GUIDE TO MONITORSHIPS

THIRD EDITION

Editors
Anthony S Barkow, Neil M Barofsky, Thomas J Perrelli

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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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PART III: INTERNATIONAL MONITORSHIPS AND RELATED ISSUES

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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.

Acknowledgements

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 22

Multilateral Development Bank Monitorships

Kevin T Abikoff, Laura N Perkins, Michael A DeBernardis and Christine Kang[1]

Introduction

Monitorships are now a routine part of the sanctions systems at the World Bank Group (World Bank or WBG) and other multilateral development banks (MDBs). The World Bank has been utilising independent monitors since 2011, when it made debarment with conditional release its baseline sanction for corruption, fraud and other forms of misconduct.[2] Under a debarment with conditional release, a sanctioned party is ineligible to participate in World Bank-financed activity for a specified amount of time. If, at the end of the specified period, the sanctioned party has met certain conditions, the most common of which is the implementation of an integrity compliance programme, the sanctioned party will be released from debarment and will again become eligible to participate in World Bank-financed projects. Independent monitors have become a key part of the effort to assess whether companies have met the conditions for release.

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1 Kevin T Abikoff, Laura N Perkins, Michael A DeBernardis and Christine Kang are partners at Hughes Hubbard & Reed LLP. The authors would like to thank associates Jonathan Zygielbaum, Ayoka Akinosi and Jiaxing Hao for their assistance in researching and drafting this chapter.

2 World Bank Group (WBG), 'The World Bank Group Sanctions System: Addressing Fraud and Corruption Through a Two-Tiered Administrative Process', available at https://www.worldbank.org/content/dam/documents/sanctions/other-documents/sanctions-board/Two-Tier-Sanctions-brochure-Final.pdf (last accessed 9 Mar. 2022).

MDB monitorships[3] have many of the same characteristics as other monitorships: independent review and assessment, reporting to a third-party regulatory or administrative body, review of records, interviews with management and employees, and testing of controls. However, MDB monitorships have their own unique characteristics, both in process and execution. This chapter highlights some of these unique characteristics.

Context – MDB sanctions regimes and history of monitorships

MDBs play an increasingly significant role in policing corruption, fraud, collusion and other forms of misconduct throughout the world. Leading MDBs, including World Bank, African Development Bank (AfDB), Asian Development Bank (ADB), Inter-American Development Bank (IADB) and European Bank for Reconstruction and Development (EBRD), have established administrative sanctions systems to identify and punish misconduct, including fraud, corruption and collusion (referred to as sanctionable practices or prohibited practices) by parties participating in transactions financed or otherwise managed by the MDB. The sanctions systems allow for the imposition of sanctions against companies or individuals shown to have participated in a sanctionable practice or a prohibited practice. MDBs can assert 'jurisdiction' over companies and individuals of any nationality and in any location, so long as those companies or individuals participated in a project financed or administered by the MDB. MDB sanctions can be imposed as a result of contested or uncontested sanctions proceeding or through a settlement between the sanctioned party and the MDB.

In April 2010, the leading MDBs entered into the Agreement for Mutual Enforcement of Debarment Decisions, under which certain sanctions imposed by the signatories are recognised by other MDBs. Consequently, a decision by the AfDB to debar a company may not only prohibit the debarred company from participating in projects financed or administered by the AfDB, but may also result in ineligibility to participate in projects financed by the ADB, IADB, EBRD and World Bank.[4]

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3 Multilateral development banks (MDBs) often use different terms to refer to the monitor title. These different terms include, among others, compliance monitor, independent integrity compliance expert, independent compliance consultant, and variations of the same. For the purposes of this chapter and for the sake of simplicity, we use the term 'monitor'.

4 Agreement for Mutual Enforcement of Debarment Decisions (9 Apr. 2010), available at https://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/AGREEMENT%20FOR%20MUTUAL%20ENFORCEMENT%20OF%20DEBARMENT%20DECISIONS.pdf (last accessed 9 Mar. 2022).

