Introduction

Monitors, known by a variety of names including external compliance officers and Independent Private Sector Inspectors General (IPSIGs), have become a common judicial, regulatory, and conflict resolution tool. In most instances, a Monitor is installed by agreement between a company or other public or private entity (referred to in these standards as the Host Organization) and a state or federal government department or agency (The Government). The agreement between the parties (the Agreement), often resulting from some concern about fraud, misconduct, or regulatory violation, often enables the host organization to mitigate, suspend or avoid government actions or penalties, such as debarment, administrative charges, or indictment, through the host organization’s commitment to perform the actions enumerated in the Agreement.
In some cases, the Monitor may be imposed by a court as a condition of probation or as part of a civil remedial action or settlement. Typically, the Host Organization will enter into an Engagement Letter (Engagement Letter) with the Monitor setting forth the responsibilities and authorities of the Monitor and obligations of the Host Organization.

Once in place, a Monitor may serve a variety of functions. These frequently involve remedial measures within the Host Organization’s corporate compliance and ethics program, but vary greatly in accordance with the underlying issues giving rise to the Agreement. For example, the Monitor may advise an organization on the implementation of a compliance program, audit the organization’s compliance with its Agreement with the Government, investigate the organization’s compliance with law, as well as acting to reduce waste, abuse, and fraud and increase the Host Organization’s economy, efficiency, and effectiveness. In some cases, the efforts of Monitors may be intended to result in a change to the Host Organization’s cultural environment.

Although Monitors may serve these and other functions, they have certain central features in common, including being independent of both the Government and the Host Organization, and having an obligation to report to the court, the Government, or both, concerning the Host Organization’s conduct. These Standards provide guidance both to court-ordered Monitors and to Monitors installed by Agreement between the Government and the monitored entity, distinguishing between the two circumstances as appropriate.

A Host Organization may also voluntarily enter into an Engagement Letter with a Monitor in order to ensure or measure the host organization’s compliance with laws, regulations, and codes of conduct. While these standards will almost always be applicable to a Monitor engaged voluntarily, the lack of an Agreement with the Government or a Court Order technically takes such a situation outside the definitions as used herein.

**Standard 24-1.1 Definitions**

For purposes of these standards:

A. **“Agreement”** means an agreement between the Host Organization and the Government in which the Host Organization agrees to utilize the services of a Monitor and which establishes the scope of the monitorship.

B. **“Compliance Program”** means the system of policies and procedures implemented by the Host Organization to encourage ethical behavior and to reasonably prevent, detect, and respond to misconduct by employees or agents of the organization.

C. **“Court Order”** means an administrative or court order that provides for the Host Organization to utilize the services of a Monitor.

D. **“Engagement Letter”** means the contract between the Host Organization and the Monitor entered into in connection with the Agreement or Court Order.

E. **“Financial Interest”** means any material financial interest that could potentially be affected by the financial decisions of, or the successes or failings of, the Host Organization, whether held directly or indirectly or by a family member. The interest is material if it is of sufficient value
that a reasonable person might believe it has the capacity to affect one’s judgment in serving as a Monitor.

F. “Government” means (1) a public department or agency; or (2) any other entity that has oversight over the Host Organization due to regulatory authority, contractual agreement, or court order.

G. “Host Organization” means the organization that engages the Monitor.

H. “Monitor” means a person or entity:
   · Engaged by a Host Organization pursuant to a Court Order or an Agreement and Engagement Letter;
   · Who is independent of both the Host Organization and the Government;
   · Whose selection is approved by the Government or ordered by a court; and
   · Whose responsibilities and authority are established by Court Order or by the terms of the Agreement and the Engagement Letter.

I. “Monitorship Team” means those individuals or organizations engaged by, and operating under the authority and supervision of, the Monitor in assisting in the discharge of the duties of the Monitor as described in the Court Order or the Agreement. The Team includes, inter alia, employees, subcontractors, and consultants engaged by the Monitor.

J. “Work Plan” means a written analysis of the responsibilities and authority of the Monitor and how the Monitor intends to fulfill those responsibilities and exercise that authority. To the extent possible, the Work Plan should outline the specific tasks to be undertaken and a realistic timeline for each to be completed.

II. Monitor Selection

Standard 24-2.1 General Principles

The Government, Host Organization, and court, for Monitors appointed subject to a Court Order, should consider what qualifications are necessary for a Monitor to effectively conduct the monitorship based on the specific facts and circumstances of the matter. The Monitor selection process should ensure that the Monitor is a highly competent person or entity for the specific assignment and that the Monitor possesses the qualifications set forth under these standards. Absent extraordinary circumstances, both the Host Organization and the Government should be allowed to have a significant role in the selection process.

Standard 24-2.2 Candidate Pool

The selection process should encourage consideration of a broad range of Monitor candidates that should not be artificially limited by demographic, professional, and geographic factors. When possible, the Government should announce the decision to select a Monitor so that appropriate persons or entities may submit indications of interest.

Standard 24-2.3 Pre-qualified Monitor Pool
It may be appropriate for the Government to establish, and update on a regular basis, a pre-qualified pool of Monitors who are capable of handling an expected Monitor role where:

1. The Government expects the Monitors to have substantially similar assignments;
2. The Government expects that the timely selection of a Monitor will be of significant importance; or
3. The Government determines that there is a need to be able to provide names of potential Monitors to Host Organizations when requested.

**Standard 24-2.4 Selection Criteria**

When determining the necessary qualifications of the Monitor and when reviewing Monitor candidates, the following factors should be considered:

1. **Qualifications**
   a) The integrity, credibility and professionalism of the Monitor.
   b) The expertise or experience in the industry or specific subject matter of the monitorship.
   c) The relevant skills and experience necessary to discharge the duties of the Monitor as described in the Court Order or the Agreement.
   d) The expected structure of the Monitorship Team and the ability of the Monitor to access and deploy resources as necessary to discharge the duties of the Monitor as described in the Court Order or the Agreement.
   e) The commitment to serving as the Monitor for the entire monitorship term.

2. **Costs**
   a) The Monitor’s cost structure for the Monitorship Team.
   b) The Monitor’s projected costs to discharge the duties of the Monitor as described in the Court Order or the Agreement.
   c) Any other costs expected to be imposed on the Host Organization by reason of a particular Monitor’s selection.

3. **Mandatory Exclusions**

The following persons should not be permitted to serve as Monitors:

a) Former Government employees who, while employed by the Government, were involved in the matter giving rise to the monitorship.

b) Any person who was involved in, supervised persons involved in, or otherwise had responsibility over the activity giving rise to the monitorship.

c) Any person who was involved in structuring, reviewing, supervising, or providing advice regarding the Compliance Program or the internal controls related to the wrongdoing and in place at the time of the wrongdoing, where an objective review of that Compliance Program or system of internal controls pursuant to the Monitor’s mandate might reasonably call into question the efficacy and value of that work or the implementation thereof.
d) Any person who provided non-monitoring legal or other professional services to the Host Organization relating to the activity giving rise to the monitorship.

e) Any person who has a Financial Interest related to the Host Organization.

4. Potential Exclusions

When determining the severity of the following potential conflicts of interest and the extent to which each could impair, or be perceived to impair, the Monitor’s judgment or independence, as balanced against the qualifications of that Monitor, the following factors should be considered:

a) Prior, non-Monitor work with the Host Organization that was unrelated to the activity, or the investigation of the activity, giving rise to the monitorship, with appropriate consideration given to the significance and nature of the work, and the time period during which the work occurred.

b) Prior Monitor work for the Host Organization, including independent monitoring work initiated by the Host Organization in response to the discovery of the wrongful acts that gave rise to the monitorship or work as a private sector inspector general.

c) Prior affiliation with a firm that provided legal or other professional services to the Host Organization during the time of that affiliation.

d) Any other factor that could bias or impair, or be perceived to bias or impair, the Monitor’s judgment, objectivity or independence.

Standard 24-2.5 Duty to Disclose

The Monitor should ascertain whether it, or any member of the Monitorship Team, has any potential conflicts of interest. The Monitor should disclose any identified conflicts of interest to the Government, Host Organization, and court, within adequate time for those parties to consider whether the potential conflict requires or warrants exclusion under these standards.

III. Establishing the Monitorship

Standard 24-3.1 General Principles

The Court Order or the Agreement and the Engagement Letter should clearly define the responsibilities and authority of the Monitor, Host Organization, and Government, and the goals and scope of the monitorship. The Court Order or the Agreement should state a length of time and projected resources necessary for the monitorship, which should be adequate to achieve its goals. The Government, Host Organization, and Monitor should commit, for the duration of the monitorship, the time and resources required by the monitorship.

Standard 24-3.2 Modifications

1. Monitorships Imposed by Court Order

Monitorships imposed by Court Order may be modified, extended, or terminated early to the extent permitted by the court, after hearing from the Government, the Host Organization, and the Monitor.
2. Monitorships Established by Agreement

a) Substantive Modifications

When the monitorship is established by Agreement, the Agreement should provide that any modifications should be in writing and agreed to by the Government, Monitor, and Host Organization. The Agreement should specify the process and conditions, under which the Host Organization, the Government and the Monitor may seek modifications of the scope or nature of the monitorship.

b) Extensions

The Agreement may allow for extensions to the monitorship. The Agreement should state the criteria for determining when an extension is appropriate, state how to determine when those criteria are met, require that there is a clearly articulated reason for the extension, and create a process for resolving any objections by the Host Organization.

c) Early Termination

The Agreement should allow, and state the criteria for, a Monitor to recommend granting an early termination and for the Host Organization to apply for early termination. The Agreement should require that the Monitor or Host Organization provide a clearly articulated reason for early termination before it is granted. If the Agreement does not address early termination, and the Monitor or Host Organization believes that the monitorship is no longer beneficial to the Host Organization and that the Host Organization has met its obligations under the terms of the Agreement, then the Monitor may recommend early termination or the Host Organization may apply for early termination.

Standard 24-3.3 Monitor Work Plan

1. The Court Order or the Agreement ordinarily should require that the Monitor create a Work Plan at the outset of the monitorship, and that it be developed in consultation with the Host Organization and Government.

2. When the Monitor is required to make material changes to the Work Plan, either due to changing circumstances, new information, or modifications to the Court Order, the Agreement, or the Engagement Letter, the Monitor should disclose the changes to the Government, and, if appropriate, to the Host Organization.

3. If disclosure of the Work Plan, or any subsequent changes to it, to the Host Organization would hinder a Monitor’s ability to effectively perform its duties under the Agreement, then selected aspects of the Work Plan may be disclosed to the Government only.

Standard 24-3.4 Monitor Compensation and Billing

1. Estimates of Fees and Expenses

During the selection and approval process, prospective Monitors should provide a reasonable estimate of fees and expenses, including the use of third party resources, expected to be incurred to achieve the objectives of the monitorship.

2. Reasonable Fees and Expenses
a) The Monitor should incur only costs that are reasonably necessary for carrying out the monitorship. Where appropriate, the Monitor should look to utilize the Host Organization’s resources to reduce costs.

b) During the course of the monitorship, if fees and expenses are expected materially to exceed estimates, and if appropriate and practicable, the Monitor should inform the Host Organization before incurring those expenses. If the increase in fees and expenses is due to investigative aspects of the monitorship and the Monitor determines it is not appropriate to disclose these changes to the Host Organization, then the Monitor should consult with the Government, and if appointed pursuant to Court Order, the court, as soon as practicable.

c) The Court Order or Engagement Letter should provide for payment to the Monitor for its reasonable costs and time if the Monitor is required to testify or perform some other function related to the monitorship not otherwise addressed.

3. Invoices

a) The Monitor should maintain records that accurately reflect the work performed and the fees and expenses incurred.

b) The Monitor should prepare and issue invoices to the Host Organization that are sufficiently detailed to provide an understanding of the type of work performed and the expenses incurred, unless the parties agreed otherwise or disclosure of detailed invoices would hinder a Monitor’s ability to effectively perform its duties under the Court Order or the Agreement.

4. Disputing Fees and Expenses

For Monitors appointed subject to a Court Order, the Order should provide that any dispute over fees and expenses will be resolved by the court. For Monitorships established by Agreement, the Agreement and/or the Engagement Letter should set forth a dispute resolution process to resolve disputes over fees and expenses that takes into account the Government's interest in the secrecy of investigations and the Host Organization's interest in the protection of proprietary or confidential information.

