



GUIDE TO MONITORSHIPS

THIRD EDITION

Editors

Anthony S Barkow, Neil M Barofsky, Thomas J Perrelli

Guide to Monitorships

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Anthony S Barkow

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Publisher's Note

Guide to Monitorships is published by Global Investigations Review (GIR) – the online home for everyone who specialises in investigating and resolving suspected corporate wrongdoing.

It flowed from the observation that there was no book that systematically covered all aspects of the institution known as the ‘monitorship’ – an arrangement that is delicate and challenging for all concerned: company, monitor, appointing government agency and their respective professional advisers.

This guide aims to fill that gap. It does so by addressing all the pressing questions and concerns from all the key perspectives. We are lucky to have attracted authors who have lived through the challenges they deconstruct and explain.

The guide is a companion to a larger reference work – GIR’s *The Practitioner’s Guide to Global Investigations* (now in its sixth edition), which walks readers through the issues raised and the risks to consider, at every stage in the life cycle of a corporate investigation, from discovery to resolution. You should have both books in your library: *The Practitioner’s Guide* for the whole picture and the *Guide to Monitorships* for the close-up.

Guide to Monitorships is supplied in hard copy to all GIR subscribers as part of their subscription. Non-subscribers can read an e-version at www.globalinvestigationsreview.com.

Finally, I would like to thank the editors of this guide for their energy and vision, and the authors and my colleagues for the elan with which they have brought that vision to life. We collectively welcome any comments or suggestions on how to improve it. Please write to us at insight@globalinvestigationsreview.com.

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Preface

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

Part I offers an overview of monitorships. First, Neil M Barofsky – former Assistant US Attorney and Special Inspector General for the Troubled Asset Relief Program, who has served as an independent monitor and runs the monitorship practice at Jenner & Block LLP – and his co-authors Matthew D Cipolla and Erin R Schrantz of Jenner & Block LLP explain how a monitor can approach and remedy a broken corporate culture. They consider several critical questions, such as how a monitor can discover a broken culture; how a monitor can apply ‘carrot and stick’ and other approaches to address a culture of non-compliance; and the sorts of internal partnership and external pressures that can be brought to bear. Next, former Associate Attorney General Tom Perrelli, independent monitor for Citigroup Inc and the Education Management Corporation, walks through the life cycle of a monitorship, including the process of formulating a monitorship agreement and engagement letter, developing a work plan, building a monitorship team, and creating and publishing first and final reports. Next, Bart M Schwartz of Guidepost Solutions LLC – former chief of the Criminal Division in the Southern District of New York, who later served as independent monitor for General Motors – explores how enforcement agencies decide whether to appoint a monitor and how that monitor is selected. Schwartz provides an overview of different types of monitorships, the various agencies that have appointed monitors in the past, and the various considerations that go into reaching the decisions to use and select a monitor. Finally, Pamela Davis and her co-authors, Suzanne Jaffe Bloom and Mariana Pendás Fernández at Winston & Strawn, explain how

a successful monitorship must consider the goals and perspectives of a variety of different constituencies; chief among a monitor's goals should be securing the trust of both the government and the organisation.

Part II contains three chapters that offer experts' perspectives on monitorships. Professor Mihailis E Diamantis of the University of Iowa provides an academic perspective, describing the unique criminal justice advantages and vulnerabilities of monitorships, and the implications that the appointment of a monitor could have for other types of criminal sanctions. Jeffrey A Taylor, a former US Attorney for the District of Columbia and chief compliance officer of General Motors, who is now executive vice president and general counsel of Fox Corporation, provides an in-house perspective, examining what issues a company must confront when faced with a monitor, and suggesting strategies that corporations can follow to navigate a monitorship. Finally, Loren Friedman, Thomas Cooper and Nicole Sliger of BDO USA provide insights as forensic professionals by exploring the testing methodologies and metrics used by monitorship teams.