For many years, MDBs relied primarily on fixed periods of debarment to sanction companies and individuals found to have engaged in sanctionable practices. This approach changed in around 2011 when the World Bank shifted to a three-year debarment with conditional release as the baseline sanction for engaging in sanctionable practices. Other MDBs followed suit. The shift to debarment with conditional release reflected a recognition that one of the most effective ways to achieve the goals of the sanctions systems (i.e., to ensure that funds entrusted to the MDBs are used for the purposes intended) would be to increase the number of qualified contractors who are committed to integrity compliance. Conditional release offered an excellent opportunity to rehabilitate sanctioned parties before allowing them to once again participate in MDB projects. Policy statements on the sanctions regimes of the AfDB, EBRD and World Bank stress the importance of the sanctions systems in protecting bank assets by deterring bad actors and by addressing deficiencies in corporate controls and improving a sanctioned party's compliance programme.[5]

To monitor integrity compliance by sanctioned companies and assess whether companies have met the conditions for release, the World Bank created the position of Integrity Compliance Officer in September 2010.[6] The Integrity Compliance Officer was later joined by a team, now referred to as the Integrity Compliance Office. The AfDB took a similar approach and created an Integrity and Prevention Division of the office, now referred to as the Office of Integrity and Anti-Corruption (PIAC).[7] Not all MDBs created separate offices. At the

5 African Development Bank (AfDB), Proposal for the Implementation of a Sanctions Process within the African Development Bank (May 2012), para. 7.1, available at https://www.afdb.org/sites/default/files/documents/financial-information/proposal_for_the_implementation_of_a_sanctions_process_within_the_adb_-_rev_1.pdf; European Bank for Reconstruction and Development (EBRD), 2017 Enforcement Policy and Procedures (4 Oct. 2017), Section 10.1, available at https://www.ebrd.com/news/publications/policies/enforcement-policy-and-procedures.html; WBG, World Bank Group Sanctioning Guidelines (Jan. 2011), p. 1, https://www.worldbank.org/content/dam/documents/sanctions/other-documents/osd/World%20Bank%20Group%20Sanctioning%20Guidelines%20January%202011.pdf (web pages last accessed 9 Mar. 2022).

6 Summary of World Bank Group Integrity Compliance Guidelines, available at https://thedocs.worldbank.org/en/doc/06476894a15cd4d6115605e0a8903f4c-0090012011/original/Summary-of-WBG-Integrity-Compliance-Guidelines.pdf (last accessed 9 Mar. 2022). The initial integrity compliance officer was Michael Silverman, currently senior counsel at Hughes Hubbard & Reed LLP.

7 The Integrity and Prevention Division is referred to as PIAC.1, while the Investigations Division is referred to as PIAC.2.

ADB, for example, the Office of Anti-Corruption and Integrity, which is responsible for investigating incidences of alleged sanctionable practices, is also responsible for assessing whether a respondent has met the conditions for release.[8]

As the investigation and sanctioning activity at MDBs increased, more companies were subject to debarment with conditional release. That meant more companies for the World Bank Integrity Compliance Office, the Integrity and Prevention Division of PIAC and similar offices at other MDBs to monitor. According to the World Bank's latest Sanctions System Annual Report, the Integrity Compliance Office worked with 118 debarred (or conditionally non-debarred)[9] companies in 2021 towards meeting their conditions for release.[10] Given the large workload, MDBs have turned to independent third-party monitors to help ensure that sanctioned parties are adopting appropriate and effective compliance programmes and otherwise meeting their conditions for release.

Monitors are appointed to oversee enhancements to the sanctioned party's integrity compliance programme and corporate governance framework,[11] supervise the adoption and implementation of their anti-corruption action plans,[12] and report on and analyse the sanctioned party's compliance programme, including by

8 Asian Development Bank (ADB), Integrity Principles and Guidelines (2015), paras. 102–09, available at https://www.adb.org/documents/integrity-principles-and-guidelines (last accessed 9 Mar. 2022).

9 In addition to conditional debarment, most MDBs offer a sanction of conditional non-debarment, where the sanctioned party remains eligible to participate in MDB-funded activity so long as they meet conditions similar to those imposed on sanctioned parties facing debarment with conditional release.

10 WBG, World Bank Group Sanctions System: Annual Report Fiscal Year 2021 (WBG Sanctions System Annual Report FY 2021), available at https://documents1.worldbank.org/curated/en/284891634566178252/pdf/World-Bank-Group-Sanctions-System-FY21.pdf (last accessed 9 Mar. 2022).

11 See, e.g., European Investment Bank, Press Release, 'Agreement reached between the European Investment Bank, JSC Nenskra Hydro and Hyundai Engineering & Construction Co., Ltd. in relation to the Nenskra hydropower plant project in Georgia' (5 Nov. 2020), available at https://www.eib.org/en/press/news/agreement-reached-between-eib-jsc-nenskra-hydro-hyundai-hydropower-plant-georgia; see also EBRD, Integrity and Anti-Corruption Report 2018, at 25, available at https://www.ebrd.com/documents/occo/anticorruption-report-2018.pdf?blobnocache=true (web pages last accessed 9 Mar. 2022).