5. Fund to Cover Future Fees and Expenses

Where appropriate, The Court Order, the Agreement, or the Engagement Letter may provide for the creation of a replenishing fund that would cover expected periodic fees and expenses of the Monitorship Team.

Standard 24-3.5 Public Disclosure of Fees and Expenses

Unless otherwise required by law, the Host Organization should have discretion not to disclose to the public the Monitor’s fees and expenses incurred during the monitorship.

IV. Conducting the Monitorship

Standard 24-4.1 Professionalism

1. Independence

The Monitor is independent of both the Host Organization and the Government. To be independent, the Monitor should be impartial and objective in all of its activities, and avoid any
conduct that may impair, or appear to impair, the Monitor’s impartiality and objectivity. The Monitor should not allow the prospect of future monitorship engagements or other economic considerations to influence its independence.

a) Except for reasonable fees and expenses, the Monitor should not accept anything of value from the Host Organization, unless the value is nominal or it mitigates costs to the Host Organization.

b) The Monitor should agree not to provide, or offer to provide, any services to the Host Organization for a period of at least one year from the date the monitorship is terminated, other than serving in a monitoring role not objected to by the Government. During the course of the monitorship, the Monitor and Host Organization may not discuss the possibility of future employment, including serving in a monitoring role.

c) Any expansion of the Monitor’s duties that increases the compensation of the Monitor should be in compliance with the Court Order or the Agreement as modified under these Standards.

2. Professional Codes

Each member of a Monitorship Team should be familiar with and responsive to the professional codes, rules and/or governing legislation of its profession; should comply with such, and should promptly seek professional guidance when a compliance question arises.

3. Supervision

The Monitor should take reasonable measures to ensure that members of the Monitorship Team comply with the relevant provisions of these standards.

Standard 24-4.2 Access to Records, Persons and Information

1. Obligations of the Host Organization

a) The Monitor should have access to all information that is reasonably necessary to fulfill the duties of the Court Order or the Agreement, as determined by the Monitor.

b) The Court Order or the Agreement should clearly state the types of information and records to be made available to the Monitor, and how and under what circumstances the Host Organization is required to give access to certain individuals for interviews with the Monitor, including, among others, employees, past employees, vendors, and subcontractors.

2. Proprietary and Confidential Information

a) Notwithstanding subsection (1), the Host Organization should not be required to disclose information that is subject to the attorney-client privilege or the attorney work-product doctrine, or the disclosure of which would otherwise be inconsistent with applicable law.

b) Monitors should respect the Host Organization’s proprietary and confidential information and take reasonable measures to protect that information. The Monitor should not use the Host Organization’s proprietary and confidential information for personal gain or for any purpose beyond the scope of the monitorship.
The Engagement Letter should specify the process, at the termination of the monitorship, for the Monitor to return to the Host Organization any confidential information that is the property of the Host Organization and is not required to be maintained by the Court Order or the Agreement, by applicable law, or by any other provision of these standards.

3. Dispute Resolution

For Monitors appointed subject to a Court Order, the order should specify that the court will resolve any dispute as to the Monitor’s access to information. For Monitorships established by Agreement, the Agreement and/or Engagement Letter should specify a process for resolving any disputes as to the Monitor’s access to information that takes into account the Government's interest in the secrecy of investigations and the Host Organization's interest in the protection of proprietary or confidential information.

4. Interviewing Employees

a) The Court Order, the Agreement, or the Engagement Letter should address issues of employee rights that may arise during the monitorship, including, but not limited to, privacy rights and the right to counsel. In addition, Monitors should familiarize themselves with rights of employees of the Host Organization that may not have been addressed in the Agreement or the Engagement Letter.

b) Unless such disclosure would hinder the Monitor’s ability to effectively perform its duties under the Court Order or the Agreement, the Monitor should fully disclose its identity during interviews, and if appropriate have available documentation that establishes the Monitor’s status and authority. The Monitor should inform the interviewee why it is collecting the information, and what the Monitor is authorized or required to do with the information.

c) Monitors should respect a represented employee's right to counsel, and if the employee, whether represented or unrepresented, is a subject or target of a Monitor's investigation, the employee should be made aware of this status and should be provided the opportunity to have counsel present at the interview. Monitors should not suggest to the Host Organization that the employee should receive any adverse treatment solely as a consequence of the employee's decision to have counsel present during the interview. This provision does not apply if the employee is not aware that the Monitor is interviewing the employee, such as during the course of an undercover investigation.

d) The Court Order or the Agreement should afford the Monitor sufficient authority to collect information confidentially, or otherwise protect the identity of persons providing information, as deemed appropriate by the Monitor.

e) The Monitor should inform employees of the level of confidentiality afforded them, if any, when providing information to the Monitor and that:

i) Statements given to the Monitor do not constitute notice to the Host Organization on those matters;

ii) Statements given to the Monitor are not privileged communications; and

iii) Statements given to the Monitor may be disclosed to the Government.
Standard 24-4.3 Scheduled Reports and Other Reports and Communications

1. Scheduled Reports

a) The Court Order or the Agreement should require the Monitor to submit to the Government and the court, for Monitors appointed subject to a Court Order, scheduled, written reports that state the Monitor’s findings, conclusions, and recommendations.

b) The Court Order or the Agreement should specify the form and frequency of the Monitor’s written reports. The requirements on frequency should balance the Government’s need to be informed against the costs of creating the reports or otherwise impairing the efficiency of the monitorship.

c) The Court Order or the Agreement should state if, and when, the Host Organization may receive a copy of the final written report, as well as any preliminary drafts of the report.

d) The Monitor is responsible for the report. Unless otherwise stated in the Court Order or the Agreement, or otherwise inappropriate, the Monitor may allow the Host Organization and the Government to make suggested changes to the report or produce evidence that challenges the Monitor’s preliminary findings, but neither the Host Organization nor the Government has or should be given the authority to modify the Monitor’s report.

2. Other Written Reports and Communications

a) The Court Order or the Agreement should authorize the Monitor to communicate freely with the Government for purposes of discussing any aspect of the monitorship.

b) Notwithstanding subsection (a), due to the time and expense necessary to draft formal, written reports, the Monitor should produce interim reports only if the Court Order or the Agreement provides for them.

c) The Court Order or the Agreement should specify the types of communications that must be disclosed to the Host Organization.

3. Reporting Misconduct

a) The Court Order or the Agreement should specify the types of observed or discovered wrongdoing that the Monitor should report and specify when and how the wrongdoing should be reported to the Host Organization, the Government, or both.

b) The Monitor should have the discretion to determine whether observed or discovered misconduct that is not specified in the Court Order or the Agreement, and is unrelated to the subject matter of the monitorship, should be reported to the Government, the Host Organization, or both.

4. Confidentiality of Monitor Reports

a) The Court Order or the Agreement should state whether the Monitor’s report is to be confidential or whether it is to be made available to the public, in part or in whole. For reports that are to remain confidential, the Government may decide whether other government agencies or departments may have access to the report, unless the Court Order or the Agreement provides otherwise. Any government agency or department that receives the report
should keep it confidential. Unless the Government objects or the Court Order or the Agreement provides otherwise, the Host Organization should have the right to disclose to third parties any written report it receives.

b) If a written report may be publicly disclosed or provided to third parties, the Monitor should consult with the Government and Host Organization, or if appointed by a court, the court, for purposes of protecting against the disclosure of sensitive or disparaging information concerning individuals who may be named in the report, and the disclosure of proprietary, confidential, or competitive business information.

5. Basis of Findings and Conclusions

The Monitor’s findings and conclusions should be determined fairly, objectively and impartially, and based on relevant evidence. The Monitor should state the factual basis of all findings and conclusions, and maintain records sufficient to show that factual basis, including any material facts that do not support the Monitor’s findings and conclusions.

6. Curing of Reporting Errors and/or Inaccuracies

If after issuing a report the Monitor determines that it contains material errors or inaccuracies, then the Monitor should formally notify all recipients of the report.

Standard 24-4.4 Monitor Recommendations

1. Appropriateness and Impact

The Monitor’s recommendations should be pragmatic, reasonable, and designed to achieve the objectives of the Court Order or the Agreement. When developing recommendations, the Monitor should, as appropriate, consider such factors as the length of time required to implement the recommendations, costs, existing internal controls and Compliance Programs, the culture of the organization, the likelihood of the recommendations to be sustainable post-monitorship, and their impact on the Host Organization’s operations.

2. Responsiveness to Host Organization

Absent exceptional circumstances, the Monitor should work cooperatively with the Host Organization in developing recommendations. The Monitor should consider the Host Organization’s existing plans, recommendations, and concerns. The Monitor should consider any reasonable changes proposed or made by the Host Organization, and if rejecting a proposal, the Monitor should articulate the reasons for the rejection.

3. Disputes

The Court Order or the Agreement should specify a process by which the Host Organization or Government may challenge any of the Monitor’s findings, conclusions, or recommendations. The Monitor should in good faith attempt to resolve any differences with the Host Organization or Government on the necessity of implementing any of the Monitor’s recommendations.

Standard 24-4.5 Indemnification
The Court Order, Agreement, or Engagement Letter should specify the conditions under which the Host Organization must indemnify and hold harmless the Monitor from claims arising from the Monitor’s performance of its duties under the Court Order or the Agreement.

**Standard 24-4.6  Withdrawal**

1. The Court Order, Agreement, or Engagement Letter should address the circumstances under which the Monitor could or should withdraw from the monitorship. The Engagement Letter should address the withdrawal process, notice, timing, disclosure, and other implications of withdrawal, including financial matters.

2. If during the course of the monitorship, the Monitor develops or discovers a Financial Interest or any other conflict of interest that impairs the Monitor’s independence, the Monitor should provide full disclosure. Following full disclosure, the Monitor should begin the withdrawal process unless the conflict of interest is cured, or is waived by the Host Organization and the Government, and where appropriate the waiver is approved by the court.

3. The Monitor should begin the withdrawal process if the Monitor determines that it does not have and cannot obtain the expertise, resources, or ability necessary to conduct the monitorship effectively and within the appropriate time frame.

4. The Monitor may begin the withdrawal process if the Host Organization fails to compensate the Monitor in compliance with the Court Order, the Agreement, or the Engagement Letter, or the Host Organization acts in a manner that prevents the Monitor from appropriately fulfilling its obligations under the Court Order or the Agreement.

5. The Monitor should confer with the Government and the Host Organization, and provide the reasons for the proposed withdrawal.

6. The Court Order or the Agreement should state the process for selecting a new Monitor in the event that the existing Monitor withdraws. That process should seek to minimize the costs to the Host Organization and the disruption of the monitorship.

**Standard 24-4.7  Removal of the Monitor**

1. **Monitors Appointed by Agreement**

   a) Where a Monitor has been appointed subject to an Agreement, the Agreement should give only the Government the power to remove a Monitor.

   b) The Agreement should establish a process for the Government to raise any concerns about the performance of the Monitor with the Host Organization and the Monitor before initiating the removal process. The process should allow the Host Organization and the Monitor to respond to any performance concerns and, where appropriate, allow the Monitor to cure any performance deficiencies before removing the Monitor.

   c) The Government may require removal of the Monitor if the Monitor fails to conduct the monitorship effectively, fails to comply with the Agreement or these standards, or is no longer qualified. The Government’s exercise of discretion should not be arbitrary, capricious, or otherwise an abuse of discretion. The Government should consider any negative impacts the
removal or threat of removal would have on the Host Organization or on the independence of the Monitor.

d) The Agreement should establish a process for the Host Organization to raise concerns about the performance or qualifications of the Monitor to the Government.

e) The Agreement should state the process for selecting a new Monitor in the event that the existing Monitor is removed. The process should seek to minimize the costs to the Host Organization and the disruption of the monitorship.

2. Monitors Appointed by Court Order

Where the Monitor has been appointed subject to a Court Order, only the court may remove the Monitor, on its own motion or pursuant to an application by the Government or the Host Organization. The court’s removal determination should be guided by the considerations in Standard 24-4.7.1

Standard 24-4.8 Evaluation of Monitorships

1. The Government should evaluate the effectiveness of each of its ongoing monitorships on a regular basis, and should meet separately with both the Monitor and the Host Organization to discuss concerns or suggestions for improvement.

