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Note

Independent Corporate Compliance Monitors as Vehicles for Restoring Social License in the Wake of Corporate Criminality

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Introduction

"Diesel dupe"[1] and "dieselgate,"[2] articles proclaimed after revelations that Volkswagen AG (VW) and its coconspirators employed a cheating software, known as "defeat devices," to trick U.S. emissions testing processes.[3] When the scandal erupted in September 2015, sales of VW brand vehicles sharply declined—dropping by 4.8% from the previous year—despite 2015 being a record-setting year for car sales.[4] The scandal cost VW not only billions in penalties and other related costs but also its reputation among consumers—a temporary revocation of VW's "social license."[5]

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1. Russell Hotten, *Volkswagen: The Scandal Explained*, BBC NEWS (Dec. 10, 2015), https://www.bbc.com/news/business-34324772 [https://perma.cc/X9ZH-VXX6].

2. *EU Court Backs Broader Definition of Tools Used to Rig Vehicle Emissions Tests*, REUTERS (Dec. 17, 2020, 7:35 AM), https://www.reuters.com/article/volkswagen-emissions-eu/eu-court-backs-broader-definition-of-tools-used-to-rig-vehicle-emissions-tests-idUSKBN28R1XW [https://perma.cc/HSW8-L5BZ].

3. *Volkswagen AG Agrees to Plead Guilty and Pay $4.3 Billion in Criminal and Civil Penalties; Six Volkswagen Executives and Employees Are Indicted in Connection with Conspiracy to Cheat U.S. Emissions Tests*, U.S. DEP'T OF JUST. (Jan. 11, 2017), https://www.justice.gov/opa/pr/volkswagen-ag-agrees-plead-guilty-and-pay-43-billion-criminal-and-civil-penalties-six [https://perma.cc/8XWM-K427] [hereinafter *Volkswagen AG Agrees to Plead Guilty*].

4. *See Volkswagen Branded Sales Drop for First Time in 11 Years*, BBC NEWS (Jan. 8, 2016), https://www.bbc.com/news/business-35267164 [https://perma.cc/TFV2-85H9] ("In 2015, a record 17.47 million cars were sold, according to Autodata. The car data firm has been keeping records since 1980.").

5. *See infra* Part I.

In January 2017, VW pleaded guilty to participating in a conspiracy to mislead and lie to the Environmental Protection Agency (EPA) and U.S. consumers about whether certain vehicles complied with U.S. emissions regulations under the Clean Air Act.[6] Under the terms of the plea agreement with the Department of Justice (DOJ), VW agreed to the appointment of an independent corporate compliance monitor to oversee compliance reform in accordance with the terms of the agreement.[7]

When the DOJ brings criminal charges against a corporation, rather than seek a formal conviction, prosecutors may negotiate a deferred prosecution agreement ("DPA") or a nonprosecution agreement ("NPA") with the corporation, the terms of which may include the appointing of an independent corporate compliance monitor to oversee the corporation's compliance with the terms of the agreement.[8] Since its inception, this practice has been exhaustively criticized, in part for the DOJ's failure to provide clear guidance as to the power and scope of the monitor.[9]

This Note argues that monitors have dual, competing roles—private and public—which can be meaningfully harmonized when monitorship is viewed through the lens of social license theory. Setting aside obvious structural criticisms that are already the subject of a significant body of literature, this Note argues that corporate monitorship—as part of a criminal disposition—can serve as a vehicle for restoring social license. Further, this Note argues that increased transparency at all stages in the lifetime of a monitorship may have the unexpected benefit of restoring, securing, and sustaining social license.

Part I of the Note describes the origins and development of the independent corporate compliance monitor and describes the conflicting, dual nature of the monitor. Part II introduces the theory of social license and provides an understanding of corporate criminality within the context of social license. Part III argues that in the wake of corporate criminality, independent corporate compliance monitors can and should be seen as a vehicle for restoring social license. This conceptualization harmonizes the public and private aspects of a corporate monitor. Part IV contends that the goal of restoring social

6. *See Volkswagen AG Agrees to Plead Guilty*, *supra* note 3.

7. *Id.* The government selected former U.S. Deputy Attorney General Larry D. Thompson to fill the role of monitor. *Volkswagen AG Sentenced in Connection with Conspiracy to Cheat U.S. Emissions Tests*, U.S. DEP'T OF JUST. (Apr. 21, 2017), https://www.justice.gov/opa/pr/volkswagen-ag-sentenced-connection-conspiracy-cheat-us-emissions-tests [https://perma.cc/38LF-ND8A].

