators needed to find innovative ways to oversee firms' remediation efforts. Ultimately, they took a tool often utilized by courts,⁸⁶ the appointment of monitors or special masters, and started using it as part of civil negotiated settlement agreements and guilty pleas. This section details four different types of monitorships that are used today.

⁸² Holder Memorandum, *supra* note 46; *see also* Martinez, *Government's Prioritization*, *supra* note 47, at 89–92.

⁸³ One of the unsatisfying realities regarding the use of monitors by governmental actors is that there is no database or easy way by which to understand the extent of the use of monitorships by the federal government. There are slices of data available, but none give a full and accurate picture regarding the use of monitors across both federal regulators and prosecutors. *See, e.g.*, Duke Univ. Sch. of L. & Univ. of Va. Sch. of L.'s Legal Data Lab, *Downloads*, CORP. PROSECUTION REGISTRY, <https://corporate-prosecution-registry.com/downloads> [<https://perma.cc/5YM2-JEAW>] (providing information regarding federal organizational pleas and prosecution agreements and, when downloaded, some information about the use of monitorships); STAN. L. SCH.: FOREIGN CORRUPT PRACS. ACT CLEARINGHOUSE, <https://fcpa.stanford.edu/index.html> [<https://perma.cc/DR3U-EFKG>] (providing information regarding FCPA enforcement actions). One of the benefits of this Article's proposal is that it would provide a mechanism by which data could be gathered and generated about the use of monitorships by federal governmental actors.

⁸⁴ Monaco Press Release, *supra* note 10.

⁸⁵ *Id.*

⁸⁶ Root, *Modern-Day*, *supra* note 7, at 116.

1. *Traditional, Court-Ordered Monitorships.* — Courts have used the services of independent, private outsiders — monitors⁸⁷ — for many decades to assist in their adjudication efforts.⁸⁸ “After a finding of liability, [the monitor is] often appointed at the remedial stage of complex cases to aid in formulating the decree, assist the court in implementing it, and monitor compliance.”⁸⁹ Monitors are agents of the court and, traditionally, are “employed to ensure the monitored organization’s specific performance with the court’s orders.”⁹⁰ In serving as an explicit agent of the court, the monitor (in theory) maintains its independence from the entity bringing the case — often the DOJ or a regulator — as well as from the monitored organization. The remediation effort seeks to protect the interests of the parties specified in the court’s order.⁹¹ Access to the monitor’s work is intended to be quite broad, as “these monitorships are an outgrowth of what is often a very public court proceeding with active court involvement in determinations of organizational misconduct.”⁹² “If the Court-Ordered Monitor’s work product qualifies as a judicial record, it will normally be deemed a document that must be made accessible to the public,”⁹³ although the use of modern-day, court-ordered monitorships, which is discussed more below,⁹⁴ has pushed against this norm, particularly in the corporate context.

2. *Enforcement Monitorships.* — Over time, the use of monitors spilled over from court-ordered monitorships into other domains.⁹⁵ There may be times when firms enter into a negotiated agreement of some sort, such as a deferred or nonprosecution agreement, to resolve the misconduct or offense to the government’s satisfaction.⁹⁶ The government could choose to oversee the company’s specific performance with the negotiated agreement itself, and, at times, it does so directly.⁹⁷ But in some instances, the government outsources this oversight function to an independent, private outsider as part of a monitorship.⁹⁸ The monitor is employed “to oversee and ensure [the company’s] compliance

⁸⁷ Court-appointed agents “are referred to by a number of terms often used interchangeably, including master, special master, receiver, trustee, or monitor.” *Id.* (citing *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982); BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 175 (2014)).

⁸⁸ *Id.*

⁸⁹ Ellen E. Deason, *Managing the Managerial Expert*, 1998 U. ILL. L. REV. 341, 352. *See generally id.* at 350–54 (discussing the ability of a court to appoint an outsider to assist the court under Federal Rule of Civil Procedure 53).

⁹⁰ Root, *Modern-Day*, *supra* note 7, at 116.

⁹¹ *See, e.g., id.* at 117–18.

⁹² *Id.* at 148.

⁹³ *Id.*

⁹⁴ *See infra* section I.B.4, pp. 777–78.

⁹⁵ Root, *Modern-Day*, *supra* note 7, at 124.

⁹⁶ *See id.*

⁹⁷ *Id.* at 120, 126.

⁹⁸ *Id.* at 120–21.

with the agreement.”⁹⁹ The enforcement monitor is “often perceived as [an] agent[] of the government” who maintains a type of supervisory authority over the monitored organization.¹⁰⁰ The effort is undertaken to assuage the government’s concerns regarding the monitored organization’s ability or willingness to implement the changes necessary to improve its compliance program on its own initiative. Sometimes the monitorship also provides direct remediation to third parties outside the government, such as refunds of improperly made payments. As a result, access to the monitor’s work should be quite broad because “it would allow individuals that the organization harmed to receive information regarding the status of remediation efforts.”¹⁰¹ Given that the required remediation effort is already dictated in what is typically a public settlement agreement,¹⁰² the monitorship effectively serves to certify that the company has complied with the predetermined terms or to sound the alarm if they have failed to do so.

3. *Corporate Compliance Monitorships.* — Corporate compliance monitorships signify yet another link on the monitorship evolutionary chain, and they appear to be one of the most popular types of monitorships utilized by the DOJ.¹⁰³ They are distinct from traditional, court-ordered monitorships and enforcement monitorships because the corporation consents to the imposition of a monitorship that encompasses activities beyond ensuring specific performance with a predetermined set of requirements¹⁰⁴:

[T]he monitor is retained to engage in a sort of root-cause analysis. Specifically, the Corporate Compliance Monitor is “retained to investigate the compliance failure that resulted in the legal or regulatory violation, assess the cause of the compliance failure, and analyze the company’s unique business structures against the legal and regulatory requirements.” The monitor is then responsible for delivering a set of recommendations that the organization should implement to ensure long-term legal and regulatory compliance.¹⁰⁵

That is not to say that corporate compliance monitors never oversee specific performance — they sometimes do¹⁰⁶ — but the scope of their duties, as outlined in the negotiated settlement agreements, requires that they do more than ensure compliance with the agreement. Thus, the corporate compliance monitorship’s remediation effort is to ensure that the monitored organization complies with the agreement it enters into with a prosecutor or regulator, as well as to prevent compliance failures

⁹⁹ *Id.* at 124.

¹⁰⁰ *Id.* at 151.

¹⁰¹ *Id.* at 149.

¹⁰² *See id.*

¹⁰³ *See id.* at 127 n.109.

¹⁰⁴ *Id.* at 127–28.

¹⁰⁵ *Id.* at 128 (footnotes omitted) (quoting Root, *Monitor-“Client,” supra* note 31, at 524–25) (citing Root, *Monitor-“Client,” supra* note 31, at 528).

¹⁰⁶ *See id.* at 130.

in the future.¹⁰⁷ The effort undertaken is meant to provide not only some assurance to the government that the firm will comply with the terms of the agreement but also a concrete service to the monitored organization in the form of a set of recommendations the company can implement going forward.¹⁰⁸ A key feature of the corporate compliance monitorship is that many of the changes that the company will need to implement to ensure future compliance with legal and regulatory requirements are unknown at the outset of the monitorship.¹⁰⁹ As a result, the monitor is charged with developing and providing the company with a set of recommendations that will improve the individual firm's long-term compliance. To do this, corporate compliance monitors must develop strong working relationships with members of the company who can aid them in their quest to develop a sophisticated set of recommendations.¹¹⁰

4. *Modern-Day, Court-Ordered Monitorships.* — Modern-day, court-ordered monitorships are ones wherein the monitor is an agent of the court, but these monitorships take on elements of corporate compliance monitorships.¹¹¹ Instead of limiting the monitor's authority to ensuring specific performance with the court's order, the court gives the monitor semi-independent decisionmaking authority over changes that the monitored organization should implement.¹¹² The court may provide this broad authority without the explicit consent of the monitored organization, unlike corporate compliance monitorships where the monitored organization voluntarily enters into the monitorship relationship.¹¹³ As a result, modern-day, court-ordered monitorships have the potential to be quite contentious.¹¹⁴ The purpose of the remediation effort is often twofold: (i) to ensure compliance with the court's order

¹⁰⁷ Root, *Monitor-“Client,” supra* note 31, at 528. There is typically no, or no meaningful, involvement from courts during a corporate compliance monitorship. *See id.* at 531–32.

¹⁰⁸ Root, *Modern-Day, supra* note 7, at 130.

¹⁰⁹ *See generally* Root, *Monitor-“Client,” supra* note 31, at 533–35; Root, *Modern-Day, supra* note 7, at 128.

¹¹⁰ Root, *Monitor-“Client,” supra* note 31, at 552–54.

¹¹¹ *See* Root, *Modern-Day, supra* note 7, at 131, 136.

¹¹² *See id.* at 132–37.

¹¹³ *See id.* at 134–36.

¹¹⁴ *See id.* The Apple antitrust monitorship proved to be very contentious, with repeated disputes between Apple and the monitor, resulting in an appeal to the Second Circuit. *Id.* at 136; *see also* Christopher M. Matthews, *It's in the “Public Interest” to Monitor Apple's Antitrust Reforms, Judge Says*, WALL ST. J. (Jan. 16, 2014, 12:13 PM), <https://www.wsj.com/articles/BL-LB-46915> [<https://perma.cc/6TY5-2KZ9>] (“Judge Cote indicated during a contentious hearing . . . that she would deny Apple's request.”); Roger Parloff, *Who Won the Battle of the Apple Antitrust Monitor?*, FORTUNE (Feb. 11, 2014, 3:28 PM), <https://fortune.com/2014/02/11/who-won-the-battle-of-the-apple-antitrust-monitor> [<https://perma.cc/CGN3-GBHD>] (noting Apple's “crescendo’ing objections” about the monitor's “intrusions” into the company). On appeal, the Second Circuit, without ruling on the legal question of the appropriate scope for court-ordered monitorships, “concluded that [the court's] order [creating the monitorship] ‘should be interpreted narrowly,’ as simply allowing the monitor ‘to assess the appropriateness of the compliance programs adopted by Apple and the means used to communicate those programs to its personnel.’” *Id.* (quoting *United States v. Apple Inc.*, 787 F.3d 131, 137 (2d Cir. 2015)).

and (ii) to engage in activities that look akin to the remediation efforts overseen in corporate compliance monitorships. Thus, the monitor arguably provides a tangible service to the monitored organization beyond rote compliance monitoring.¹¹⁵

* * *

Monitors have been used on a consistent basis for over fifteen years. They are a key actor in overseeing complex remediation efforts at firms that have experienced significant compliance failures. And yet, as is demonstrated in Part II, modern-day monitorships have been plagued with several challenges that have yet to be rectified.

II. THE PROBLEMS OF DISCLOSURE AND OVERSIGHT

This Part focuses on the problems of information disclosure and oversight within the monitorship context. The Part begins by demonstrating how there is limited information disclosure for many modern-day monitorships, which often occur with little to no meaningful court oversight. When information fails to make it to interested parties, conflicts tend to arise within the monitorship process, resulting in Freedom of Information Act¹¹⁶ (FOIA) requests, litigation, and questions about the legitimacy of the monitorship. The Part goes on to explain how the work conducted by monitors lacks formal oversight because it occurs within a regulatory vacuum,¹¹⁷ despite various attempts to create both formal and informal mechanisms for regulating monitors and monitorships.

It is worth noting, however, that these problems are significant because courts, regulators, and prosecutors have proven to be imperfect supervisors over monitors and monitorships. Concerns about the potential of cronyism in the selection process; inadequacies in governmental oversight over the monitorship (whether due to ability or willingness); capture of the regulators or prosecutors by the monitored firm or industry more generally; or conflicts of interest based on the governmental actors' own self-interest have exacerbated the disclosure and oversight problems addressed in this Article.¹¹⁸ This is because courts, regulators, and prosecutors — or, more precisely, the people who are serving in the courts and as regulators and prosecutors — are not perfect, thereby making it important for the issues of information disclosure and oversight to be addressed directly.

¹¹⁵ Root, *Monitor-“Client,”* *supra* note 31, at 564.

¹¹⁶ 5 U.S.C. § 552.

¹¹⁷ Monitors are often, but not always, lawyers, and even when lawyers serve as monitors they are not engaged in an attorney-client relationship, so the Model Rules of Professional Conduct are inapplicable. See Root, *Constraining Monitors*, *supra* note 40, at 2238 n.85, 2246–47.

¹¹⁸ See *infra* pp. 791, 796, 821.

A. Limited Information Disclosure

The section begins by looking at instances where information from the monitor is blocked — either fully or partially — from being accessed by interested third parties, often by obtaining a court order restricting access to the monitor’s report. This section then demonstrates how monitors sometimes successfully gather, analyze, and assess information, but fail to disseminate that information to certain interested parties. The section next looks at situations where the information is available broadly but is not easily understandable by the public without the help and assistance of an intermediary to distill all that the monitor has disseminated. If the monitor provides reports that are hundreds of pages or that include technical material, an intermediary — like a reporter — often steps in to provide high-level information to the public about what occurred during the monitorship.¹¹⁹ When the information that the monitor gathers, analyzes, and assesses is kept private,¹²⁰ it stifles one of the monitor’s key functions, which is to disseminate information across diverse networks to parties with an interest in knowing whether the monitored firm did in fact effectively remediate the underlying misconduct that gave rise to the monitorship.

I. Access to the Monitor’s Information Is Blocked. — It has become common for courts to rule in favor of restricting public access to corporate monitorship reports. For example, after finding that the American International Group (AIG) had engaged in improper accounting and financial reporting, the SEC in 2004 entered into a consent order with the company, which required AIG to retain an independent monitor to “examine certain of its prior transactions and to establish a Transaction Review Committee to review the appropriateness of certain future transactions.”¹²¹ Roughly two years later, both the SEC and AIG filed a motion with the district court to place the monitor’s reports under seal, which would have effectively blocked public access to and dissemination of the monitor’s report.¹²² However, in 2011, a FOIA request was sent to the DOJ and SEC seeking access to the reports, prompting new

¹¹⁹ See *infra* section II.A.3, pp. 781–83.

¹²⁰ The mere fact that the information gathered by the monitor and disseminated to select parties remains secret prompts many to doubt the legitimacy of the practice. There is a line of scholarly research focused on legitimacy in legal decisions that, while not directly applicable to this Article’s argument, does suggest that people respond more positively to laws they view as just or fair. See generally, e.g., Kristina Murphy, Tom R. Tyler & Amy Curtis, *Nurturing Regulatory Compliance: Is Procedural Justice Effective when People Question the Legitimacy of the Law?*, 3 REGUL. & GOVERNANCE 1 (2009). A lack of transparency in the monitorship process prevents the public from knowing whether the remediation effort undertaken was, in fact, just or fair.

¹²¹ American International Group, Inc. Agrees to Settle Charges, Litigation Release No. 18,985, 84 SEC Docket 1104, 1106 (Nov. 30, 2004).

¹²² See Memorandum of Points & Authorities in Support of Joint Motion for Clarification of Consent of Defendant American International Group, Inc. at 5, SEC v. Am. Int’l Grp., Inc., No. 04cv2070 (D.D.C. June 14, 2006), ECF No. 3-1.

litigation.¹²³ The district court ruled in favor of granting access to the reports, finding that the “[r]eports [we]re no different than executed plea agreements with their statements of facts to which the defendant pleads and motions for summary judgment with their many attached exhibits,” and thereby were to be considered judicial records.¹²⁴ The D.C. Circuit, however, disagreed with the district court’s finding that the reports were judicial records “subject to the right of access.”¹²⁵ In reversing the lower court’s decision, the circuit court found that “the district court made no decisions about [the monitor’s reports] or that otherwise relied on them.”¹²⁶ It further noted that the monitor “had no relationship with the court,” and that the consent decree did not give the monitor “powers unique to individuals possessing judicial authority, nor . . . require the [monitor] to file his reports with the court.”¹²⁷ Consequently, the reports remain sealed, and their contents and findings remain out of the public view.¹²⁸

2. *Dissemination of Information Is Imperfect.* — An enforcement monitorship was used as part of the National Mortgage Settlement, which involved five banks, the federal government, and forty-nine state attorneys general.¹²⁹ The banks were accused of engaging in “mortgage loan servicing and foreclosure abuses.”¹³⁰ The agreement outlined several remediation efforts that the banks were required to implement to, in part, provide compensation to homeowners who had been harmed by the banks’ conduct.¹³¹ Additionally, the agreement included the imposition of a monitor.¹³²

The National Mortgage Settlement monitor was an agent of the federal government who was instructed to oversee remediation efforts at several banks.¹³³ The monitor also had the authority to sanction the

¹²³ SEC v. Am. Int’l Grp., Inc., 854 F. Supp. 2d 75, 78 (D.D.C. 2012), *rev’d*, 712 F.3d 1 (D.C. Cir. 2013).

¹²⁴ *Id.* at 81.

¹²⁵ *Am. Int’l Grp.*, 712 F.3d at 3.

¹²⁶ *Id.* at 4.

¹²⁷ *Id.*

¹²⁸ *Id.* at 5.