2. The Government should compare similar ongoing monitorships on a regular basis to explore the possibility of common issues that it should address or best practices it can share.

3. At the conclusion of a monitorship, the Government should evaluate the effectiveness of the monitorship, including the performance of the Monitor. The results of that analysis should be used in the consideration of that Monitor for future assignments and by the Government in designing future monitorships.
Commentary to Introduction and Part I. Definitions.

Since the early 1980s, Monitors have been used with increasing frequency to ensure that the entity being monitored (the "Host Organization") complies with laws, regulations, and internal controls. Widespread use of Monitors, or Independent Private Sector Inspectors General ("IPSIGs"), began with the issuance of the interim and final versions of the Report on Corruption and Racketeering in the New York City Construction Industry. Monitors, or IPSIGs, were based on the concept inherent in the federal Inspector General program: that an individual (or team) using audits and investigations, combined with other skills and disciplines, would help the Host Organization reduce waste, abuse, and fraud, and promote its economy, efficiency, and effectiveness.

These standards utilize the term Monitors for all such programs no matter what the parties term the role as long as the Monitor is engaged by a Host Organization pursuant to a Court Order or pursuant to an Agreement with a governmental body (the "Government"). Generally, there will be a secondary written understanding (the "Engagement Letter") between the Host Organization and the Monitor that incorporates the terms of the Agreement and sets forth the operational, financial, and other terms of the monitorship.

The Standards’ definitions make clear that the Monitor is independent of both the Government and the Host Organization. The Standards do not directly apply to the Host Organization’s voluntary engagement of an individual or organization in a Monitor-like capacity without the formal involvement of the Government or a Court. The Standards also do not apply to engagements where the Monitor is not independent of the Host Organization, retains an attorney-client privilege, or does not have an obligation to report misconduct to the Government. While such Monitor-like activities technically fall outside the Standards, the Standards may still provide useful guidance for those situations.

There are wide variations in the purpose and scope of monitorships. Monitors may be employed for the limited purpose of ensuring that the Host Organization complies with a specific task or discrete tasks, or may be responsible for helping the Host Organization develop, or reform, a broad Compliance Program and oversee its implementation. Monitors also can be utilized to

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1 See RONALD GOLDSTOCK ET AL., FINAL REPORT ON CORRUPTION AND RACKETEERING IN THE NEW YORK CITY CONSTRUCTION INDUSTRY (1990).


3 Others have created general categories of monitorships based on the intended purpose and scope of the monitorship, see Christie Ford & David Hess, Can Corporate Monitorships Improve Corporate Compliance?, 34 J. CORP. L. 679, 707-709 (2009) (discussing four general types of monitorships: Advisor, Auditor, Associate, and Autocrat); Veronica Root, Modern-Day Monitorships, 33 YALE J. REG. 109, 123-141 (2016) (classifying monitorships into the following categories: enforcement monitorships, corporate compliance monitorships, court-ordered monitorships, and public relations monitorships).
investigate allegations of past wrongdoing by the Host Organization or to determine and oversee the appropriate amount of restitution to victims, if wrongdoing had been found to exist.

The most well-known type of monitorships are those associated with non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs). Under these agreements, the prosecutor conditions the prosecution/plea/punishment decision on the Host Organization’s acceptance of a Monitor, and then the Monitor’s determination of the Host Organization’s compliance with the terms of the Agreement. If there is a prosecution, or even the initiation of judicial proceedings, then the Court may be involved in the Monitor process.

Monitorships are not limited to the corporate or business context. For example, a governmental agency, such as a Police Department\(^4\) or prison,\(^5\) may be the Host Organization. Other non-governmental and non-business entities, such as unions, may also be required to be monitored.\(^6\)

Monitors are frequently used in government contracting situations.\(^7\) For example, for a variety of reasons, a state or local government body may determine that the best vendor or contractor for a particular job is a company that either has a history of past misconduct or has reputational issues. Rather than refuse to do business with that company, the Government may require the Host Organization to engage a Monitor through a provision in the contract. Monitors may also be used in emergency situations in which normal bidding procedures are bypassed or where normal oversight is extremely difficult.\(^8\)

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\(^8\) Ronald Goldstock & Frank Anechiarico, *Here’s a way to rebuild the Gulf Coast honestly*, HOUSTON CHRON., Oct. 3, 2005 (stating that in the clean-up after a natural disaster “illegality is enhanced due to the emergency nature of the situation, requiring government to waive controls for standard procurement and to allow contracts without competitive bids and payment based on a cost plus profit formula rather than a fixed price”). For these reasons, commentators have suggested the use of Monitors for the clean-up after a natural disaster or for an emergency situation, such as the World Trade Center clean-up. Rich Schulsohn, *IPSIG Agreements: A Vehicle to Rehabilitate Vendors*, 20 CITY LAW 121 (Nov./Dec., 2014) (discussing the use of Monitors in response to Superstorm Sandy); Thomas D. Thacher II, *Making Sure the Cleanup Is Clean*, N.Y. TIMES, Nov. 19, 2005 (arguing for the use of integrity Monitors in the cleanups for damages causes by natural disasters, such as hurricanes); Jacobs & Goldstock, supra note 2, at 228-29 (discussing the World Trade Center clean-up).
The development of these Standards is based in part on the experience of the Government\(^9\) in utilizing Monitors and of experienced Monitors in performing their responsibilities.\(^{10}\)

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\(^{10}\) See, for example, the code of ethics for IPSIGs. IAIPSIG Code of Ethics, online at http://www.iaipsig.org/ethics.html.
Commentary on Part II. Monitor Selection

Standard 24-2.1 General Principles

The selection of an appropriate and qualified Monitor is essential to the success of the monitorship. Under this standard, the first step in the selection process is for the Host Organization, Government, and court (for Monitors appointed subject to a Court Order) to jointly determine the qualifications necessary for a Monitor to be suitable for the Monitor assignment based on the Agreement’s goals and its stated role for the Monitor. These qualifications may include a range of expertise, experience, and skills, such as knowledge of the industry or with Compliance Programs; investigative, accounting, or auditing experience; or management or governance expertise. Any Monitor as an individual person would not need to be proficient in all the identified requirements, as others who comprise the monitorship team will generally aid the Monitor. The Monitor must, however, have sufficient knowledge to understand and appreciate the issues involved and to be able to direct and supervise those on the team that have the requisite skills.

After establishing the necessary expertise and experience qualifications, the parties should design a selection process that ensures the selection of a Monitor that not only meets those qualifications but is also independent and free from conflicts of interest. Among other reasons, the Standard provides for significant input in the selection process from both the Host Organization and the Government to protect against the appointment of individuals based on political connections, friendship, or other inappropriate considerations.\textsuperscript{11}

Due to the different circumstances in which Monitors may be used, there is not a single method for selecting a Monitor that is optimal for all cases. In developing the selection process, the parties should keep in mind the following practical issues, which can help lead to a successful monitorship. First, the parties must find the right balance between the Government and the Host Organization’s power to select the Monitor. The Host Organization should have significant input, because selecting a Monitor that is acceptable to the Host Organization, and respected by it, will often lead to more successful outcomes. In part, this will minimize the Host Organization’s inherent oversight backlash. The Government’s input is necessary to protect against the possibility of the Host Organization selecting an ineffective Monitor. However, the process must also protect against the Government using inappropriate considerations as the basis for selecting a Monitor, who then may be in a position to charge excessive fees, for example. Second, a

\textsuperscript{11} The Task Force was particularly concerned about previous Monitors who appeared to have been selected unilaterally by the Government for just those reasons. The Zimmer Holdings, Inc., monitorship raised this issue in the public eye because it involved a federal prosecutor selecting his former boss as the Monitor in a selection process that did not involve other bidders or public notice. Veronica Root, The Monitor-“Client” Relationship, 100 VA. L. REV. 523, 580-81 (2014).
transparent, competitive, and merit-based selection process will help to “instill public confidence in the process.”

Examples of possible selection processes include:

- The Host Organization selecting a candidate with the Government retaining a veto.
- The Host Organization proposing several (for example, three) candidates and allowing the Government to select the Monitor from that group.
- The Government proposing several (for example, three) candidates and allowing the Host Organization to select the Monitor from that group.

Whatever process the parties select, it should be set forth in the Agreement and be designed to be understandable, transparent, and auditable. An external reviewer should be able to understand the process used to identify Monitor candidates, evaluate their qualifications and

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13 For federal criminal monitorships, the Morford Memo, supra note 9, sets out a five-step selection process that is focused primarily on avoiding any conflicts of interests in the selection process. First, the Government attorneys involved in the Monitor selection process should ensure their compliance with the conflicts of interest guidelines found in 18 U.S.C. §208 (Acts affecting a personal financial interest) and 5 C.F.R. Part 2635. Second, the Government should create a committee (either standing or ad hoc) to consider Monitor candidates. The committee should have responsibility for selecting, accepting, or vetoing a Monitor candidate, and a US Attorney or Assistant Attorney General should not make this decision unilaterally. Third, the Office of the Deputy Attorney General must approve the Monitor. Fourth, The Government should reject any Monitor that has an interest in, or relationship with, the corporation or its employees, officers, or directors. Fifth, the corporation must agree not to employ or be affiliated with the Monitor for a period of one year after the monitorship has terminated.

The 2009 Breuer Memo, supra note 12, supplemented the Morford Memo’s Monitor selection process. First, the Breuer Memo states that the Agreement should contain:

- An explanation of the Monitor’s responsibilities.
- A description of the necessary qualification of the Monitor.
- The term of the monitorship.
- A commitment to select a Monitor within sixty days of the execution of the Agreement.

Second, the Breuer Memo requires the Criminal Division to create a Standing Committee on the selection of Monitors. Third, the memo sets out the selection process. This process begins with the Host Organization providing the Criminal Division with a list of three Monitor candidates and their qualifications. The Host Organization may also list its preferences among the candidates. Next, the Criminal Division attorneys should interview each candidate and review their qualifications and suitability for the assignment. The Criminal Division attorneys may elect to reject all three candidates and have the Host Organization nominate an additional candidate (or candidates). Once the attorneys handling the matter have selected a candidate, they should draft a memo describing the case and why a Monitor is required, the Monitor’s responsibilities, the selected Monitor’s qualifications (and any countervailing considerations), and a statement that the attorney’s have complied with the conflicts-of-interest guidelines for government employees. The Monitor selection memo should then be submitted to the Standing Committee. If the Standing Committee approves the candidate, then the Assistant Attorney General and the Office of the Deputy Attorney General need to give their approval.
suitability for the monitorship, and determine the basis for the selection of that particular Monitor.

The parties should be aware that extraordinary circumstances may require limiting or removing the Host Organization’s role in the selection process. Such circumstances include the Host Organization employing tactics which it knows will result in undue delay or the selection of an unsuitable Monitor.

There also may be a special circumstance where only one particular Monitor is capable of completing the monitoring assignment expeditiously and effectively, or that Monitor is capable of completing the monitorship at a significantly lower cost than any other candidate. For example, it may be the case that one suitable Monitor not only understands the particular oversight issues at hand, but also has familiarity with the Host Organization. This familiarity may place the Monitor significantly further along on the learning curve for the monitorship than other Monitor candidates, which can provide a speedier remediation and significant cost reductions for the Host Organization. It is expected that the situations where only one Monitor candidate provides such significant benefits to the monitorship will be rare. In such situations – which should be subject to objective justification – the parties should determine whether it is necessary to seek applications from other Monitor candidates considering that those candidates are likely to expend substantial resources in preparing an application and undergoing interviews without any real chance of selection for the assignment.

**Standard 24-2.2 Candidate Pool**

The selection process should ensure that the candidate pool contains a broad range of Monitor candidates. For example, studies have shown that in the early use of Monitors for DPAs and NPAs most of the federally-chosen Monitors were former DOJ prosecutors known and trusted by the Government even though their background and skill set were not necessarily dictated by the needs of the particular monitorship assignment. Instead, this Standard encourages the parties to ensure that the selection process involves the consideration of Monitor candidates from various backgrounds, including those who do not have monitorship experience but do possess the relevant skills. The process should also ensure the consideration of Monitor candidates from a variety of geographic areas. Although travel costs may prove to be a selection consideration in some cases, a potential Monitor from outside the local area may choose to absorb some or all those additional costs in order to have a competitive application.

