GIR Global Investigations Review

The Guide to Monitorships - Fourth Edition

Facing the hurdles in concurrent monitorships

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Since WorldCom, the United States Department of Justice and other agencies have imposed more than 80 monitorships on a variety of companies, including some of the world's best-known names. The terms of these monitorships and the industries in which they have been used vary widely, yet many of the legal issues they raise are the same. To date, there has been no in-depth work that examines them.

GIR's Guide to Monitorships fills that gap. Written by contributors with first-hand experience of working with or as monitors, and edited by Anthony S Barkow, Neil M Barofsky, Thomas J Perrelli, Erin Schrantz and Matt Cipolla of Jenner & Block, the fourth edition of this esteemed guide discusses all the key issues, from every stakeholder's perspective, making it an invaluable resource for anyone interested in understanding or practising in the area.

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Facing the hurdles in concurrent monitorships

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Summary

INTRODUCTION

US government agencies and other oversight entities (e.g., World Bank) regularly use independent monitors as a reliable and effective compliance tool. Independent monitors evaluate the design and effectiveness of a company's compliance and ethics programmes to shift corporate culture away from prior 'bad behaviour' and determine whether the company is in compliance with applicable laws and the terms of settlement agreements.

As non-US jurisdictions have increasingly continued to adopt the US stance of holding companies accountable for the misconduct of employees, subcontractors and others, the use of independent monitors outside the United States is expected to follow suit. In fact, the UK's Serious Fraud Office and Brazil's Federal Prosecutor's Office have both used external monitors in recent years. Sometimes a company may be subject to multiple settlement agreements – or probation orders – with different government agencies or oversight entities, which may substantiate the need for multiple independent monitors during any period that the agreements overlap. This is referred to as 'concurrent monitors or monitorships'.

ANALYSIS OF CONCURRENT MONITORSHIPS

The two entities discussed below were subject to concurrent monitors for different reasons but primarily to protect the interests of all parties involved.

ZTE CORPORATION

Zhongxing Telecommunications Equipment Corporation (ZTE)[2] agreed to a plea agreement with the US Department of Justice (US DOJ) on 6 March 2017 and entered into two settlement agreements on 7 March 2017 with the Bureau of Industry and Security (BIS) and the Office of Foreign Assets Control, for conspiring to violate the International Emergency Economic Powers Act.[3]

These plea and settlement agreements required ZTE to retain an independent, third-party compliance monitor to review and assess its processes, policies and procedures regarding compliance with US export control laws, and to hire an independent compliance auditor, with expertise in US export control laws, to conduct external audits of its compliance with US export control laws. ZTE's March 2017 settlement agreement with BIS stated that the role of the auditor and compliance monitor would be filled by the same person. US District Judge Ed Kinkeade appointed James Stanton as the independent compliance monitor to meet the requirements of the March 2017 plea and settlement agreements. In October 2018, Monitor Stanton's appointment was extended for an additional two years until March 2022.[4]

In March 2018, ZTE notified BIS that it had made false statements in its letters submitted to BIS, concerning the discipline of 39 employees involved in the aforementioned violations.[5] As a result, in April 2018, BIS activated a previously suspended seven-year denial order precluding ZTE from transacting in any way with US-origin items. On 7 June 2018, ZTE entered into a superseding settlement agreement (SSA) with BIS, which included a US$1 billion fine. The SSA required ZTE to retain an independent special compliance coordinator (SCC) selected by BIS to coordinate, monitor, assess and report on ZTE's compliance with export control laws and the SSA for a probationary period of 10 years.[6] Subsequently, BIS issued an order on 13 July 2018 removing ZTE from the Denied Persons List.[7] On 24 August 2018, the US Department of Commerce appointed Roscoe C Howard, Jr as the SCC.[8]

ODEBRECHT SA/NOVONOR

Odebrecht SA, rebranded as Novonor, drew unwanted international attention after being embroiled in a corruption and bribery scandal.[9] What began as an investigation by Brazilian law enforcement grew into a multinational regulatory enforcement action involving Brazil, Switzerland and the United States.