¹²⁹ Press Release, U.S. Dep’t of Just., Federal Government and State Attorneys General Reach \$25 Billion Agreement with Five Largest Mortgage Servicers to Address Mortgage Loan Servicing and Foreclosure Abuses (Feb. 9, 2012) [hereinafter Mortgage Servicers Press Release], <https://www.justice.gov/opa/pr/2012/February/12-ag-186.html> [<https://perma.cc/9CJX-6L5J>] (discussing the “deceptive practices in the offering of loan modifications” and the retention of an independent monitor to oversee compliance with a consent agreement between the DOJ and Bank of America, JP Morgan Chase & Co., Wells Fargo & Company, Citigroup Inc., and Ally Financial Inc.).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² “The monitor will oversee implementation of the servicing standards required by the agreement; impose penalties of up to \$1 million per violation (or up to \$5 million for certain repeat violations); and publish regular public reports that identify any quarter in which a servicer fell short of the standards imposed in the settlement.” *Id.*

¹³³ *Id.*

banks for noncompliance with the applicable agreements.¹³⁴ The monitor freely provided information to the federal government and the five banks being monitored.¹³⁵ The monitored remediation effort was for the benefit of homeowners, who received information and compensation as a result of the monitorship and retained a strong connection to the monitor.¹³⁶ One of the tasks of the monitorship was to attempt to identify homeowners who qualified for remediation.¹³⁷ However, some evidence suggests that, despite the monitor's best efforts, some eligible homeowners were not notified of their eligibility, frustrating the goal of the remediation effort.¹³⁸ Thus, the failure of monitors to effectively disseminate information from their findings can have a significant impact on the public who otherwise depends on their reports.

3. *An Intermediary Is Needed to Parse Information.* — In 2017, Princess Cruise Lines Ltd. and its parent company, Carnival Cruise Lines PLC (collectively “Carnival”), pleaded guilty to felony charges for illegally dumping oil-contaminated waste into the ocean and falsifying official record logs to cover up its misconduct.¹³⁹ The plea agreement contained an environmental compliance plan detailing what remediation requirements Carnival needed to complete given its environmental misconduct and structural deficiencies.¹⁴⁰ It also imposed a traditional, court-ordered monitor.¹⁴¹

¹³⁴ *Id.*

¹³⁵ In an effort to simplify the discussion of the National Mortgage Settlement monitorship, I have omitted the state attorneys general from this discussion. I have also omitted the fact that many states retained statewide monitors to effectuate the relevant negotiated agreements. See, e.g., Press Release, Univ. of Cal. Irvine Sch. of Law, UCI Law Professor Katherine Porter Issues Final Report for California Monitor Program (Oct. 7, 2014), <https://www.law.uci.edu/news/press-releases/10-07-14.html> [<https://perma.cc/6UC8-BWMR>].

¹³⁶ See Mortgage Servicers Press Release, *supra* note 129.

¹³⁷ See Consent Judgment at 3–4, United States v. Bank of Am. Corp., No. 12-0361 (D.D.C. Apr. 4, 2012), ECF No. 10.

¹³⁸ The DOJ acknowledged that some homeowners who qualified for the program may not be contacted by their bank regarding their ability to participate in the program and encouraged homeowners to contact their banks on their own initiative. Press Release, U.S. Tr. Program, U.S. Dep't of Just., Homeowners in Bankruptcy May Be Eligible for Relief, https://www.justice.gov/sites/default/files/ust/legacy/2012/04/24/341_One_Pager.pdf [<https://perma.cc/H7P5-WWLW>]. Additionally, Professor Katherine Porter helped ensure — as part of the National Mortgage Settlement Agreement — that the companies provide multilingual notices to homeowners, including notices in English and Spanish. CAL. REINVESTMENT COAL., CHASM BETWEEN WORDS AND DEEDS IX: BANK VIOLATIONS HURT HARDEST HIT COMMUNITIES 13 (2013), <https://deadlyclear.files.wordpress.com/2013/04/134353138-chasm-bw-words-and-deeds-ix-final-report-1.pdf> [<https://perma.cc/CJ54-MV9S>] (noting that Porter's efforts in helping provide multilingual notices “set[] a good precedent regarding the importance of translating all foreclosure documents and for future efforts to ensure equal access to all available relief provided by programs or settlement agreements”).

¹³⁹ Carnival Press Release, *supra* note 14.

¹⁴⁰ Plea Agreement attach. B, United States v. Princess Cruise Lines, Ltd., No. 16-20897-CR (S.D. Fla. Dec. 1, 2016), ECF No. 2 [hereinafter Carnival Environmental Compliance Plan].

¹⁴¹ *Id.* attach. B, at 18.

Under the current plea agreement, the court-ordered monitor must provide reports to Carnival and interested parties¹⁴² regarding the company's compliance with the environmental compliance plan, as well as the monitor's own assessment of Carnival's progress toward meeting the goals of the remediation effort as set out in the plea agreement.¹⁴³ Additionally, the monitor must report to interested parties any "information [the monitor receives] regarding a Major Non-Conformity" on Carnival's part or if Carnival fails "to consider and act upon, as appropriate, an Audit Finding or recommendation" by a third-party auditor regarding the agreement's environmental compliance plan.¹⁴⁴ Importantly, the court-ordered monitor identified violations with Carnival's adherence to the environmental compliance program, which, in 2019, resulted in additional criminal penalties and an extension of the probationary period.¹⁴⁵

The monitor overseeing the Carnival monitorship is gathering and disseminating information across a wide swath of parties. He has strong ties to Carnival and its subsidiaries, the court, and the federal government. The monitor's reports in this traditional, court-ordered monitorship are publicly available through the court's docketing system, thus technically giving the public access to the information that the monitor provides to the court. The monitor's reports, however, were not generated specifically for the public — rather, they were generated for the court, the government, and the company. The monitor's December 2019 report, for example, is 100 pages, and while it does have an accessible executive summary and takeaways, it is also full of additional information that is probably irrelevant to the average citizen concerned about environmental harms.¹⁴⁶ However, because the reports are accessible publicly, a number of intermediaries have taken the information in the monitor's reports, synthesized it, and disseminated it to the public. For example, one of the most common intermediaries between the public and a monitor are reporters. The *Miami Herald* has published a number of articles explaining the alleged misconduct at Carnival as well as the status of the monitorship and other remediation efforts.¹⁴⁷ Additional intermediaries can include attorneys who go through the information in

¹⁴² Interested parties under Carnival's Environmental Compliance Plan include "the Government, the United States Probation Office for the Southern District of Florida, the Seventh Coast Guard District (dp), and the U.S. Coast Guard Office of Investigations & Analysis." *Id.* attach. B, at 3.

¹⁴³ *Id.* attach. B, at 19–20. Steven P. Solow served as the court-appointed, or court-ordered, monitor. Carnival Monitor Closing Letter, *supra* note 36, at 14.

¹⁴⁴ Carnival Environmental Compliance Plan, *supra* note 140, at 20.

¹⁴⁵ Carnival Press Release, *supra* note 14.

¹⁴⁶ See Carnival Monitor Quarterly Report, *supra* note 19.

¹⁴⁷ See, e.g., Taylor Dolven, *Federal Judge Frustrated over Carnival's Continued Pollution While on Probation*, MIA. HERALD (Jan. 8, 2020, 6:27 PM), <https://www.miamiherald.com/news/business/tourism-cruises/article239089503.html> [<https://perma.cc/KGA6-VYUC>]; Taylor Dolven, *Carnival Violated Environmental Laws During Second Year on Probation, Monitor Found*, MIA. HERALD (July 22, 2019, 5:14 PM), <https://www.miamiherald.com/news/business/tourism-cruises/article232750552.html> [<https://perma.cc/CP7J-4LMR>].

the monitor's report and court filings and then provide some analysis while disseminating it to a segment of the public.¹⁴⁸ In any event, when a monitor's report is technically accessible by all parties, it sometimes is not practically accessible given the manner and tone in which the report has been drafted.¹⁴⁹ In those situations, the public may rely on intermediaries, rather than the monitor themselves, to provide a better understanding of the status of the monitorship and remediation effort.

4. *Resistance Against Report Disclosure Is Entrenched.* — Information disclosure and lack of oversight could be resolved via a number of methods. Perhaps the easiest way to ensure greater disclosure about the work done by monitors would be for the corporation, the government, and the monitor themselves to agree to release the information. If some or all of these parties argued strongly in favor of greater information disclosure, the current norms regarding monitorships today might shift in dramatic ways. This, however, seems quite unlikely.

(a) *The DOJ.* — The DOJ has been quick to join with corporations in arguing against the disclosure of corporate monitor reports in formal litigation. Whether it was in *SEC v. AIG*,¹⁵⁰ where the government successfully urged the courts to prevent a reporter from obtaining access to the monitor reports,¹⁵¹ or *United States v. HSBC Bank USA*,¹⁵² where the DOJ argued that the district court must not disclose interim monitor reports that were created by the monitor,¹⁵³ or *Tokar v. DOJ*,¹⁵⁴ where the government went so far as to litigate against turning over even the names of individuals who served as monitors after firms entered into some sort of negotiated settlement agreement with the government,¹⁵⁵ the DOJ has time and again demonstrated its willingness to litigate strongly in favor of keeping monitor reports private. Indeed, even as DOJ officials acknowledged difficulties occurring within

¹⁴⁸ See, e.g., Jim Walker, *Court Appointed Monitor: Carnival Continues to Violate Air Emission Laws*, WALKER & O'NEILL MAR. LAWS.: CRUISE L. NEWS (Jan. 7, 2020), <https://www.cruiselawnews.com/2020/01/articles/pollution/court-appointed-monitor-carnival-continues-to-violate-air-emission-laws> [https://perma.cc/CYH9-235N].

¹⁴⁹ The monitor's reports for Carnival are available on the court website, and on one of the intermediaries' websites, but much of the public does not know how to pull documents from a court's docket. Moreover, there are associated costs to retrieving these documents and information from the court's docket. See Ann E. Marimow, *Should the Public Pay a Dime for Access to Court Records?*, WASH. POST (Feb. 3, 2020, 1:56 PM), https://www.washingtonpost.com/local/legal-issues/should-the-public-pay-a-dime-for-access-to-court-records/2020/02/02/578fa488-42d1-11ea-b5fc-eefa848cde99_story.html [https://perma.cc/4E48-ZMP4]. That said, any time a report is dozens or hundreds of pages, it is going to necessarily be less accessible to a general member of the public because the time necessary to parse through the document will be pretty significant.

¹⁵⁰ 712 F.3d 1 (D.C. Cir. 2013).

¹⁵¹ *Id.* at 5.

¹⁵² No. 12-CR-763, 2016 WL 347670 (E.D.N.Y. Jan. 28, 2016), *rev'd*, 863 F.3d 125 (2d Cir. 2017).

¹⁵³ Motion to File Monitor's Report Under Seal, *HSBC Bank USA*, No. 12-CR-763, ECF No. 35.

¹⁵⁴ 304 F. Supp. 3d 81 (D.D.C. 2018).

¹⁵⁵ *Id.* at 87–89.

monitorships, its response focused on greater oversight by the DOJ itself, not greater public disclosure.¹⁵⁶

The DOJ's reluctance to promote more information disclosure for monitorships likely has a variety of causes, but the most prevalent appears to be its desire to obtain unfettered access regarding the full scope of misconduct from the firm itself.¹⁵⁷ The DOJ has implemented a range of policies, including attempts to have firms waive attorney-client privilege¹⁵⁸ or turn over individuals engaged in wrongdoing,¹⁵⁹ to ensure full disclosure from firms. These efforts are often accompanied with a statement that mitigation credit will be withheld from firms that do not comply.¹⁶⁰ And while the DOJ has often walked back these policy pronouncements in response to objections from the white-collar defense bar,¹⁶¹ there are many reasons to believe that part of its reason for advocating in favor of confidentiality surrounding monitorship reports is as a way to bolster its negotiations with firms that the DOJ wants to have retain a monitor.¹⁶²

Additionally, in recent work, I argue that this behavior by the government demonstrated that it prioritized its own access to obtaining information related to a firm's misconduct over other important considerations.¹⁶³ This insight seems particularly salient when applied to the use of monitorships today. The upshot is that the DOJ routinely includes language in its negotiated settlement agreements stating that any reports will remain private and considered confidential, and it has backed up this language by litigating against those who have attempted to access this information. The DOJ has engaged in this behavior even though it has failed to effectively oversee some monitorships. For example, Deputy Attorney General Monaco recently acknowledged that

¹⁵⁶ See Livni, *supra* note 38 (noting issues related to monitorships in the past and explaining that a new set of policies would require greater oversight by DOJ officials of the work being done by monitors).

¹⁵⁷ This is my own independent assessment of the conduct of the DOJ based on my observations over the past decade. The DOJ's stated reasons for objecting include a potential chilling effect on the monitor's ability to work with employees within the firm and to engage in interagency and intercountry enforcement activity. See Motion to File Monitor's Report Under Seal, *supra* note 153. I do not dispute the validity of these concerns, but my own view of the more fulsome situation is articulated in this section.

¹⁵⁸ Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Just., to Heads of Dep't Components & U.S. Att'ys 8 (Dec. 12, 2006), https://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf [<https://perma.cc/9PJB-C6Z6>].

¹⁵⁹ See Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Just., to Assistant Att'y Gen., Antitrust Div., et al. 2–3 (Sept. 9, 2015), <https://www.justice.gov/archives/dag/file/769036/download> [<https://perma.cc/JVT3-REFA>].

¹⁶⁰ See, e.g., *id.* at 2.

¹⁶¹ Martinez, *Government's Prioritization*, *supra* note 47, at 102.

¹⁶² *Id.* at 104.

¹⁶³ *Id.* at 99–105.

the department had failed to oversee a variety of issues that had arisen during monitorships.¹⁶⁴

(b) *The Monitored Firm.* — Corporations have generally fought quite hard against the notion that it might be acceptable for monitors to turn over their reports in a manner that would make their contents publicly accessible. AIG, for example, emphatically insisted that it would not have entered into the monitorship if it had known the reports would be made public.¹⁶⁵ Interestingly, after *AIG*, the use of temporary monitorships decreased in favor of “self-reporting” periods.¹⁶⁶ No one can confidently state why this occurred, but one hypothesis may be that firms watching the *AIG* litigation saw how close the reports were to being disclosed and were more reluctant to agree to terms of a negotiated settlement agreement that included a monitorship provision. Corporations are typically not pleased at the prospect of retaining a monitorship,¹⁶⁷ so it is unsurprising that they are reluctant to have information regarding the monitorship disclosed to the public.

(c) *The Monitor.* — Some monitors have also expressed concern about disclosing aspects of their reports. Perhaps the best example of this is in the *HSBC* case, where the monitor filed an affidavit arguing against the disclosure of his reports.¹⁶⁸ In part, the monitor explained his belief that if the interim report were to be made public, it would create a chilling effect on future employees whom he might attempt to interview.¹⁶⁹ The monitor was concerned that if the employees knew their statements would end up in the public domain, it might discourage them from being forthcoming for fear of causing harm to themselves or others.¹⁷⁰ Accordingly, principal actors, like the monitor and the government entity, will often attempt to evade public disclosure by expressing concerns over the impact that such disclosure will have in pursuing

¹⁶⁴ Livni, *supra* note 38.

¹⁶⁵ Opposition of the Securities and Exchange Commission and American International Group, Inc. to the Motion of Sue Reisinger for Leave to Intervene for Access to Monitor’s Reports at 12, SEC v. Am. Int’l Grp., No. 04-2070 (D.D.C. Feb. 28, 2012), ECF No. 20.

¹⁶⁶ See, e.g., 2014 Year-End FCPA Update, GIBSON DUNN LLP (Jan. 5, 2015), <https://www.gibsondunn.com/2014-year-end-fcpa-update> [<https://perma.cc/7FEY-2BMG>].

¹⁶⁷ Warin, Diamant & Root, *supra* note 46, at 325–26.

¹⁶⁸ Cherkasky Affidavit, *supra* note 28, ¶¶ 10–12.

¹⁶⁹ *Id.*

¹⁷⁰ The DOJ expressed similar concerns over chilling effects for the monitor when nonprofit news organization 100Reporters submitted a FOIA request to access a monitor’s annual reports in the Siemens AG case. Memorandum of Points and Authorities in Support of the United States Department of Justice’s Motion for Summary Judgment at 27, 100Reporters LLC v. U.S. Dep’t of Just., No. 14-1264 (D.D.C. Mar. 22, 2016), ECF No. 59-2 (“If the information that the DOJ obtains from monitors is subject to disclosure under FOIA, then the quality of the information that the Monitor receives from the affected companies will be diminished because . . . [i]f the affected companies knew that the information relayed to the Monitor, and ultimately to the government, would be publicly disclosed, those companies [would be] less likely [to] volunteer information with monitors, including reporting new misconduct or problems with their compliance program.”).

and achieving the remedial goals of the monitorship — the success of which is often determined upon balancing the parties' various interests.

B. *Elusive Oversight*

As demonstrated in Part I, the use of a monitor to oversee complex remediation at firms occurs in a variety of ways. This complexity, while not inherently good or bad, has made it difficult to establish a set of formal rules that will apply across all monitorship types. Each monitorship involves a different set of actors, and the remediation effort could be as simple as monitoring compliance with a predetermined set of requirements or as complex as assisting in a major effort to overhaul a firm's compliance program. The upshot is that it is extremely difficult to adopt a set of uniform rules to govern all monitorships because monitorships are heterogeneous phenomena.