The five chapters in Part III examine the issues that arise in the context of cross-border monitorships and the unique characteristics of monitorships in different areas of the world. Gil Soffer, former Associate Deputy Attorney General, former federal prosecutor and a principal drafter of the Morford Memorandum, and his co-author Johnjerica Hodge – both at Katten Muchin Rosenman LLP – consider the myriad issues that arise when a US regulator imposes a cross-border monitorship, examining issues of conflicting privacy and banking laws, the potential for culture clashes, and various other diplomatic and policy issues that corporations and monitors must face in an international context. Nicholas Goldin and Joshua Levine, of Simpson Thacher & Bartlett – both former prosecutors with extensive experience in conducting investigations across the globe – examine the unique challenges of monitorships arising under the US Foreign Corrupt Practices Act (FCPA). By their nature, FCPA monitorships involve US laws that regulate conduct carried out abroad, and so Goldin and Levine examine the difficulties that may arise from this situation, including potential cultural differences that may affect the relationship between the monitor and the company. Next, Switzerland-based investigators Simone Nadelhofer, Daniel Bühr and their co-authors, at LALIVE SA, explore the Swiss financial regulatory body's use of monitors. Judith Seddon, an experienced white-collar solicitor in the United Kingdom, and her co-author at explore how UK monitorships differ from those in the United States. And litigator Jason Kang and former federal prosecutors Wade Weems, Daniel Lee and Scott Hulsey, at Kobre & Kim, examine the treatment of monitorships in the East Asia region.

Part IV has 10 chapters that provide subject-matter and sector-specific analyses of different kinds of monitorships. Frances McLeod and her co-authors at Forensic Risk Alliance explore the role of forensic firms in monitorships, examining how these firms can use data analytics and transaction testing to identify relevant issues and risk in a monitored financial institution. Additionally, Rachel Wolkinson and Blair Rinne, at Brown Rudnick LLP, explore how monitorships are used in resolutions with the SEC. Next, with their co-authors at Wilmer Cutler Pickering Hale and Dorr LLP, former Deputy Attorney General David Ogden and former US Attorney for the District of Columbia Ron Machen, co-monitors in a healthcare fraud monitorship led by the US Department of Justice (US DOJ), explore the appointment of monitors in cases alleging violations of healthcare law. Günter Degitz and Richard Kando of AlixPartners, both former monitors in the financial services industry, examine the use of monitorships in that field. Michael J Bresnick of Venable LLP, who served as independent monitor of the residential mortgage-backed securities consumer relief settlement with Deutsche Bank AG, examines consumer-relief fund monitorships. With his co-authors at Kirkland & Ellis LLP, former US District Court Judge, Deputy Attorney General and Acting Attorney General Mark Filip, who returned to private practice and represented BP in the aftermath of the Deepwater Horizon explosion and the company's subsequent monitorship, explores issues unique to environmental and energy monitorships. Glen McGorty, a former federal prosecutor who now serves as the monitor of the New York City District Council of Carpenters and related Taft-Hartley benefit funds, and Lisa Umans of Crowell & Moring LLP lend their perspectives to an examination of union monitorships. Ellen S Zimiles, Patrick J McArdle and their co-authors at Guidehouse explore the legal and historical context of sanctions monitorships. Jodi Avergun, a former chief of the Narcotic and Dangerous Drug Section of the US DOJ and former Chief of Staff for the US Drug Enforcement Administration, former federal prosecutor Todd Blanche and Christian Larson, of Cadwalader, Wickersham & Taft LLP, discuss the complexities of monitorships within the pharmaceutical industry. And Kevin Abikoff, Laura Perkins, Michael DeBernardis and Christine Kang at Hughes Hubbard & Reed explain the phenomenon of monitorships being imposed as part of the sanctions systems at the World Bank and other multilateral development banks.

Finally, Part V contains three chapters discussing key issues that arise in connection with monitorships. McKool Smith's Daniel W Levy, a former federal prosecutor who has been appointed to monitor an international financial institution, and Doreen Klein, a former New York County District Attorney, consider the complex issues of privilege and confidentiality surrounding monitorships.

Among other things, Levy and Klein examine case law that balances the recognised interests in monitorship confidentiality against other considerations, such as the First Amendment. Roscoe C Howard, Jr, a former US Attorney for the District of Columbia, and Tabitha Meier at Barnes & Thornburg LLP, with Nicole Sliger and Pei Li Wong at BDO USA LLP, next examine situations in which an entity is subject to multiple settlement agreements or probation orders with different government agencies or oversight entities, which is referred to as ‘concurrent monitorship’. And, finally, former US District Court Judge John Gleeson, now of Debevoise & Plimpton LLP, provides incisive commentary on judicial scrutiny of deferred prosecution agreements (DPAs) and monitorships. Gleeson surveys the law surrounding DPAs and monitorships, including the role and authority of judges in those respects, and separation-of-powers issues.