In the United States, Odebrecht was charged with conspiracy to violate the anti-bribery provisions of the Foreign Corrupt Practices Act and, on 21 December 2016, pleaded guilty to a one-count criminal information.[10] On or about 1 December 2016, Odebrecht signed a leniency agreement with the Federal Public Ministry in Brazil. As part of the respective settlements, Odebrecht entered into a three-year independent compliance monitorship and, in 2017, Charles Duross oversaw Odebrecht's compliance on behalf of the US DOJ. Separately, Odebrecht also agreed to a two-year corporate anti-bribery and anti-corruption monitorship,[11] and Otávio Yazbek, former director of Brazil's Securities and Exchange Commission, oversaw this separate monitorship, which reported to Brazil's Federal Prosecutors' Office.[12] In a 2017 interview,[13] Yazbek acknowledged the risks associated with Odebrecht's geographical diversity as a multinational company operating in different legal environments.

SUMMARY

In reviewing cases where concurrent monitors have been appointed in recent years, rationale has included (1) new penalties stemming from subsequent violations, (2) multiple agreements with different regulatory or oversight agencies, and (3) international jurisdictional requirements. Concurrent monitorships pose unique challenges for all parties regardless of how they come into existence. From a project management standpoint, special consideration should be given to these challenges at the outset to minimise issues and risks.

SCOPE OVERLAP

Monitorships, based on the scope outlined by the underlying resolution or settlement agreement,[14] can be costly and disruptive to a company's operations. Concurrent monitorships can amplify these issues. When multiple regulatory or oversight agencies appoint concurrent monitors to oversee a company, the concurrent monitors can take steps to minimise inefficiencies and the operational impact on the company. Though the involved government agencies or jurisdictions may have had different causes or reasons for entering into the settlement agreements affecting the scope of a monitorship, those agreements are most likely to include aspects of the same company compliance and ethics programme, inevitably creating scope overlap between the concurrent monitorships.

As good financial stewards of the use of company funds and resources in a monitorship,[15] and in light of a possible inquiry about the reasonableness of fees and expenses from the regulators, the concurrent monitors should consider ways to efficiently navigate any intersection of their workstreams, including the sharing of information and coordination of logistics for interviews, site inspections, and data preservation and collection activities (noting that local privacy laws must also be taken into consideration as well as the confidentiality requirements of the agreements). By understanding each monitor's charge from the respective settlement agreements and engaging in regular dialogue on planning and execution, possible synergies may be gained, or areas of joint collaboration and learning may be identified, with the monitors ensuring that the required levels of confidentiality and independence are maintained.

WORKING EFFECTIVELY WITH ALL INVOLVED PARTIES

Healthy working relationships among the involved parties critically contribute to the success of concurrent monitorships. To navigate the challenges of accomplishing similar yet distinct objectives, the monitors and all interested parties must build a good rapport, maintain a mutual level of trust and make a good-faith effort to understand the perspectives and needs of all those concerned.

Although each party may have differing interests or vantage points, the parties possess some commonality when it comes to the execution of the respective monitorships, in that they need to identify and agree certain ground rules for procedural matters in the day-to-day operations of the monitors' work. The monitors should consider coordinating between themselves at the onset of the overlapping term of the monitorships and, as appropriate, work together with the company and its legal representatives (and the regulators, if warranted) to determine the joint protocols, if any, for addressing matters such as establishing protocols, coordinating software and application platforms, and sharing information and reports.

ESTABLISHING PROTOCOLS

Although the monitors' individual charges may be separate and distinct, there is often some level of overlap in their work. If permissible under the respective settlement agreements, each monitor's team should consider developing an internal protocol to determine whether to review document productions from the other monitor's work and, if so, in what circumstances and to what level of detail. In situations where there is mutual interest between the monitors to attend company meetings and employee interviews, ground rules should be established prior to each of the monitors' team attending such meetings and interviews. The parties might want to make clear who will be leading the enquiries, the protocol for follow-up questions or clarifications from the other monitor's team, and an agreed preamble to be communicated to company attendees so they clearly understand the distinction between the roles and responsibilities of the concurrent monitors.