As a result, there is no formal regulation or oversight over monitors or monitorships. They operate in a regulatory vacuum.¹⁷¹ The combination of power, secrecy, and lack of regulatory oversight has led to a number of questions surrounding the use of monitorships, including the potential of (i) cronyism in the monitor-selection process, (ii) capture of the monitor or, when applicable, the government during the course of the monitorship, and (iii) a lack of responsiveness by the monitored corporation to the monitor's recommendations.

A number of efforts have been undertaken to address the need to formally oversee monitors and monitorships, but they have been largely unsuccessful.¹⁷² For example, legislation governing monitorships failed to move beyond the U.S. House of Representatives.¹⁷³ Additionally, attempts by district court judges to assert authority over monitorships have been rejected by courts of appeals.¹⁷⁴ Informal efforts to regulate monitors have also been pursued, but because they are nonbinding, their ability to serve as a reliable check on monitor behavior is limited. For instance, the American Bar Association engaged in a several-year effort to create a set of standards to informally govern monitors and monitorships.¹⁷⁵ During this time, the International Association of Independent Corporate Monitors was created, which issued its own Code of

¹⁷¹ Monitors are often, but not always, lawyers, and even when lawyers serve as monitors they are not engaged in an attorney-client relationship, so the Model Rules of Professional Conduct are inapplicable. Root, *Monitor-“Client,”* *supra* note 31, at 537; *see also* Veronica Root Martinez, *Third Party and Appointed Monitorships*, in *THE CAMBRIDGE HANDBOOK ON COMPLIANCE* 605, 607 (Benjamin van Rooij & D. Daniel Sokol eds., 2020) [hereinafter Martinez, *Third Party*].

¹⁷² Martinez, *Third Party*, *supra* note 171, at 610.

¹⁷³ Accountability in Deferred Prosecution Act of 2009, H.R. 1947, 111th Cong. (2009); Accountability in Deferred Prosecution Act of 2008, H.R. 6492, 110th Cong. (2008).

¹⁷⁴ *See, e.g.*, United States v. HSBC Bank USA, N.A., No. 12-CR-763, 2016 WL 347670, at *4 (E.D.N.Y. Jan. 28, 2016), *rev'd*, 863 F.3d 125 (2d Cir. 2017); SEC v. Am. Int'l Grp., Inc., 854 F. Supp. 2d 75, 83 (D.D.C. 2012), *rev'd*, 712 F.3d 1 (D.C. Cir. 2013).

¹⁷⁵ ABA CRIM. JUST. STANDARDS COMM., STANDARDS FOR CRIMINAL JUSTICE MONITORS AND MONITORING (2020).

Professional Conduct.¹⁷⁶ More recently, practitioners have banded together to provide information about the role of monitors and monitorships.¹⁷⁷ These more informal mechanisms may help to solidify a set of expectations and norms for monitors and monitorships, but they are inherently limited given that adherence to these guidelines and norms is necessarily voluntary.

As a result, there are two primary constraints on monitor behavior. The first is the agreement or court order that created the monitorship. The monitor's ability to pursue certain lines of inquiry is based directly on the original description in the documents that created the monitorship since it is this description that establishes and defines the monitor's power and authority.¹⁷⁸ Consequently, the scope, boundaries, and oversight of the monitorship fluctuate depending on the order or agreement. For a court-ordered monitorship, in theory, the monitor should receive strong oversight from the court. Indeed, scholars have explicitly called for more involvement of courts when monitorships are a part of negotiated settlement agreements, with the hope that it would create more stable oversight of monitorships.¹⁷⁹ For monitorships that occur outside of the court context, questions can arise over what to do if there is a conflict between the monitor and the monitored company.¹⁸⁰ DOJ settlement agreements tend to state that disputes can be elevated to the DOJ for resolution,¹⁸¹ but the DOJ is not the only agency that requires the imposition of monitors,¹⁸² and the DOJ is sometimes critiqued for demonstrating signs of capture.¹⁸³ The upshot is that while the monitorship agreement does provide boundaries and limitations to govern

¹⁷⁶ INT'L ASS'N OF INDEP. CORP. MONITORS, CODE OF PROFESSIONAL CONDUCT (2016), <https://iaicm.org/wp-content/uploads/2015/04/Adopted-IAICM-Code-of-Professional-Conduct.pdf> [<https://perma.cc/36RD-GDRT>].

¹⁷⁷ See, e.g., GLOB. INVESTIGATIONS REV., GUIDE TO MONITORSHIPS (Anthony S. Barkow, Neil M. Barofsky & Thomas J. Perrelli eds., 3d ed. 2022).

¹⁷⁸ *HSBC Bank USA*, 863 F.3d at 136–37.

¹⁷⁹ GARRETT, *supra* note 87, at 176–77 (discussing the need for more robust court oversight of all monitorships that are the outgrowth of a deferred or nonprosecution agreement).

¹⁸⁰ See *supra* section I.A.2, pp. 771–73.

¹⁸¹ “[A]n agreement should explain what role the Department could play in resolving any disputes between the monitor and the corporation, given the facts and circumstances of the case.” Memorandum from Gary G. Grindler, Acting Deputy Att’y Gen., to Heads of Dep’t Components & U.S. Att’ys (May 25, 2010), <https://www.justice.gov/dag/dag-memo-guidance-monitors.html> [<https://perma.cc/2V8X-WB28>].

¹⁸² The FTC, for example, sometimes uses monitorships. See Press Release, Fed. Trade Comm’n, Herbalife Will Restructure Its Multi-level Marketing Operations and Pay \$200 Million for Consumer Redress to Settle FTC Charges (July 15, 2016), <https://www.ftc.gov/news-events/news/press-releases/2016/07/herbalife-will-restructure-its-multi-level-marketing-operations-pay-200-million-consumer-redress> [<https://perma.cc/9C5P-LDKJ>].

¹⁸³ See Root, *Monitor-“Client,” supra* note 31, at 579 (noting that monitor or regulatory “capture could lead to ‘sympathy to industry (implying excessive sympathy), identification with industry’s interest, and (unduly) lax enforcement’” (quoting Dorit Rubinstein Reiss, *The Benefits of Capture*, 47 WAKE FOREST L. REV. 569, 578–79 (2012))); Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. (SPECIAL ISSUE) 167, 178 (1990).

the monitorship, ad hoc agreements are likely not sufficient, on their own, to trigger standardized, comprehensive oversight over the many diverse regulatory and legal areas where monitors are appointed.

The second constraint is the monitor's own reputation. Each appointed monitor, like a lawyer or an auditor, must maintain awareness of her reputational capital, or "the value of [her] reputation in the relevant marketplace," when undertaking a monitorship.¹⁸⁴ Even when the identity of the monitor is not readily available to the public,¹⁸⁵ informal networks of general counsels and chief ethics and compliance officers are likely aware of who has been appointed to serve as firm's monitor and, importantly, the reputation of the individual monitor. Additionally, repeat players like the DOJ and other enforcement agencies will have at least some aspect of historical knowledge about whom they have approved to serve as monitors in the past and the quality of their work.¹⁸⁶ Because monitorship appointments are often very profitable endeavors, monitors have a strong incentive to ensure that their reputations are pristine, both in the view of the government and in the view of firms that may be on the receiving end of a monitorship appointment.¹⁸⁷ Therefore, monitors are constrained at least in part by their desire to maintain a strong reputation across the various networks of individuals who may appoint them for subsequent monitorship engagements.¹⁸⁸

* * *

The upshot is that information disclosure and oversight challenges have presented themselves for over a decade and continue to persist.

¹⁸⁴ Alex Raskolnikov, *The Cost of Norms: Tax Effects of Tacit Understandings*, 74 U. CHI. L. REV. 601, 671 (2007).

¹⁸⁵ See, e.g., Tokar v. U.S. Dep't of Just., 304 F. Supp. 3d 81, 89 (D.D.C. 2018); *List of Independent Compliance Monitors for Active and Previous Fraud Section Monitorships*, U.S. DEP'T OF JUST. (Sept. 22, 2022), <https://www.justice.gov/criminal-fraud/strategy-policy-and-training-unit/monitorships> [<https://perma.cc/NJ6X-HYKY>]; see also Ephraim Wernick, Palmina M. Fava, Ronald J. Tenpas, Conrad Bolston & Peter Thomas, *Monitoring Corporate Monitors: DOJ Publishes List of Compliance Monitors, Improving Transparency and Accountability in the Monitorship Program*, VINSON & ELKINS LLP (Apr. 16, 2020), <https://www.velaw.com/insights/monitoring-corporatemonitors-doj-publishes-list-of-compliance-monitors-improving-transparency-and-accountability-in-the-monitorship-program> [<https://perma.cc/UCZ9-9HFQ>] (demonstrating the transparency of monitor identity in response to the litigation).

¹⁸⁶ Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713, 1740 (2007) ("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.")

¹⁸⁷ Root, *Constraining Monitors*, *supra* note 40, at 2229; see also Bernard S. Black, *Information Asymmetry, The Internet, and Securities Offerings*, 2 J. SMALL & EMERGING BUS. L. 91, 96 (1998) (noting that in securities regulation, "[e]nsuring that broker-dealers treat their customers fairly is an important indirect constraint on both puffing and outright fraud").

¹⁸⁸ See Dave Owen, *Private Facilitators of Public Regulation: A Study of the Environmental Consulting Industry*, 15 REGUL. & GOVERNANCE 226, 234 (2021) (noting consultants' struggles to maintain neutrality and reputation when conducting their work).

Monitors oversee remediation efforts that impact victims and members of the public every day, yet efforts to have information disclosed regarding their work — like in the HSBC and AIG examples — can be blocked or, as in the Carnival example, produce something difficult for the average member of the public to digest as provided. The lack of disclosure is exacerbated by the reality that monitors operate in a regulatory vacuum.¹⁸⁹ Lack of public disclosure might not be as problematic if there were a robust oversight regime in place to ensure proper conduct on the part of both the monitor and the monitored firm, but such oversight is sorely lacking. This Article suggests that to address the problems of information disclosure and lack of oversight, one must find a way to bring more information about the results of each monitorship into the light of day.

III. REQUIRING A PUBLIC REPORT

As detailed above, attempting to regulate monitors directly seems to be an endeavor unlikely to succeed. The diversity in actors who serve as monitors, paired with the large range of regulators, prosecutors, and courts that rely on monitors in some way to oversee remediation efforts, has made it difficult to identify and implement universal rules or standards across all monitorship types. Recognizing this reality, this Article suggests an end run around direct regulation of monitors or monitorships themselves; it argues in favor of interventions that focus on increasing transparency regarding the results of the monitorship.¹⁹⁰

In particular, this Article argues that at the conclusion of all monitorships, a public report should be disseminated that opines on whether the firm has or has not engaged in a successful remediation effort. This Part begins by outlining how a public report might be incentivized. The Part next discusses standardized elements to include in a public report that details the results of a monitorship. The Part then outlines why a public report might be beneficial by drawing on corporate crime and securities literatures. The public report, on its own, might help cure many of the concerns raised by the lack of information disclosure associated with monitorships.

¹⁸⁹ See Martinez, *Third Party*, *supra* note 171, at 610.

¹⁹⁰ This Article argues that at the conclusion of all monitorships, the public should receive an accounting of the work completed by the monitor and whether the firm has or has not engaged in a successful remediation effort. This includes traditional, court-ordered monitorships, which already have strong transparency norms. But as indicated above, transparency and accessibility are not synonymous. The public report conceptualized in this Article is meant to provide an accessible and concise account of the firm's success or failure at its remediation process. Even for traditional, court-ordered monitorships, this sort of public reporting may be helpful to allow the public an accessible means of understanding the state of the firm's remediation effort.

A. The Public Report: A Proposal

As explained in Part I, a monitor oversees or assists in a remediation effort at a firm that has engaged in misconduct. In doing so, the monitor gathers, analyzes, and assesses information it receives during the monitoring period. It then disseminates information about the status of the remediation effort to leaders within the firm and others that were parties to the creation of the monitorship — typically a court or a governmental enforcement authority. The public, however, generally does not get access to the monitor's reports, which has created the information disclosure problem outlined in section II.A of this Article. Indeed, one of the most common concerns regarding compliance efforts at firms — like those raised by monitorships — is whether they are designed and implemented in a manner likely to be effective or are rather simply put into place for “paper” or “cosmetic” purposes.¹⁹¹ This section discusses how to create and structure a set of public reports meant to be issued at the conclusion of all monitorships. It then outlines, at a purposefully high level, what specific information should be included within a public report. It concludes by examining a monitorship where public reports and more traditional reports were both prepared.

I. Creating Incentives to Issue a Public Report. — The first-order question for this Article's proposed public report is, of course, how would one create incentives for the use of this new reporting mechanism? This section walks through three potential scenarios: (i) an act of Congress (unlikely), (ii) an SEC disclosure mandate for public companies, and (iii) a policy intervention from OMB.

(a) Ideal Proposal: Congressional Intervention. — The most sweeping and impactful means of implementing a public reporting mandate would be for Congress to pass legislation ordering all federal entities that utilize a monitor to require the creation and dissemination of a public report. Monitors are used by the DOJ, the SEC, the FTC, and a whole host of other administrative agencies.¹⁹² It would be difficult, if not impossible, to capture the full scope of how independent, private outsiders are utilized to oversee remediation efforts at organizations that have engaged in misconduct without formal congressional intervention.

The primary challenge in crafting legislation of this sort would be one of terminology. As discussed above, governmental actors use a variety of terms to capture the same sort of conduct.¹⁹³ Therefore, any act by Congress would need to define what sort of activity would trigger a public reporting mandate, like the government's use of “(i) an

¹⁹¹ See Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 491 (2003) (“[A] growing body of evidence indicates that internal compliance structures do not deter prohibited conduct . . . and may largely serve a window-dressing function . . .”).

¹⁹² See, e.g., Root, *Modern-Day*, *supra* note 7, at 119, 122, 131.

¹⁹³ See *supra* note 87; Root, *Monitor-“Client,” supra* note 31, at 528–29.

independent, private outsider, (ii) employed after an institution is found to have engaged in wrongdoing, (iii) who effectuates remediation of the institution's misconduct, and (iv) provides information to outside actors about the status of the institution's remediation efforts."¹⁹⁴ By focusing on these factors instead of the term "monitor," Congress would ensure that reports would be obtained from monitors regardless of the relevant term used in the agreement that gives birth to the monitorship. It would also make it more difficult for an agency to dodge the public reporting requirement should it attempt to use a different title than "monitor" in its agreements or orders.

Past proposed legislation involving monitorships focused primarily on the use of monitors by the DOJ¹⁹⁵ and was prompted by concerns of cronyism¹⁹⁶ and potential abuse.¹⁹⁷ A public reporting mandate for all monitorships — especially one that could ensure more fulsome oversight over the use of monitors throughout the federal government — would be more challenging to draft. Despite this challenge, the legislation itself would be a relatively narrow intervention: when independent, private outsiders are utilized to oversee remediation efforts, the results of those efforts should be documented for the public.

The weakness of a proposal that relies on congressional activity is that federal legislation is difficult to pass, particularly in the midst of the current political and economic upheaval prompted by the events of 2020.¹⁹⁸ Because of this gridlock, it may be more efficient to attempt to obtain a public reporting mandate via regulatory intervention and policy change. This is particularly true as the current Administration has taken a more aggressive corporate enforcement stance than the last, including a greater focus on the use of monitors.¹⁹⁹

¹⁹⁴ Root, *Modern-Day*, *supra* note 7, at 111.

¹⁹⁵ See Accountability in Deferred Prosecution Act of 2009, H.R. 1947, 111th Cong. (2009); Accountability in Deferred Prosecution Act of 2008, H.R. 6492, 110th Cong. (2008).

¹⁹⁶ See *Deferred Prosecution: Should Corporate Settlement Agreements Be Without Guidelines?: Hearing Before the Subcomm. on Com. & Admin. L. of the H. Comm. on the Judiciary*, *supra* note 68, at 1–2 (statement of Rep. Sánchez, Chairwoman, H. Subcomm. on Com. & Admin. L.) (noting her concern on the appointment of former Attorney General John Ashcroft as a monitor for Zimmer Holdings); *Ashcroft Consulting Deal Reeks of Cronyism*, TAMPA BAY TIMES (Jan. 18, 2008), <https://www.tampabay.com/archive/2008/01/11/ashcroft-consulting-deal-reeks-of-cronyism> [<https://perma.cc/8JJA-9LJG>]; Shenon, *supra* note 68.

¹⁹⁷ See Shenon *supra* note 68; see also Morford Memorandum, *supra* note 70.

¹⁹⁸ Cf. BROOKINGS INST., LEGISLATIVE PRODUCTIVITY IN CONGRESS AND WORKLOAD 1–4 (2019), <https://www.brookings.edu/wp-content/uploads/2019/03/chpt-6.pdf> [<https://perma.cc/ZAE4-MBBK>]; William Hicks, *Partisan Competition and the Efficiency of Lawmaking in American State Legislatures, 1991–2009*, 43 AM. POL. RSCH. 743, 763 (2015) (“[T]he partisan composition of state legislatures influences the efficiency with which they process legislation”); Jeffrey D. Grynawski, *Congress Used to Pass Bipartisan Legislation — Will It Ever Again?*, THE CONVERSATION (Jan. 4, 2019, 6:35 AM), <https://theconversation.com/congress-used-to-pass-bipartisan-legislation-will-it-ever-again-107134> [<https://perma.cc/7LHU-26TJ>].

¹⁹⁹ See Monaco Press Release, *supra* note 10.