12 See, e.g., EBRD, Integrity and Anti-Corruption Report 2016, at 18, available at https://www.ebrd.com/sites/Satellite?c=Content&cid=1395255798589&d=&pagename=EBRD%2FContent%2FDownloadDocument (last accessed 17 Mar. 2022).

identifying gaps, addressing deficiencies and making relevant recommendations.[13] At the conclusion of the sanction period, the monitor gives its views on whether the sanctioned party has met its obligations and is eligible for release. However, the relevant MDB division (e.g., Integrity Compliance Office) ultimately determines whether the conditions for release have been satisfied.

MDB monitorships, like many others, are forward-looking exercises and are not meant to reinvestigate the misconduct that led to the sanctions. However, monitors may request materials relating to the past misconduct to understand any control failures and ensure that those failures have been remediated. In addition, negotiated settlement agreements may include a requirement that a sanctioned party retain an independent 'investigator', who will work with the sanctioned party to investigate an agreed number of past MDB projects and report the findings to the MDB. The sanctioned party receives immunity from the MDB for any misconduct discovered during these investigations. The role of the investigator is separate and distinct from a monitor and is not a focus of this chapter.

Authority to impose monitors

The AfDB, ADB, EBRD, IADB, European Investment Bank (EIB) and World Bank all have the ability to impose monitors as a condition for release from debarment or non-debarment pursuant to the institutions' broad powers to impose conditions for release from debarment, including as a means to verify improvements to the sanctioned party's compliance programme.[14] Monitors are imposed both as an agreed term in a negotiated resolution or settlement agreement and as a condition unilaterally imposed by the MDB following a contested or uncontested sanctions proceeding.

Although the appointment of a monitor as part of a settlement agreement has long been accepted and understood, it was not generally recognised in the sanctions procedures or other formal documentation by the MDBs until recently. In July 2021, the World Bank, ADB, AfDB, IADB, EBRD and EIB adopted the MDB General Principles for Settlements, which sets out agreed common features

13 See, e.g., Inter-American Development Bank (IADB),Press Release, 'IDB Announces Settlement in Connection with Prohibited Practices' (21 Aug. 2018), available at https://www.iadb.org/en/news/idb-announces-settlement-connection-prohibited-practices (last accessed 9 Mar. 2022); see also WBG Sanctions System Annual Report FY 2021 (op. cit. note 10, above), at 19.

14 See, e.g., ADB, Office of Anticorruption and Integrity: 2020 Annual Report, at 36, available at https://www.adb.org/sites/default/files/institutional-document/696631/oai-annual-report-2020.pdf (last accessed 9 Mar. 2022).

of settlements of investigations into sanctionable practices.[15] The Principles formally identified the engagement of a third-party monitor as a condition of a settlement agreement.[16]

The unilateral imposition of a compliance monitor following a sanctions proceeding may come as a surprise to sanctioned parties as it is not clearly described in many of the MDBs' public sanctions procedures. Of the large MDBs, only the World Bank and EIB specifically cite the appointment of independent compliance monitors as an illustrative compliance condition for release from debarment or conditional non-debarment in formal sanctions procedures.[17]

Procedures and framework

Selection process

The process for selecting a monitor varies between MDBs. Some MDBs require that a sanctioned party propose multiple candidates to be considered for the monitorship role. Both the World Bank and AfDB, for example, require companies to propose at least three candidates for consideration. Although in each instance the final selection of the monitor is left to the sanctioned party, the World Bank and AfDB maintain the right to veto any candidates who lack sufficient independence or qualifications. If more than one proposed candidate is satisfactory, the sanctioned party can select its preferred candidate. Other MDBs, including the ADB, typically allow a sanctioned party to select a monitor, subject to approval by the Office of Anti-Corruption and Integrity.

Regardless of the nomination process, potential monitors must have sufficient experience in evaluating corporate compliance programmes to international standards and sufficient capabilities to manage the work required for the specific assignment. Candidates must also be independent and free from conflicts. A monitor candidate (and the candidate's firm) should not previously have been engaged by the sanctioned party, nor can there be other personal or professional connections between the candidate and the sanctioned party. MDBs also

15 MDB General Principles for Settlements (8 Jul. 2021), available at http://lnadbg4.adb.org/oai001p.nsf/0/299CA009578916A84825870F007B1604/$FILE/General%20Principles%20for%20MDB%20Settlements.pdf (last accessed 9 Mar. 2022).

16 ibid., at para. 10.

17 EIB, Exclusion Policy (February 2018), at 12, available at https://www.eib.org/attachments/strategies/eib_exclusion_policy_en.pdf; World Bank, Sanctions Procedures (15 Apr. 2012) at 25, available at https://www.worldbank.org/content/dam/documents/sanctions/other-documents/osd/WBGSanctions_Procedures_April2012_Final.pdf (web pages last accessed 9 Mar. 2022).

generally require that sanctioned parties refrain from engaging the monitor (and the monitor's firm) for any other matters for at least one year (and up to three or more) following the end of the monitorship.