COORDINATING SOFTWARE AND APPLICATION PLATFORMS

Especially in a predominately remote working environment, the use of technology has become increasingly critical in carrying on business as usual. In circumstances involving concurrent monitorships, the monitors' teams may benefit from making a conscious effort to minimise the use of various different technology platforms (e.g., Microsoft Teams, Zoom and Google Meet) in favour of using the same software and application platforms as much as possible. Requiring the use of multiple technology platforms that serve a similar purpose can be confusing and inefficient to participants and may be cost-prohibitive to the company under monitorship. To facilitate more timely production of data and alleviate the administrative burden on the company, the monitors may consider coordinating their teams' use of document repositories and project management tools, and make efforts to streamline the respective document production and other communication protocols. For example, if the monitors could leverage the same document repository platform vendor, both monitor teams may experience efficiencies, and may minimise learning curves in navigating different tools from the company's perspective. It is not always possible or practical, but coordination of technology and related protocols should be considered. Although not unique to concurrent monitorships, given the heightened risk in respect of data breaches, special consideration should be given to cybersecurity risks when selecting software and application platforms

and vendors, including (but not limited to) cloud-based software tools, especially when the same platforms and tools are used by the concurrent monitors' teams.

SHARING INFORMATION AND REPORTS

To execute the concurrent monitors' work efficiently and effectively, and to the extent allowed by the respective settlement agreements, the concurrent monitors should consider establishing a regular meeting cadence between their teams to compare notes and discuss any findings or observations that may be relevant to their respective objectives. One example of this may be previewing high-level significant findings or internal control enhancements with the other monitor to evaluate the pervasiveness and extent of issues, as well as to fact-check the monitors' understanding of the company's processes and procedures. Although the concurrent monitors' work plans and deliverables themselves may be proprietary and confidential in nature, maintaining an open dialogue, again where allowable by the respective settlement agreements, is mutually beneficial to all parties involved. By sharing mutual challenges and communicating issues that are bubbling to the surface in real time, the monitors may be able to more swiftly escalate prevalent compliance issues to the company, which may result in more dedicated company resources and attention to remediating high-priority concerns. With the common goal of monitoring and assessing the company's compliance pursuant to the respective settlements, the monitors can work together yet separately to address issues while also maintaining their independence and confidentiality requirements. When there are limitations that affect one monitor's ability to communicate with another monitor (owing to the settlement agreement, non-disclosure agreement, independence or privacy concerns), one should consider identifying areas where cooperation is possible while fulfilling one's own mission. Think dual, not duel.

EMPLOYEE COMMUNICATION

When multiple monitors are involved, it can be complicated for a company to explain to employees the different roles and responsibilities of each monitor, which can result in employee misunderstanding or confusion. Especially in concurrent monitorships, it is critical for the company to instil an open flow of information with the monitors and encourage employees to freely share information with them. Likewise, it is important for the concurrent monitors to establish a level of trust and rapport with employees, reiterating their roles and responsibilities and providing employees with multiple mechanisms to report complaints or concerns confidentially or anonymously. The company should design an effective communication strategy to ensure that employees have a clear understanding of the respective roles, responsibilities and purpose of each monitor. The roles of the company's senior and local leadership teams are significant in driving these communications to employees and mandating an open dialogue.

When designing written notifications for employees, the company may want to consider adding a headshot of each monitor, the logo of the affiliated regulatory agency or country, and simple and concise language defining the scope of each monitor as well as the expectations regarding cooperation with the monitors.