(b) *Second-Best Proposal 1: SEC Disclosure Mandate.* — Regulatory requirements from the SEC require firms to disclose information in a variety of contexts.²⁰⁰ The SEC could require, as part of its general disclosure authority, that public firms provide a public report detailing the results of a monitorship. Currently, the end of a monitorship would likely need to be included in a firm's routine quarterly or annual filings, but that information on its own does not inform the public in the manner this Article proposes. It would, however, be possible to require firms to issue a public report, with signed attestation from the monitor, that details the remediation effort undertaken during the monitorship.²⁰¹ Moreover, SEC regulations could require that the reports include standardized elements, like those presented in section III.A.2 below, which would allow consistency from one disclosed report to the next.

The downside to an intervention that depends upon the SEC is that it would apply only to public companies, thereby omitting various other types of organizations that sometimes utilize monitorships.²⁰² That said, the SEC's regulatory scope would allow it to gather information about monitorships entered into by public companies across a variety of industries and legal areas. Thus, this intervention, while imperfect, could be quite significant. That said, this intervention would require a complementary intervention to ensure the issuance of public reports from monitorships outside the public firm context, which necessitates the next proposal.

(c) *Second-Best Proposal 2: New OMB Policy.* — OMB has oversight authority over all executive branch agencies, which includes management over agency performance as well as regulatory policy.²⁰³ As part of its oversight of performance, OMB could strongly urge all federal agencies that utilize monitorships to provide a public report any time a monitorship concludes. Because OMB oversees a wide swath of agencies, a regulatory intervention from it would capture a large percentage of monitors retained at the request or requirement of the federal government. Additionally, a strong policy from OMB would be squarely

²⁰⁰ See, e.g., *Disclosure Guidance*, U.S. SEC. & EXCH. COMM'N (May 3, 2022), <https://www.sec.gov/corpfin/cfdisclosure> [<https://perma.cc/Y9KM-579F>].

²⁰¹ One way to do this would be to modify Form S-K requirements. Item 103 of current Form S-K requirements provides a strong model of how one might create a public reporting mandate for public companies to detail the results of monitorships undertaken. Cf. Laura D. Richman, David S. Bakst, Robert F. Gray, Michael L. Hermsen, Anna T. Pinedo & David A. Schuette, *SEC Adopts Rules to Modernize and Simplify Disclosure*, 20 J. INV. COMPLIANCE 1, 2 (2019). The SEC modernized these requirements in 2019, including by moving "from prescriptive disclosure requirements toward a more 'principles-based, registrant-specific approach to disclosure.'" Andrew R. Brownstein, John L. Robinson & Elina Tetelbaum, *The New SEC Regulation S-K Rules*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 14, 2020), <https://corpgov.law.harvard.edu/2020/10/14/the-new-sec-regulation-s-k-rules> [<https://perma.cc/J4HP-A9CN>].

²⁰² See, e.g., *Former FBI Director Freeh to Conduct Independent Investigation*, *supra* note 65.

²⁰³ See Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 807, 823–24, 836 (2013).

within the spirit of its oversight ability, as such a concise report with consistent categories of information would provide OMB with a better understanding of the ways in which the federal government is utilizing monitors. That sort of information could, eventually, be harnessed to study their effectiveness in different contexts.

There are potential drawbacks to relying upon OMB as one avenue for requiring a public report. First, OMB typically oversees only executive branch agencies, so a proposal based on OMB might not reach independent agencies that employ monitorships.²⁰⁴ Second, and more concerning, scholars have criticized OMB's transparency, independence, and professional competence.²⁰⁵ But if OMB required all monitorships entered into as part of a settlement with an executive agency to include a public report from the monitor, one would not necessarily have to rely solely upon OMB to engage in an analysis of the information gathered. For example, the Government Accountability Office has been previously tasked with research into topics related to monitorships.²⁰⁶ Additionally, there are a number of parties — academics, members of Congress, policymakers, and perhaps even the white-collar defense bar — with an interest in researching the use and effectiveness of monitors and monitorships.²⁰⁷ This research, however, has been limited because much of the work done by monitors outside of the court-ordered context occurs in secret.²⁰⁸

2. *Standardized Elements for Public Reports.* — This Article argues that at the conclusion of all monitorships, the public should receive an accounting that details whether the firm has or has not engaged in a successful remediation effort. It has suggested two mechanisms for incentivizing the creation of such public reports: intervention via SEC regulation or a policy change at OMB. For both of these potential interventions, the public report should include certain standardized terms. This section outlines the terms that the SEC and OMB should consider requiring of any public reports issued at the conclusion of a monitorship.

(a) *Timing/Frequency.* — Currently, the decision to appoint a monitor is often communicated to the public directly through a press release from the relevant governmental actor, the court, or the monitored organization itself.²⁰⁹ Though the public is told that a monitorship has

²⁰⁴ See *id.* at 776–81; Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV. 273, 276 (1993); Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 607–11 (2010).

²⁰⁵ See Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1169 (2014).

²⁰⁶ See Root, *Modern-Day*, *supra* note 7, at 112.

²⁰⁷ See Martinez, *Third Party*, *supra* note 171, at 613–14.

²⁰⁸ See Root, *Monitor-“Client,”* *supra* note 31, at 532.

²⁰⁹ See, e.g., Carnival Press Release, *supra* note 14 (“[A]ll Carnival related cruise lines vessels eligible to trade in U.S. ports were required to comply with a court approved and supervised environmental compliance plan . . . [and] audits by an independent company and oversight by a Court Appointed Monitor.”).

been determined to be necessary, there is no similar “noisy” announcement when the monitorship concludes. This absence persists despite calls for greater transparency in the monitorship process from a variety of interested parties.²¹⁰ While this Article advocates for a public report to be issued at the conclusion of the monitorship, this proposal leaves open two questions related to timing.

First, should interim public reports be required as well, like the interim progress reports provided to the court and the government under current monitorships?²¹¹ The amount of time between the beginning of the monitorship and its conclusion is often quite significant,²¹² so a legitimate question exists as to whether there should be regular updates to the public regarding the status of the remediation effort. The problem, however, as explained by the HSBC monitor, is that interim updates, depending upon the extent and nature of the information therein, might discourage employees from continued cooperation with the monitor.²¹³ The monitor is by definition an outsider; she will depend on information gathered from individuals within the organization. Because of the potential risk that releasing interim reports to the public will negatively impact the monitor’s ability to gather the information needed to facilitate and oversee an effective remediation effort, this Article does not advocate in favor of interim reports.

Second, what should occur if the original monitorship term is amended? There have been a variety of situations where additional misconduct has come to light during the course of a monitorship, which has resulted in the extension of the monitoring term.²¹⁴ In these instances, a public report should be released explaining why it was deemed necessary to extend the monitorship term. If the public reporting mandate is adopted for monitorships, the public will expect to be informed at the conclusion of the monitorship. If that date changes, the public might begin to wonder what occurred and why the report has been delayed. Instead of keeping the public wondering, a report should be issued explaining the status of the remediation effort and the rationale

²¹⁰ See, e.g., Press Release, U.S. Dep’t of Just., Deputy Attorney General Lisa O. Monaco Delivers Remarks on Corporate Criminal Enforcement (Sept. 15, 2022), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement> [<https://perma.cc/3NYX-EBWV>] (noting that the DOJ has “heard a call for more transparency to reduce suspicion and confusion about monitors”).

²¹¹ See Warin, Diamant & Root, *supra* note 46, at 348.

²¹² Monitorship terms are often three to four years when they are the result of a settlement with the DOJ. See *id.* at 347–48. For other regulators, a monitorship term can be up to twenty years. See, e.g., Agreement Containing Consent Order at 6, Facebook, Inc., No. 092 3184 (F.T.C. Nov. 29, 2011); Agreement Containing Consent Order at 5–6, Google Inc., No. 102 3136 (F.T.C. Mar. 30, 2011).

²¹³ See Cherkasky Affidavit, *supra* note 28, ¶ 11.

²¹⁴ See, e.g., Carnival Press Release, *supra* note 14; Ben Protes, *New Bribery Evidence Adds a Year to Biomet’s Probation*, N.Y. TIMES (Mar. 17, 2015), <https://www.nytimes.com/2015/03/18/business/new-bribery-evidence-adds-a-year-to-biomet-probation.html> [<https://perma.cc/NN74-UP7W>].

behind the extension. For monitorships that are shortened, the rationale for the decreased time period can be explained concurrently when providing the public report that details the final status of the organization's remediation efforts.

(b) *Content.* — The public report should focus on informing the public about what it is most interested in — namely, whether the organization successfully implemented the required remediation effort. The answer to this question will necessarily look different depending upon the remediation effort undertaken. For an underlying violation of the Foreign Corrupt Practices Act of 1977²¹⁵ (FCPA), the report may need to provide details on the types of training employees were required to undergo as well as any new books and records controls adopted by the organization. When a bank has improperly foreclosed upon mortgages, the report may need to detail the efforts that were taken to identify potential victims as well as the way monetary compensation was distributed. Monitorships are tailored to the particular organization and the specific misconduct that triggered the need for a remediation effort, and the public reports will need to be similarly tailored. Some description of the assessment methodology and clear, concrete goals and measurements should be included, even if those goals and measurements will differ depending on the circumstances of the institution. Additionally, the report should provide general information about the monitor's work and reporting periods to the government.

(c) *Monitor Identity.* — The public report should contain the identity of the monitor.²¹⁶ It is often the case that a monitorship will be announced prior to the selection of the monitor or the monitor's identity has not been readily available, particularly for enforcement and corporate compliance monitorships.²¹⁷ The public report should include the monitor's identity for a whole host of reasons, but this Article will focus on two. First, part of what currently reins in the monitor's conduct is her own interest in maintaining a positive reputation.²¹⁸ If the monitor's identity is not disclosed, that mechanism is never triggered. Second, requiring the monitor to sign and take ownership of the public report will create additional incentives for the monitor to ensure that her assessments are as accurate and thorough as possible and also alleviate

²¹⁵ Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.).

²¹⁶ See Warin, Diamant & Root, *supra* note 46, at 348 (stating that under FCPA settlement agreements between 2004 to 2010, only four monitors were identified); see also GARRETT, *supra* note 87, at 177–78, 192. For example, in the Tokar litigation, the DOJ resisted a FOIA request for the identity of monitors, which resulted in litigation and motions practice prior to the DOJ agreeing to provide the identities of those who had served as monitors. See *supra* p. 783.

²¹⁷ See, e.g., Tokar v. U.S. Dep't of Just., 304 F. Supp. 3d 81, 86 (D.D.C. 2018).

²¹⁸ Root, *Constraining Monitors*, *supra* note 40, at 2229.

concerns about potential conflicts of interest that may exist between the monitor and the institution.²¹⁹

(d) *Attestation Requirement.* — The monitor should be required to attest to the truthfulness of the statements made in these public reports. Currently, the monitor who oversees a modern-day monitorship provides a report to the court or governmental authority involved in the monitorship, but there is no formal attestation requirement. Requiring the monitor to sign the public report provides another mechanism for personal accountability that the monitor must consider when performing her work.²²⁰ Additionally, requiring an attestation might help counterbalance concerns regarding the potential for a public reporting requirement to eventually result in boilerplate disclosures. One objection to mandatory disclosure is that disclosure might not be meaningful or robust. Requiring the monitor to attest to the efficacy of the firm's particular remediation effort should encourage the monitor to draft a report that is individualized and tailored to that organization as opposed to full of boilerplate, nonspecific terms.

(e) *Length.* — Another question to consider is how long a monitor's public report should be to maximize the public's ability to reasonably digest the information contained in the report. The answer, very likely, is that it depends. It is difficult to state how long a public report should be — it should be as long as is needed to convey information to the public regarding the organization's remediation efforts and the status of that progress when the monitorship ends. That said, one would hope that the proposed public report would be significantly shorter than the monitor's formal report to the court, government, or organization as this would be key in maintaining the goals of public awareness and accessibility of the report. The content of this new public report should not be buried in legalese or language difficult for the general public to understand.

(f) *Delivery Mechanism.* — The public report should be easily accessible by the public, which means it should be widely disseminated. To ensure broad-based dissemination, public reports should be posted online in at least two places: (i) the organization's own website²²¹ and (ii) the governmental actor's website. Housing the report on the organization's own website would allow interested parties to easily access it and to have confirmation that they are looking at a report for that specific organization. For an organization whose monitorship is a result of

²¹⁹ Cf. Lisa M. Fairfax, *Form over Substance?: Officer Certification and the Promise of Enhanced Personal Accountability Under the Sarbanes-Oxley Act*, 55 RUTGERS L. REV. 1, 13–15 (2002) (noting the relationship between certifications and accountability).

²²⁰ Cf. *id.*

²²¹ See, e.g., *Volkswagen/Audi/Porsche Diesel Emissions Settlement Program*, VW CT. SETTLEMENT OFF. INFO. SITE, <https://www.vwcourtsettlement.com/en> [https://perma.cc/GU4Z-FDHN] (demonstrating public access to certain environmental compliance program reports written in relation to Volkswagen's plea agreement).

an agreement with a governmental actor, the supplemental public report should also be posted, along with other case materials, on the website of that governmental actor. This Article argues in favor of the creation of a public report detailing the work undertaken during the monitorship, but this intervention will fail at meeting its goal if this new report is not disseminated in an easily accessible fashion.

(g) *Special Considerations for Court-Ordered Monitorships.* — Many court-ordered monitorships already make the monitor's reports available to the public, as they are publicly filed with the court.²²² Thus, one question to consider is whether a supplementary public report should be made available for court-ordered monitorships, or other types of monitorships, when the monitor's report is technically available for the public to obtain. The problem, as evidenced by the Carnival reports,²²³ is that a report prepared for the court or regulator may not be truly accessible to the public. As noted above, many monitorship reports are hundreds of pages. Part of the beauty of the public report advocated by this Article is that it not only provides information about the monitor's oversight of the organization's remediation efforts, but also does so in a more concise, accessible manner than the formal reports provided by the monitor to the court or government. Thus, even in the event that a full report is available, a monitor should still create a supplementary public report that gives an abridged version of its views on the monitored organization's remediation efforts.

3. *Volkswagen: An Example of a Public Report.* — This Article argues that monitors should continue to provide reports to the government, organization, and court as they would normally but also that a separate, public report should be disseminated broadly at the conclusion of each monitorship. Importantly, there is a current example of a monitorship that has resulted in two sets of monitorship reports. While this example is not a perfect representation of this Article's proposed interventions, it does suggest that it is possible to have a monitor create reports meant for a limited audience while also publishing a public report that is made generally available.

Volkswagen A.G. (VW) found itself in the headlines after it was discovered cheating the EPA's vehicle emission standards and falsely certifying its vehicles when importing them into the United States.²²⁴ The DOJ filed both civil and criminal charges against VW; the company settled the civil case and pleaded guilty in the criminal case.²²⁵ For the 2017 resolution of the civil case, VW was required to undergo a three-year monitorship, although the consent order refers to an "independent

²²² See, e.g., Root, *Monitor-“Client,”* *supra* note 31, at 547 (citing SEC v. Am. Int'l Grp., 854 F. Supp. 2d 75, 81–83 (D.D.C. 2012), *rev'd*, 712 F.3d 1 (D.C. Cir. 2013)).

²²³ See *supra* section II.A.3, pp. 781–83.

²²⁴ Volkswagen Press Release, *supra* note 11.

²²⁵ *Id.*

compliance auditor.”²²⁶ The individual was charged with overseeing VW’s implementation of the consent decree and its remedial efforts toward the specific civil charges. As part of his duties, the “auditor” was required to provide VW and the government with a copy of his reports. Importantly, these reports were required to be made publicly available and “posted by [VW] on [a] public website.”²²⁷

In March 2017, VW’s guilty plea in the criminal case required the company not only to pay monetary damages but also to adopt remedial measures — including among other things, the appointment of an independent compliance monitor for a period of up to two years.²²⁸ The monitor’s mandate covered broad-ranging issues relating to VW’s environmental misconduct, including those covered in the civil case against the company. The monitor was tasked with assessing VW’s remediation and compliance with the plea agreement; exposing risks that may cause the company to recommit similar, future misconduct; and evaluating VW’s compliance and ethics programs and the company’s leadership in enforcing these programs.²²⁹ In performing his responsibilities, the monitor was also required to send his reports to VW and the government, as well as inform the government of any misconduct discovered in the course of his oversight.²³⁰ However, the monitor’s reports were to remain confidential and thus publicly inaccessible.²³¹

It is important to note that the individual who served as the independent compliance auditor in the civil case was also chosen to be the independent compliance monitor in the criminal case.²³² The mandate in the civil case had a more limited scope of oversight than that in the criminal case.²³³ The monitor was responsible for creating one set of confidential reports for the criminal matter and another set of public documents for the civil matter. He submitted two sets of reports, one of which was, in part, for public dissemination, as stipulated by the consent

²²⁶ The same individual was appointed as an “auditor” in the civil case and a “monitor” in the criminal case. As I have defined the term “monitor,” the individual who acted as an auditor in the civil case meets the definition of a monitor. Third Partial Consent Decree at 20–21, *In re Volkswagen “Clean Diesel” Mktg., Sales Pracs. & Prods. Liab. Litig.*, MDL No. 2672 (N.D. Cal. Jan. 11, 2017), ECF No. 2758-1 [hereinafter Volkswagen Third Partial Consent Decree].

²²⁷ *Id.* at 26.

²²⁸ Volkswagen Plea Agreement, *supra* note 49, at 8, 30.

²²⁹ *Id.* at Exh. 3-4 to -5.