If none of the monitorship candidates proposed by a sanctioned party is acceptable to the MDB for reasons relating to qualifications, capabilities, independence or otherwise, the MDB may offer recommendations or other guidance to help the sanctioned party identify more suitable candidates. Some MDBs maintain a 'soft list' of qualified candidates that companies can reference, many of whom have previously served as monitors.

Once a sanctioned party and the MDB have agreed on a candidate for the monitorship, the sanctioned party is responsible for negotiating the engagement agreement. Some MDBs are more involved in this process than others; for instance, some review and approve all terms, including the proposed fees, and even sign the engagement letter. MDBs may also require that certain provisions be included in the agreements, including specific provisions concerning confidentiality, independence and MDB privileges and immunities. The sanctioned party is responsible for all costs and expenses associated with the monitorship, even in instances where the MDB is a formal signatory of the engagement agreement.[18]

Structure of the monitorship

The structure of monitorships imposed by MDBs can vary depending on the facts and circumstances and the MDB involved. The World Bank uses a traditional model, which usually includes intensive review and testing activities, including collection and review of relevant documents regarding the sanctioned party's activities and compliance controls, on-site visits and interviews to better understand the sanctioned party's operations and test the implementation of its compliance controls, and evaluation of internal controls and accounting practices, including, in certain instances, through the use of forensic analysis. These monitorships resemble those imposed by national enforcement authorities such as the US Department of Justice (DOJ) or the UK Serious Fraud Office.

The AfDB often uses a hybrid model involving both self-reports from the sanctioned company and active review and reporting by the monitor. The sanctioned party (often through counsel) will prepare written implementation

18 See, e.g., Integrity Compliance at the World Bank Group: Frequently Asked Questions (April 2020), at 2, available at https://thedocs.worldbank.org/en/doc/da26092a692560030e0f2dd5c0a8c07b-0090012020/original/ICO-FAQs-4-2020.pdf (last accessed 9 Mar. 2022).

reports, with supporting documentation, that describe its efforts to implement a compliance programme. The implementation report is provided both to the AfDB and the monitor. The monitor will follow up with assessment reports, in which the monitor will assess the information provided by the sanctioned party in the implementation reports. To further test the implementation of the compliance programme and the information provided in the implementation reports, the hybrid model often includes a limited number of site visits by the monitor.

In limited circumstances, certain MDBs may limit a monitorship to a desktop review. In this model, the monitor does not conduct site visits or interview employees, but carries out a review of policies and records from his or her desk. Sometimes these desktop reviews are supplemented by self-reports from the sanctioned company itself on its progress with implementing the compliance programme. There is a recognition that a desktop review will not be as thorough and probing as the more traditional monitorship. As a result, its use is limited, typically to situations where the misconduct was minor and the sanctioned party already has a well-established compliance programme.

Both the desktop review model and the hybrid model are recognised as being generally less burdensome than more expansive arrangements. However, they can still place significant burdens on sanctioned parties, particularly if the sanctioned party is required to provide detailed reports on its compliance activities to the monitor.

Scope of review

The scope of an MDB monitor's review can vary greatly and is dictated in the first instance by the conditions imposed on the sanctioned party for release. Although the most common condition for release is the implementation of an integrity compliance programme, MDBs have discretion in customising conditions based on the facts and circumstances. MDBs have been known to limit compliance conditions to a specific activity (e.g., bidding controls), geographical scope or corporate entity under the right circumstances.

Beyond the conditions for release imposed by the MDB, the scope of review is largely determined by the circumstances presented in the specific case. Key factors that influence the scope and structure of the review include, among other things, the length of the period of debarment or conditional non-debarment, the size and makeup of the sanctioned party's operations, the type of misconduct that led to the sanction, and the sanctioned party's existing compliance programme. The scope of the monitorship may also be affected by whether the sanction is imposed through sanctions proceedings or a settlement agreement. When a monitorship

is imposed through sanctions proceedings, the company will have almost no input into the scope of the review. As a result, such monitorships tend to be more expansive than could potentially be negotiated through a settlement agreement.

Standards of review

Monitors measure a sanctioned party's compliance programme implementation against standards adopted by the relevant MDB. In addition to the specific benchmarks set by the MDB, monitors frequently assess a sanctioned party's performance in areas that have been identified as hallmarks of effective compliance programmes, including whether the party:

- has adopted appropriate risk-based policies and procedures;
- has a sufficiently independent and adequately staffed compliance function;
- provides regular training and communication;
- conducts proper due diligence of its business partners; and
- has mechanisms to detect and remediate misconduct.