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The editors gratefully acknowledge Jenner & Block LLP for its support of this publication, and Jessica Ring Amunson, co-chair of Jenner’s appellate and Supreme Court practice, and Jenner associates Tessa J G Roberts, Matthew T Gordon and Tiffany Lindom for their important assistance.

Anthony S Barkow, Neil M Barofsky and Thomas J Perrelli

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Part IV

Topical Analyses

CHAPTER 13

The Role of Forensic Firms in Monitorships

Frances McLeod, Jenna Voss, Samantha Hsu and Anushka Ram¹

Global use of monitorships has increased significantly during the past decade and recent developments across the enforcement landscape indicate that we can expect the use of independent monitors to remain an important enforcement tool in multiple jurisdictions. Ranging from court-appointed monitorships to quasi-monitorships, the use of corporate monitors is prominent in the US government's enforcement regime, and is featuring increasingly in United Kingdom and European regulatory prosecutions as well.

Historically stemming primarily from investigations into alleged bribery and corruption, regulators are now imposing monitorships in response to a variety of organisational misconduct across a breadth of industries. Monitors have been installed, for example, to oversee and assess conduct in:

- police departments (focusing on cultural change);
- the automotive industry (assessing controls around research and development, and regulatory compliance, such as safety and emissions standards);
- financial institutions (testing anti-money laundering and sanctions-related compliance programmes); and
- public accounting and auditing firms (overseeing quality control and cultural improvements).

¹ Frances McLeod is a founding partner, Jenna Voss and Samantha Hsu are partners and Anushka Ram is a director at Forensic Risk Alliance. The authors acknowledge the contribution of manager Jorge Lopes to this chapter.

As the scope of monitorships has evolved, so has the role of forensic accountants in these engagements. Chartered and certified public accountants, certified fraud examiners, anti-money laundering specialists, data specialists and analysts (including data privacy and cybersecurity experts), and industry-specific experts within forensic accounting firms (forensic firms) marry complementary expertise in anti-corruption, anti-money laundering, sanctions and counter-terrorism financing investigations, data governance and analysis, compliance programme design, review and testing, process review and internal controls testing, audit negligence assessments, disgorgement and the ability to pay calculations.

Forensic firms serve in a number of capacities on monitorships, depending on the nature of the monitorship, the regulator's mandate, the terms of the settlement agreement and the level of sophistication or maturity of the company's compliance programme. A firm may take on the role of monitor if a monitorship requires subject-matter expertise that sits within a forensic accounting firm. Forensic advisers may also support a company during its monitorship by helping the company proactively understand and respond to key issues since companies often find themselves overwhelmed by the preparation, remediation and the burden on time and resources that monitorships often require. Finally, a forensic firm may also collaborate with the monitor to provide support in specific areas in line with the forensic firm's areas of expertise.

This chapter primarily focuses on how forensic firms support a monitor or company through the monitorship process.

Leveraging forensic accountants and forensic data analytics

Forensic firms leverage closely integrated teams with varied yet complementary expertise, and use their unique blend of skills and expertise to facilitate the evaluation of historical conduct and necessary remediation efforts. This section describes how companies operating under a monitorship can leverage forensic firms to supplement their teams. Many of these areas also parallel situations in which forensic firms can prove invaluable to a monitor.

Complementary expertise and resources for companies under monitorship

Forensic firms are experts in triaging a company's controls landscape, performing baseline risk and compliance programme assessments, understanding a company's systems and monitoring capabilities, identifying and collecting relevant data, and developing action plans to address critical issues. A forensic firm can act as an adviser and provide guidance to the company in these important areas, especially if the company does not have a mature compliance programme.

A company preparing for a monitorship should also consider whether its personnel possess sufficient resources and skills to meet the requirements of a monitorship, including the inevitable associated project management and information-gathering activities associated with a monitorship, as this is critical to successful completion. Companies often lack the required processes for gathering and delivering requested documents as this is not part of their standard operating procedures. If the monitor cannot obtain evidence of the enhancements in a timely manner, a company could find itself in the costly position of a delays or even an extension of the monitorship period. Reputable forensic firms possess project management experience in sensitive, time-critical situations and have an understanding of the information needed to satisfy monitor requests and regulatory expectations. Therefore, they can take on or help to support the company with satisfying many of the imminent requirements once a company enters a monitorship.