²³⁰ *Id.* at Exh. 3-7.

²³¹ *Id.* at Exh. 3-13. However, the reports could be made publicly accessible if doing so was “agreed to by the parties in writing” or if the government “determine[d] in [its] sole discretion that disclosure would be in furtherance of . . . discharg[ing] [its] duties and responsibilities.” *Id.*

²³² Press Release, Volkswagen AG, Volkswagen AG Statement on Appointment of Larry D. Thompson as Independent Compliance Monitor (Apr. 21, 2017), https://www.volkswagenag.com/en/news/2017/04/Appointment_L_D_Thompson.html [<https://perma.cc/333K-GGHA>].

²³³ See First Annual Report by the Independent Compliance Auditor for the VW Defendants at 3–4, *In re Volkswagen “Clean Diesel” Mktg., Sales Pracs. & Prods. Liab. Litig.*, MDL No. 2672 (N.D. Cal. Aug. 17, 2018) (noting the difference in scope and confidentiality requirements between the criminal plea agreement and the civil consent decree).

decree that required the civil reports to be posted on a VW website — as opposed to merely filed with the court.²³⁴ VW and the government's efforts — and ultimately the court's decision — to keep the monitor's reports in the criminal matter confidential occurred after both parties agreed to make the information and reports arising out of the resolution of the civil proceeding publicly available.

While this report by VW is an example of a public report, the reports that would result from this Article's proposal would be more accessible and transparent. First, for public companies, the reporting would be mandatory, allowing for information in the public report to be available for all monitorship arrangements and not at the discretion of particular agencies, companies, or courts. Second, the public report outlined in this Article requires the monitor to provide an attestation about the veracity of the remediation effort undertaken. In contrast, the VW public report specifically states that it is not a guarantee of continued or absolute compliance and is designed only to help VW in evaluating its adherence to U.S. emissions laws.²³⁵ Third, the proposed public report would be disseminated more broadly than the VW public report, which was housed on a single website for that purpose. The public report proposed by this Article would also be housed on governmental websites, which might, eventually, provide an opportunity to create a more formal, online repository of public reports issued at the conclusion of monitorships.

Despite the differences between the VW report and that proposed by this Article, many aspects of the VW report demonstrate the benefit the public would receive if these reports were mandatory. The report is not of arduous length, running only seventeen pages of content with attachments following that.²³⁶ The language is such that the general public can read it and understand it. The report clearly lays out the criteria for success and concludes with a finding of whether VW was successful based on that criteria.²³⁷ This report allows the public to easily see whether and how VW complied with the requirements set before it. The report also allows shareholders to appreciate the progress made and actions taken by the company to avoid future financial penalties and bad publicity that could damage the company's share value. Stakeholders can also document the work done by the company to improve the

²³⁴ Volkswagen Third Partial Consent Decree, *supra* note 226, at 20 (“Upon completion of each annual EMS audit report, the VW Defendants shall . . . post a copy of the annual EMS audit report (redacted of any CBI or personal information the disclosure of which is restricted by applicable law; however no emissions test methods and results may be claimed as CBI) in English and German on the public website required by [the decree].”).

²³⁵ BUREAU VERITAS, ENVIRONMENTAL MANAGEMENT SYSTEM — AUDIT REPORT 1, https://www.vwcourtsettlement.com/wp-content/uploads/2018/05/20180412-VWGoA-Audit-Report-English_final_secured.pdf [<https://perma.cc/FVC6-D23W>] (the public-facing report from VW's 2018 court settlement).

²³⁶ *Id.*

²³⁷ *Id.* at 5, 16.

environment as a result of the remediation effort, and those affected by the misconduct that prompted the remediation effort can judge the level of success based off this report. The mandatory public report proposed by this Article would do the same and would ensure that all monitorships release such useful information to relevant parties, while also advocating for even greater transparency and availability than what is present in the case of the VW report.

* * *

The adoption of a public reporting mandate will decrease some of the secrecy surrounding monitorships. Additionally, this increased transparency will allow for greater information regarding an organization's remediation efforts and wider dissemination thereof. That information may aid in increasing the legitimacy of the entire monitorship process. Thus, given that one of the public's desires in the face of organizational misconduct and monitorships is an assurance that future misconduct will not occur, releasing information to the public may help it to assess whether the monitorship has achieved its goals and whether the remediation effort was legitimate.²³⁸

B. The Benefits of a Public Reporting Mandate

After analyzing what information a public report should contain, there are still many different assessments by scholars, policymakers, and courts about when it might be beneficial to disclose certain information to the public. This section will highlight three: (i) the general public's interest in information related to corporate settlements; (ii) shareholders' rights to information; and (iii) stakeholders' interests in information disclosure.

1. *The General Public's Interest in Information Related to the Monitorship.* — Professor Brandon Garrett has analyzed the general public's interest in obtaining information about corporate settlements that result from misconduct within firms.²³⁹ He focuses on judicial review of corporate plea agreements, deferred prosecution agreements, nonprosecution agreements, administrative settlements, and regulatory consent decrees.²⁴⁰ Each of these types of corporate settlements is sometimes used as the impetus for creating a monitorship.

Garrett and I have different views regarding transparency as it relates to monitorships. He has argued in favor of universal court

²³⁸ See Samuel W. Buell, Essay, *Liability and Admissions of Wrongdoing in Public Enforcement of Law*, 82 U. CIN. L. REV. 505, 513 (2013) (“[A] firm’s public declaration of the nature and facts of its own wrongdoing might spur more introspection and reform . . . than would a bare legal judgment in which a firm simply concedes that its government litigation adversary has something of a case, and the firm . . . chooses to settle the whole thing so it can ‘move on.’”).

²³⁹ See generally Garrett, *Corporate Settlements*, *supra* note 30.

²⁴⁰ *Id.* at 1494–1522.

oversight and transparency in monitors' reports.²⁴¹ I, however, am not advocating for a complete release of the monitor reports that are currently prepared. For the reasons I have outlined throughout this Article and in prior work, I believe that there are good reasons to allow certain monitorships to remain highly confidential. That said, Garrett's general argument about the public having an interest in the work being done by monitors is persuasive.²⁴² As he explains, "[t]he entire concept of a corporate monitor is to retain a person or entity that is independent: not an agent of the corporation or of the prosecutor, but rather an entity serving in the public interest."²⁴³ The harm the firm is meant to remedy is something that does not just affect the court, or the regulator, or the prosecutor. The court, regulator, and prosecutor are standing in a posture of service to the public when engaged in the monitorship relationship. That posture, however, does not negate the public's interest in receiving information about monitorships directly, particularly given the reality that the courts, regulators, and prosecutors are not engaged in perfect supervision of monitorships.

Moreover, there are a range of other potential benefits that could arise from greater public disclosure regarding monitorships. Garrett, for example, notes that "[a]mong the public, other corporations can benefit from best practices and success stories described in monitor reports, as well as from the difficulties monitors encounter."²⁴⁴ On this point, he and I agree. One concern within compliance circles is the lack of safe and reliable mechanisms to collaborate on effective compliance strategies. Currently, many of the insights regarding monitorships are funneled into the arms of government regulators and prosecutors — but those insights are not available to industry members who might also benefit from them.²⁴⁵ Adopting a public reporting mandate regarding the status of monitorships could therefore serve to benefit other companies within particular industries facing similar difficulties by allowing them to learn from the missteps of other organizations, a benefit that ultimately could improve compliance at the level of an entire industry, as opposed to at the level of an individual firm.²⁴⁶

²⁴¹ GARRETT, *supra* note 87, at 177.

²⁴² Garrett, *Corporate Settlements*, *supra* note 30, at 1523–36.

²⁴³ *Id.* at 1530.

²⁴⁴ *Id.*

²⁴⁵ Martinez, *Government's Prioritization*, *supra* note 47, at 104–05.

²⁴⁶ See Buell, *supra* note 238, at 514 (discussing the weakened effects of enforcement on enterprises as a whole if the public perception is that the system “appears unprincipled or even random” — such consequence would be that “deterrence is seriously weakened”). *But see* Elisabeth de Fontenay, *The Deregulation of Private Capital and the Decline of the Public Company*, 68 HASTINGS L.J. 445, 452 (2017) (“The goal of fostering dynamic and efficient capital markets would likely be better served by *either significantly scaling back public company disclosure* or, in contrast, by redrawing the public-private divide so as to confine substantially more issuers and investors to the public side.” (emphasis added)).

Another reason to provide information publicly about the status of a firm's remediation effort is to enable parties to "have enough information to know whether to intervene if compliance is lacking."²⁴⁷ For example, if a monitor is overseeing a remediation effort that involves providing financial compensation to those harmed as a result of a firm's misconduct, mandating public disclosure might allow for gaps or holes in the remediation effort to be made plain. If, for instance, a certain subset of individuals is not receiving meaningful notice about their right to compensation due to a language barrier or a lack of technology, announcement of this reality might allow various intermediaries to intervene to inform parties impacted by the organization's wrongdoing. Yet, without public disclosure of the information related to the monitorship, advocacy or community groups would not be aware that there might be constituencies in need of assistance.

The upshot is that the general public often has a strong interest in the outcomes of an organization's remediation effort.²⁴⁸ If, however, the monitor does not communicate directly to the public, for many modern-day monitorships, particularly those that occur without meaningful court oversight, the public is left in the dark. A public reporting mandate would bring the work of monitors into the light of day.

2. *Shareholders' Interests in Information About Public Firms.* — In addition to the arguments levied by Garrett and others regarding the need for public access to reports more generally, there is also a great deal of precedent for wanting corporate firms to turn over information that might be of interest to their investors. Current securities regulations require firms to disclose all material information to their investors.²⁴⁹ With respect to monitorships, public corporations are likely required to disclose the need to begin a monitorship, any material information discovered during the course of the monitorship, and the conclusion of the monitorship — if this information is deemed material for shareholders. The disclosure about the end of the monitorship, however, may be as simple as a short line in a required disclosure — like a Form 8-K, 10-K,

²⁴⁷ Garrett, *Corporate Settlements*, *supra* note 30, at 1529.

²⁴⁸ See, e.g., *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763, 2016 WL 347670, at *5 (E.D.N.Y. Jan. 28, 2016) ("Th[e] case implicates matters of great public concern, and is 'therefore one[] which the public has an interest in overseeing.' . . . It is equally appropriate and desirable for the public to be interested and informed . . . in the progress of the arrangement between DOJ and HSBC that the government chose to make the centerpiece of a federal criminal case, and in whether I am doing my job of monitoring the execution and implementation of that arrangement." (second alteration in original) (quoting *United States v. Erie County*, 763 F.3d 235, 242 (2d Cir. 2014))), *rev'd*, 863 F.3d 125 (2d Cir. 2017).

²⁴⁹ See Regulation S-K, 17 C.F.R. § 229.601(b)(2)(i) (2021) (stating that "[a]ny material plan of acquisition, disposition, reorganization, readjustment, succession, liquidation, or arrangement and any amendments thereto" must be disclosed and filed as an exhibit).

or 10-Q — and it does not currently have much meaningful detail associated with it.²⁵⁰

There are arguments that a more meaningful disclosure should be required at the conclusion of a monitorship for public firms because whether a firm has properly engaged in an effective remediation effort is of material interest to investors considering purchasing or selling an interest in a firm.²⁵¹ Take, for example, corporate recidivists. In prior work, I highlight several firms that engaged in multiple instances of misconduct within a five-year period during which they were under a monitorship.²⁵² Some of those firms engaged in similar acts of misconduct, like unlawful bribery, in violation of multiple regulatory and legal requirements.²⁵³ If an investor was aware of a firm that engaged in bribery that violated the FCPA and resulted in a monitorship, they might have an interest in knowing about the results of the remediation effort undertaken by the firm. Future, similar misconduct could, after all, lead to greater penalties being levied against the firm, additional harm to the firm's reputation, and negative impacts on the stock price. Currently, however, investors are given very little information about the status of a firm's remediation efforts. Justifying a public reporting mandate based on the "materiality" of the information disclosed, however, would most likely lead to protracted litigation and disputes about whether the information within the new public report is in fact material for investor decisionmaking.

But shareholders' rights to certain information and disclosures are not limited to material information. As was explained by former SEC

²⁵⁰ See, e.g., Walmart Inc., Current Report (Form 8-K), at 2, 5 (June 20, 2019) (discussing Walmart's entering into a two-year monitorship); Walmart Inc., Quarterly Report (Form 10-Q) (June 4, 2021) (not mentioning the monitorship's conclusion); Walmart Inc., Quarterly Report (Form 10-Q) (Sept. 2, 2021) (same).

²⁵¹ This Article focuses on the monitor as an important actor in compliance efforts, and it argues in favor of the creation of a public report in an effort to create greater publicness regarding the remediation effort that the monitor was charged with overseeing. Corporate firms, however, could decide to provide more meaningful disclosures about the state of their remediation efforts on their own. The question of how much corporate firms should directly disclose their compliance efforts has been the subject of concern and scholarly conversation, with a particular focus on the need for greater empirical work to determine what compliance efforts are or are not impactful. See, e.g., Benjamin van Rooij & Melissa Rorie, *Measuring Compliance: The Challenges in Assessing and Understanding the Interaction Between Law and Organizational Misconduct* 6 (Amsterdam L. Sch., Legal Studies Research Paper No. 2022-30, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3853764 [<https://perma.cc/8M7R-HUDG>]; Brandon L. Garrett & Gregory Mitchell, *Testing Compliance*, 83 LAW & CONTEMP. PROBS. 47, 48 (2020). There are strong arguments in favor of greater disclosure about compliance efforts more generally at and by firms, but a robust discussion of this topic is outside the scope of this particular project, which is focused on a powerful and high-profile mediator, the monitor.

²⁵² Veronica Root, *Coordinating Compliance Incentives*, 102 CORNELL L. REV. 1003, 1071–85 (2017).

²⁵³ See, e.g., Press Release, U.S. Dep't of Just., Hewlett-Packard Russia Pleads Guilty to and Sentenced for Bribery of Russian Government Officials (Sept. 11, 2014), <https://www.justice.gov/opa/pr/hewlett-packard-russia-pleads-guilty-and-sentenced-bribery-russian-government-officials> [<https://perma.cc/C432-5KED>].

Commissioner Allison Herren Lee, the SEC does have the authority to require specific disclosures of items that are not deemed material.²⁵⁴ Lee's remarks were triggered by debates about potential environmental, social, and governance (ESG) disclosures by firms, but her takeaways are applicable to this analysis. SEC disclosure requirements do not have to "be strictly limited to material information."²⁵⁵ As she noted, the SEC's "statutory rulemaking authority under Section 7 of the Securities Act of 1933 gives the SEC full rulemaking authority . . . for the protection of investors."²⁵⁶ She explained that the statutory authority is "not qualified by 'materiality.'"²⁵⁷ Shareholders have a variety of reasons for having an interest in the status of the remediation effort undertaken by a firm, and the monitor is the entity in the best position to report about the success or failure of a firm's remediation effort at the end of the monitorship term.

Moreover, regardless of whether the information contained in a new public report is material, the current challenges surrounding information disclosure and monitorships might lead to information inefficiencies for public firms that may, on their own, be concerning. The capital markets are assumed to be efficient, in part, because the U.S. disclosure regime requires all investors to have access to information at the same time. The basic understanding is that public disclosures allow the market to react appropriately to new information, regardless of whether it could be proven material in a subsequent legal dispute. Professors Ronald Gilson and Reinier Kraakman, however, observe that how information is distributed matters.²⁵⁸ In particular, they argue that "the distribution of information among traders is a function of information costs, and that many familiar market institutions, such as investment banks, serve the function of reducing information costs, and thereby facilitate efficiency in the capital market."²⁵⁹ The fact that information regarding a particular monitorship is not publicly disclosed does not mean that there is no information disclosure for interested public firms. Indeed, Professor Elisabeth de Fontenay's work has demonstrated how transactional lawyers have leveraged their status as repeat players within certain practice areas to provide their clients with nonpublic

²⁵⁴ Lee, *supra* note 52.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.* (citing 15 U.S.C. § 78m(a)).

²⁵⁸ Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 567 (1984). *But see* Lynn A. Stout, *The Unimportance of Being Efficient: An Economic Analysis of Stock Market Pricing and Securities Regulation*, 87 MICH. L. REV. 613, 617–18 (1988).

²⁵⁹ Gilson & Kraakman, *supra* note 258, at 554.

information about certain deal terms.²⁶⁰ Similar expertise is obtained and leveraged by repeat players of the white-collar bar.

