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Will Corporate Monitor Reports Become Public?

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Many reporters would love to get their hands on independent compliance monitors' reports. These reports are intended to include candid, independent analyses of companies' compliance programs. In order to provide a full picture of a company's compliance program, a monitor's report typically discusses in some detail the company's business operations. This means that monitors' reports will often include a significant amount of confidential business information.

In a few recent cases, reporters or members of the public have requested that courts grant access to monitor reports. In one recent case, now on appeal to the U.S. Court of Appeals for the Second Circuit, the district court concluded that a monitor's reports are "judicial records" and should be disclosed to the public. In another case, a district court recently issued a mixed ruling that upheld many of the government's assertions of Freedom of Information Act exemptions but indicated that the court would review the reports to determine whether redacted versions could be released. In other words, the recent court rulings have created uncertainty regarding whether the public and the media can get access to monitors' reports. As explained below, if independent compliance monitorships are to remain an important part of how the U.S. government resolves corporate investigations, it is imperative that the courts reject demands for public release of the reports. The current uncertainty, if not resolved, has the potential to have a chilling effect on monitors' work.

Over the last decade and a half, monitorships have become a critical component of the government's approach to resolving its largest corporate investigations. These monitorships work as follows: The relevant government agency will often agree to settle with a corporation rather than bring a case against it; as part of the settlement, the corporation will typically admit to certain conduct, pay a large fine, agree to certain compliance reforms, and agree not to engage in the same conduct again; and in order to ensure that the corporation complies with its obligations, the corporation will be subject to review by an independent compliance monitor for some defined time period, typically two or three years. The monitor is usually required to be independent, meaning that while the monitor's fees are typically paid by the company being monitored, the monitor does not serve as the company's counsel or agent. Instead, the monitor conducts an independent review of the company's compliance program and reports his or her findings to both the government and the company.

Monitorships have become increasingly prevalent for several reasons.

First, there has been a significant increase in the U.S. government's investigations of corporations since the early 2000s. This began with the demise of Enron, Arthur Andersen, WorldCom and others in 2002 and 2003, and it continued through the financial crisis of 2008 and beyond.

Second, the government has adopted a strong preference for resolving corporate investigations in a way that holds the company accountable without putting the company out of business. The U.S. Department of Justice's indictment of Arthur Andersen, which effectively put the company out of business, is the quintessential example of the consequences of a criminal indictment of a company. A settlement with a fine and a monitor allows the DOJ to hold the company accountable without many of the collateral consequences for innocent employees, shareholders, and others. Since the indictment of Arthur Andersen, the government has entered more than 300 deferred prosecution agreements or nonprosecution agreements, many of which included the appointment of a monitor.

Third, state regulatory agencies are increasingly adopting the monitor model as well. The New York Department of Financial Services is the most notable, but certainly not the only, example of this.

Finally, some foreign governments are getting into the business of appointing monitors as well. While a purely foreign case would not be impacted by the recent U.S. court decisions on monitorships, those U.S. court decisions do have the potential to impact joint monitorships, i.e., situations where monitors are jointly appointed by the U.S. government and a foreign government.

Part of the media's interest in monitorships and monitors' reports could be that there has been some controversy regarding the use of monitors. Allegations of favoritism in the selection of the monitors have plagued the system from the start. Although the DOJ adopted a formal procedure for the selection of corporate compliance monitors, certain courts and interest groups have still criticized the monitor-selection process. In March 2017, for example, a federal judge in Texas rejected the monitor selection process included in a proposed plea agreement between the United States and ZTE Corporation and selected the monitor himself. Perhaps due to this controversy or the potential treasure trove of business information in the reports, reporters and other members of the public have sought to obtain monitor reports as judicial records or through FOIA requests.

The first significant decision on the issue came in 2012, after a reporter sought access to reports prepared by the monitor for AIG. The reports were of particular interest not only because of AIG's prominent role in the financial crisis but also because the monitor, James Cole, went on to become deputy attorney general of the United States. The reporter sought access to the monitor's reports as "judicial records" to which she has a common law right of access, and the district court in D.C. agreed. The U.S. Court of Appeals for the D.C. Circuit, however, reversed the district court's ruling, holding that the reports were not judicial records "because the district court made no decisions about them or that otherwise relied on them."

The D.C. Circuit's decision in the AIG case gave significant comfort to corporations subject to monitors, the monitors themselves, and government agencies that rely on the monitors to provide candid and detailed information. But two recent cases create some uncertainty regarding whether monitor reports will remain confidential.