Monitorships also often require resource-intensive remediation projects and companies must consider whether they have sufficient capacity to design and implement action plans, train staff and develop policies and procedures as required to achieve certification. Forensic firm resources can temporarily alleviate the burden on the company's employees who are also responsible for carrying out their daily job responsibilities. For example, a financial institution may consider retaining a forensic firm to assist with a backlog of 'know your customer' onboarding forms.

Navigating international monitorships and data management

The global nature of businesses today frequently results in transnational operations. As such, investigations and convictions often involve misconduct that has occurred abroad. For example, European companies that engage in wrongdoing in the United States can be prosecuted by US regulators, such as the US Department of Justice (US DOJ), who may require a foreign independent monitor as part of a settlement agreement.

The cross-border nature of these monitorships presents additional complexities. Importantly, these matters require the monitor team to possess appropriate language skills, local knowledge and in-country experience to facilitate the navigation of communication barriers, local regulatory requirements and sensitive cultural differences.

There are other critical challenges in respect of different data protection regimes. Information that a monitor commonly requests (such as a list of company employees) is often considered sensitive data under local regulations, such as Regulation (EU) 2016/679 (the General Data Protection Regulation (GDPR)),

enacted in the European Union in May 2018. As such, the data protection requirements of local jurisdictions can hinder the process of collecting, storing and ultimately reviewing company data.

A forensic firm that possesses appropriate data governance capabilities – including adequate infrastructure, staff and knowledge in key jurisdictions – can provide the necessary expertise to navigate any data privacy restrictions and impediments to data transfers brought about by local regulations. It is critical to establish data transfer protocols that enable companies to respond to monitor and regulator requests in a manner that is not only timely but also compliant with local legislation.

Global companies also often have myriad data sources and systems, and navigating information technology (IT) systems to extract required information can prove challenging, even in a business-as-usual setting. The IT landscape is especially complicated for companies that have expanded through acquisitions or maintain disparate systems in different locations. When handed a request for aggregate information (such as a list of global clients), companies often have a hard time compiling the required data from the various systems under the deadlines and pressure of a monitorship. A forensic firm can help a company lessen potential pain points in the data collection process, navigate data collection and validation challenges, and work with the monitor to ensure requests are specific, targeted and formulated in a way that will make sense to a company's IT team.

Understanding historical misconduct and designing recommendations

A company's history of misconduct is important when determining the terms of a settlement agreement, and having a clear understanding of the events and decisions that preceded the misconduct is crucial for the company to take appropriate action. Forensic firms can serve a critical role in reviewing company records (which often include large sets of data) to help a company understand what went wrong historically and to ensure it designs and implements remedial actions in a manner that will not only address the root cause of prior issues but also enable continuous monitoring. During the initial planning phase, it is important for a company to conduct a thorough risk assessment and identify risks relevant to the monitorship (e.g., geographically, by customer type or by business unit). A forensic firm experienced in these assessments will be adept in identifying risks through a combination of data analytics, targeted review of documents, interviews and control testing.

Control testing during the initial assessment will also deliver examples of what is actually happening in practice, help to pinpoint existing or remaining risk areas, and identify isolated and systemic issues. Forensic firms can then draw on

experience in other matters to assess which risks within the company are the most critical for the company to remediate, given the historical concerns underlying the settlement agreement.

Developing, executing and testing remediation plans

Ensuring that a remediation plan is designed with a view to post-monitorship sustainability and continuous self-monitoring is crucial to guarantee both the robustness of the company's compliance programme and the success of the monitorship. The company will need to develop, execute, test and communicate its remediation plans, as well as train its employees and develop appropriate guidance in response to the monitor's recommendations. A forensic firm may help the company to interpret these recommendations and support the company's remediation plans. Developing a remediation plan will often require a holistic evaluation of a company's control environment, which can benefit from a forensic firm's assessment of whether controls are appropriately designed and operating effectively.

Execution of a monitor's recommendations often require enhancements to – or even replacement of – the key financial, accounting and operational systems. A forensic firm with systems-related expertise can help to evaluate a company's technical and systems environment, including ensuring that it has the appropriate capability to support the operational and compliance functions within the company. Expertise in systems implementation and integration, data transfer and data governance is necessary to ensure accurate assessments, provide the necessary insight to remediate issues or gaps, and enable effective self-monitoring. These assessments can help to evaluate controls embedded within systems and the governance around systems implementation efforts.