**Standard 24-2.3 Pre-qualified Monitor Pool**


15 For example, federal and state Inspectors General tend to be a mix of civil and criminal attorneys, forensic accountants and auditors, investigators, and loss prevention or compliance specialists.
The creation of a pre-qualified pool of Monitors may prove beneficial for a number of reasons. The existence of a pool allows for the speedy identification and selection of a Monitor. This avoids what have often been extensive delays, especially if the selection process involves the Host Organization selecting from a number of potential candidates identified as acceptable to the Government. In addition, the creation of a stable pool of candidates—as opposed to attempting to identify candidates on case-by-case basis—assists in achieving the diversity of candidates sought in the prior provision. The creation of the candidate pool allows the Government to more easily analyze the diversity of candidates and seek out additional candidates as necessary.

The inclusion of a Monitor candidate into a pre-qualified pool does not mean that the candidate is necessarily appropriate for every assignment; different monitorship assignments may require different experience, expertise, and skills. As indicated by the Standards, the creation of a candidate pool is unlikely to be useful if the use of monitorships is infrequent or where the types of misconduct leading to the monitorship, and the subsequent oversight and remediation process, are likely to be quite dissimilar from case to case.

Standard 24-2.4 Selection Criteria

1. Qualifications

The first qualification requirement is that the Monitor have credibility, integrity, and be professional in its operations (which extends to the entire Monitorship Team). These qualifications are necessary for any Monitor because the Government, Host Organization, and also the public, place significant trust in the Monitor to carry out its duties efficiently, fairly, and effectively. The Government places significant trust in the Monitor because it may be choosing to impose a Monitor as a condition relating to a criminal investigation or proceeding, as a condition of supplying goods or services to the Government, or as a condition of holding a license to engage in a regulated activity. Thus, the Government is trusting that the Monitor can play an important oversight role and effectuate compliance with relevant laws and regulations. In addition, the Government has expressed its confidence that the Monitor will report any misconduct should it occur.

The Host Organization must trust that the Monitor will operate fairly, act independently of both it and the Government, and not act over-zealously to expand the Monitor role or seek to engage in additional work for undue compensation. The Host Organization must also trust that its proprietary and confidential information will be maintained as such and that its ability to carry on its business activities will not be unduly constrained.

16 See Commentary to Standard 24-2.1 General Principles, supra.
Subsections (b) through (e) focus on the more specific skills, resources, and commitment of the Monitor necessary to complete the monitorship assignment at hand in a manner satisfactory to the Host Organization and the Government. The necessary qualifications will vary from assignment to assignment. The Court Order or Agreement will provide the details of the Monitor’s required activities and the desired outcomes of the monitorship. A review of those terms should dictate the necessary qualifications of the Monitor, including knowledge of the industry and subject matter of the areas of oversight, the skill sets of the Monitor and Monitorship Team, the size of the Monitorship Team to complete the assignment (and the ability to manage a team of the size and complexity), required assets, capability of operating in various jurisdictions (which may include international jurisdictions), and any licensing necessary. Additional qualifications may include an understanding of the design, implementation, and evaluation of Compliance Programs and other relevant internal controls.

The need for any expertise or experience requirements must be balanced against the need to ensure that the pool of potential Monitor candidates is not unnecessarily limited (see Standard 24-2.2). The list of qualifications should not unnecessarily result in the conclusion that only a small number of individuals or organizations are qualified to serve as the Monitor. For example, if monitorship experience is listed as an essential requirement, then only former Monitors may be selected. Such a requirement artificially limits the pool of potential candidates, and excludes candidates that have gained relevant experience through other types of work. Monitoring experience can be gained by being a member of a Monitorship Team, for example, and not necessarily being the named Monitor. An individual may also gain the necessary experience by having served as a corporate compliance officer or the representative of a monitored company chosen to work with the Monitor. Thus, the required experience qualification should be carefully delineated in a manner designed to expand the number of entities who can successfully compete for the Monitor position.

Likewise, for the other qualifications, the parties also should closely examine their list of qualifications to protect against this risk of artificially limiting the pool of candidates. For example, if the Host Organizations is a union, then the parties may reasonably conclude that the Monitor should have knowledge regarding the role of unions and how they are structured, and have some experience with the process of collective bargaining. It does not follow, however, that if the union operates in a particular industry, then the Monitor must have experience in that industry. On the other hand, if the union had a history of corruption that was due to the nature of the industry, then knowledge of the industry might be a substantial factor in the selection process.

Another example would be an Agreement that requires the Monitor to oversee the Host Organization’s development and implementation of a Compliance Program to prevent violations of the Foreign Corrupt Practices Act (FCPA). The most essential expertise for the Monitor may not be related to FCPA legal knowledge, but to Compliance Programs. The best candidate for the Monitor role may be a Monitor with experience and expertise in helping organizations implement Compliance Programs across global operations. For the necessary FCPA legal knowledge, the Monitor can add an FCPA expert to the Monitorship Team.
Subsection (e) identifies an additional critical factor, which is the ability and commitment of the Monitor to see the assignment through to completion. Because monitorships typically extend for a period of years, the parties should seek to engage a Monitor who is willing and able to fulfill the term of the monitorship. The Monitor may not be able to fulfill the term if, for example, the Monitor (as an organization or an individual working for an organization) is not financially viable due to business reasons or civil liability. If the Monitor is an organization that relies on the experience and expertise of a certain individual for the assignment, then there may be problems with completing the monitorship if that individual leaves the organization. Thus, the parties should consider such factors as employment history, contingency plans for loss of key personnel, financial viability, pending litigation, and other relevant issues.

2. Costs

The selection process should attempt to ensure that the costs of the monitorship are fair and reasonable for the Host Organization. It is also important to remember that the costs of the monitorship to the Host Organization are not intended to be punitive.

As was noted in a similar context:¹⁷

[If professional services are contracted for,] the economic forces of the marketplace generally result in a fee that both sides regard as reasonable. But when a corporation, union or other entity is compelled to engage a particular [Monitor], the market dynamics are dramatically different. The imposing authority’s main concern is generally that the fee not be inadequate; the host organization is often in an extraordinarily weak bargaining position; and the [Monitor's] tendency, as a free market player, is often to maximize revenue and profits. Indeed, even if the latter were not the case, the [Monitor] would seek to have an unlimited budget, or at least of a size so that it would not be constrained in its ability to do as effective job as possible. To the degree possible, fees charged by imposed [Monitors] should approximate those charged by voluntary IPSIGs whether it is accomplished by negotiation, competition or regulation. In particular, the work done by appointed [Monitors] should not be duplicative¹⁸ nor unreasonable¹⁹ and discretionary billings should be overseen by the appointing agency. In a voluntary situation, the work of a properly utilized IPSIG, promoting economy and efficiency and controlling waste and abuse, should actually provide

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¹⁸ For example, it generally makes little sense for a Court to appoint an individual as a monitor who then must hire [a Monitoring] firm to do the actual work [footnote from quoted source].

¹⁹ The charging of rack rates and the undertaking of unwarranted and unnecessary investigations are unfortunately not unknown [footnote from quoted source].
the host with financial savings. While that may not necessarily be the outcome in a case where the [Monitor] has been imposed, it is certainly possible and desirable.

The costs may become unfair to the Host Organization if the scope of the monitorship is not clearly defined (see Standard 24-3.1) or the parties select a Monitor without adequate consideration of the Monitor’s expected costs. In addition, because the Host Organization may have only budgeted a certain amount of funds for the Monitor based on the estimates at the start of the monitorship, any significant increase in the costs may cause a significant hardship to the Host Organization. Thus, even at the earliest stages—when drafting the Agreement—the parties should consider the potential costs of the monitorship when determining the scope of the monitorship and other terms of the Agreement. Standard 24-3.4 provides additional guidance on Monitor fees and expenses.

The Government and Host Organization should decide (and include in the Agreement) whether to allow the Host Organization’s fine (or similar fees) to be offset (in whole or in part) by any part of the Monitor’s compensation and expenses. For example, at the outset, the parties could come to a reasonable estimate of the Monitor’s fees and expenses. This determination may need to be made after the Monitor’s development of a Work Plan. The parties could then agree that any Monitor fees and/or expenses over that estimated amount will be offset by the fine or fees (i.e., the fine or fees paid to the Government will be reduced by the amount that exceeds the estimate). This approach may be useful in situations where the fees are difficult to estimate and/or there is a concern that the Monitor’s compensation and expenses may significantly increase during the monitorship. It may also be useful in situations where unexpected costs may create an undue financial burden on the Host Organization. While the Government should always take an active role in managing costs by ensuring that the Monitor is conducting only work required by the Agreement, with offsets the Government will have a pecuniary interest and can be expected to be extra-vigilant in reviewing the billings.

A variety of methods of calculating Monitor’s fees have and can be utilized. Others, of course, can be created as they have been for other professional services.

Two basic models for calculating the Monitor’s fees are the flat fee and the hourly billing models. Under the first model, the Monitor may charge a flat fee for the entire monitorship or for different aspects of the monitorship work. This compensation model creates an incentive for the Monitor to manage costs and not to incur unnecessary expenses. However, it also provides an incentive for the Monitor to not undertake additional work that may be desirable to create a more effective monitorship. This compensation model may work best in situations where the parties are able to specify the Monitor’s tasks in advance and with significant certainty. This same approach could be modified to create a flat fee per month, or per quarter, depending on the work expected to be done during that time period—keeping in mind that costs may be greater in earlier periods when the Monitor must complete preliminary work.
Whereas a flat fee model places the risk of additional costs on the Monitor, an hourly billing compensation model places the risk on the Host Organization (though this can be managed to some degree with fine offsets as noted earlier). Different Monitors will have different hourly billing rates based on the cost structure of the Monitor and its staff, but all Monitors are likely to charge different rates for team members possessing different skills. Ideally, the Monitor should seek to manage costs by selecting the lowest billing-rate subcontractor or staff member that meets the necessary qualifications for the task.

A common alternative to the standard hourly rate is the “blended rate.” Under this model, the Monitor calculates the average hourly rate of those on the team (the “blended rate”) and charges that rate whether the actual person doing that job normally bills at a higher or lower rate. This approach, however, may encourage the Monitor to utilize lower billing members of the team when the work more appropriately should be completed by a higher billing team member. The “maximum blended rate” is another alternative. Under this model, prior to the work being completed, the parties agree upon the maximum “blended rate” that the Monitor may charge. In other words, the average hourly rate of the work completed by all members of the Monitorship Team may not exceed the agreed upon maximum blended rate. This approach seeks to protect against both the potential problems of the hourly rate model—where the Monitor has an incentive to over-utilize higher billing team members—and against the “blended rate” model—where the Monitor has an incentive to over-utilize lower billing team members.

Two other approaches combine the hourly rate and the flat fee models. Under a fee-cap model, the Monitor charges hourly rates, but the total amount charged by the Monitor cannot exceed a previously agreed-upon amount. Similarly, the two basic models can be combined by having some key personnel charge a flat rate and others charge an hourly rate. The latter approach allows for more accurate budgeting by the Host Organization by reducing the likely range of total costs in that time period. In addition, it helps the Host Organization to trust that when key personnel are working, calling for meetings, or otherwise spending time on the monitorship, the Monitor is not doing so simply to increase billings.

3. Mandatory Exclusions; 4. Potential Exclusions; and 5. Duty to Disclose

In assessing whether certain individuals or companies should be excluded from consideration as a Monitor for a particular case, there are some conflicts of interest that should clearly and unambiguously disqualify a candidate. In other cases, the facts that create the potential conflict may actually support that candidate’s selection as the Monitor. For example, the candidate’s experience with the Host Organization, the circumstances that led to the monitorship, or a certain candidate’s awareness of what needs to be accomplished to achieve compliance, may all support that candidate’s selection. Recognizing these issues, the Standards denote two types of exclusions, mandatory and potential. Of course, the same considerations apply to the entire Monitorship Team.
Former government employees involved in the matter giving rise to the monitorship should be mandatorily excluded from consideration as a Monitor. Without this restriction, there would be concerns of a Government official exercising discretion with respect to the Host Organization with an eye towards being selected as the Monitor after that official leaves Government service. In addition, the selection of such a Government official as a Monitor raises issues about the former official’s independence from the Government.