The AfDB and the WBG have adopted a set of Integrity Compliance Guidelines that serve as a framework for what will be considered an effective compliance programme.[19] For World Bank and AfDB monitorships, the Integrity Compliance Guidelines guide the monitor's review. The monitor is expected to evaluate the extent to which the company has met the requirements of each guideline, always through the prism of the company's unique risk profile.

MDBs that have not specifically adopted a set of compliance guidelines will either require the monitor to ensure that the entity has met certain specific requirements or otherwise adopted a compliance programme that is consistent with international standards. Some MDBs do both. For example, the ADB may require a company sanctioned for fraud in the bid process to demonstrate that it has established bidding controls that include specific standards identified by the Office of Anti-Corruption and Integrity and bring its code of ethics and anti-corruption controls to an 'acceptable international standard'.

19 AfDB, Integrity and Anti-Corruption Department: Integrity Compliance Guidelines, available at https://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/AfDB_-_Integrity_Compliance_Guidelines.pdf; WBG, Summary of World Bank Group Integrity Compliance Guidelines, available at https://thedocs.worldbank.org/en/doc/06476894a15cd4d6115605e0a8903f4c-0090012011/original/Summary-of-WBG-Integrity-Compliance-Guidelines.pdf (web pages last accessed 9 Mar. 2022).

Techniques and methodologies

Document requests and reviews

A fundamental element of MDB monitorships is a review and assessment of relevant compliance documents. The quantity and nature of documents collected and reviewed by a monitor will vary greatly depending on the circumstances, but MDB monitorships will almost always include a review of, at a minimum:

- existing policy documents;
- evidence of training provided to employees;
- key governance documents; and
- evidence of implementation of compliance policies (e.g., certain completed forms and files).

In monitorships that cover the sanctioned party's full compliance programme, the document collection and review will be broad and will include data and information concerning business operations, organisational charts, records of disciplinary proceedings, internal investigation reports, due diligence files, training materials, audit reports, financial documents, background check materials, and records of gifts and hospitality, donations and sponsorships, and other similar expenditures.

Document collection and review is a critical part of a monitorship, and successful monitors devote significant time to planning and considering document requests throughout the course of the monitorship. Successful monitorships conduct more targeted document reviews as a part of the site visits (described below).

For the sanctioned party, document production can be a significant burden throughout the monitorship. Not only does the sanctioned party need to identify and produce the requested materials, sometimes from affiliates or branches in various parts of the world, but the sanctioned party may be required to translate the documents as well (if they are not in English). Making matters worse, these tasks often fall to the compliance department, which is already burdened with implementing new or enhanced compliance controls under the watchful eye of the monitor and the MDB.

Site visits and interviews

Another common feature of an MDB monitorship is a site visit. This is one of the most important tools that monitors have at their disposal to assess and test the implementation of a compliance programme or other release conditions. During a site visit, a monitor can thoroughly test the implementation of compliance controls across the entity through a targeted review of records and interviews with employees.

The location and number of site visits is typically determined by the monitor in consultation with the sanctioned party and the MDB. For small to medium-sized companies, or companies with a smaller scope of operations, monitors may attempt to visit every location. For larger organisations, a monitor is likely to select locations that are considered high risk or that offer a representative sample. A monitor is also likely to seek to visit locations associated with the misconduct that led to the sanction.

Interviews with employees and managers are an essential part of a site visit and offer the monitor the opportunity to test whether relevant controls are properly understood by individuals at various levels within the entity. Interviews also allow the monitor to test the information in the records provided by the sanctioned party. For example, an interview may provide the monitor with the opportunity to discuss a due diligence file directly with the compliance officer who conducted the due diligence to understand the process that was used and to assess the ability of the compliance officer to analyse relevant risks. Finally, interviews are the best way to assess whether management has created a proper culture and tone in respect of compliance.

Site visits may also allow an opportunity for various forms of observation. The monitor may be able to observe compliance training, allowing it to better understand the trainers' capabilities and the audience's level of engagement. The monitor can also observe the physical environment for signs demonstrating the importance of the compliance programme; for example:

- Where and how are the compliance personnel positioned in the office?
- Are they in a back corner or positioned in a way that minimises their importance?
- Has the sanctioned party put up any posters or notices that publicise or encourage the compliance programme in a meaningful way?