Transaction testing is often critical to assess remediation efforts and control effectiveness. Forensic firms perform multiple iterations of testing to evaluate whether transactions are consistently in accordance with the company's policies and procedures, supported by a reasonable business rationale and appropriately documented and reported. Aiding in this testing are forensic analytics specialists, who help to identify suspicious transactions or those not aligned with company policy. These specialists develop sophisticated algorithms to process large volumes of data quickly, extract key observations and create the necessary transparency to understand the effectiveness of remediation steps.

Finally, depending on the monitorship's established reporting cadence, a company may not receive feedback from the monitor except at predefined intervals, sometimes even as infrequently as once per year. Forensic firms can use proactive

testing to provide transparency in remediation efforts in a timely manner and, therefore, mitigate the risk that the company receives critical feedback without sufficient time to address potential shortcomings.

Supplementing the expertise of the monitor team

Monitors can benefit from supplementing their team with the experience and expertise a forensic firm provides, especially in accounting and finance matters and the review of internal controls. Many of the ways forensic firms support monitors are quite similar to the themes described above and, therefore, are not detailed here. Forensic firms can provide support for reporting, project management, performing baseline risk assessments and testing remediation efforts. Monitors are also well served by leveraging forensic firms' expertise in navigating complex data environments.

A monitor may also want the forensic firm to assess specific areas of a business. For example, a forensic firm is well equipped to assess the adequacy of a company's internal audit, investigations, compliance monitoring, data analytics and accounting functions. Specifically for internal audit, forensic professionals can provide guidance on improving the level and type of documentation incorporated into work papers, ensure audit work programmes capture relevant regulatory risks, deliver reporting that clearly articulates key observations and perform periodic root cause analysis to remediate audit findings. Similarly, an inexperienced internal investigations team could benefit from receiving feedback on how forensic firms conduct an investigation into a hotline complaint regarding alleged misconduct. Finally, forensic firms can provide useful guidance on developing insightful continuous surveillance and monitoring of key risk areas within the company.

Partnering with the right forensic firm

Since every monitorship is different, it is important to consider the nature, complexity and subject matter of the assignment at hand when evaluating forensic firms. The paragraphs below describe factors for consideration when considering which forensic firm to engage.

- *Industry and subject-matter expertise:* Prior experience in the subject matter and the industry of the monitorship are both important considerations when selecting a forensic firm. For example, the analysis required for monitoring bribery and corruption concerns will involve different skill sets and experience from a monitorship regarding environmental matters. A monitor should also consider how the experience and credentials of the forensic firm's expertise will complement the monitor's own team.

- *Experience and credibility with regulators:* Many forensic firms have significant experience of working with certain regulators, and some even hire professionals who have worked for a regulator in the past. A company or monitor can gain insight into understanding the regulator's expectations and anticipate potential areas of regulatory concern by engaging a forensic firm that has a proven track record with a specific regulator (e.g., the US DOJ, the US Securities and Exchange Commission (SEC) and the Environmental Protection Agency (EPA)).
- *Systems and data management expertise:* In cross-border and multi-jurisdictional engagements, it is inevitable that there will be data privacy and management hurdles to address while ensuring that data collected, reviewed and analysed supports the overall goal of the monitorship. For instance, the GDPR further compounds data management challenges within monitorships where relevant data resides in the European Union. Forensic firms should not only have the experience in dealing with these constraints but should also be able to apply sophisticated protocols that allow the monitor team access to the information it needs in a compliant fashion.
- *Global experience:* It is also important to consider global experience when evaluating potential forensic firms. A forensic firm with global experience is likely to have diverse language skills, experience of working in multiple regions and a more sophisticated understanding of potentially applicable regulations. A global firm is also likely to be more sensitive to cultural differences that can arise while working in foreign jurisdictions. It is important to understand whether the forensic firm has sufficient expertise in-house, will have to use personnel from other locations, or will retain external contractors to bolster head count or to meet specific language or technical expertise requirements.
- *Independence:* Like law firms, forensic firms need to ensure they do not accept work on matters that would present a conflict of interest to the potential client or any existing conflicts. The types of conflicts that may arise – and how a forensic firm perceives them – will vary depending on the size and specific policies of the firm. A forensic practice that is part of a large audit firm, for example, is likely to have more conflicts than a stand-alone practice.