Having a “financial interest” related to the Host Organization creates a mandatory exclusion. “Financial Interest” is a defined term under the Standards, which keys into the requirement of unbiased objectivity in fact and in perception. Thus, the definitional focus relates to whether the potential Monitor, or a family member, would materially benefit or be harmed in a pecuniary sense, or be seen to do so, through a decision made by the Monitor. Note that this is not limited to situations where the Monitor has a financial interest in the Host Organization; a sufficient investment in a competitor, for example, would also trigger this provision.

The need for absolute objectivity gives rise to other mandatory exclusions. Any person who had any involvement in the matter giving rise to the monitorship, whether or not an employee of the Host Organization, faces mandatory exclusion. This exclusion includes those with supervisory authority over those who provided legal or other professional services related to the wrongdoing. Similarly, individuals involved in any way with developing or overseeing the Compliance Program, or other internal controls, related to the wrongdoing should also be excluded if the effectiveness of their work could be called into question as part of the monitorship.

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20 In the case of a federal monitorship, under 18 U.S.C. § 207(a)(1), former government employees are permanently prohibited from appearing before the court, DOJ, or other government agency, on behalf of another person with respect to a matter in which the former Government employee “participated personally and substantially” while an employee.

21 The Government Ethics opined on the nature of a financial interest, as follows:

An employee has a disqualifying financial interest in a particular matter only if there is a close causal link between a particular Government matter in which the employee participates and any effect on the asset or other interest (direct effect) and if there is a real possibility of gain or loss as a result of development in or resolution of that matter (predictable effect). Gain or loss need not be probable. The possibility of a benefit or detriment must be real, not speculative. One common point of confusion is distinguishing between an asset or other interest and a financial interest in a particular matter under 18 U.S.C. § 208. The financial interest is the possibility of gain or loss (of the value of an asset or other interest) resulting from a particular matter, not the asset or interest itself. Thus, a person could have a large holding but only a relatively small financial interest in the particular matter, because the potential for gain or loss is small.

Such mandatory exclusions do not necessarily apply to all individuals who had a previous relationship with the Host Organization or to individuals who created or oversaw a Compliance Program that successfully identified the wrongdoing. A person not involved in activities that gave rise to the monitorship, or otherwise having any responsibility over persons or activities that gave rise to the monitorship, may be considered. A person or entity that the Host Organization employed as a non-imposed Monitor or IPSIG may still be selected as a Monitor for the Host Organization if they are not otherwise precluded from doing so. For example, an IPSIG that discovered and reported wrongdoing might prove to be the ideal candidate for the Monitor role, as this is someone selected by the Host Organization who has proven to have done its job well. It is also useful to note that the selection of such a Monitor could provide financial savings to the Host Organization due to reduced start-up costs as compared to other Monitor candidates, and may also encourage other companies or organizations to engage voluntary Monitors in the future.

Another group of potential Monitors that needs special consideration includes those individuals who worked for firms providing legal or other professional services to the Host Organization. Obviously, the more remote the potential Monitor was to the Host Organization and its wrongdoing, the less likely there would be a need to exclude that individual. Factors to be considered include the nature and timing of the services provided by the firm, the position and responsibilities of the individual in the firm, and the individual’s relationship, if any, to the Host Organization. If the individual was not affiliated with the firm at the time the firm provided services to the Host Organization, then the potential exclusion does not apply. Similarly, former employees of the Host Organization are not necessarily precluded if their work for the company was unrelated to the wrongdoing or any potential evaluation by the Monitor. Finally, a candidate who previously monitored the Host Organization may be eligible if the monitorship was deemed successful despite the Host Organization’s later misconduct.

The potential exclusions seek to balance the principle that the pool of potentially qualified Monitors, particularly those with specialized knowledge or who could provide significant cost savings to the Host Organization, not be artificially limited with the requirement that the selected Monitor not have, or be seen to have, a conflict of interest or a lack of independence and objectivity. Thus, acceptance of those candidates with potential exclusion factors should be considered the exception, not the norm. Standard 24.4.4.d should be interpreted broadly as it is designed to ensure that the selected Monitor is without bias and has no relationships which might impair “judgement, objectivity, or independence.” Such relationships are not limited to contacts with the Host Organization. For example, current or past work for a competitor of the Host Organization might well create such bias.

The Standards do not place the burden of discovering any conflict that may trigger a mandatory or potential exclusion under this section on those making the selection of the
Monitor, but places the duty to disclose squarely on those being considered for the position. This obligation includes a duty to make timely disclose and relates to the entire Monitorship Team.\textsuperscript{22}

\textsuperscript{22} Federal Monitor candidates must provide written certification that they do not have an interest in, or relationship with, the Host Organization. Breuer Memo, supra note 12, at 2. Obviously, this would not satisfy the “financial interest” requirements above.
Commentary on Part III. Establishing the Monitorship

Standard 24-3.1 General Principles

The authority and responsibility of the Monitor, as well as the expected outcomes of the monitorship, are contained in the Court Order or Agreement (and mirrored in the Engagement Letter). Referred to by one set of commentators as “the monitor’s bible,” those documents set forth the conditions of the monitorship – often the result of bargaining between the Host Organization and the Government – and therefore likely bind the Monitor by its conditions.

Each monitorship should be individually designed. The parties should think carefully about the role of the Monitor in the particular monitorship, and provide the Monitor with the authority to do what is necessary to achieve the monitorship’s goals, but circumscribing that authority sufficiently to prevent the Monitor from losing focus on the identified problems. Often, the Monitor’s primary responsibility is to assess and monitor the Host Organization’s compliance with the terms of the Agreement that address the Host Organization’s misconduct and seeks to reduce their recurrence. Typically, this requires the Monitor to evaluate (and propose recommendations for) the Host Organization’s internal controls and/or Compliance Program. This includes both the design of such programs and their implementation.

The Agreement should address the length of the monitorship necessary to achieve the monitorship’s goals, which will also have an impact on the total expected costs of the monitorship. If the Agreement requires the Host Organization to undertake extensive and/or complex remedial measures, then the monitorship should typically provide for a longer duration. On the other hand, if the Host Organization has already designed and started implementation of a Compliance Program (or reforms to an existing Compliance Program) at the time of the Agreement, then the monitorship would likely be projected to last for a shorter period of time.

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24 Id. Warin et al. state that the monitor must “appreciate that his or her very existence is a function of the settlements.” Id.

25 Likewise, the Morford Memo, supra note 9, at 5-6, states:

Neither the corporation nor the public benefits from employing a monitor whose role is too narrowly defined (and, therefore, prevents the monitor from effectively evaluating the reforms intended by the parties) or too broadly defined (and, therefore, results in the monitor engaging in activities that fail to facilitate the corporation’s implementation of the reforms intended by the parties).

26 The Morford Memo, supra note 9, at 7, suggests the consideration of the following factors for determining the length of time for the monitorship:

- the nature and seriousness of the underlying misconduct;
One structural problem with the negotiation of the terms of the Agreement is that the negotiations are frequently concluded prior to the selection of the Monitor (as the goals of the Agreement determine the qualifications of the Monitor to be selected). The result is that the negotiation process does not receive input from the individual or entity who is charged with its implementation. Not unlike an architect’s design that the contractor determines is impractical to build, a Monitor may find that the authority delineated by the Agreement is insufficient to complete the assignment, or that other terms are impractical. In some situations, this problem may be avoided by choosing the Monitor (generally from a pre-selected pool of candidates) prior to the finalization of the Agreement. In other situations, the parties may consider consulting an individual or entity with monitoring experience during the negotiations of the Agreement and design of the monitorship.

If a Monitor finds its authority in the Agreement to be insufficient, or identifies other potential problems, then the Monitor’s options are to: do the best job possible with the unfortunate restrictions, seek to increase the Monitor’s authority under the Engagement Letter with the Host Organization, or seek a modification of the Agreement and other implementing documents.

**Standard 24-3.2 Modifications**

To facilitate any type of modification to the Agreement, the Standards provide that the Agreement should contain a provision that sets forth the conditions under which the Agreement’s terms may be modified. Generally, any modification should be in writing and have the consent of all parties (including the Monitor). Extensions to the duration of the monitorship and early terminations are two modifications that are specifically identified in the Standards as the proper subject of modification. Both are generally based on a determination by the Monitor that the goals of the monitorship have, or have not, been met, and each requires a clearly articulated reason for the change in duration.

Consideration of early termination may also be triggered by an application made by the Host Organization asserting that the monitorship is no longer required. That assertion may be based upon the claim that the Host Organization achieved full compliance earlier than expected, or

- the pervasiveness and duration of misconduct within the corporation, including the complicity or involvement of senior management;
- the corporation’s history of similar misconduct;
- the nature of the corporate culture;
- the scale and complexity of any remedial measures contemplated by the agreement, including the size of the entity or business unit at issue; and
- the stage of design and implementation of remedial measures when the monitorship commences.
that the reason for the imposition of the monitorship no longer exists (e.g., the misconduct can no longer occur because the Host Organization no longer operates the business which was the subject of the monitorship, or the Host Organization has become part of another organization with an effective Compliance Program). 27

In rare cases, the Host Organization, generally having diversified operations, may become the subject of more than one monitorship. In such a case, it may be appropriate to terminate one Monitor and select a single Monitor to implement both Agreements. The Monitor selected must be qualified to handle both monitorships. If possible, the parties should attempt to utilize one of the existing Monitors rather than selecting a new Monitor, as this will typically save the Host Organization the start-up costs associated with a new Monitor.

**Standard 24-3.3 Monitor Work Plan**

The Standards provide that the Monitor set forth its approach to conducting the monitorship — the activities that the Monitor will undertake and the process for undertaking those activities — in a “Work Plan” (a defined term in the Standards). The Work Plan not only helps the Monitor design its strategy for conducting the monitorship, develop a budget, and assign work to the Monitorship Team in an efficient and effective manner, but it also provides important information to the Host Organization. Commentators have recognized that “[t]he monitorship will already be traumatic for the company, and the uncertainty of a vague or unfocused work plan only will exacerbate institutional unease.” 28 The Host Organization—which likely has not previously been subject to a monitorship—does not know what to expect. The Host Organization’s management team may be concerned that the Monitor will second-guess every managerial decision, worry that extensive oversight will disrupt operations, and have questions about the timing and amount of the Monitor’s fees and expenses. A properly designed Work Plan can reduce that uncertainty and anxiety and permit the Host Organization to more fully cooperate with the Monitor.

For a variety of reasons, the Monitor should generally consult both the Host Organization and Government when developing the Work Plan. Often, during the selection process, the Monitor candidates provide an early draft of the Work Plan they expect to follow if selected. Thus, the Monitor may need only to refine the Work Plan based on feedback from the Government and Host Organization.

The Monitor may also find it valuable to consult the relevant employees of the Host Organization (and its attorney). These employees’ knowledge of the relevant issues will not only improve the Work Plan, but may also allow the Monitor to identify opportunities to reduce

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27 Morford Memo, *supra* note 9, at 8.

28 Warin et al., *supra* note 23, at 362.
costs by utilizing the Host Organization’s resources or structuring the Monitor’s work in the manner least disruptive to the Host Organization’s operations.

The Monitor should also determine whether to consult with the Government privately. The Government may be in possession of information not shared with the Host Organization that might help guide the direction of the monitorship. In addition, the Standards specifically contemplate the possibility of concealed aspects of the Monitor’s work such as, “surprise” audits, covert interviews, the development of informants, or physical surveillance. If undertaken, such tactics need not be revealed to the Host Organization or placed in the Work Plan but should be discussed with the Government.