There are a variety of situations where information asymmetry within the capital markets may be problematic. Professor Gina-Gail Fletcher, for instance, has explored the rise of information asymmetry²⁶¹ within the context of market regulation and credit default swaps.²⁶² She suggests that effective market discipline in this area is based on two key factors: monitoring and influence.²⁶³ Ensuring effective monitoring, Fletcher argues, “depends on the ease with which market participants can access information about each other’s decisions and actions.”²⁶⁴ When only partial or incomplete information is provided to the market, it can result in information that is in fact distorted and that leaves parties with inaccurate or unreliable information.²⁶⁵ When information is distorted in this manner, it can result in the market being denied “socially beneficial information.”²⁶⁶ Consequently, the ability of the market to efficiently respond to information that is distorted is, perhaps unsurprisingly, limited and weak because the market actors lack the necessary information and market transparency to effectively monitor counterparties.²⁶⁷ Note, this Article is not arguing that there is no information being provided at the end of a monitorship term today. For public firms, there is often a short disclosure in required filings. Additionally, within certain networks, like the corporate white-collar bar, information is shared informally about the efficacy of the monitor, monitorship, and remediation effort. And yet, currently, the information that monitors provide to the public is restricted in a manner that results in information asymmetries, preventing the market from responding efficiently to information about the conclusion of a monitorship term. Requiring the

²⁶⁰ Elisabeth de Fontenay, *Law Firm Selection and the Value of Transactional Lawyering*, 41 J. CORP. L. 393, 396 (2015). Within the white-collar defense bar, attorneys often engage in a variety of legal roles over the course of their careers. An attorney may at one time be charged with negotiating settlements with the government on behalf of private clients, and that same attorney may then move into the government. In either role — whether in private practice or with the government — the attorney may work in conjunction with a monitor as part of a firm’s remediation process. These attorneys and monitors are then able to use the information they obtained during one engagement to inform their conduct for subsequent matters. When information surrounding monitorships remains (i) private or (ii) opaque, it allows certain actors within the corporate white-collar bar to leverage the secrecy of the information for their own profit and benefit.

²⁶¹ The term is generally recognized as the difference in access to information “aris[ing] whenever a buyer or seller has more information about a product or service than his counterpart does — which can provide the better-informed party with considerable economic advantage.” Ronald Fink, *Default Swap Faults*, CFO (Oct. 7, 2004), <https://www.cfo.com/banking-capital-markets/2004/10/default-swap-faults> [<https://perma.cc/XWC6-FKUP>].

²⁶² Gina-Gail S. Fletcher, *Engineered Credit Default Swaps: Innovative or Manipulative?*, 94 N.Y.U. L. REV. 1073, 1117–20 (2019).

²⁶³ *Id.* at 1118–19.

²⁶⁴ *Id.* at 1119.

²⁶⁵ *Id.* at 1109–10.

²⁶⁶ *Id.* at 1110.

²⁶⁷ *Id.* at 1119.

issuance of a public report at the conclusion of each monitorship term could begin to help address these asymmetries in the market.

3. *Stakeholders' Interests in Information About Public Firms.* — In addition to shareholders, various stakeholders of public corporations may have an interest in the results of the remediation effort being overseen by the monitor. There is an emerging line of literature in the securities space that focuses on the importance of disclosure for various stakeholders of the firm and the public more generally. For years, the focus of disclosure literature has been on how to best communicate information to investors,²⁶⁸ but more recent work has extended that rationale to other constituencies of the firm.

For example, Professor Hillary Sale has argued that “disclosure’s purpose is to address information asymmetries beyond those facing investors.”²⁶⁹ Sale has coined the term “publicness” when discussing the impact of securities disclosures and their ability to impose social control over the activity of public firms.²⁷⁰ Sale has further explained that “[d]isclosure is also designed to complement corporate governance systems.”²⁷¹ For example, mandatory disclosure regimes allow for “regulatory structure[s to insert] directors into the disclosure space, requiring them to play a role in diminishing information asymmetries and detecting fraud.”²⁷² If monitors are required to provide a public report, they could contribute directly to this purpose of disclosure. Modern-day monitorships often result in entrenching information asymmetries. They gather, assess, and analyze information, but disseminate the information in a selective or limited manner. However, if monitors instead created a public report for the purpose of broadening the scope of those who would receive information regarding the monitorship, they could contribute to a decrease in information asymmetries.

Professor Ann Lipton has also argued that disclosures can be quite important for noninvestor audiences.²⁷³ Lipton rejects the idea that “a disclosure system designed for investor audiences can continue to serve the needs of the general public.”²⁷⁴ Indeed, she notes that the investor-centric focus of most required disclosures allows investors to “use their informational advantage to influence business decisions” in a manner

²⁶⁸ See, e.g., Michael Rifkin, Note, *Accountants, Financial Disclosure and Investors' Remedies*, 18 N.Y. L.F. 681, 712–13 (1973) (“Too often, financial disclosure has been abbreviated as a concession to management whose basic instincts are to disclose as little as possible. In light of developing case law and new pressures from the SEC, disclosure will undoubtedly improve but there remains a long way to go to restore investor confidence.”).

²⁶⁹ Hillary A. Sale, *Disclosure's Purpose*, 107 GEO. L.J. 1045, 1049 (2019).

²⁷⁰ Hillary A. Sale, *The New “Public” Corporation*, 74 LAW & CONTEMP. PROBS. 137, 137–38 (2011).

²⁷¹ Sale, *supra* note 269, at 1050.

²⁷² *Id.*

²⁷³ Lipton, *supra* note 52, at 511–19.

²⁷⁴ *Id.* at 503.

that can leave other stakeholders “weakened and unprotected.”²⁷⁵ Lipton calls on scholars and policymakers to address more robustly “the informational needs of the general public, or when and whether businesses should operate under a duty of public transparency.”²⁷⁶

Sale, Lipton, and other scholars are engaging in an effort to demonstrate the ways in which stakeholders, including the general public, might have a genuine interest in certain types of information regarding a public corporation. When one looks to the stakeholders of monitored firms, it appears that they may have a strong argument in favor of greater information disclosure by monitors overseeing remediation efforts. To demonstrate the interests of stakeholders in the results of a monitorship, this section will focus on three sets of stakeholders: employees, contracting partners, and “sophisticated stakeholders.”

Employees might have an interest in knowing whether the firm has properly remediated certain misconduct for a variety of reasons. Currently, disclosure within the company regarding the status of a remediation effort will often be quite limited to ensure that confidentiality of the monitorship is maintained. If a firm were to internally publish extensive results regarding the status of a monitorship, the chances of it being leaked are significant, particularly given the relative anonymity afforded to individuals via Twitter and other social media platforms. And yet employees might want to know whether their firm has effectively completed its remediation responsibilities in a manner that will ensure that future, similar misconduct does not occur. A firm’s failure to internally share the status of its remediation efforts may cause its employees to draw inferences, whether positive or negative, about the status of the firm’s remediation effort. If employees negatively perceive the firm’s attempt at remediation, it could lead to mistrust of their employer, thus harming the reputation of the firm. This, in turn, may also lead an employee to worry about whether the firm’s negative reputation harms the employee’s own reputation due to an association with the company.²⁷⁷ Or employees might be concerned that if the firm fails to properly train employees regarding their legal obligations, they might accidentally engage in conduct that could place them in legal jeopardy. And, perhaps most concerning for firms, employees may develop a negative perception of their employer after instances of misconduct have been announced.²⁷⁸ Without a public disclosure from the monitor,

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ See, e.g., Jim Yardley, *Big Burden for Ex-workers of Enron*, N.Y. TIMES (Mar. 3, 2002), <https://www.nytimes.com/2002/03/03/us/big-burden-for-ex-workers-of-enron.html> [https://perma.cc/L9G3-NVQG] (documenting the difficulties that former Enron workers faced in finding jobs thanks to their previous affiliation with Enron after its fall); Yuqing Zhou & Christos Makridis, *Financial Misconduct and Changes in Employee Satisfaction 4* (Oct. 23, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3467787 [https://perma.cc/ALL3-MU7H].

²⁷⁸ See Zhou & Makridis, *supra* note 277, at 5.

employees are left without any clear guidance about the firm's remediation effort, which may prevent the firm from rehabilitating its reputation with members of its own workforce.

Second, contracting partners might have concerns about whether a firm has properly remediated misconduct. For some legal and regulatory areas, the conduct of a firm's contracting partners can create liability for the firm itself.²⁷⁹ For example, if a firm utilizes a supplier that violates environmental, child labor, or anticorruption mandates, it can create liability for the firm even though its direct employees did not engage in the behavior. There are numerous examples of a firm being subject to liability due to the actions of its contracting partners.²⁸⁰ As a result, stakeholders that engage in contracting relationships with a monitored firm have a strong interest in knowing the results of the monitoring and whether the firm was successful in its remediation efforts. And yet, currently, contracting partners know very little, if anything, about the status of a monitored firm's remediation efforts.

Third, with greater disclosure, certain sophisticated stakeholders might be better able to respond to potential risks created by firms. For example, if an organization is engaged in activity that is harmful to the environment, isolated members of the public might care about this harm, but they might not be able to pursue recourse easily. An environmental nonprofit or legal organization, however, might be better positioned to engage in advocacy, lobbying, or litigation activity on behalf of the public more generally. When, however, information about the status of a firm's remediation effort is kept outside of the public space or disclosed in an inaccessible or incomplete manner, it makes it more difficult for sophisticated stakeholders to do their work effectively and efficiently.

Disclosure conversations often focus on what information, material or nonmaterial, should be provided to shareholders. Yet, recent securities literature has argued that stakeholders also have an active interest in certain public disclosures. The results of a monitoring appear to be the sort of disclosure that could be beneficial to both shareholders and stakeholders alike. However, there are strong disincentives to providing this sort of information to stakeholders. As discussed previously, firms strongly object to having monitoring reports turned over to the public. In litigation, these firms officially rely on concerns like the need not to turn over trade secrets or sensitive customer data. Additionally, firms often

²⁷⁹ See, e.g., Johnson & Johnson to Pay More than \$70 Million in Settled FCPA Enforcement Action, Litigation Release No. 21,922, 100 SEC Docket 3254, 3254 (Apr. 8, 2011) ("The SEC's complaint alleges that J&J subsidiaries . . . paid bribes to public doctors and administrators in Greece, Poland, and Romania."); see also Veronica Root Martinez, *Complex Compliance Investigations*, 120 COLUM. L. REV. 249, 271-72 (2020).

²⁸⁰ See, e.g., Robert C. Blume, John D.W. Partridge & Tafari Nia Lumumba, *FCPA Liability for Third-Party Conduct: Identifying Pitfalls and Minimizing Risk*, PRAC. L.J.-LITIG., Dec. 2018-Jan. 2019, at 29, 38.

have concerns about third-party litigation that might occur if monitor reports are turned over. When corporate misconduct occurs, firms today know that they will likely settle the claim with the government, pay a fine that is somewhere below their organizational guidelines²⁸¹ range, and possibly be subject to a monitor.²⁸² It is much more difficult, however, to predict the full scope of liabilities presented by third-party litigation, and fears about those potential liabilities create a large deterrent effect to widespread disclosure of monitor reports. And yet, as discussed above, there remain strong rationales in support for greater disclosure about whether the monitor believes the firm has or has not completed an effective remediation effort.

* * *

The upshot is that there are a variety of ways in which agency action could lay the groundwork for a very broad, if not complete, public reporting mandate for monitorships. If a combination of the SEC and OMB interventions described above were pursued, most monitorships involving a federal agency would be covered without any need for congressional intervention. The problem, of course, is that what makes these sorts of regulatory and policy requirements easier to implement also makes them easier to walk back. Thus, any progress made toward increasing public disclosure of information through these avenues would be subject to retraction any time there was a change of administration or leadership within the particular agencies. Despite the inherent malleability of these sorts of interventions, once a public report is required and provided, it may be difficult for monitors and organizations to retreat back to the current status quo of relative secrecy. Thus, a public reporting mandate could move the ball forward on the information disclosure problem in a considerable manner.

C. An Opportunity to Create an Ethical Floor and Greater Personal Responsibility

There are a number of disclosure regimes that have been put into place by the government and regulators in an effort to rein in and incentivize certain types of conduct by particular actors. For broker-dealers, Congress put into place the Financial Industry Regulatory Authority (FINRA), a self-regulatory organization that requires a number of

²⁸¹ U.S. SENT'G GUIDELINES MANUAL ch. 8 (U.S. SENT'G COMM'N 2021).

²⁸² See Jennifer Arlen, *Corporate Criminal Enforcement in the United States: Using Negotiated Settlements to Turn Potential Corporate Criminals into Corporate Cops* 13 (N.Y. Univ. Sch. of L. Pub. L. & Legal Theory Research Paper Series, Working Paper No. 17-12, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2951972 [<https://perma.cc/4HMM-TWM3>].

disclosures from industry members.²⁸³ For banks, there is the phenomenon of bank examination, through which a common law evidentiary privilege allows for a “confidential, non-public dialogue between a regulator and a bank about the bank’s policies and practices.”²⁸⁴ But the regime that is the most applicable to the oversight concerns regarding monitorships is likely the gatekeeping responsibilities placed upon attorneys by certain provisions of the Sarbanes-Oxley Act of 2002²⁸⁵ (SOX).

Part II of this Article has explained that the challenges confronting monitorships today include a lack of information disclosure and oversight. Sections III.A–B have considered how a public reporting mandate might address the information disclosure problem. Section III.C now explains how the public reporting mandate, specifically the attestation requirement outlined above, might work to deal with the issue of oversight. This section begins by discussing how SOX created new gatekeeping obligations for attorneys. It then turns to how a public reporting mandate for monitorships could create an opportunity for addressing the oversight problems as well as contribute to the creation of an ethical floor of conduct for monitors.

I. The Impact of SOX on Attorneys. — Prior to the enactment of SOX, there were two sources of authority governing the conduct of attorneys in relation to audit procedures: (i) state codes of conduct that mandated the reporting of wrongful acts and (ii) SEC Rule of Practice 102(e), which authorized the Commission to enforce ethical standards for attorneys practicing before it.²⁸⁶ However, the “patchwork” of state rules was “largely monitored by sometimes less than zealous state regulators.”²⁸⁷ Additionally, the SEC’s authority to actually enforce its standards “remained controversial and its application ha[d] been episodic at best.”²⁸⁸

²⁸³ See, e.g., *Rule 4530 Reporting Requirements*, FINRA, <https://www.finra.org/filing-reporting/regulatory-filing-systems/rule-4530-reporting-requirements#:~:text=FINRA%20Rule%204530> [https://perma.cc/6KQL-ZAQ4]. For transparency purposes, please note that I am currently on FINRA’s National Adjudicatory Board.

²⁸⁴ Eric B. Epstein, *Why the Bank Examination Privilege Is Breaking Down*, YALE J. ON REGUL.: NOTICE & COMMENT (Aug. 23, 2017), <https://www.yalejreg.com/nc/why-the-bank-examination-privilege-is-breaking-down-by-eric-b-epstein> [https://perma.cc/TWP5-NY4L]; see also BEVERLY HIRTLE, ANNA KOVNER & MATTHEW PLOSSER, FED. RES. BANK OF N.Y., *THE IMPACT OF SUPERVISION ON BANK PERFORMANCE* (2019); Julie Andersen Hill, *When Bank Examiners Get It Wrong: Financial Institution Appeals of Material Supervisory Determinations*, 92 WASH. U. L. REV. 1101, 1181–82 (2015).

²⁸⁵ Pub. L. No. 107-204, § 101, 116 Stat. 745, 750–53 (codified at 15 U.S.C. § 7211); *id.* § 102, 116 Stat. at 753–55 (codified at 15 U.S.C. § 7212); *id.* § 104, 116 Stat. at 757–59 (codified at 15 U.S.C. § 7214); *id.* § 105, 116 Stat. at 759–64 (codified at 15 U.S.C. § 7215).

²⁸⁶ See Thomas O. Gorman & Heather J. Stewart, *Is There a New Sheriff in Corporateville? The Obligations of Directors, Officers, Accountants, and Lawyers After Sarbanes-Oxley of 2002*, 56 ADMIN. L. REV. 135, 173 (2004).

²⁸⁷ *Id.* at 173 & n.202 (quoting Paul M. Barrett, *Silent Partners: When Lawyers See Fraud at a Company, What Must They Do?*, WALL ST. J., Aug. 22, 1997, at A1).

²⁸⁸ *Id.* at 172 n.198.

SOX and its implementing regulations, however, can be understood as “federalizing” two prior practices of attorneys involved with audits into provisions codifying the SEC’s explicit powers.²⁸⁹ First, section 307 of the Act provided explicit authority for the SEC to issue “minimum standards” for attorneys practicing before the SEC,²⁹⁰ including:

(1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty to the chief legal officer or the equivalent (“CLO”), if the issuer has a CLO, or to both the CLO and the CEO, of the company; and (2) if the corporate executives do not respond appropriately, requiring the attorney to report to the board of directors or an appropriate committee thereof.²⁹¹

Second, section 307 applies to both inside and outside counsel representing public companies before the SEC.²⁹² Violations of this provision also can result in fines, suspension, or debarment from practicing before the SEC.²⁹³ Thus, SOX attempted to settle any questions surrounding the SEC’s enforcement authority over those individuals practicing before the Commission.

The implications for attorneys under section 307 originally raised several concerns.²⁹⁴ Indeed, the American Bar Association (ABA) attempted to fight these provisions governing an attorney’s conduct, arguing that it was in conflict with the attorney’s duty to maintain client confidences.²⁹⁵ The ABA lost this fight and ultimately enacted ABA Model Rule of Professional Conduct 1.13, which requires lawyers to report

²⁸⁹ This is not to say that this is the only impact of SOX. The breadth of scholarship discussing the significance of SOX illustrates the wide-ranging implications of the law. For example, Professor Kate Litvak has examined how SOX prompted a change in firm behavior toward “defensive management” and “excessive caution” by firms, which in turn led to decreases in corporate risk-taking. Kate Litvak, *Defensive Management: Does the Sarbanes-Oxley Act Discourage Corporate Risk-Taking?*, 2014 U. ILL. L. REV. 1663, 1666.

²⁹⁰ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 307, 116 Stat. 784, 784 (codified at 15 U.S.C. § 7245).