8. Memorandum from Craig S. Morford, Acting Deputy Att'y Gen., U.S. Dep't of Just., on Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corps. 1 (Mar. 7, 2008), https://www.justice.gov/sites/default/files/dag/legacy/2008/03/20/morford-useofmonitorsmemo-03072008.pdf [https://perma.cc/866A-CZ6L] [hereinafter Morford Memorandum].

9. *See, e.g.,* Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar*, 105 MICH. L. REV. 1713, 1737 (2007).

license calls for reforming monitorship to increase transparency, which in turn would increase public trust.

I. The Nature of Monitorship: Public, Private or Both?

Corporations have arguably "usurp[ed] the state's role as the most important institution of wealthy capitalist societies," functioning as the primary sources of wealth creation.[10] Herein lies a central tension in punishing corporate crime. Due to the outsized role played by corporations in society and the accordingly outsized opportunities for corporations to cause harm, the public has a vested interest in holding corporations accountable for their actions. But this interest at times conflicts with society's general interest in economic growth, unfettered by burdensome government action. Some commentators have even argued that certain corporations are considered "too big to jail," or too impactful in the global economy to incapacitate the corporation through punishment for its crimes.[11] The DOJ has sought to resolve this tension by taking an alternate route to prosecuting corporate crime: implementing an independent corporate compliance monitor. Part I provides a brief background to the independent corporate compliance monitor and explores the possible structural tensions implicit in its dual nature.

Various types of corporate crime—specifically, forms of fraud—reflect pervasive noncompliance by a corporation. Corporate crimes like financial fraud or environmental crimes carry "a substantial risk of great public harm" and will lead to the criminal indictment of the offending corporation, in addition to or instead of an individual.[12] Specific examples include healthcare fraud and violations of the Foreign Corrupt Practices Act (FCPA).[13] For example, the world's largest provider of dialysis equipment and services, Fresenius Medical Care AG & Co. KGaA, is currently under active monitorship after Fresenius self-reported and disclosed widespread violations of the FCPA.[14] In total, Fresenius paid about $30 million in bribes to officials in over seventeen countries.[15] After reaching an NPA with Fresenius, the DOJ

10. Gabrial Rauterberg, *The Corporation's Place in Society*, 114 MICH. L. REV. 913, 913 (2016).

11. For insight into a related debate centralized around the argument that certain corporations are "too big to jail," meaning too impactful in the global economy to incapacitate the corporation through punishment for its crimes, see generally BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014).

12. U.S. Dep't of Just., Just. Manual § 9-28.200 (2020).

13. *Id.* at §§ 9-44.000, 9-47.000.

14. Richard L. Cassin, *Fresenius Medical Pays $231 Million to Settle Widespread FCPA Offenses*, FCPA BLOG (Mar. 29, 2019, 5:18 PM), https://fcpablog.com/2019/03/29/fresenius-medical-pays-231-million-to-settle-widespread-fcpa/ [https://perma.cc/Z8YV-PVEF].

15. Cassin, *supra* note 14.

required the company to retain an independent compliance monitor for two years and self-report for an additional year.[16]

Crimes such as these, committed by business entities, may lead prosecutors to choose to defer prosecution and impose an independent corporate compliance monitor rather than seek a formal conviction. Prosecutors task the monitor with overseeing the corporation's compliance with the terms of a negotiated agreement between the prosecutors and the corporation "specifically designed to address and reduce the risk of recurrence of the corporation's misconduct[.]"[17] The practice of imposing a monitor as part of a negotiated agreement traces back to the 1994 *Prudential Securities*[18] case, which saw the first modern appointment of an independent expert whose role was to monitor compliance of the company after deferred prosecution.[19] Since *Prudential*, the DOJ has "increasingly" relied on the corporate monitor in settlements.[20]

In 2008, then-acting Deputy Attorney General Craig Morford penned a department-wide memorandum (The Morford Memorandum) providing guidance as to the use and selection of monitors, and the general scope of the monitor's duties.[21] According to the Morford Memorandum, a "monitor is an independent third-party, not an employee or agent of the corporation or of the Government."[22] Throughout the duration of the agreement, however, "there should be open dialogue among the corporation, the Government[,] and the monitor[.]"[23] The duties of a monitor are to (1) evaluate internal

16. *Fresenius Medical Care Resolves FCPA Investigation*, FRESENIUS MEDICAL CARE (Mar. 29, 2019), https://www.freseniusmedicalcare.com/en/news/fresenius-medical-care-resolves-fcpa-investigation [https://perma.cc/VF33-V4KY].