Practical examples of forensic accountants in monitorships

As noted at the beginning of this chapter, the use of monitorships has matured considerably and regulators are imposing monitorships in response to a variety of organisational misconduct across a breadth of industries. In this new environment, forensic firms still have a fundamental role as the underlying purpose of monitorships still remains the same. The following subsections include examples

of how forensic firms provide assistance in anti-money laundering (AML) and sanctions, US Foreign Corrupt Practices Act (FCPA), audit malpractice, and environmental regulatory and fraud monitorships.

AML and sanctions

Forensic firms with multi-jurisdictional experience in the financial services industry and sophisticated forensic data analytics bring value to AML and sanctions monitorships that typically focus on analysing large volumes of data to detect potentially suspicious transactions or sanctions circumventions, and a company's transaction monitoring processes, to identify potentially nefarious activity.

Financial institutions' global compliance and business operations often rely on disparate systems that have evolved over time in response to business needs and regulatory requirements. This frequently presents a unique challenge for monitors that is exacerbated by legacy systems and technology. To assess compliance with multi-jurisdictional regulations, forensic firms use specialist tools and forensic data analytics to consolidate large volumes of data from multiple systems into one platform, isolate anomalies and identify connections between accounts or transactions that are indicative of money laundering. Routines can identify simple AML and sanctions risk (e.g., senders or recipients on exclusion lists or entities operating in known tax haven countries) but can also be designed to identify activity intended to evade regulatory controls. For example, more sophisticated routines may detect customers that frequently transfer money below thresholds to the same beneficial owner, flag recipients that present multiple indicia characteristic of shell companies, or recognise subsequent transaction patterns intended to mask the true nature of the transfer activity. Institution-wide data profiling may highlight business units or geographies where suspicious activity systematically went unnoticed, thus identifying process deficiencies as well as trends arising from market-specific risks. Finally, more sophisticated forensic analytics firms now use machine learning and artificial intelligence algorithms to find anomalous transactions and reduce false positives.

In economic-related and trade sanction-related monitorships, forensic firms leverage sophisticated forensic data analytics and previous experiences to identify transaction patterns that indicate potential sanctions circumvention. Forensic accountants can match specific terms to SWIFT² messages with higher sanctions risks and use electronic elimination to reduce false positives. Additionally, a

2 Society for Worldwide Interbank Financial Telecommunication.

monitor may rely on forensic firms during the sample selection process to trace payments or receipts of funds and identify corresponding customer or vendor invoices. For example, forensic firms have analysed sales and accounting data to identify inter-company transactions used to circumvent controls and facilitate sales to customers based in sanctioned countries. This allows the monitor to target transactions with a higher risk profile or pattern that evaded the interdiction software and to test interdicted transactions for compliance. For example, incoming funds from a recently onboarded customer can be traced back to specialist products or similar sales orders sold to previously blacklisted customers.

Forensic tools can be leveraged to analyse and consider structured (e.g., payment data) and unstructured data (e.g., emails, chat room data or voice recordings) from various sources. During the sample selection process, a monitor will typically review transactional data to identify suspicious transactions for further review. Forensic firms can offer alternative approaches that provide additional intelligence. For example, a monitor could first gather information from unstructured data about potential sales opportunities. Then, the information (e.g., entity or contact information) is used to inform the customer relationship management and enterprise risk planning data review process and allow the monitor to determine whether the sale materialised after the initial sales communication.

Forensic data specialists also perform network analyses to identify multi-layer relationships between entities (e.g., distributors) or to understand the ownership structure of a financial institution's customer. For example, a customer's parent company may be based in a low-risk country but a subsidiary conducting business with the financial institution is located in a high-risk country.

FCPA

US regulators frequently use compliance monitorships as an enforcement tool in corporate criminal proceedings when settling FCPA violations. FCPA monitorships often emphasise a robust, sustainable compliance department that exercises sufficient monitoring and oversight. A forensic firm with significant FCPA experience is skilled at advising companies on best practices for detecting bribes and preventing bribes from being paid and implementing processes to encourage transparent books and records. A forensic firm brings this expertise to an FCPA monitorship by designing work steps that zero in on the business areas, activities and geographies with the highest bribery and corruption risk profile.