When interviewing employees, a monitor should consider including in an introduction who he or she is, the regulatory agency or body that appointed him or her, and the purpose of the monitorship. The monitor should then obtain confirmation of each employee's understanding.[16] If employees do not understand the distinction between the concurrent monitors and their respective purposes, they may:

- believe that they have already discussed a topic with monitor A when, in reality, the prior discussion was with monitor B;
- choose not to volunteer or share information believed to be out of scope; or
- contact the incorrect monitor with whistle-blower complaints or be hesitant in reaching out because of confusion or uncertainty regarding each monitor's purpose.

Concurrent monitors face additional challenges, such as coordination, timing and scheduling of inspections and interviews. These challenges can be a burden on employee resources if not handled properly.

COMMUNICATIONS WITH COUNSEL FOR THE COMPANY

In nearly every monitorship, in-house or external legal counsel (or both) represent the monitored company.[17] A key point in managing a concurrent monitorship is establishing effective communication and guidelines with counsel.

Although it is possible for monitors to commence their work simultaneously, it is more likely that they will start at different times. When a subsequent monitor is appointed after an initial monitor, operating procedures and expectations would have already been set between the first monitor and counsel (e.g., whether external counsel will be present for employee interviews or whether the company is waiving privilege). As a result, the first monitor's historical interactions, arrangements and actions typically will affect the subsequent monitor's initial protocols and communications with counsel.

When establishing how to interact with the company's counsel during a concurrent monitorship, each monitor and counsel may consider:

- communicating what, if any, specific role, or roles, counsel will play throughout the monitorship. In the event that multiple law firms and counsel are involved, the monitor should understand the role of each;
- communicating whether the company or its counsel plans to exclude one or more of the monitors from certain issues or company updates. Given the difference in the scope of the concurrent monitors, the company and its counsel may want to clarify scope in situations where a monitor may have different expectations;
- establishing counsel's role (if any) in the company's response to monitor document requests, including whether the company is redacting or not disclosing items because of privilege, trade secrets or state secrets;[18] and
- establishing whether counsel may be present during monitor interviews or meetings with company representatives.

BURDEN ON COMPANY RESOURCES

As enforcement agencies must weigh the costs and benefits of imposing a potential monitorship, so too must a monitor consider how the scope of his or her work affects the company in relation to the benefits for the enforcement agency, the company and the public. In situations where multiple enforcement agencies appoint more than one monitor, these considerations for each monitor are compounded.

Concurrent monitors must therefore account for the increased strain on the company in terms of time, expense and resources. For example, areas of strain often relate to (1)

document and data requests, (2) employee interviews and (3) reconciliation of monitor recommendations.

DOCUMENT AND DATA REQUESTS

Information gathering is critical in any monitorship, and document and data requests make up the bulk of the role during the initial phases of the monitorship. As such, the company should manage the requests through an internal liaison or project management team to coordinate the productions to the monitors. Although concurrent monitors may have different objectives based on the respective settlement agreements, the monitors are likely to share an interest and need to review company records produced for overlapping monitor requests.

EMPLOYEE INTERVIEWS

Similar to document and data requests, employee interviews ordinarily form a large part of the information gathering needed for monitorships. In the case of concurrent monitorships, the monitors should consult with the company to establish a protocol for submitting interview requests through the company's liaison team. When establishing the protocol, the monitors should consider determining (1) whether and when each monitor is to receive notice from the other monitor regarding interview requests and (2) whether each monitor will extend an opportunity to the other monitor to jointly participate in or observe the interviews (to the extent allowable by the settlement agreements). By sharing notices of interviews and agreeing to joint interviews, the monitors can avoid scheduling conflicts and minimise business disruption within a particular company location, division or department. Moreover, joint interviews may limit the need to interview the same employee multiple times. Although not always possible given the timing of the respective monitor appointments, these practices might be particularly helpful during the early stages of a concurrent monitorship, when the monitors are likely to identify similar company leadership representatives for their initial sets of interviews.