17. *See* Morford Memorandum, *supra* note 8, at 2.

18. *See* Deferred Prosecution Agreement, United States v. Prudential Sec., Inc., No. 94-2189 (S.D.N.Y. Oct. 27, 1994), at 3.

19. Khanna & Dickinson, *supra* note 9, at 1717–18. Note that the *Prudential Securities* case was an SEC enforcement action. *Id.* For the sake of simplicity, this paper will not be discussing SEC enforcement actions and internal policies regarding monitorships beyond this mention.

20. *Id.*

21. Morford Memorandum, *supra* note 8, at 4–8. Since 2008, the Morford Memorandum has been built upon, clarified, and altered with the change of leadership and administrations. *See also* Memorandum from Lanny A. Breuer, Assistant Att'y Gen., U.S. Dep't of Just., on Selection of Monitors in Crim. Div. Matters to All Crim. Div. Pers. (June 24, 2009), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/response3-supp-appx-3.pdf [https://perma.cc/P23C-R7X9]; Memorandum from Gary G. Grindler, Acting Deputy Att'y Gen., U.S. Dep't of Just., on Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corps. to Heads of Dep't Components, U.S. Attorneys (May 25, 2010), https://www.justice.gov/sites/default/files/dag/legacy/2010/06/01/dag-memo-guidance-monitors.pdf [https://perma.cc/GQ38-H7HH]; Memorandum from Brian Benczkowski, Assistant Att'y Gen, U.S. Dep't of Just., on Selection of Monitors in Crim. Div. Matters to All Crim. Div. Pers. (Oct. 11, 2018), https://www.justice.gov/criminal-fraud/file/1100366/download [https://perma.cc/88R7-6STS] [hereinafter Benczkowski Memorandum].

22. Morford Memorandum, *supra* note 8, at 4.

23. *Id.* at 4–6.

controls and corporate ethics and compliance programs; (2) make recommendations to alter, improve, or otherwise implement internal controls and corporate ethics and compliance programs; and (3) make periodic reports to the corporation and the government.[24]

As an independent third-party reporting both to the corporation and the government, the monitor has a split allegiance that raises the question of whether it is more government agent or private agent. The monitor's duties suggest both public and private features, and this duality seems to create an inherent conflict in how monitorship can and should be carried out. Understanding the functionality of monitorship requires exploring the two sides separately and then exploring how the purposes behind monitorship might necessitate and explain this dual nature.

An independent compliance monitor has multiple public functions. Monitors communicate with and make written reports to the government throughout their duration. As a prosecutorial tool employed by the DOJ, a monitor has the mandate of the polity as an extension of the democratically elected executive. Although the monitor is explicitly not an agent of the government, it reports to the government undisclosed misconduct uncovered by the monitor.[25] However, unlike whistleblowing, the monitor serves the additional purpose of making recommendations designed to bring the corporation into compliance with the negotiated agreement. Although the monitored corporation retains control over decision-making, the government does conduct some oversight. If the corporation decides not to adopt the monitor's recommendation, the monitor will report that to the government along with the corporation's reasons.[26] The government will use this information to determine if the corporation is complying with the agreement,[27] demonstrating some public control over the resolution of the monitorship.

An independent compliance monitor has multiple private functions as well. Their services are paid for by the monitored corporation. Independent compliance monitors are often attorneys,[28] but the monitored corporation is *not* the monitor's client. The monitor's mandate is to identify and remedy inadequacies in internal compliance policies and programs, yet the monitored company retains all control over decision-making, a hallmark of private

24. *Id.* at 4–7.

25. *See id.* at 5 (stating that a monitor "is not an agent or employee of the Government").

26. *Id.* at 6.