The following are tasks that are likely to be common to the Work Plans of most monitorships.29

- A ‘kick-off meeting” for the parties to discuss how the Monitor will approach the monitorship and what is expected of each party.
- A timeline, to the extent it is feasible, of when certain aspects of the monitorship are to occur and when they are to be completed.
- A description of how the Monitor will evaluate the current policies of the Host Organization as they relate to compliance and ethics, and, if necessary, any initial plans relating to the modification, creation, and/or implementation the Compliance Program and its training programs.
- A list of the people the Monitor may formally interview, including management, employees, and others doing business with the Host Organization.
- The identification of the documents, financial records, emails, or other written or electronic information to be reviewed.
- The locations to be visited and/or planned physical audits, including how and when those activities are likely to occur.
- A schedule for when regular reports, or their drafts, will be produced and ready for review by the other parties.

The Work Plan should not be viewed as a static document. The Monitor’s collection of information during the course of the monitorship will often reveal unforeseen issues, put to rest originally held concerns, and inform how the monitorship should proceed. The Work Plan should be updated to reflect these new understandings. As with the original creation of the Work Plan, the Monitor should discuss any material changes to the plan with the Government, and, when appropriate, with the Host Organization.

**Standard 24-3.4 Monitor Compensation and Billing**

As noted earlier when discussing the possible Monitor compensation models, the Host Organization will always have a concern with costs and the incentive for Monitors to not

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29 For a list of common items found in a Monitor’s Work Plan for FCPA monitorships pursuant to a DPA or NPA, see Warin et al., supra note 23, at 363.
adequately control their fees and expenses. As a result, the Standards stress that the Monitor has an obligation to incur only those costs that are reasonably necessary for carrying out the monitorship. Moreover, the Standards require that the Monitor seek to reduce costs by appropriately utilizing the Host Organization’s resources, including its facilities, technical capabilities, and employees. The Monitor should avoid duplicating work done by an outside service provider (e.g., an accounting firm) unless there is a valid reason for not wanting to rely on that service provider’s work papers and findings.

The reasonableness of the fees and expenses should be determined by an objective standard. The willingness of the Host Organization to pay such costs should not necessarily be the determining factor. The Standards make clear that the independence of the Monitor is, in part, dependent upon the Host Organization not providing the Monitor “anything of value” not covered by the Engagement Letter (unless it would reduce costs to the Host Organization). The acceptance or billing of lavish meals, luxury travel and accommodations (particularly where part of the business trip is used for pleasure), for example, is recognized as problematic. In general, the Monitor’s fees and expenses should be in line with what it charges other clients. In addition, the Monitor’s expenses should be consistent with what the Host Organization’s policies allow individuals with a similar status within its organization to submit as legitimate expenses. The Engagement Letter should set forth what is and is not allowable using those standards. In addition, the Monitor should keep and maintain financial records, in auditable form, sufficient to document the nature and necessity of all expenses billed to the Host Organization.

It would not be uncommon for there to be times when the Monitor will, of necessity, incur fees and expenses that significantly exceed previously estimated amounts due to unanticipated work or travel. Whenever possible, the Monitor should inform the Host Organization before incurring those costs. Of course, if the increased costs are due to investigative activities that should not be disclosed to the Host Organization, the Monitor should, if possible, consult with the Government or Court before incurring those expenses. In such cases, the Monitor should make a determination of when the reason for incurring those costs can be disclosed to the Host Organization without adversely affecting the effectiveness of the monitorship.

For monitorships established by an Agreement, the parties should include in the Engagement Letter a process for resolving any disputes over fees and expenses. Various Government agencies take differing positions as to their role in contractual disputes between the Monitor and Host Organization. While some agencies require that periodic invoices be submitted to, and approved by, the agency before it is given to the Host Organization for payment, others do not want to be involved in approving, or be seen as endorsing, any fees and expenses. Other agencies take an intermediate position of not initially approving expenses but serving as a mediator or arbitrator when disputes arise. Finally, some agencies do not want any role in the process of resolving cost disputes.

See, supra, Commentary discussion of Standard 24-2.4.2 Costs.
When deciding on their agreed upon dispute resolution process, the parties should remember that for some monitorships, certain fees and expenses (such as those related to a confidential investigation) cannot be detailed to the Host Organization as would normally be the case.

If the parties agree to use a third party to resolve disputes, the Government and Host Organization both have an interest in preventing the disclosure of sensitive information relating to the Monitor’s work. Thus, the parties may decide to include a statement in the Agreement or Engagement Letter that a specific third party will be used to resolve any disputes over fees and expenses. The Host Organization, the Government, and the Monitor should all provide approval of that third party.

To help avoid disputes, the Host Organization should pay all invoices in a timely manner. The parties may find it beneficial for the Host Organization to create a retainer account that is periodically replenished to pay invoices.

**Standard 24-3.5 Public Disclosure of Fees and Expenses**

There are reasons why disclosure of the amounts paid to the Monitor would be in the public interest, but there are countervailing considerations that militate against disclosure. For example, although the public is able to know the identity of the Monitor, review the terms of the Agreement, and, often, review the Monitor selection process, the public may also have an interest in ensuring that the process does not inappropriately lead to the selection of a Monitor with close ties to the Government that is paid exorbitant fees. The publication of Monitor fees may also assist parties in determining a fair market price for Monitor services, and help them identify inappropriate billing. The Host Organization, on the other hand, may have legitimate concerns that the public will view high monitorship costs as evidence that the Host Organization must have engaged in serious misconduct, had internal processes that required substantial remediation, or were not cooperating with the Monitor’s oversight responsibilities.

While the Standards have taken the position that the Host Organization should have the discretion to decide whether to permit public disclosure of the Monitor’s fees and expenses, there is a recognition that the Host Organization may have other legal obligations that require disclosure. For example, a public corporation may, in certain circumstances, make filings with the SEC that would have the effect of making such disclosure.

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31 See, supra note 11 (discussing an example of public concern over a Monitor’s selection process that, at a minimum, created the perception that the Monitor might charge unfairly high fees).
Commentary on Part IV. Conducting the Monitorship

Standard 24-4.1 Professionalism

The first section of this Standard stresses the independence of the Monitor – from both the Host Organization and the Government. The independence of the Monitor has been emphasized in multiple sections of the Standards and the Commentary, including the sections on qualifications, conflicts, and compensation. In addition to re-emphasizing these earlier concerns, the section also addresses the issue of ensuring that the Host Organization does not seek to influence the Monitor by suggesting the possibility of future business with it. To that end, the Standards bar the Monitor from performing any work for the Host Organization for a period of at least one year after the termination of the monitorship. The sole exception is a continuation of the imposed monitorship as a voluntary monitorship with Government approval.

This exception recognizes that in some cases, the Monitor provides significant value to the Host Organization and does not function simply as a cost center. In many cases, Monitors provide significant benefits to the Host Organization by helping it to reduce waste, abuse, and fraud, and increase its economy, efficiency, and effectiveness. For example, the Monitor may provide value to a corporation by helping it improve its corporate culture. Or, the Monitor may provide value to a union by ensuring that it is managed for the benefit of all workers.

It does not serve the purpose of the standards on independence to prohibit a Monitor from continuing to provide value to the Host Organization, as long as certain conditions are met. First, the Government must not object to the Monitor’s continuation with the Host Organization. Second, the Host Organization cannot raise this engagement possibility with Monitor until after the monitorship is effectively terminated (the point at which all discretionary actions to be taken by the Monitor have been completed). In addition, the Standards contain the implicit provision that the continuation of the monitorship, while voluntary, is a real monitorship in the sense that the Monitor’s duty to report misconduct remains in place.

As discussed previously under Standard 24-3.4, the Monitor must only charge, and must only receive, reasonable fees and expenses. The Host Organization cannot seek to influence the Monitor by providing extra compensation in the guise of underwriting lavish travel and expenses, for example. The Standards recognize, however, that there are times when the Monitor’s receipt of certain benefits is in the legitimate best financial interests of the Host Organization, and to disallow the payment would create a detriment. For example, it would be inappropriate for the Monitorship Team to travel to Hawaii for a limited purpose (e.g., to

32 The Morford Memo, supra note 9, at 3, also creates a one-year restriction for federal Monitors.

33 The current Monitor may be the best person (or organization) for that role due to the Monitor having developed trust with the Host Organization, familiarity with the Host Organization’s operations, and a full understanding of the changes that the Host Organization is seeking to implement.
interview one vendor), especially if the discussion could be easily accomplished via a telephone or video-conference call. On the other hand, if the Host Organization’s entire management team had a planned meeting in Hawaii, and that one trip would save the Monitorship Team from having to take multiple other trips (albeit, to less exotic locations), then the travel expenses may be acceptable.

Under Standards 24-3.2 and 24-3.4, the fees and expenses paid to the Monitor may be increased by an expansion of the Monitor’s role under the Agreement. Here, Standard 24-3.1.1.c on independence focuses on the potential for the Monitor’s expanded role to lead to excess fees and expenses that negatively influence the Monitor’s independence. Thus, any increased role for the Monitor should have a legitimate purpose, a firm basis in fact, and be dependent upon the approval of the Government.

Even if not precluded by the letter of these Standards, the Monitor is under a continuing obligation to report to the Government an offer of increased compensation, fees, or expenses; subsequent employment; or any other benefit, including a referral by the Host Organization or its representatives for another potential monitoring assignment. As with all independence standards, these considerations apply to all members of the Monitorship Team.

Finally, Standard 24-4.1.2 provides for the necessity of the Monitor, and the entire Monitorship Team, to adhere to their professions’ codes of conduct. There may be specific guides for those who engage in monitoring activity, however, in general, professionals, such as attorneys, accountants, auditors, and others, are likely to be bound by their own professions’ codes. Monitors who are attorneys should pay particular attention to their responsibilities. It is clear under these Standards that the Monitor should not treat the Host Organization as its client, and therefore, for example, the Monitor does not have a duty of zealous representation or a duty to maintain most confidences. On the other hand, other provisions of the Model Rules of Professional Conduct (or the rules adopted in the jurisdiction of admission and practice) may apply. Thus, the Standards require that all professionals ensure they are familiar with those code provisions that are applicable to them in their monitoring role and abide by them.

34 See, for example, the code of ethics for IPSIGs. IAIPSIG Code of Ethics, online at http://www.iaipsig.org/ethics.html.

35 The IAIPSIG Code of Ethics states:

“This Code of Ethics recognizes that key IPSIG members—lawyers, investigators and accountants—are also members of professions having their own ethical codes, concepts, rules, standards and/or governing legislation. IPSIG members shall be familiar with and responsive to the mandates of their respective professional codes, rules and/or legislation and shall act consistently with those codes, rules and law as required in the context of particular assignments. If an IPSIG member believes that an act performed or to be performed during an IPSIG assignment may be in conflict with a relevant professional code, rule or law, the member should refer that potential conflict to the relevant professional association and/or to the IAIPSIG’s Ethics Committee for guidance.”
Standard 24-4.2 Access to Records, Persons and Information

Access to information is critical for the Monitor’s ability to determine the Host Organization’s compliance with the relevant laws, rules, and regulations, and whether its Compliance Program related to those legal requirements has been effectively implemented. For similar reasons, Inspectors General are “authorized …to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable establishment which relate to programs and operations with respect to which that Inspector General has responsibilities ….” This suggests that Monitors should have similar access to information. Host Organizations in the private sector, however, have legitimate concerns that would restrict the Monitor’s access to certain information. Such concerns include trade secrets, attorney-client and work product privileges and doctrines, and employee privacy. These concerns may not exist for public sector organizations.

The Standards start with the general notion that, with only limited exceptions, the Monitor should have access to all information, in whatever form, that is necessary for the monitorship. The exceptions delineated include those that the American Bar Association has previously identified as critical to the proper functioning of the legal system – the attorney-client privilege and the work product doctrine – and those that are otherwise legally mandated. If there are limitations to the Monitor’s access to records beyond those just listed, such exceptions will almost always be the result of negotiations between the Government and Host Organization. These exceptions should be based on particularized reasons and should be included in the Agreement and Engagement Letter. If there are exceptions due to a judicial determination, then those exceptions to access should be explicitly set forth in the Court Order and Engagement Letter.

An important source of information for the Monitor is the ability to interview various people. Often, interviewees will be under either the direct control of the Host Organization, such as employees, or its indirect control, such as vendors who may be, or become, contractually

IAIPSIG Code of Ethics, id., section on “Conflicts with Existing Professional Codes and Laws.”