RECONCILIATION OF MONITOR RECOMMENDATIONS

During a concurrent monitorship, each monitor will have his or her own observations and findings about the company's efforts to develop and implement its compliance and ethics programme, which usually include reports to the company and the relevant enforcement agency. These reports are sometimes accompanied by actionable recommendations for improvements in the effectiveness of the company's compliance and ethics programme and related internal control enhancements. For example, these recommendations may include changes to the company's systems, or updates to policies or other business practices to address compliance gaps. These recommendations may require substantial company resources to implement. To the extent that each monitor has access to the reports and recommendations of the other,[19] the monitors should be cognisant of each other's recommendations in an effort to be fully aware of the depth and breadth of issues. Independent corroboration of similar findings may illustrate that the issues are not anecdotal and may serve as a measure of confirmation of significant compliance gaps. By regularly communicating changes to its policies and procedures to the concurrent monitors, the company can help to ensure that future recommendations are practical and based on the current processes of the company.

DIFFERING OPINIONS AMONG CONCURRENT MONITORS

During concurrent monitorships, the findings and recommendations of the monitors may differ or be contradictory. Successful project management acknowledges that such divergence may occur and has a plan to address these situations where necessary.

In the event that the company or concurrent monitors find themselves in this position, the first step is to understand the reported discrepancy. As British novelist C S Lewis reminds us: 'For what you see and hear depends a good deal on where you are standing[.]'[20] The reason for the discrepancy could be as simple as the monitors working from different sources of information or a different context in which the company presented the information. For instance, one monitor may have reviewed different documents or conducted different employee interviews that have led to a finding and recommendation differing from that of the other monitor.[21]

Furthermore, the company may have agreed to be subject to additional areas of oversight with one enforcement agency but not the other. As a result, the vantage point through which the monitors view the company's actions and report findings, risks and recommendations may be different and explain the apparent discrepancy.

The monitors and the company should consider reviewing the findings and recommendations together to determine whether the discrepancies require reconciliation and, if so, the process to resolve them, including possible revisions or refinements of the findings or recommendations. For instance, one monitor may have intended the application of a finding or recommendation to be narrow in scope, or to address a specific aspect of the company's operations, or a specific risk associated with only the regulations under its purview.

JURISDICTIONAL CONFLICTS

Concurrent monitors will often deal with multinational companies. One challenging aspect of monitoring a multinational company is the conflicts of law that may arise. Any significant differences between the laws and business practices of different jurisdictions need to be identified so that these expectations can be managed at the beginning of the monitorship.

This is certainly true in the area of data privacy. Regulation (EU) 2016/679, which was adopted on 14 April 2016 and entered into force on 25 May 2018,[22] is one of the strictest privacy laws in the world. Although it was drafted and passed by the European Union, it imposes obligations on companies anywhere that target or collect data concerning citizens of the European Union and the European Economic Area.[23]

Concurrent monitors should have protocols in place at the beginning of the monitorship to avoid situations that will require the monitor to return to the company any information improperly provided or disclosed by the company. It is incumbent upon all parties to ensure that they are adhering to both international laws and the laws of the governing jurisdiction.

CRIMINAL INVESTIGATION DURING MONITORSHIP

Concurrent monitors should be sensitive to the possibility of criminal investigations and prosecution of matters within the scope of the monitorships. If the monitorship is established as a result of, or concerning, a criminal investigation or prosecution, other matters may remain open to further criminal investigation and prosecution. Consideration should be given by a concurrent monitor to determine whether certain aspects of his or her work should be approached differently, on a different timeline from that originally planned or not at all, given the pending investigation or prosecution. It is usually recognised in the United

States that criminal investigations take priority over monitor investigations, which ordinarily have primarily civil consequences.