Companies may use third-party intermediaries to conceal bribes to foreign officials. Improper payments are rarely recorded as bribes in a company's books and records and are frequently disguised as commissions, consulting fees and miscellaneous expenses. Employees go to great lengths to conceal bribes made to foreign

officials, and forensic accountants experienced in FCPA matters and forensic data analytics can identify book and record violations. Through thoughtful analytics and insightful visualisations fuelled by previous experience, forensic accountants can identify anomalies in third-party activity by analysing trends (e.g., unusual spikes in sales), volume of activity (e.g., number and monetary value of payments) and activity by location (e.g., high-risk transaction types occurring in higher-risk jurisdictions). Forensic accountants can perform further analysis to identify activity indicative of improper payments or inaccurate books and records. For example, forensic accountants may identify significant payments to regions outside a company's normal areas of operations (e.g., countries not identified in the vendor or customer master file), or unusual patterns of payments that do not make sense (e.g., a large volume of payments recorded with a vague description, such as 'consulting fees').

In addition to payments made through intermediaries, companies may also use gifts and other means of hospitality to influence foreign officials. Forensic firms can analyse sales opportunities and travel and entertainment information to identify amounts that have been reported across various entities and payment methods in an effort to evade controls designed to limit the value and frequency of gifts and hospitality. Companies may attempt to further conceal their use of third-party intermediaries by adding individuals or entities as employees rather than vendors, circumventing the vendor onboarding process all together. Forensic accountants can analyse employee master files and payroll activity to identify payments to ghost employees or bogus bonus payments.

Audit malpractice

The Public Company Accounting Oversight Board (PCAOB) establishes auditing and related professional standards for registered public accounting firms and may impose an independent monitor when an accounting firm violates these rules and standards. PCAOB monitor or independent consultant candidates are required to have substantial accounting and auditing experience and qualifications. The United Kingdom's Financial Reporting Council and other regulators are expected to adopt similar requirements in the future.

Forensic firms often have team members with deep public accounting and audit experience, and as such are familiar with PCAOB auditing standards and can provide expert assessments of an accounting firm's compliance with regulatory requirements. PCAOB settlements may require an accounting firm to make updates to its policies and procedures to improve quality control in areas where misconduct has occurred historically. For example, a forensic firm may need to assess an accounting firm's ethics reporting and whistleblower hotlines, engagement quality review process, internal consultation with subject-matter experts or

promotion of an ethical culture through management's tone at the top. Forensic accountants apply a risk-based approach to the scope of their review considering the nature of the PCAOB's enforcement, scope of remediation and risks specific to the accounting firm's local market.

A forensic accountant's approach to assessing an accounting firm's compliance with the regulatory requirements may include a detailed review of policies and procedures, interviews with accounting firm personnel and process-level tests of the design, implementation and operational effectiveness of internal controls surrounding its quality control system and compliance with PCAOB auditing standards.

Environmental regulatory and fraud

For companies operating in the energy, transportation and environment sectors, there are several types of monitorships that may come into play in the wake of an environmental incident or environmental fraud: monitorships imposed by a United States (or other) court order; monitorships as part of an agreement with a US government agency (DOJ, SEC or EPA); and World Bank monitorships in which World Bank funding is involved. To address the level of technical complexity inherent in these monitorships and include testing for compliance with a broad range of environmental statutes, in addition to counsel and technical industry experts, forensic accountants and data analysts are helpful in assessing control design (where embedded in systems), analysing reporting and systems output, and assessing change management around software and algorithm development. Further, a team of forensic accountants experienced in addressing stringent confidentiality and trade secret issues, particularly in non-US jurisdictions where the GDPR may also come into play, may help with designing protocols for review of sensitive data in an anonymised but auditable fashion.

Conclusion

As has been highlighted, forensic firms draw on multi-jurisdictional experience, an understanding of regulatory issues and investigations skills to perform risk-based analyses, controls testing, data analytics, risk assessments and reviews of a multitude of compliance programmes (e.g., corporate and social responsibility, human rights, product liability, sanctions, anti-bribery and corruption, anti-money laundering and counter-terrorism financing, and taxation). When properly leveraged throughout the life of the monitorship, these skill sets are invaluable to monitors and companies under monitorship alike.

APPENDIX 1

About the Authors

Frances McLeod

Forensic Risk Alliance

Frances McLeod is a founding partner of Forensic Risk Alliance (FRA) and head of its US offices. She is a former investment banker and has more than 25 years of experience in advising diverse clients on sanctions, anti-corruption, fraud, internal controls, asset tracing and money laundering issues.