37 A 2005 resolution adopted by the American Bar Association opposed “the routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the grant or denial of any benefit or advantage.” A copy of the resolution and a report of the Task Force on Attorney-Client Privilege may be found online at: https://www.americanbar.org/content/dam/aba/directories/policy/2005_am_111.authcheckdam.pdf. For an example of a case that supports the idea that a Host Organization may disclose work product information to the Monitor but still maintain confidentiality as to other third parties, see, United States v. Deloitte, LLP, 610 F.3d 129 (D.C. Cir. 2010).

38 For example, the privacy rules under HIPAA (the Health Insurance Portability and Accountability Act) may prohibit certain disclosures.
bound to cooperate with the Monitor. The Standards provide that the Agreement or Court Order provide access to such persons, and any conditions related to such access. In some cases, the Host Organization may be required to use its “best efforts” to induce cooperation by those with whom it is, or had been, associated.

The Standards require the Monitor to respect the rights of those interviewed. To help the Monitor in ensuring the protection of interviewees’ rights, the Standards encourage the Monitor to take into account two critical factors – (1) whether the interviewee is merely a witness or is potentially a subject or target of misconduct; and (2) whether the interview is overt, or whether the conversation with the individual occurs during the course of a covert investigation. In general, in a formal interview, the Monitor should provide the interviewee with the identity of those present during the interview, the responsibilities of those present, the reason for the interview, and how the Monitor (or others present) may use the information obtained from the interview. The Monitor should tell the interviewee that the information may be provided to the Government (unless there is a vehicle for maintaining confidentiality), and that providing information to the Monitor does not satisfy any obligation the interviewee may have to provide information to the Host Organization. If the Monitor has reason to believe that the interviewee may incriminate him or herself, or is, in fact, a subject or target of an investigation, the Monitor should inform the interviewee of those facts and give the interviewee the opportunity to have counsel present.

If an individual is being questioned in a manner designed to preclude his or her awareness that the information sought is being provided to the Monitor, such as during the course of an undercover or covert investigation, then such requirements do not apply. However, the Monitor should determine whether there are any other additional considerations concerning an individual who is being represented by counsel, or who is covered by a collective bargaining agreement, that may apply. The Standards take no position on whether, as a matter of law, a Monitor appointed pursuant to an Agreement with the Government, or by Court Order, is a state actor for purposes of seeking statements from a represented party or compelling statements for purposes of the right against self-incrimination under decisions such as Garrity v. New Jersey.39 Given the number of jurisdictions that might consider the issue in a wide variety of contexts, no definitive answer can be given. Certainly, the more the Monitor inserts itself into the operations of the Host Organization and the more the Host Organization believes it must take certain actions to appease the Monitor, the more likely state action will be found.

Thus, instead of providing a list of rules that could not possibly cover all situations, the Standards provide that the Agreement should anticipate potential issues related to employee rights that may arise during the monitorship, but explicitly puts the burden on the Monitor to become knowledgeable concerning any employee rights issues that may arise in the context of that monitorship in the specific controlling jurisdiction(s). In no case should the Monitor provide legal advice to interviewees.

Finally, the Standards encourage the creation and use of mechanisms designed to increase the flow of information to the Monitor. The ability to obtain certain records without identifying which specific document is of interest, the ability to allow certain individuals to speak confidentially or anonymously, and the ability to operate covertly, are all envisioned by this provision. If the flow of information includes proprietary or confidential information, the Monitor is under a duty to safeguard that information, not to use it for personal or professional gain, and to return such information at the conclusion of the monitorship unless otherwise directed by the Agreement or Court.

**Standard 24-4.3 Scheduled Reports and Other Reports and Communications.**

Although the Monitor is independent of the Government, it has the responsibility of reporting to the Government or Court, in almost all cases, its activities, findings, conclusions, and recommendations. The form and frequency of those reports should be set forth in the Court Order or Agreement.

The Monitor’s independence extends to the contents of the report. The Monitor’s conclusions in the report should be based on a fair, objective, and impartial review of all relevant evidence. Although the Monitor can and, except in extenuating cases, should share a draft of any report with both the Government and Host Organization for comment (and be prepared to seriously consider and potentially be persuaded by those comments), it is ultimately for the Monitor to determine the contents of the submitted report. If the Monitor is persuaded to modify the draft, it should be because the Monitor is convinced that it made a factual mistake, a conclusion is incorrect, or a recommendation is not in the best interests of achieving the goals of the monitorship – and not as a result of deference to the entity that made the suggestion. In anticipation that the Host Organization may be dissatisfied with a determination of the Monitor, the parties may include in the Agreement a method by which the Host Organization can voice its disagreement to the Government and possibly have a record of that disagreement available to a future reader of the report.

The Standards impose additional requirements upon the Monitor with respect to the accuracy of its findings and recommendations. First, the Monitor must maintain records of all relevant information on which it bases its report, including facts that may be contrary to its conclusions. Second, the Monitor is obligated to correct any material errors or inaccuracies that the Monitor learned after the Report was issued, and to inform the Government and Host Organization (if appropriate) of those changes.

In determining the necessary frequency of written reports in the Agreement, the parties should be mindful of the cost and burden placed on the Monitor and Host Organization compared to the value of more frequent reports. Reports can be expensive to produce, both in terms of fees and other costs to the Host Organization, and in terms of the distraction to the Monitorship Team from its other monitoring work and to the Host Organization from its regular business and its compliance efforts. In addition to these costs, the parties should consider the nature of the monitorship and the value of requiring additional reports. For example, a monitorship
focused on compliance with an ethics code may require only annual or semi-annual reports. If a Monitor is tasked with determining whether public health or environmental issues continue to exist, however, then the Agreement may mandate monthly or quarterly reports, or reports based upon evaluations of particular events.

Likewise, the contents of the reports may vary considerably based on the nature of the monitorship and the activity that gave rise its imposition. For example, a monitorship that is concerned with ensuring fair and non-discriminatory work distribution may require a report that only provides a statistical analysis of non-controversial data. Contrarily, a Monitor responsible for overseeing a corrupt union with new leadership may have to report on a wide-variety of activities and individual events as well as on the union’s attempts to encourage union democracy.

The parties may also agree to the use of interim written reports. However, the parties should specify their use in the Agreement, keeping in mind that such reports may cause the Host Organization to incur significant additional expense. The parties should require interim written reports only when necessary. They should consider agreeing to the use of less-expensive oral reports to the Government as appropriate. The Monitor and Government should determine whether notifying the Host Organization of the existence, and contents, of any written or oral report would be detrimental to the monitorship (such as during ongoing covert investigation). In addition, informal meetings between the Monitor, the Host Organization, and the Government, to discuss progress on the monitorship’s goals and to determine whether there are any problems going forward, should occur as a matter of course in most Monitorships and are consistent with these Standards.40

Because the Monitor may observe or discover various acts of misconduct by employees or agents of the Host Organization, Standard 24-4.3.3 instructs the parties to include in the Agreement a description of the types of misconduct that the Monitor should report. It should also state when, how, and to whom (the Host Organization, the Government, or both) the Monitor should report the misconduct. For misconduct not specified in the Court Order or Agreement, the Monitor has discretion to determine if the conduct should be reported to the Host Organization, Government, or both. For discovered misconduct that directly relates to the scope of the monitorship, but has been (or can easily be) corrected by the Host Organization,

40 For federal monitorships, the Grindler Memo suggests including the following language in Agreements:

At least annually, and more frequently if appropriate, representatives of the company and the Department will meet together to discuss the monitorship and any suggestions, comments, or improvements the company may wish to discuss with or propose to the Department, including with respect to the scope or costs of the monitorship.

the Monitor may wait to report until the time of a regularly scheduled report. If the Monitor discovers more serious offenses (e.g., fraud, danger to the peace and safety of the public), then the Monitor may need to immediately report the misconduct. For other violations, the Monitor must balance minor infractions or victimless offenses against the impact of reporting every infraction on the Monitor’s ability to gather needed information and successfully conduct the monitorship.41

Standard 24-4.3.4 covers the confidentiality of Monitor reports. The Standards recognize that there are compelling reasons in favor of making Monitor reports public, such as the public’s general “right to know,” and allowing external stakeholders to evaluate the decision making of the prosecutor or agency who authorized the imposition of the Monitor, to determine the effectiveness of the Monitor in that specific case and for monitorships in general, and to obtain information about the Host Organization that would have likely become available in a public trial.

However, there are also compelling reasons for keeping Monitor reports confidential. The disclosure of the report may cause the release of proprietary, confidential, or competitive business information that may unfairly result in significant harm to the Host Organization through its use by competitors, the media, or others. The Monitor’s inability to promise confidentiality may inhibit candid discussions between the Monitor and the Host Organization, and otherwise inhibit the free flow information between the two parties. Although the Host Organization may be able to challenge the accuracy of negative information in the report, individuals named in report (or easily identified by readers of the report) may not be able to challenge the information and may be unfairly publicly denigrated. In addition, those individuals who believe they could be identified in a report may be deterred from cooperating with the Monitor. Over time, knowledge that Monitor reports could become public may dissuade some organizations from agreeing to the engagement of a Monitor due to concerns that potential litigants or competitors may use the information against them.

41 The Morford Memo, supra note 9, at 7—which is consistent with the Standards—states that the presence of any of the following factors weighs in favor of reporting the misconduct only to the Government (and not the Host Organization):

- poses a risk to public health or safety or the environment;
- involves senior management of the corporation;
- involves obstruction of justice;
- involves criminal activity which the Government has the opportunity to investigate proactively and/or covertly; or
- otherwise poses a substantial risk of harm.

The Monitor may choose to report misconduct only to the Host Organization in the following situations:

- there are allegations of misconduct that the Monitor does not find credible;
- the misconduct is committed by individuals acting outside of the scope of the Host Organization’s business.
With a full appreciation of these concerns, a Host Organization, however, may still see value in making the Monitor reports public. For example, the Host Organization may benefit from disclosing that a respected Monitor has determined that the organization has eliminated its previous problems, has conducted its current operations with integrity, and has committed itself to, in the case of companies, commendable corporate citizenship.

The Standards recognize that there is not a single, best approach for all cases. The parties are afforded the flexibility to state in the Court Order or Agreement whether the Monitor’s report is intended to remain confidential, whether it can be disclosed to other Government agencies, or whether, and under what circumstances, it should be made available to the public (in part or in whole). If the report is to be disclosed, the Monitor should work closely with the Government and Host Organization (or Court, if relevant) to prevent the unnecessary disclosure of information about specific individuals or proprietary or competitive business information that legitimately belongs to the Host Organization.

The Agreement will not provide the definitive answer as to whether, in fact, a particular report, or series of reports, can remain confidential. The Government (or Court) will need to consider court rulings,\textsuperscript{42} Freedom of Information statues,\textsuperscript{43} and other public disclosure laws and regulations, if an external party makes a request. The Standards do, however, give the Host Organization the discretion to disclose to a third party any report to which the organization has access, unless the Government has a legitimate objection or there is a contrary determination set forth in a Court Order.

**Standard 24-4.4 Monitor Recommendations.**

While Monitors often have, as individuals, or through their Monitorship Teams, industry expertise, they are generally not as familiar with the Host Organization’s operations and business strategy as the organization’s management team. In addition, unlike the management team, the Monitor does not have a financial stake in the success or failure of the business. Therefore, the

\textsuperscript{42} In *United States v. HSBC Bank*, 863 F.3d 125 (2d Cir. 2017), the Second Circuit Court of Appeals overturned the District Court ruling that the Monitor’s report was a judicial document and subject to public disclosure. The Monitor was appointed pursuant to a DPA on charges related to HSBC’s failure to prevent money laundering. The Court of Appeals held that the Monitor’s report was not a judicial document because the District Court did not have authority to supervise the implementation of DPA.