INTERNATIONAL CONSIDERATIONS

In addition to navigating international laws, there are other considerations for monitors to keep in mind. Language, for example, can be a challenging factor to navigate. Differences in interpretation can affect concurrent monitors' understanding of the issues and potential compliance gaps. Content in certain languages, when translated into English, can lend itself to multiple 'correct' interpretations. Concurrent monitors using different translation service providers may not receive consistent interpretations of the same content. As a result, it is imperative for concurrent monitors to maintain open communication channels as far as possible so that such differences in interpretation may be addressed in a timely manner.

LESSONS LEARNT FROM CONCURRENT MONITORSHIPS

In the United States, there are many enforcement agencies that may impose an independent monitor on a company. Going forward, companies can expect prosecutors in the United States as well as around the world to rely frequently on independent monitors as an effective mechanism to deter future misconduct. This chapter has discussed significant topics for those vested in, or affected by, the practice of concurrent monitorships. Monitors, companies, counsel and their respective consultants should consider the following key takeaways:

- Settlement agreements requiring a monitor should consider, to the extent possible and permissible by the confidentiality provisions, the sharing of information and communications with any subsequently appointed monitor in the event that these circumstances should arise or, at a minimum, outline a protocol to revisit the sharing of information and communications at a future date. If the agreements do not contemplate the sharing of information, the parties may want to consider entering into a separate confidentiality or non-disclosure agreement to permit communication and sharing of information between themselves to the extent possible.
- Standardising software and application platform vendors used by the concurrent monitors can increase efficiencies and improve the exchange of communication for all parties.
- The company should consider establishing a monitor liaison team with dedicated resources to manage the requests and enquiries from concurrent monitors.
- The company should design an effective communication strategy to ensure that its employees are informed about the role and responsibilities of the respective monitors.
- All parties, where permissible, should consider engaging in regular dialogue to reduce inefficiencies, create synergies and alleviate undue burden on the company's resources.

ENDNOTES

[1] Roscoe C Howard, Jr and Tabitha Meier are partners at Barnes & Thornburg LLP and Nicole Sliger and Pei-Li Wong are principals at BDO USA, PC. The authors would like to acknowledge the contributions of Michelle Bradford, Jeff Bartolozzi, Ariyike Diggs, David

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[2] This matter was introduced in 'Monitorships in East Asia' (chapter 9, The Guide to Monitorships, first edition, 2019), p. 113,

[3] The International Emergency Economic Powers Act grants broad discretion to the US President to respond to any extraordinary threat from outside the United States that affects national security, foreign policy or the economy, if the President declares a national emergency with respect to such a threat: see https://home.treasury.gov/system/files/126/ieepa.pdf.

[4] As noted in 'Monitorships in East Asia', op. cit. note 2, above, p. 113.

[5] https://www.govinfo.gov/content/pkg/FR-2018-07-23/html/2018-15633.htm (last accessed 8 Feb. 2024).

[6] https://www.bis.doc.gov/index.php/documents/regulations-docs/federal-register-notices/federal-register-2018/2234-superseding-settlement-agreement-6-11-18-final/file (last accessed 8 Feb. 2024).

[7] https://www.govinfo.gov/content/pkg/FR-2018-07-23/html/2018-15633.htm (last accessed 8 Feb. 2024).

[8] Roscoe C Howard, Jr, a partner at Barnes & Thornburg LLP, serves as the special compliance coordinator appointed by the US Department of Commerce for Zhongxing Telecommunications Equipment Corporation (ZTE), of Shenzhen, China, and ZTE Kangxun Telecommunications Ltd. In this role, he coordinates, monitors, assesses and reports on compliance with US export control laws by ZTE, its subsidiaries and its affiliates worldwide.

[9] See 'Switzerland-Ordered Monitorships' (chapter 10 in The Guide to Monitorships, second edition, 2020), pp. 119–120,

[10] US Department of Justice, Press release No. 16-1515, https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global -penalties-resolve (last accessed 8 Feb. 2024).

[11] Odebrecht and Braskem Leniency Agreement Note available in English at http://www.mpf.mp.br/pgr/documentos/nota-acordo-de-leniencia-odebrecht-e-braskem_ingles.pdf/view (last accessed 8 Feb. 2024).