Frances has been deeply involved in all of FRA's compliance monitorship work. In 2019, she was appointed as the compliance monitor for a European engineering company in connection with a US Department of Justice (US DOJ) fraud and environmental (dieselgate) settlement. She has also played leading roles in, for example, US DOJ and Securities Exchange Commission Foreign Corrupt Practices Act monitorships, a New York Department of Financial Services bank monitorship, the Ferguson City monitorship, a Public Company Accounting Oversight Board monitorship and a US DOJ fraud-related monitorship.

Frances has extensive experience in addressing complex international data-transfer issues, whether in regulatory investigations or cross-border litigation. She led the FRA team responding to anti-corruption investigation data requests in all jurisdictions for Alstom in the United States, United Kingdom, Brazil, Indonesia, Poland, Sweden, etc., which included addressing French data privacy and blocking statute issues. She is leading FRA's General Data Protection Regulation compliance initiative, leveraging the firm's decades of experience in addressing data protection issues in cross-border litigation and investigation.

Jenna Voss

Forensic Risk Alliance

Jenna Voss is a partner at Forensic Risk Alliance with extensive experience in providing guidance to clients in sensitive cross-border matters across multiple industries. She leads teams in performing anti-bribery and corruption compliance

reviews and investigations, conducting white-collar investigations and providing accounting expertise on litigation matters. She has led teams involved in multiple monitorships globally, including in Russia, Brazil, Mexico, Germany and the United Kingdom.

Jenna is currently leading a global team in performing a multi-year forensic assessment of a European engineering company under the scope of a US Department of Justice fraud and environmental (dieselgate) settlement, and recently led forensic analysis and review of internal controls at the direction of the monitor of a Brazilian-based company that engaged in misconduct relating to bribery and corruption. She has also directed a global team in executing an anti-money laundering monitorship mandated by the New York Department of Financial Services, including leading assessments of the company's know-your-customer, compliance and internal audit processes. Jenna also has experience in conducting whistleblower investigations, performing accounting and anti-corruption due diligence, building complex financial models, and advising financially troubled companies in bankruptcy and restructuring situations across the globe.

She is a certified public accountant, a certified fraud examiner, a certified anti-money laundering specialist and is certified in financial forensics.

Samantha Hsu

Forensic Risk Alliance

Samantha Hsu is a partner at Forensic Risk Alliance with significant experience in providing forensic accounting services across a variety of industries. She has led many large-scale and multi-jurisdictional investigations and proactive compliance engagements, including regulatory-related matters such as anti-bribery, anti-money laundering and tax fraud.

Samantha has directed forensic investigations relating to corruption, financial statement manipulation, and fraud and asset misappropriation. She has provided assistance to clients in the prevention, detection and investigation of fraud, anti-money laundering, contract governance and compliance review. She has assisted various Securities and Exchange Commission-listed multinationals to address investigative and risk management challenges in diverse cultural environments and complex legal and regulatory framework.

Samantha is a native speaker of Mandarin and is also fluent in Cantonese. She has provided proactive anti-bribery and corruption services, including delivery of corporate training courses to local Chinese subsidiaries of multinationals, and assisting corporate compliance and internal audit groups in programme review.

Samantha has master's degrees in business administration and science in accounting from the University of Texas at Dallas. She is a certified public accountant, is licensed in Texas and is a certified financial forensic.

Anushka Ram

Forensic Risk Alliance

Anushka is a director at Forensic Risk Alliance with extensive experience in providing clients with legal and compliance services, with a particular focus on proactive and reactive anti-bribery and corruption services. She specialises in developing, implementing and managing compliance systems policies and procedures, particularly in relation to anti-bribery and corruption, codes of conduct, whistleblowing, third-party risk, trade sanctions and corporate governance. Her work has covered challenging jurisdictions, including Nigeria, Kurdistan, the Middle East, the United States and the United Kingdom.

Anushka is currently leading the assessment of the technical and regulatory compliance environment of a European engineering company under the scope of a US Department of Justice (US DOJ) fraud and environmental (dieselgate) settlement, and recently supported Airbus with a multi-year forensic accounting and eDiscovery review within the context of the company's multinational investigation, reporting to four investigative authorities: UK Serious Fraud Office, the US DOJ, the US Department of State and France's Parquet National Financier.

Anushka is a qualified attorney-at-law, certified fraud examiner and certified anti-money laundering specialist.

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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, it discusses all the key issues, from every stakeholder's perspective, making it an invaluable resource for anyone interested in understanding or practising in the area.

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