²⁹¹ Byron F. Egan, *Major Themes of the Sarbanes-Oxley Act*, 42 TEX. J. BUS. L. 339, 438 (2008) (paraphrasing 15 U.S.C. § 7245).

²⁹² *Id.* at 439.

²⁹³ See 17 C.F.R. § 205.6(a), (b) (2021).

²⁹⁴ Additional concerns include the fact that SOX did not provide a safe harbor provision in the event of inappropriate actions by those in the reporting ladder; this too has been arguably addressed by a “focused fortification of a lawyer’s representation of corporate clients.” Larry Catá Backer, *The Sarbanes-Oxley Act: Federalizing Norms for Officer, Lawyer, and Accountant Behavior*, 76 ST. JOHN’S L. REV. 897, 924 (2002). Another concern raised was that a failure to discover and report under section 307’s standards could result in additional civil liability for attorneys; however, certain cases may be protected under section 806 antiretaliation protections, which cover in-house counsel, outside lawyers, and accountants for public companies. See *id.* at 935–43; Lynne Bernabei, Alan Kabat, Richard Levine & Kristen Sinisi, *Navigating the Nuances of Sarbanes-Oxley and Dodd-Frank Whistleblower Claims*, PRAC. LAW., Oct. 2019, at 42–43.

²⁹⁵ Clifton Barnes, *ABA, States, and SEC Hash Out Lawyers’ Responsibility in Corporate Settings*, AM. BAR ASS’N: BAR LEADER (Nov.–Dec. 2003), https://www.americanbar.org/groups/bar_services/publications/bar_leader/2003_04/2802/corporate [<https://perma.cc/2UTN-5RFP>].

up the ladder.²⁹⁶ Yet, over time, legal scholars and attorneys have largely accepted the gatekeeping obligations that attorneys now have after Congress adopted section 307 and the SEC promulgated the implementing regulations, known as Part 205.²⁹⁷ The intervention by Congress and the SEC meaningfully changed, for at least a subset of attorneys, how they viewed their ethical responsibilities as related to gatekeeping.²⁹⁸

2. *An Opportunity for Oversight and the Creation of an Ethical Floor for Monitor Conduct.* — The intervention proposed by this Article, a standardized public reporting mandate, does not include the same type of explicit regulation of monitors as that found in SOX for attorneys (and accountants).²⁹⁹ Instead, it requires that the monitor's identity be revealed and that the monitor have an attestation requirement. These are, admittedly, modest requirements on which to build oversight and ethical standards, yet they could prove to be quite powerful.

As explained earlier, and in my prior work, because monitors exist within a regulatory vacuum — with some monitors being lawyers, others accountants, and some consultants — the reliance on personal reputation to ensure the monitor's good behavior is incredibly important.³⁰⁰ If all individual monitors are instead required to take ownership over their work in a public manner, it puts them on the proverbial hook in case the effectiveness of their work is later called into question.³⁰¹ For

²⁹⁶ MODEL RULES OF PRO. CONDUCT r. 1.13 (AM. BAR ASS'N 2022); see Susan P. Koniak, *Corporate Fraud: See, Lawyers*, 26 HARV. J.L. & PUB. POL'Y 195, 220–21 (2003).

²⁹⁷ See, e.g., Sung Hui Kim, *Inside Lawyers: Friends or Gatekeepers?*, 84 FORDHAM L. REV. 1867, 1896–97 (2016) (arguing that inside lawyers within an organization should position themselves as gatekeepers and not as “friends” to corporate managers); Darlene M. Robertson & Anthony A. Tortora, *Current Development, Reporting Requirements for Lawyers Under Sarbanes-Oxley: Has Congress Really Changed Anything?*, 16 GEO. J. LEGAL ETHICS 785, 787–88, 800 (2003) (“If lawyers believe that the Act imposes new burdensome measures on the profession, these individuals were most likely remiss in ignoring their ethical obligations and the Act puts them back on course.” *Id.* at 800.). But see Jill E. Fisch & Kenneth M. Rosen, *Is There a Role for Lawyers in Preventing Future Enrons?*, 48 VILL. L. REV. 1097, 1097 (2003) (arguing that the reporting-up requirement is a flawed approach to corporate governance reform); Stephen M. Bainbridge & Christina J. Johnson, *Managerialism, Legal Ethics, and Sarbanes-Oxley Section 307*, 2004 MICH. ST. L. REV. 299, 306–07, 326 (arguing similarly and asserting that, given the nature of the legal market, lawyers are incentivized to overlook managerial misconduct).

²⁹⁸ It is worth noting, however, that tension remains between Part 205 and the requirement to maintain client confidence, codified in state equivalents to the ABA Model Rule of Professional Conduct 1.6. See, e.g., *Wadler v. Bio-Rad Lab's, Inc.*, 141 F. Supp. 3d 1005 (N.D. Cal. 2015) (finding that the federal requirements preempted the state requirements).

²⁹⁹ See Egan, *supra* note 291, at 438 & n.458, 480 (outlining SOX's requirements for attorneys and auditors, including auditor independence, corporate and enhanced attorney responsibilities, corporate and criminal fraud accountability, among other things).

³⁰⁰ Root, *Constraining Monitors*, *supra* note 40, at 2229, 2239–41.

³⁰¹ See generally Dave Owen, *Consultants, The Environment, and the Law*, 61 ARIZ. L. REV. 823, 843, 853–54 (2019). Professor Dave Owen has previously stated that “[m]any consultants frankly acknowledged tensions between their desire to deliver accurate information to regulators and the preferences of their clients.” Owen, *supra* note 188, at 234. He has further noted the consultants' need for a type of “license to operate” . . . and [that] many [consultants have] explained

example, if the monitor assures the public that effective accounting controls have been put into place but it subsequently turns out that the accounting controls were merely “artificial” and not “effective” controls, a personal and reputational sanction could be levied against the monitor even if a more formal sanction is unavailable.³⁰² Scholars have long recognized the ways in which individuals respond to these sorts of incentives.³⁰³ For instance, some scholars have suggested that investigators or auditors are “affected by such factors as accountability and reward structure[s],” finding that these factors impact “the knowledge or level of attention brought to bear on a task, thereby affecting [their] performance.”³⁰⁴ Additionally, when the SEC assessed the impact of SOX seven years after it became law, it found that the Act’s external auditor attestation requirement “appear[ed] to have a positive impact on the informativeness of internal control disclosures and financial reporting quality.”³⁰⁵ Needless to say, requiring a public report increases the opportunities to incentivize monitors to perform their work in an effective manner because their own reputations will be at stake.³⁰⁶

* * *

that they perceive [that] their role as neutral brokers [i]s crucial to preserving it. As one consultant explained, . . . ‘at the end of the day, all I’ve got is my reputation. And so if I’m just a hired gun, that kind of thing gets around.’” *Id.*; see also Hillary A. Sale, *Gatekeepers, Disclosure, and Issuer Choice*, 81 WASH. U. L.Q. 403, 407 (2003) (“Gatekeepers are to ensure issuer truth-telling because they will review and cleanse issuer information. *Their reputations and the competition for the offering work will ensure that they do their jobs — whether they do so as accountants signing off on audited financials or as investment bankers/analysts opening up the doors of capital to the issuers.*” (emphasis added)).

³⁰² See, e.g., Gina-Gail S. Fletcher, *Detering Algorithmic Manipulation*, 74 VAND. L. REV. 259, 323–24 (2021) (noting that a third-party programmer attestation requirement “could also make the deterrence regime more effective by forcing programmers to internalize the potential risk of harm their algorithms pose” in causing “misconduct that manipulates the market”).

³⁰³ There is a plethora of scholarship discussing the power of reputation. For example, Litvak and others have researched the impact of reputation within the world of venture capitalists and found that reputational mechanisms can help deter certain types of opportunism. Vladimir Atanasov, Vladimir Ivanov & Kate Litvak, *Does Reputation Limit Opportunistic Behavior in the VC Industry? Evidence from Litigation Against VCs*, 67 J. FIN. 2215, 2244 (2012) (“Our results suggest that reputational mechanisms act to prevent widespread abuse of power by VCs and that litigation could enhance reputational enforcement mechanisms by informing other counterparties of VC misbehavior.”).

³⁰⁴ Robert A. Prentice, *The Case of the Irrational Auditor: A Behavioral Insight into Securities Fraud Litigation*, 95 NW. U. L. REV. 133, 195 (2000) (citation omitted).

³⁰⁵ U.S. SEC. & EXCH. COMM’N, STUDY AND RECOMMENDATIONS ON SECTION 404(B) OF THE SARBANES-OXLEY ACT OF 2002 FOR ISSUERS WITH PUBLIC FLOAT BETWEEN \$75 AND \$250 MILLION 86 (2011).

³⁰⁶ See Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911, 1927 (1996) (“[D]isclosure is an important constraint on management behavior. Disclosure of management self-dealing [or business problems] can lead to formal enforcement . . . [or] market sanctions, such as a drop in stock price, reduced availability of credit, and difficulty in hiring employees. Embarrassment from public disclosure also exerts important discipline.”).

In order to promote the goals of disclosure and oversight, this Article's proposal focuses on how to increase transparency regarding the monitorship process. That said, changing the status quo as suggested in this Article raises a range of potential considerations. The next Part discusses some questions policymakers may want to consider when weighing whether to adopt this Article's suggested interventions.

IV. ADDITIONAL CONSIDERATIONS

This Article argues that at the conclusion of all monitorships, the public should receive an accounting that details whether the firm has or has not engaged in a successful remediation effort. This Article proposes the release of a public report that provides (i) the results of the monitorship at the conclusion of the engagement or (ii) in the event a monitorship is extended or shortened, justifications for this change in term. This Part focuses on addressing some additional considerations raised by this Article's argument and proposal.

A. *Why Not Make Current Monitors' Reports Public?*

The most obvious answer to the problems highlighted in this Article would be to make the current reports monitors generate public and easily accessible. For example, the DOJ could adopt a custom or policy of publishing all monitor reports resulting from its cases on its website. The DOJ already provides a wide variety of information on its website. For FCPA enforcement actions, the DOJ maintains a database of cases that provides information about the case, including any negotiated settlement agreements and any relevant press releases.³⁰⁷ For cases where monitors were appointed, the DOJ could just add the monitor reports to the webpage it already maintains regarding the case. This would seem to be the most efficient and low-cost way of getting this information out to the public. There are, however, at least three problems with this sort of approach.

First, there is no guarantee that the information contained in the traditional reports that monitors create would remain the same if they were subject to mandatory disclosure. Currently, the majority of monitor reports are drafted and disclosed to the government with the understanding that they will remain outside the public view.³⁰⁸ The specific content of these reports is subject to the discretion of the monitor and the government. If the norm changes from one of confidentiality to one of complete transparency, the content or manner of the reports would likely shift. The typical monitorship report is quite long, as evidenced

³⁰⁷ See, e.g., *United States v. Herbalife Nutrition Ltd.*, Docket No. 20-CR-00443, U.S. DEP'T OF JUST. (Sept. 2, 2020), <https://www.justice.gov/criminal/fraud/fcpa/cases/herbalife-nutrition-ltd> [<https://perma.cc/MSF6-XYM6>].

³⁰⁸ See, e.g., Root, *Monitor-“Client,”* *supra* note 31, at 575 & n.173 (explaining that AIG would not have agreed to the monitorship if it had known the reports would be made public).

by the reports that have been disclosed via traditional, court-ordered monitorships and public relations monitorships. But there is no requirement that they be dozens to hundreds of pages, as that would be difficult to mandate. Monitorships are utilized by different governmental actors in a variety of subject matter areas, and it might be difficult to mandate with specificity the contents of monitor reports *ex ante*. Additionally, since monitor reports are currently submitted in writing, if formal reports are required to be publicly disclosed, one might see some or all of a monitor's reports shift from being written work product to becoming oral presentations, thereby allowing the monitor and government to skirt the requirement. There is no way to know exactly what would occur if mandatory disclosure of monitors' reports were formally adopted, but if the status quo — which keeps the majority of the reports away from the public eye — changes, one should expect the content and manner of a monitor's reports to change in response.

Second, as I have detailed in other work, governmental actors often prioritize the receipt of information over the manner in which that information is conveyed to them.³⁰⁹ The government does not have to utilize a monitor to effectuate its oversight of a firm's remediation effort. The DOJ's Fraud Section, for example, has at times utilized monitorships quite frequently but at other times has instead allowed for self-reporting periods.³¹⁰ If monitor reports are required to be made public, corporations may push during negotiations to have the external counsel who oversaw the internal investigation into the firm's misconduct continue to assist the company in its self-reporting period, thereby allowing the company to maintain attorney-client privilege over the bulk of the information. This would allow the government to know there was an external third party overseeing the remediation effort — albeit one not truly independent of the organization — while allowing the corporation to maintain some degree of confidentiality over the information gathered during its self-reporting period. Importantly, there are regulators who already allow this sort of continued reliance on the entity that conducted the internal investigation.³¹¹ Thus, if mandatory public reporting of current monitor reports were adopted, one might expect to see

³⁰⁹ See Martinez, *Government's Prioritization*, *supra* note 47, at 105.

³¹⁰ See Memorandum from Andrew Weissmann, Chief, Fraud Section, Crim. Div., U.S. Dep't of Just. 4 (Apr. 5, 2016), <https://www.justice.gov/archives/opa/blog-entry/file/838386/download> [<https://perma.cc/D9RG-M9HH>] ("This Guidance first sets forth the requirements for a company to qualify for credit for voluntary self-disclosure, cooperation, and timely and appropriate remediation under this pilot program.").

³¹¹ See, e.g., S. COMM. ON GOVERNMENTAL AFFS., 107TH CONG., GOVERNMENT AT THE BRINK 118 (Comm. Print 2001) (primarily authored by Senator Fred Thompson) (citing an inspector general report that expressed concerns over the Treasury Department's "excessive reliance . . . placed on third-party information, such as the annual independent financial audits"); Freifeld, *supra* note 81 (discussing the case of Promontory where the state regulator relied heavily on the information provided by the company tasked with investigating the firm charged with misconduct).

organizations attempt to negotiate for self-regulatory periods instead. Because the government has historically displayed a preference for the receipt of information and has yet to specify a preference for how it gets that information, the government may concede that point. In short, adopting a mandatory reporting option may have the effect of decreasing the use of monitorships, which — to the extent having a truly independent outsider oversee the remediation effort is beneficial — ultimately might have a deleterious impact on ensuring firms engage in effective remediation practices.

Of course, there is a larger empirical question about whether monitorships are, in fact, “effective.” That is, to a certain extent, a difficult question to test quantitatively. Would effectiveness be measured by improvements in stock price, decreased rates of recidivism, or something else, and over what span of time? Quantitative empirical projects should, as I have noted previously, be pursued,³¹² but none will fully capture the pros and cons of monitorships without qualitative assessments and feedback. There is anecdotal evidence that suggests monitors are perceived as adding value. For example, during the Carnival monitorship, the monitor assisted in the discovery of noncompliance with the mandated environmental compliance program.³¹³ Additionally, during the VW monitorship, the company asked for additional time to demonstrate that it had met certain remediation requirements, and, in doing so, it stated that the monitor “ha[d] been an important catalyst for change” at the firm.³¹⁴ The upshot is that even without quantitative empirical evidence proving the effectiveness of monitorships, there does appear to be anecdotal evidence that monitors provide a valuable function by overseeing remediation efforts at firms — a function that may be negotiated away if the public disclosure of monitors’ full reports becomes required.

Third, there are arguments in favor of keeping a monitor’s reports confidential in certain situations. As I explain in prior work, for certain monitorships — like corporate compliance monitorships — allowing the monitor to maintain confidentiality over her work with the corporation might encourage members of the monitored organization to cooperate with the monitor.³¹⁵ As the HSBC monitor explained when resisting the disclosure of his report: “I believe that maintaining the confidentiality of the [report] is in the interest of an effective monitorship because it is

³¹² See Martinez, *Third Party*, *supra* note 171, at 614.

³¹³ Carnival Press Release, *supra* note 14. A DOJ official stated: “I want to take this opportunity to thank and commend the . . . Court Appointed Monitor for the close attention that [he] devoted to this important matter.” *Id.*

³¹⁴ Press Release, Volkswagen AG, Volkswagen AG Granted More Time to Test Compliance Programs Under Its U.S. Monitorship (Oct. 17, 2019), <https://www.volkswagen-newsroom.com/en/press-releases/volkswagen-ag-granted-more-time-to-test-compliance-programs-under-its-us-monitorship-5450> [https://perma.cc/TJD9-X583].

³¹⁵ Root, *Monitor-“Client,” supra* note 31, at 555; Root, *Modern-Day, supra* note 7, at 150.

clear to me that confidentiality encourages cooperation from the employees of HSBC Group.”³¹⁶ If the monitor needs to get information and buy-in from the monitored organization’s employees to facilitate the development of a remediation strategy, her ability to develop a rapport with employees may be harmed if they know the information will be publicly released. In these situations, it may be prudent to allow the reports to remain confidential, but that, of course, means the public will not have access to information that it might find important regarding the status of an organization’s remediation efforts. Thus, permitting a separate public report to be disclosed would allow confidentiality to be maintained for the monitor’s larger reporting obligations but still allow for the public to benefit from greater transparency regarding the results of the monitorship.