Review and testing of financial controls

Many MDB monitorships include a review of internal financial or accounting controls. Monitors may assess policies and procedures around financial and accounting controls and interview individuals involved in these processes. Monitors may also request other financial records, including general ledgers, vouchers, invoices, purchase orders and other documentation as part of a testing of the financial and accounting controls.

Depending on the facts and circumstances, a more detail evaluation and assessment of the financial controls, including testing by forensic accountants, may be appropriate. This typically depends on the nature of the misconduct that

led to the sanction, the size of the entity and the concerns regarding the entity's financial controls. Whether and to what extent this more detailed testing is appropriate will be determined by the MDB in consultation with the monitor.

Reporting

Monitors submit their findings to both the MDB and the sanctioned party through formal written reports. The fundamental role of the monitor is to provide an independent analysis of whether the sanctioned party has satisfied the compliance requirements as set out in its sanction or settlement. The monitor's reports regularly analyse the sanctioned party's progress towards meeting these requirements throughout the course of the monitorship, and make recommendations to help the company shore up any areas where its progress is lacking.

As with other elements of the monitorship, the frequency of reports is determined by the MDB depending on the circumstances. The most common arrangement involves reporting biannually. Both the World Bank and AfDB have adopted a practice whereby the monitor provides an initial report within the first few months of the monitorship, followed by periodic reports on a regular schedule. The initial report often focuses on the initial status and design of the compliance programme and controls. The periodic reports provide the monitor's findings with respect to the sanctioned party's implementation of the compliance programme and any recommendations made by the monitor and the MDB regarding the same.

Written reports serve as an opportunity for the monitor to make recommendations and track the company's progress as the monitorship progresses. Recommendations are commonly made at all stages of the monitorship, but often decrease in number with each successive report. Even when a recommendation is made orally by the monitor directly to the sanctioned party during a site visit or other interaction, the monitor often includes such a recommendation in the next report so that it can be catalogued and tracked.

Benefiting from the monitorship – implementing recommendations

Where MDB monitors are tasked with performing independent reviews of sanctioned parties' progress in establishing compliance programmes or otherwise meeting their conditions for release, monitors are often more than disinterested observers. Instead, MDB monitors regularly play a key role in assisting sanctioned parties in improving their compliance programmes, in both design and implementation. The constructive feedback provided by the monitors, who are experts in their field, helps guide companies in developing their integrity culture and

improving their compliance programmes. Monitors have also been known to take steps such as providing training sessions for sanctioned parties on high-risk areas or more complex compliance concepts.

MDB personnel are also a key part of the monitorship process and in working with the sanctioned party to improve its compliance programme. Indeed, MDBs often engage with the sanctioned party directly for clarification, recommendations or additional requirements. At a minimum, representatives from the relevant MDB review and comment on the monitor's reports and may offer guidance to the monitor on its findings and additional areas of interest. Representatives from the MDBs may also take a more active role in the process, including by participating in site visits or meetings between the monitor and company personnel.

The existence of the monitorship creates an environment of urgency and accountability at the sanctioned entity. When the monitor makes recommendations, the sanctioned party knows that the monitor or the MDB (or both) will be testing their implementation, and is thus incentivised to adopt them rapidly. This can lead to the expeditious development or enhancement of a compliance programme across a large organisation, often in a much shorter time than would happen organically.

The history of MDB monitorships includes many stories of impressive success and progress, two of which are discussed below.

Case study: SNC-Lavalin

In April 2013, the World Bank announced the debarment of SNC-Lavalin Inc (SNC-Lavalin) for 10 years following allegations of corruption by SNC-Lavalin in connection with the Padma Bridge project in Bangladesh. The sanction, which was reached as part of a negotiated settlement with SNC-Lavalin, included the opportunity for early release from debarment after eight years if SNC-Lavalin met all the conditions in the settlement agreement, including the adoption of an integrity compliance programme.[20] This settlement was one in a string of scandals that SNC-Lavalin endured over a number of years. Most prominently, in

20 World Bank, Press Release, 'World Bank Debars SNC-Lavalin Inc. and its Affiliates for 10 years' (17 Apr. 2013), available at https://www.worldbank.org/en/news/press-release/2013/04/17/world-bank-debars-snc-lavalin-inc-and-its-affiliates-for-ten-years (last accessed 9 Mar. 2022).