\textsuperscript{43} In *100Reporters LLC v. United States Department of Justice*, 248 F. Supp. 3d 115 (D.D.C. 2017) the District Court reviewed an organization of journalists’ Freedom of Information Act (FOIA) request to obtain the Monitor’s report for Siemens. Siemens had agreed to retain a Monitor as part of its criminal plea agreement for violations of the FCPA. The Court upheld some of the DOJ’s claims for FOIA exemptions, but also ordered the DOJ to provide the Court with one of the Monitor’s work plans and one annual report for *in camera* review to determine if a redacted version of the report could be disclosed.
Monitor must be cognizant of, and respect, the business realities of the Host Organization. As was noted in the IPSIG context:\textsuperscript{44}

\begin{itemize}
  \item \textit{The development of new or modified procedures should be undertaken with the full participation of the management and staff of the host organization.} Human nature permits individuals and their supervisors to accept new approaches if they understand the need for them, believe them to be workable, and have a stake in their success. ...  
  \item \textit{Internal controls must be cost-effective and not unduly impede the delivery of goods and services.} It is clearly possible to design internal controls that would eliminate all waste, abuse and fraud; those internal controls would also stop all production and delivery. Balance is critical; not every violation need be prevented, detected or reported.
\end{itemize}

In consideration of these concerns, the Standards call for cooperation between the Monitor and Host Organization in the creation of any recommendations that may have the potential to affect business operations, recommend that the Monitor take a pragmatic approach to making recommendations based on analyses of competing interests, and encourage the Monitor to adopt a willingness to reconsider a proposed recommendation in light of any legitimate objections, or alternative suggestions, made by the Host Organization. If the Monitor decides to reject the Host Organization’s objections or suggestions, then the Monitor should articulate the reasons for its decision. In anticipation that such disagreements may arise, the Agreement should specify how any disputes over Monitor recommendations are to be resolved. In all cases, the parties should notify the Government when significant disputes exist.\textsuperscript{45}

As an example of language the parties may include in their Agreement, the 2010 Grindler memo suggested the following:

\begin{quote}
With respect to any Monitor recommendations that the company considers unduly burdensome, impractical, unduly expensive, or otherwise inadvisable, the company need not adopt the recommendation immediately; instead, the company may propose in writing an alternative policy, procedure, or system designed to achieve the same objective or purpose. As to any recommendation on which the company and the Monitor ultimately do not agree, the views of the company and the Monitor shall promptly be brought to the attention of the Department. The Department may consider the Monitor’s recommendation and the company’s reasons for not adopting the recommendation in the determining
\end{quote}

\textsuperscript{44} Goldstock, \textit{supra} note 17.  
\textsuperscript{45} Cf., Inspector General Act of 1978, as Amended, § 5(a)(12) (codified at 5 U.S.C. app. § 5(a)(12)) (stating that an Inspector General is to include in its semiannual report “information concerning any significant management decision with which the Inspector General is in disagreement.”)
whether the company has fully complied with its obligations under the Agreement. 46

Standard 24-4.5 Indemnification

The nature and scope of the Monitor’s responsibilities and authorization are set forth in the Agreement and Engagement Letter. Despite the best efforts of the Monitor, misconduct may occur in the area of oversight. Or, it may occur outside the Monitor’s mandate, such as when misconduct exists and the Monitor lacks the authority or resources to expose it. In each case, victims of the misconduct may seek to hold the Monitor liable for damages, and the Monitor, although ultimately vindicated, may be compelled to expend considerable time and expense in defending itself. Lawsuits may also arise from shareholders who believe the actions of the Monitor in implementing internal controls, for example, has adversely affected profits. Or lawsuits may arise from ex-employees who claim that the Monitor’s actions led to the termination of their employment. There are numerous other circumstances that could result from the required actions of the Monitor that may also lead to litigation or the threat thereof. The Standards provide that the Agreement should include provisions for indemnifying the Monitor, but the Standards do not dictate the terms or extent of that indemnification. For example, it would be perfectly reasonable for the parties to exclude indemnification for damages and costs resulting from fraudulent or otherwise unlawful conduct engaged in by the Monitor or members of the Monitorship Team.

Standard 24-4.6 Withdrawal

The withdrawal of the Monitor is an event that has serious implications for both the Host Organization and the success of the monitorship, and it should not occur unless circumstances compel it. The Standards describe the situations in which withdrawal is appropriate. Subsections 2 and 3 allow withdrawal based on the inability of the Monitor to continue its role. Subsection 4 allows withdrawal based the actions of the Host Organization. The Agreement should consider each of these possibilities and should set forth the process for withdrawal, the role of the Government in that process, and the means by which any harm to the monitorship or the Host Organization occasioned by such withdrawal can be minimized.

The inability of the Monitor to proceed in subsections 2 and 3 relate to the qualifications of the Monitor found in Standard 24-2.4 Selection Criteria. The Standards allow withdrawal if the Monitor discovers a conflict of interest not previously known, or the Monitor develops a conflict during the course of the monitorship. The parties should first determine if the conflict can be cured before seeking withdrawal. For example, the government official overseeing the monitorship may precipitate a conflict through the creation of a direct or indirect relationship with the Monitor, which may be straightforwardly cured through recusal by the government

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46 Grindler Memo, supra note 40.
official. A member of the Monitorship Team may develop a significant relationship with an individual who has a material stake in the Host Organization, or competitor, which may require the removal of that individual from the team. In both cases the Monitor may continue with the Monitoring assignment with either no or minimal disruption. If, however, the Monitor has an irremediable conflict, the Monitor must withdraw. To reduce the costs that would arise with the learning curve of a new Monitor, the parties should consider the possibility of selecting a successor from the Monitorship Team, or keeping the remaining members of the Monitorship Team in place with the new Monitor.

The second reason for withdrawal based on the Monitor’s qualifications occurs when, during the course of the monitorship, the Monitor determines that it lacks the expertise, resources, or ability necessary to conduct the monitorship. For instance, in the above example, the member of the Monitorship Team who was removed due the discovery, or development, of a conflict of interest, may have been a key individual for whom a replacement cannot be found. Or the monitorship may develop in a way that was unanticipated at the outset, and the Monitor determines that it does not have the necessary expertise, resources, or ability to effectively conduct the monitorship. In both cases, withdrawal would be appropriate.

The third reason for withdrawal concerns the Host Organization’s refusal to cooperate, or to financially compensate, the Monitor as agreed in the Engagement Letter. If such actions by the Host Organization make the monitorship virtually impossible to continue in accordance with these Standards, withdrawal is warranted. The Monitor should carefully document the failures of the Host Organization and present them to the Government in a timely manner.

**Standard 24-4.7 Removal of the Monitor**

In addition to withdrawal, which is initiated by the Monitor, the Standards provide for removal, which is initiated by the Government. Although the Host Organization may have legitimate reasons for seeking removal of the Monitor, it may also have incentives to seek the removal of a high-performance, demanding Monitor. Thus, only the Government has the authority to remove the Monitor, and only for reasons set forth in the Standards and the Agreement.

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47 For example, see, e.g., 5 CFR § 2635.606 (Recusal based on an arrangement concerning prospective employment or otherwise after negotiations); U.S. Office of Government Ethics, *Resolving Conflicts of Interest*, online at https://www.oge.gov/Web/OGE.nsf/Resources/Resolving+Conflicts+of+Interest.

48 This reason for withdrawal is analogous to ABA Model Rules of Professional Conduct Rule 1.16 (5) and (6), which state that an attorney may decline or terminate representation of a client if:

1. the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
2. the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client;
The Government’s reasons for removing a Monitor will typically include deficiencies in the Monitor’s performance or qualifications. If the Government has concerns as to the Monitor’s performance of its duties, then it should communicate those concerns to the Monitor and be open-minded towards the Monitor’s explanation of its performance. If the Government is not satisfied by the Monitor’s response, then the Government should consider whether it is possible for the Monitor to cure the performance deficiencies within a reasonable period of time. Throughout this process, the Government should recognize the Monitor’s independence and should not seek to removal merely because the Monitor has made findings with which the Government disagrees.

If the Government determines that it is necessary to remove the Monitor, then the Government must minimize the cost to the Host Organization. This obligation is particularly strong if the Government was instrumental in qualifying or selecting a Monitor who, in retrospect, should not have been qualified or selected.

As previously stated, the Host Organization has an incentive to remove a Monitor that is too demanding, uncovers information harmful to the organization, reports misconduct to the Government, or otherwise acts adversely to the Host Organization’s interests, none of which are legitimate grounds for removing the Monitor. However, the Host Organization may also have legitimate grounds for seeking removal. For example, it may believe that the Monitor is charging excessive fees, incurring unwarranted expenses, acting outside the scope of its authority under the Agreement, engaging in abusive behavior during interviews, unreasonably interfering with the proper functioning of the business, unfairly demeaning employees, making disparaging statements to customers, spending time and resources investigating minor matters that are of limited significance, or otherwise failing to fulfill its obligations. The Agreement should provide a mechanism for the Host Organization to formally communicate those concerns to the Government, and for the Government to take appropriate action as necessary, including removal.

If the Monitor was selected pursuant to a Court Order, the Court Order should allow the Government or the Host Organization, or both, to make the concerns set forth above known to the Court. The Court would then be able to utilize those considerations in determining whether to remove, or take other action concerning, the Monitor.

**Standard 24-4.8 Evaluation of Monitorships**

There are two major reasons for a comprehensive evaluation of each monitorship at an appropriate time, which is generally at its conclusion. The first is to both illuminate the practices and procedures that were effective and to determine why other approaches did not work. The second is to be able to assess the success of that particular Monitor. That performance review may then be used in determining the suitability of that Monitor for future monitorship assignments.
Assessing a monitorship is not necessarily an easy task. In many cases, the potential metrics are not obvious and may prove misleading if not understood within the appropriate context. For example, the Monitor’s discovery of wrongdoing by a Host Organization may be either a sign of failure – the Host Organization was not reformed – or of success – the Monitor’s vigilance uncovered the misconduct. Likewise, the absence of the discovery of wrongdoing by the Monitor may either be the result of a reformed Host Organization or the failure of the Monitor to discover misconduct that does in fact exist. Compliance officers have struggled with similar problems when attempting to assess the effectiveness of their compliance programs.

In some cases, objective metrics may be available. For example, a union may be under a monitorship due to past infiltration by an organized criminal group that resulted in a variety of harms, such as undemocratic practices, underfunded pension funds (due to corruption or theft), underpaid workers, workers avoiding union membership due to illicit payments, and extortion of employers through illegal means. At the end of the monitorship, the Government could evaluate the success of the monitorship by using such objective metrics as an assessment of whether fair elections were being held (with candidates not afraid to air their views), any increase in membership numbers, whether the pension funds are actuarially sound, whether workers were receiving the compensation due them, and whether employers reported any incidents of extortion.

At the beginning of each monitorship, the parties should attempt to develop metrics based on the concerns that led to the creation of the monitorship. These metrics should help the parties determine the Host Organization’s progress towards achieving the monitorship’s goal and may be used to help determine if the monitorship should be ended earlier than expected.

In evaluating the success of monitorships and developing a catalog of best practices, it is important to remember that because an approach worked successfully in one monitorship, or the background of a Monitor proved to be advantageous in understanding the issues and achieving the goals in a monitorship, it does not mean that those factors will prove successful in

\[49\] The GAO has suggested the following as possible indicators of effectiveness:

(1) a company’s recidivist behavior—or the extent to which the company re-engages in criminal misconduct—after the agreement is complete or during the term of the DPA or NPA, or (2) whether the company successfully met the terms of the agreement, which often include requirements to establish or enhance compliance programs as a means to reform the company.


\[50\] For a lengthy list of potential metrics for different aspects of a compliance program, see DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS) OFFICE OF INSPECTOR GENERAL (OIG) AND THE HEALTH CARE COMPLIANCE ASSOCIATION (HCCA), MEASURING COMPLIANCE PROGRAM EFFECTIVENESS: A RESOURCE GUIDE (March 27, 2017), online at: https://oig.hhs.gov/compliance/101/files/HCCA-OIG-Resource-Guide.pdf.
another monitorship. The Government or the Monitor, or both, should conduct a careful analysis within, and to the extent possible, between monitorships, to understand the conditions under which certain factors are more likely to lead to success. This reminder is consistent with the general approach of the Standards, which is that there should not be a one-size-fits-all approach to selecting a Monitor, establishing the monitorship, or conducting the monitorship. Each organization, and its situation, is different. These differences must be understood and appreciated both when designing a monitorship and when attempting to distill best practices and lessons learned.