*B. Will Greater Transparency Deter Firms
from Agreeing to Monitorships?*

As noted earlier in this Article, companies and organizations of all types attempt to avoid monitorships for a whole host of reasons. In part, this is because monitorships are expensive, require time from employees, can last for several years,³¹⁷ and are consistently sought after by the government.³¹⁸ Indeed, after the *AIG* case, there was a dip in monitorships,³¹⁹ which may have been a result of firms expressing greater reluctance to enter into agreements where one of the terms included a monitorship. Therefore, one consideration policymakers must take into account is whether issuing a public report at the conclusion of a monitorship will result in a decrease in the number of monitorships entered into.³²⁰

At heart, this is an empirical question that, for a number of reasons, cannot be addressed given data currently available. First, the number of monitorships currently ongoing at the federal level is not known, in part because different agencies use different terms to refer to what this Article defines as a monitor. Second, it is difficult to definitively predict how firms will react to this sort of disclosure change. Prior calls for transparency for monitorships have focused on turning over the monitor’s full final or interim reports.³²¹ These calls faced heavy resistance,

³¹⁶ Cherkasky Affidavit, *supra* note 28, ¶ 11.

³¹⁷ See Warin, Diamant & Root, *supra* note 46, at 326, 341.

³¹⁸ See Cindy R. Alexander & Yoon-Ho Alex Lee, *Non-prosecution of Corporations: Toward a Model of Cooperation and Leniency*, 96 N.C. L. REV. 859, 894 (2018) (noting that a “prosecutor’s use of a [nonprosecution agreement] may have, in the short term, the effect of changing the profile of the corporate offender who pleads guilty to an offense, and in the long term, the effect of encouraging firms to invest more fully in robust compliance programs”).

³¹⁹ See *supra* p. 785.

³²⁰ See, e.g., Brief for the Appellant at 20–21, *SEC v. Am. Int’l Grp., Inc.*, 712 F.3d 1 (D.C. Cir. 2013) (No. 12-5141) (“AIG’s willingness to make such complete disclosures . . . depended on the understanding that the [Independent Consultant] Reports would be kept confidential.”).

³²¹ See Garrett, *Corporate Settlements*, *supra* note 30, at 1529–30.

as recounted earlier in this Article,³²² but this proposal is novel and different. It expressly attempts to maintain the status quo of how monitor reports are currently treated, while advocating for the creation of a new public report focused on informing the public about the remediation effort undertaken at the firm during the monitorship term. And while it would be quite difficult to empirically prove whether this proposal would result in a decrease in monitorships, there are policy rationales that suggest any decrease would be *de minimis*.

First, the current Administration has sent strong signals indicating that it intends to be quite bullish in its imposition of monitors.³²³ Second, the white-collar defense bar has a strong incentive to embrace this new stance as monitorships tend to be incredibly profitable engagements.³²⁴ But, perhaps most importantly, one should remember when monitors are most likely to be appointed — in the most egregious instances of corporate misconduct.³²⁵

A monitor is typically appointed in one of two scenarios. The first is when the organization has engaged in severe or significant misconduct. The second is when the organization has committed persistent or widespread misconduct. In either instance, the organization often needs to make significant modifications to its internal risk management and compliance procedures, and appointing a monitor assists in ensuring that the efforts undertaken result in meaningful, substantive remediation. Organizations that fall into one of these two categories have relatively weak negotiating power when attempting to resolve allegations of misconduct.³²⁶ Companies do not want to agree to enter into monitorships; they are pressured into them by the government or public due to the significance of the underlying compliance failure. The ebb and flow of the use of monitorships is attributable to changes in policy preferences as administrations change,³²⁷ but that does not suggest that firms have the power to reject wholesale the imposition of a monitor when the facts of misconduct meet a certain threshold. This Article's proposal may increase the amount of pushback the government receives when corporations object, as they most likely would in any event, to the imposition of a monitor, but it does not change the power of the government to pressure firms to enter into agreements that include a monitorship.

³²² See *supra* section II.B, pp. 786–88.

³²³ See Monaco Press Release, *supra* note 10; *DOJ Signals Increased Use of Corporate Monitors*, KATTEN MUCHIN ROSENMAN LLP (Nov. 18, 2021), https://katten.com/files/1133528_2021_11_18_frm_wcii_doj_signals_increased_use_of_corporate_monitors.pdf [<https://perma.cc/A6VH-XRTE>].

³²⁴ See Ben Penn, *Luck, Ties Drive Lucrative Big Law Corporate Monitoring for U.S.*, BLOOMBERG L. (Feb. 15, 2022, 4:45 AM), <https://news.bloomberglaw.com/us-law-week/luck-ties-drive-lucrative-big-law-corporate-monitoring-for-u-s> [<https://perma.cc/4M36-2KF6>].

³²⁵ Warin, Diamant & Root, *supra* note 46, at 337–38.

³²⁶ Root, *Monitor—“Client,”* *supra* note 31, at 581.

³²⁷ See Penn, *supra* note 324.

C. *Will Involvement from Shareholders Deter Firms from Entering into Monitorships?*

While I have already discussed the several benefits for specific individuals in mandating a public report,³²⁸ one specific group deserves particular attention: shareholders.

If shareholders are to have access to information regarding their firm's monitorship through a securities disclosure, two unique concerns may arise. The first is an issue of "shareholder activism." As with any party interested in the outcome of an investigation, shareholders, like institutional investors, that become aware of the monitor's work may try to assert themselves in the remedial efforts of the monitor and attempt to provide input or influence over what the monitor and monitorship will do in the future.³²⁹ Even though shareholders will not be able to influence the outcome of the particular company currently subject to the monitorship given that the terms of the monitorship will have been solidified in some type of government order or agreement,³³⁰ they may be able to influence future monitorships by attempting to incorporate new terms into these agreements that would give them greater oversight and control over the monitorship. This is particularly true for institutional investors and other shareholders that are repeat players within capital markets. And while uncommon, there has been at least one instance where a prosecutor negotiating the terms of a monitorship has considered including a major shareholder in these negotiations.³³¹

Professor Lisa Fairfax has noted how shareholders' use of the proposal process can help to "focus[] [the corporation's] managerial attention publicly and officially' on a given issue . . . [and] prompt[] corporations not only to consider . . . but also to generate the corporation's position on those issues."³³² These types of efforts to influence the corporation have also led to a type of "insider-shareholder collaboration,"³³³ which, in some cases, allows shareholders to "exploit their influence over corporate affairs opportunistically, pursuing objectives with respect to firm

³²⁸ See *supra* section III.B, pp. 800–09.

³²⁹ See Khanna & Dickinson, *supra* note 186, at 1742.

³³⁰ See *supra* p. 771; *United States v. HSBC Bank USA, N.A.*, 863 F.3d 125, 136–37 (2d Cir. 2017).

³³¹ Ford & Hess, *supra* note 80, at 702. However, "[t]he decision was ultimately made not to involve that shareholder, apparently out of concerns that the shareholder was more interested in finding fault than reforming the corporation." *Id.* at 702–03.

³³² Lisa M. Fairfax, *Making the Corporation Safe for Shareholder Democracy*, 69 OHIO ST. L.J. 53, 91 (2008) (citations omitted) (quoting W. Trexler Proffitt, Jr. & Andrew Spicer, *Shaping the Shareholder Activism Agenda: Institutional Investors and Global Social Issues*, 4 STRATEGIC ORG. 165, 173 (2006)).

³³³ See Jill E. Fisch & Simone M. Sepe, *Shareholder Collaboration*, 98 TEX. L. REV. 863, 865 (2020). Professors Jill Fisch and Simone Sepe have identified several forms of "insider-shareholder collaboration," namely "through private engagement between large shareholders and corporate executives and directors, through joint initiatives aimed at developing and promoting the spread of shared governance principles, . . . and through the increasing use of hybrid boards of directors to formalize shareholder inputs over operational decision-making." *Id.*

value that differ from those of other shareholders.”³³⁴ Consequently, shareholders concerned that a monitor may uncover more misconduct than was previously reported or known to the government entity may, in turn, attempt to prevent other companies from entering monitorships in the future, even if it is at the reputational expense of the company.³³⁵

Another shareholder-related concern is that by providing shareholders with information about the monitorship, firms will face increased liability and may be subject to more lawsuits.³³⁶ When shareholders are informed of the firm’s monitorship and remedial efforts, a firm’s failure to remediate these compliance failures may subject it to shareholder suits³³⁷ or perhaps even securities fraud claims under Rule 10b-5.³³⁸ Moreover, if the monitor shares a public report informing shareholders of subsequent similar misconduct, the firm may again find itself subject to a whole host of litigation brought by them.

It is certainly true that this Article’s argument and proposal may clear the way for more shareholder involvement in the monitorship process. The question, then, is whether the increased attention or involvement from shareholders is worth using an “end-run” approach to addressing the information disclosure and oversight problems that currently confront modern-day monitorships given that direct regulation appears out of reach. This Article contends that the potential costs of increased shareholder activity are worth it to solve these challenges. At its core, the true cost to the corporations facing a public report as a result of a monitorship is an increase in information given to shareholders and a decrease in informational asymmetries. Capital markets will have better information about the results of monitorships, which means that information will be accessible to investors and other stakeholders. Corporations might not like the collateral consequences of this Article’s argument and proposal, but there are concrete benefits to the suggestions this Article presents.

D. What About Government Responsibility or Capture?

The discussion above illustrates the degree to which monitors and monitorships are utilized when a company has been found engaging in misconduct. Given this pattern, one could argue that the government is

³³⁴ *Id.* at 907.

³³⁵ See Ford & Hess, *supra* note 80, at 703 (noting that many shareholders did not want a monitor “effectively because of the disruption they represent to business operations”).

³³⁶ Root, *Monitor-“Client,” supra* note 31, at 578.

³³⁷ See *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 966–72 (Del. Ch. 1996) (setting the standard for director oversight liability in shareholder suits). Importantly, the standard under *Caremark* is considered, at least by some scholars, to be in flux given recent decisions by the Delaware courts that have allowed cases to proceed. See, e.g., Stephen A. Radin & Joshua Glasser, *Weil Gotshal Discusses Boeing Decision and Board Oversight of Product Safety Risks*, CLS BLUE SKY BLOG (Sept. 20, 2021), <https://clsbluesky.law.columbia.edu/2021/09/20/weil-gotshal-discusses-boeing-decision-and-board-oversight-of-product-safety-risks> [<https://perma.cc/K9XT-HNJJP>].

³³⁸ 17 C.F.R. § 240.10b-5 (2021).

overusing monitors as a remedial tool, and that it is inappropriate to use private parties to oversee enforcement priorities over which courts or regulators maintain control. However, a top Office of the Comptroller of the Currency official has indicated that outside experts have a role in doing “some of the grunt work that needs to be done in a bank to correct deficiencies” and that “[i]t’s probably better for [the Office of the Comptroller of the Currency] to have someone externally do it,” while the regulators ensure the outside experts maintain their independence.³³⁹

Additionally, the reality is that the government has limited resources, so by allowing monitors to oversee remediation efforts at firms, the government can utilize its resources over a larger number of matters. Legal scholarship also suggests that “private institutions and individuals can be accountable for their own behavior, and that the government’s efforts to enforce the law should allow people to play an active role,”³⁴⁰ suggesting that classic exclusive government control over regulatory remedial efforts should be replaced with more cooperative and collaborative approaches. If a monitor is able to develop a cooperative and collaborative relationship with a monitored organization, she may be able to come to a better resolution than if the government maintained its exclusive posture over a company engaged in a remediation effort. Moreover, the monitor’s ability to connect diverse networks of people with an interest in the monitored firm’s successful remediation of past misconduct makes her uniquely situated to encourage cooperation amongst all relevant parties to the monitorship.

Even if one accepts that utilization of a monitor is not an improper abdication of the government’s responsibility, one might still have concerns about how capture might impact the monitor’s effectiveness. A primary criticism levied against the use of monitorships has been concerns about potential capture — capture of the monitor herself or capture of the entity or entities also engaged in the monitoring relationship (for example, the government or court) — by the monitored organization.³⁴¹ Increased transparency and disclosure are often the responses to concerns about capture.³⁴² Requiring a public report that provides

³³⁹ Jesse Hamilton & Cheyenne Hopkins, *OCC Asks for Enforcement Powers Against Banks’ Consultants*, BLOOMBERG (Apr. 11, 2013, 5:58 PM), <https://www.bloomberg.com/news/articles/2013-04-10/occ-asks-for-enforcement-powers-against-outside-consultant-firms> [<https://perma.cc/7NRU-KBH2>] (quoting then-Comptroller of the Currency Thomas Curry).

³⁴⁰ Edwin Rubin, *The Myth of Non-bureaucratic Accountability and the Anti-administrative Impulse*, in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 52, 54 (Michael W. Dowdle ed., 2006).

³⁴¹ See Ford & Hess, *supra* note 80, at 709–10.

³⁴² See Root, *Monitor-“Client,” supra* note 31, at 579–80; Lawrence G. Baxter, *Capture Nuances in Financial Regulation*, 47 WAKE FOREST L. REV. 537, 540 (2012) (suggesting that the likelihood of capture could be mitigated by “increas[ing] . . . transparency, independence from industry, and rigorous isolation of regulatory decisions[], which are designed to prevent, or at least minimize, the opportunity for improper influence by particular groups”).

high-level details regarding the results of the monitoring process may help to curb these concerns.

CONCLUSION

Monitors oversee remediation efforts of all types. Whether it is a concern over corruption within a union,³⁴³ improper money laundering of drug-cartel funds at a major bank,³⁴⁴ inadequate environmental compliance and purposeful pollution of ocean waters,³⁴⁵ bribery of foreign officials to obtain a competitive advantage,³⁴⁶ or abuses by police departments,³⁴⁷ monitors are responsible for overseeing remediation efforts across a variety of legal and regulatory areas. Monitorships have evolved from a tool used by the courts to one that is often folded into the terms of a negotiated settlement agreement between a regulator or prosecutor and a firm. And recent indications from the DOJ suggest a renewed prioritization of the use of monitorships to oversee remediation efforts at firms found to have engaged in significant or pervasive misconduct.³⁴⁸

At its core, the success or failure of a monitor's efforts to oversee a firm's remediation efforts directly impacts the public in a variety of ways; from deterring crime to helping ensure those responsible for policing are engaged in ethical activity, monitors impact the lives of average citizens each and every day. Because, however, courts, regulators, and prosecutors are not capable of perfectly supervising the work of monitors, a number of concerns related to a lack of information disclosure and oversight for modern-day monitorships persist. This Article addresses these problems, while making three contributions to scholarly conversations ongoing today.

First, it argues that at the conclusion of all monitorships, the public should receive an accounting of the work completed by the monitor and whether the firm has or has not engaged in a successful remediation effort. This argument is novel within legal scholarship. Most scholars and advocates who have argued in favor of greater transparency regarding monitorships have focused on obtaining the interim and final reports that corporate monitors prepare for firms and the government.

³⁴³ UAW Press Release, *supra* note 1.

³⁴⁴ HSBC Press Release, *supra* note 12.

³⁴⁵ Carnival Press Release, *supra* note 14.

³⁴⁶ Press Release, U.S. Dep't of Just., Zimmer Biomet Holdings Inc. Agrees to Pay \$17.4 Million to Resolve Foreign Corrupt Practices Act Charges (Jan. 12, 2017), <https://www.justice.gov/opa/pr/zimmer-biomet-holdings-inc-agrees-pay-174-million-resolve-foreign-corrupt-practices-act> [https://perma.cc/4T5M-WNXL].

³⁴⁷ Press Release, U.S. Dep't of Just., Justice Department Reaches Agreement with City of Baltimore to Reform Police Department's Unconstitutional Practices (Jan. 12, 2017), <https://www.justice.gov/opa/pr/justice-department-reaches-agreement-city-baltimore-reform-police-department-s> [https://perma.cc/U8YM-X467].

³⁴⁸ Monaco Press Release, *supra* note 10.

I disagree with this approach. If the current reports that monitors undertake were to be disclosed, their contents would be subject to dramatic change, including in ways that might be inefficient. There is no legal requirement for a monitor to issue a certain set of information in the reports that are prepared today. Monitors could easily pivot from written reports to verbal presentations or other mechanisms for providing information to the government. This Article argues in favor of requiring that a separate report be prepared and disseminated to the public, but it does so while leaving the status quo regarding current monitor reports in place.

Second, this Article proposes a second-best framework for addressing the information disclosure and oversight problems that have plagued monitorships for the past fifteen to twenty years. It does so by suggesting two potential paths for mandating that monitors issue a public report: (i) a securities disclosure and (ii) OMB policy. In doing so, the Article builds upon the work being done in the securities literature with regard to the purposes of disclosure for the public, shareholders, and stakeholders. Many scholars and practitioners think of disclosure requirements as being limited to material information for investors, but there is a larger discussion ongoing about the appropriateness of this view. This Article contributes to that conversation and articulates a rationale for why a public reporting mandate for monitors adheres to the SEC's ability to require disclosures for the public, shareholders, and stakeholders.

Third, this Article proposes a mechanism for creating an ethical floor to govern monitor conduct via the disclosure of the monitor's identity and the requirement that she comply with an attestation requirement. These interventions are, admittedly, modest in scope, but they will provide an opportunity to create a binding expectation with regard to monitor conduct. Today, there are no formal requirements for monitors, so this Article's proposal is one small step toward more standardized guidance.

The upshot of this Article is that public reporting of monitorship outcomes will provide an important opportunity to create broader disclosure regarding the results of monitorships and organizations' successes or failures at implementing remediation processes, while also creating opportunities for more formal oversight of monitor conduct.