[12] Odebrecht Engineering and Construction, 'Panama: Our Commitment', Slide 11, https://esnuestrocompromiso.com.pa/wp-content/uploads/2019/10/carpetaInfo_SEPT2019_english.pdf (last accessed 8 Mar. 2022).

[13] See https://g1.globo.com/economia/negocios/noticia/trabalho-e-evitar-que-compliance -fique-so-no-papel-diz-monitor-da-odebrecht.ghtml (last accessed 8 Feb. 2024).

[14] Criminal Justice Section of the American Bar Association's Standards on Monitors and Monitoring (Criminal Justice Standards on Monitors and Monitoring), at Standard 24-3.1 (General Principles), establishes that the scope of a monitor is determined by the underlying resolution/settlement agreement – see https://www.americanbar.org/groups/criminal_justice/standards/MonitorsStandards/. Similarly, and perhaps more stringently, the International Association of Independent Corporate Monitors Code of Professional Conduct (IAICM Code), at

Standard Operating Procedure 5.1, requires that its members 'rely upon the Agreement or Court Order as the principal and definitive source of the overall scope of the Monitorship'. The IAICM Code applies to its members, while recognising that it may also be relevant and useful in terms of best practices and guidance to non-IAICM member monitors, reporting agencies, host organisations, the public and others interested in the practice and conduct of corporate monitoring, http://iaicm.org/wp-content/uploads/2015/04/Adopted-IAICM-Code-of-Professional-Conduct.pdf (web pages last accessed 8 Feb. 2024).

[15] Criminal Justice Standards on Monitors and Monitoring (op. cit., note 14, above), Standard 24-3.4 Monitor Compensation and Billing, Paragraph 2(a).

[16] See ibid., Standard 24-4.2 Access to Records, Persons and Information, Paragraph 4(b) and IAICM Code (op. cit., note 14, above), Standard Operating Procedure 1.4.

[17] When the monitored company is a multinational corporation, it is common for multiple law firms to be involved, including numerous local counsel advising various offices in different countries. For instance, the monitored company may have its primary external counsel conduct a majority of the work; however, local external counsel may be necessary to advise the company on data privacy laws, state secret laws and other unique jurisdictional laws. Additionally, the monitored company may engage a law firm to advise on a narrow issue within the monitorship.

[18] It is possible that a monitored company will have already waived or agreed to waive attorney–client communication privilege when agreeing to the monitorship. However, if the monitored company has not waived privilege, it is possible that the company could enter into a limited waiver agreement. See generally, e.g.,In re Sealed Case, 676 F.2d 793 (D.C. Cir. 1982) (recognising that the 'SEC or any other government agency could expressly agree to any limits on disclosure to other agencies consistent with their responsibilities under law');-Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977) (representing the minority view finding that a company's disclosure of privileged communication may constitute a limited waiver); but cf. Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414 (3d Cir. 1991); Permian Corp. v. United States, 665 F.2d 1214 (D.C. Cir. 1981). It is important to understand whether any limited waiver agreement exists, as it may not apply to all monitors.

[19] If an enforcement agency identifies that a concurrent monitorship is possible and practical, the enforcement agency should work in coordination with its peer agencies and ensure that the monitorship agreement permits the exchange of the monitor's reports with other enforcement agencies or other independent monitors (at the direction or with the approval of the relevant enforcement agency) should a separate monitorship become established.

[20] C S Lewis, The Magician's Nephew, at 173, Harper Collins e-books (2010).

[21] During the course of concurrent monitorships, there may be information to which one monitor has access but another may not. Additionally, in the event that monitors' reports are not fully available to other monitors, one monitor may be operating with the benefit of the collective monitor reports, while another may possess only information he or she has gathered independently. The inherent risk, however, of a monitor relying on another monitor's report to issue a finding or recommendation comes into context.

[22] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).
[23] ibid., Article III.

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