In 2016, the U.S. District Court for the Eastern District of New York reached a very different conclusion from that of the D.C. Circuit. The court concluded that a monitor's report regarding HSBC's compliance with its 2012 deferred prosecution agreement was "integral to the fulfilment of [the court's] continuing obligation to monitor the execution and implementation of" the deferred prosecution agreement.

Accordingly, the court concluded that the public has a right of access to the report. While the judge permitted certain specific redactions to the report to protect confidential information, such as information about employees and information that criminals could use to exploit HSBC, the judge decided that the majority of the content of the report should be unsealed. HSBC and the government both filed appeals, and the district court stayed its own order pending resolution of the appeal. The case was argued before the U.S. Court of Appeals for the Second Circuit on March 1, 2017.

The other case arose from Siemens' then record-setting $800 million Foreign Corrupt Practices Act settlement with the DOJ and U.S. Securities and Exchange Commission. In 2013, a group of reporters filed FOIA requests with the DOJ and SEC requesting the monitor's reports. After the agencies rejected the FOIA requests, the group brought a FOIA action in the U.S. District Court in D.C. On March 31, 2017, the district court issued a ruling largely upholding the government's assertion of FOIA exemptions, but leaving open the possibility that the court would order the production of redacted versions of the monitor's reports and other materials. The court rejected DOJ's argument that it was impossible to segregate purely factual material in the documents from information that is protected by FOIA exemptions. As a result, the court ordered the DOJ to submit one work plan and one annual report prepared by the Monitor for in camera review to determine whether the release of redacted documents would be possible. The reporters' group will likely appeal the district court's decision that largely upheld DOJ's assertion of FOIA exemptions.

Due to the recent decisions by judges in the HSBC and Siemens cases, it is unclear whether monitors' reports will be protected from disclosure. What is certain is that there is much more at stake than protecting employees' private information and avoiding the disclosure of a roadmap for would-be criminals seeking to exploit weaknesses in the companies' compliance programs, though those undoubtedly are important concerns. Rather, disclosure of monitors' reports threatens to undermine the entire monitorship process.

A critical component of a successful monitorship is the free flow of information between the monitor, the company, and the government. The company and its employees must be able to share information openly and candidly with the monitor, knowing that confidential business information will not be released to the public. Likewise, the monitor must be able to communicate openly and candidly with the government and with the company's Board of Directors. If disclosure of monitor reports becomes a realistic possibility, it could have a chilling effect on this process. Although the agreements that give rise to the monitorships usually include a requirement that the companies cooperate with the monitors and that the monitors' reports will be "non-public," the companies and their employees may be more guarded about sharing information with the monitor if they believe there is a risk that their competitors, reporters, and others could gain access to the information they share. Likewise, any good monitor will be sensitive to the fact that including the company's confidential business information in a public report could cause unnecessary business harm to the company. Accordingly, the monitors, in turn, could feel constrained with regard to the level of detail they could include in their reports. This will leave the government and the courts with less information on which to assess a company's compliance with its agreement to improve its compliance program and avoid further violations of law.

More fundamentally, the disclosure of monitor reports could potentially make some companies – and perhaps even the government as well – less likely to enter into agreements that require appointment of monitors. To be sure, no company ever wishes to have a monitor. But companies could become even more resistant to the appointment of monitors if they fear that sensitive business information could become public as a result. This could lead to more settlements that do not call for the appointment of a monitor, depriving the government and the public of a valuable resource in ensuring that companies

comply with the terms of settlements. Worse yet, reluctance to agree to a monitor could prove fatal to efforts by the government to resolve an investigation without resorting to an indictment. That could leave the government in the unfortunate position of having to let a company off altogether or making the company the next Arthur Andersen.

Moreover, many monitorships involve at least some work outside the U.S. Foreign countries' privacy laws already pose a challenge that monitors must carefully navigate. If monitor reports are to become public documents, foreign governments might become even more reluctant to allow U.S.-appointed monitors to collect documents and data within their jurisdictions.

The government could avoid the judicial records doctrine by entering into purely out-of-court settlements so the monitors' reports are never shared with the courts. For example, the DOJ could use non-prosecution agreements (which do not require court approval) more frequently in the place of deferred prosecution agreements or guilty pleas, both of which involve the courts. This, however, would only result in less judicial oversight. But in any event, such an approach would not mitigate the risk of disclosure under FOIA, which could manifest any time a monitor's report is submitted to a government agency. Monitors could manage this risk by giving only oral briefings to the government, but such an approach would hardly advance the effectiveness of monitorships.

In the end, the public's interest in access to monitors' reports, while not insubstantial, falls far short of the interest in protecting monitors' reports from public disclosure. The courts should try to resolve this issue quickly, and do so in a way that protects monitors' reports from public disclosure.

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