December 2019, SNC-Lavalin pleaded guilty in Canada and admitted to paying more than C$45 million in bribes between 2001 and 2011 to the son of Libyan dictator Muammar Ghaddafi.[21]

While these scandals were surfacing, SNC-Lavalin engaged a World Bank monitor and, during the course of eight years, made significant changes and improvements to its compliance programme framework. In April 2021, despite continued news about the organisation's prior misconduct and ongoing prosecutions, the World Bank granted SNC-Lavalin early release from its debarment, in large part based on its progress in implementing an integrity compliance programme. In granting an early release, the integrity compliance officer referenced SNC-Lavalin's meaningful engagement with the officer and the monitor as well as the company's adoption of the monitor's recommendations to address its integrity compliance gaps.[22] These recommendations, among other measures, helped SNC-Lavalin Group develop a comprehensive framework for its integrity compliance programme in line with the World Bank Integrity Compliance Guidelines and secure an early release from debarment.[23]

Case study: Alstom

In February 2012, the World Bank announced that it had reached a negotiated resolution agreement (NRA) with Alstom Hydro France and Alstom Network Schweiz AG (Switzerland), two subsidiaries of Alstom SA (Alstom), regarding a corrupt practice on a project in Zambia.[24] Alstom Hydro France and Alstom Network Schweiz AG (Switzerland) were debarred from participating in World Bank-financed projects for three years, with release conditioned on Alstom meeting certain conditions in the agreement. Among other conditions, Alstom was required to improve its compliance programme to meet the standards of the World Bank Integrity Compliance Guidelines and retain an independent

21 Public Prosecution Service of Canada, Press Release, 'SNC Lavalin Construction Inc. Pleads Guilty to Fraud' (18 Dec. 2019), available at https://www.ppsc-sppc.gc.ca/eng/nws-nvs/2019/18_12_19.html (last accessed 9 Mar. 2022).

22 WBG Sanctions System Annual Report FY 2021 (op. cit. note 10, above), at 19.

23 SNC-Lavalin, Press Release, 'SNC-Lavalin Announces the Early Lifting of All World Bank Sanctions' (20 Apr. 2021), available at https://www.snclavalin.com/en/media/press-releases/2021/20-04-2021 (last accessed 9 Mar. 2022).

24 World Bank, Press Release, 'Enforcing Accountability: World Bank Debars Alstom Hydro France, Alstom Network Schweiz AG, and their Affiliates' (22 Feb. 2012), available at https://www.worldbank.org/en/news/press-release/2012/02/22/enforcing-accountability-world-bank-debars-alstom-hydro-france-alstom-network-schweiz-ag-and-their-affiliates (last accessed 9 Mar. 2022).

compliance monitor.[25] During the following three years, Alstom worked to improve its compliance programme under the watchful eye of an independent monitor and with support and input from the World Bank Integrity Compliance Office.

Almost three years later, in December 2014, Alstom pleaded guilty in the United States to violations of the US Foreign Corrupt Practices Act, agreeing to pay a US$772 million criminal penalty,[26] which was, at the time, the largest-ever foreign bribery resolution with the DOJ. Alstom's plea related to what the DOJ referred to as 'a widespread scheme involving tens of millions of dollars in bribes in countries around the world, including Indonesia, Saudi Arabia, Egypt, and the Bahamas'.[27] Despite the breadth of the misconduct, the DOJ did not require Alstom to retain a compliance monitor. Rather, in a first-of-its-kind arrangement,[28] Alstom was permitted to self-report to the DOJ regarding the implementation of its compliance programme in lieu of requiring a monitor, provided that it satisfied the monitoring requirements in its NRA with the World Bank. The DOJ specified that it would consider the monitoring requirement satisfied if the Integrity Compliance Office concluded that Alstom had 'implemented a Corporate Compliance Program that complies with the World Bank's integrity compliance policies and practices, particularly those reflected in the World Bank's Integrity Compliance Guidelines'.[29]

The DOJ's decision to reference and rely on the Integrity Compliance Office served as a testament to how comprehensive and mature the World Bank's monitoring process had become in just a few short years and lent additional credibility to the work being done by the MDBs and its independent monitors to enhance and assess the compliance programmes of international companies.

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25 Lawyers at Hughes Hubbard & Reed LLP served as counsel for Alstom in connection with this monitorship.

26 US Department of Justice, Press Release No. 14-1448, 'Alstom Pleads Guilty and Agrees to Pay $772 Million Criminal Penalty to Resolve Foreign Bribery Charges' (22 Dec. 2014), available at https://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery (last accessed 9 Mar. 2022).

27 id.

28 Dylan Tokar, 'With Alstom Monitor Agreement, DOJ Tries Something New', Global Investigations Review (4 Feb. 2015), available at https://globalinvestigationsreview.com/just-anti-corruption/alstom-monitor-agreement-doj-tries-something-new (last accessed 9 Mar. 2022).

29 Plea Agreement at D-1, *United States v. Alstom SA*, No. 14-CR-246 (D. Conn. 22 Dec. 2014), ECF No. 5, available at https://www.justice.gov/file/189331/download (last accessed 9 Mar. 2022).

The future of MDB monitorships

All indications are that the conditional release process has been hugely successful. Hundreds of companies have worked cooperatively with the MDBs to improve their compliance frameworks and rejoin the eligible pool of bidders. Monitors are likely to continue to be a large part of this increasingly important and prominent process.

The covid-19 pandemic had a significant impact on the way in which MDB monitorships could be conducted. Beginning in March 2020, travel to many parts of the world became unsafe, impossible or otherwise impractical. As in other aspects of life, monitors and sanctioned parties adjusted. The document collection and review process became more central to the monitorships. In place of in-person site visits, monitors conducted interviews through 'virtual' site visits when necessary. These virtual exercises allowed the monitorships to continue to progress through unprecedented times.

For many reasons, virtual visits and interviews are not as effective as the in-person versions. Observation of training and other interactions is far more difficult in a virtual setting. Observations of the physical space and arrangements is almost impossible. Although interviews can be conducted in largely the same manner, many of the side conversations and informal discussions that help a monitor understand a company and its culture are harder to replicate in a virtual setting. For these reasons, in-person site visits are likely to resume as soon as it is safe and practical to do so.

However, some efficiencies may be gained from lessons learned from monitorships conducted during the pandemic. For example, the relative success of virtual interviews may enable monitors and MDBs some flexibility when structuring and planning monitorships. A new hybrid model, involving a mixture of in-person and virtual visits, may emerge. Without the travel cost and time for every visit, monitors may be inclined to visit more locations than they would have in the past. Given these lessons, it is likely that the pandemic will change the way MDB monitorships are conducted in the future, although the extent and nature of that change is yet to be determined.

APPENDIX 1

About the Authors

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Kevin Abikoff is the deputy chair of Hughes Hubbard & Reed, co-chair of the firm's anti-corruption and internal investigations practice group, and co-chair of the firm's securities litigation group. He advises clients across myriad industries and geographical regions on the full range of anti-corruption issues, including US Foreign Corrupt Practices Act (FCPA) matters. Kevin frequently represents clients before US enforcement agencies, including the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ). Kevin leads the firm's engagements for several multinational companies subject to investigations and in their post-resolution activities and has successfully assisted numerous multinational companies in satisfying terms of negotiated settlements with international regulators.

Kevin also maintains a robust monitorship practice. He was the first external anti-corruption compliance monitor jointly appointed by the DOJ, SEC and UK Serious Fraud Office (with the advice and approval of the US Department of Treasury Office of Foreign Assets Control) and has served as an UN-appointed monitor. Currently, he serves as the monitor for two Chinese state-owned construction enterprises in connection with their debarment and sanction by the World Bank.

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Laura supervised and prosecuted some of the largest FCPA cases in the United States and was involved in the development of the FCPA Pilot Program and the drafting of the FCPA Resource Guide. Laura's practice focuses on high-stakes government and internal investigations, crisis management, white-collar criminal defence and cross-border compliance counselling, risk assessments and due diligence. As a skilled investigator and trial lawyer, Laura assists corporations, boards of directors, audit committees and senior executives with sensitive internal investigations and proceedings before the DOJ, the Securities and Exchange Commission and other US and international agencies, with a particular focus on the FCPA and anti-corruption, healthcare fraud, financial fraud and money laundering.

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Michael DeBernardis is a member of the firm's anti-corruption and internal investigations and white collar and regulatory defence practice groups. Michael represents corporate and individual clients in criminal, civil and administrative enforcement matters, including matters involving the Foreign Corrupt Practices Act and securities and accounting fraud. Michael has substantial experience in conducting internal investigations and due diligence efforts around the globe, including in connection with US Department of Justice, US Securities and Exchange Commission and multilateral development bank inquiries. Michael assists US, European and Asian clients in designing, evaluating, administering and maintaining anti-corruption, integrity compliance and corporate governance programmes. Michael also represents clients in complex litigation and international arbitration matters. Michael also serves as co-chair of the firm's multilateral development bank (MDB) investigations and sanctions practice, where he represents companies and individuals in all phases of MDB sanctions proceedings, from audit and investigation to litigation of allegations and arguments before sanctions boards, to sanction release proceedings.

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Christine Kang is a member of the firm's anti-corruption and internal investigations team. Christine's practice is focused on representing Chinese companies, particularly some of the largest Chinese state-owned enterprises, as well as multinational companies doing business in China, with a specific emphasis on investigations, anti-corruption, sanctions, compliance and international arbitration matters. She has extensive experience in representing Chinese and multinational companies in sensitive investigations and brings experience not only with international best

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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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