27. *Id.*

28. As compliance has developed into a cottage industry within the legal industry, elite attorneys specializing in compliance receive repeated appointments. For example, Johnny Frank is a partner at StoneTurn. Frank currently serves as the DOJ-appointed Independent Compliance and Business Ethics Monitor to Deutsche Bank as well as the DOJ-appointed Independent Auditor of Fiat Chrysler. *Johnny Frank*, STONETURN, https://stoneturn.com/who-we-are/our-people/jonny-frank/ [https://perma.cc/3ZCM-M54N].

functions.[29] The responsibility for creating and implementing a compliance program designed to prevent future misconduct remains with the corporation "subject to the monitor's input, evaluation[,] and recommendations."[30]

The public and private nature of the monitor is reflective of the DOJ's public and private concerns in prosecuting corporations. This tool is itself a recognition of the indispensable economic role played by big corporations and the need to balance deterrence with prosecutorial restraint. According to the DOJ, the decision to impose a corporate monitor should not be viewed as punitive.[31] Instead, it should be viewed as a form of rehabilitation.[32] When considering the use of a monitor in negotiations with corporations, the DOJ has advised prosecutors to be mindful of both "(1) the potential benefits that employing a monitor may have for the corporation *and the public*, and (2) the cost of a monitor and its impact on the operations of a corporation."[33] One could speculate about the potential benefits a monitor may have for the public: for example, providing access to information about a public danger created by a corporation's misconduct. The private considerations are more obvious: the impact a monitor may have on the operability of the corporation. DOJ policy thus reflects the dual nature of the monitor.

An independent compliance monitor oversees the monitored corporation's compliance in accordance with a negotiated agreement between the corporation and prosecutors. As shown, the structure and role of the monitor reveal that it is both public and private in nature, driven, in large part, by economic considerations (as indicated through substantial overtones throughout Justice Department policies). These two characteristics reveal a duality to the monitor that is in conflict, which raises questions regarding the purposes behind monitorship as a prosecutorial tool and the effectiveness of the monitor for achieving compliance and reducing corporate misconduct.

II. Social License to Operate and the Social Side of Business

The viability of any given business is dependent upon its interactions with external actors. Given that relational dynamic, external actors exercise power over businesses. The theory of social license describes one way in which society may exercise power over businesses. Social license theory holds that "businesses and other entities exist with permission from the

29. *See* Morford Memorandum, *supra* note 8, at 1–2. *See also* Veronica Root, *The Monitor-"Client" Relationship*, 100 VA. L. REV. 523, 524–26 (2014).

30. Morford Memorandum, *supra* note 8, at 5.

31. *See id.* at 2 ("A monitor's primary responsibility is to assess and monitor a corporation's compliance with the terms of the agreement . . . and not to further punitive goals.").

32. Mihailis E. Diamantis, *An Academic Perspective*, *in* GLOBAL INVESTIGATIONS REVIEW, THE GUIDE TO MONITORSHIPS 75, 75 (Anthony S. Barkow, Neil M. Barofsky & Thomas J. Perrelli eds., 2019).

33. Morford Memorandum, *supra* note 8, at 2 (emphasis added).

communities in which they are located, as well as permission from the greater community[.]"[34] As such, because "businesses are social, not just economic, institutions," they are subject to "public accountability" which acts as a form of "public control."[35] Part II provides an overview of social license theory and applies the theory to corporate criminality.

A. Introducing Social License

The theory of social license provides a helpful articulation of a predictable dynamic: when a business loses the trust of the public, the public may react, and the business will suffer. Like a license or permit a particular business must receive from a governmental agency regulating in their industry, businesses must receive a social license to operate in a particular community. It cannot be purchased or readily acquired but instead "must be earned with consistent, trustworthy behavior."[36] The credibility and legitimacy of a business in a particular community, developed and sustained over time, leads to social license to operate.[37]

Social license can be enforced in multiple different ways, directly and indirectly. First, perhaps most obviously, social license can be enforced directly through the market.[38] Consumers can always exercise their market power, indirectly or through a coordinated boycott. For example, the ride-share or ride-hail service company Uber has faced numerous public scandals over the last decade, resulting in a deterioration of its social license.[39] In 2017, in response to a Trump administration executive order banning refugees and immigrants from certain countries, unionized taxi drivers in New York went on strike.[40] Uber was viewed as attempting to capitalize on the protest when

34. Hillary A. Sale, *The Corporate Purpose of Social License*, 94 S. CAL. L. REV 785, 789 (2021).

35. *Id.*

36. *See id.* at 790.

37. *See id.* at 789–90.

38. Neil Gunningham, Robert A. Kagan & Dorothy Thornton, *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 LAW & SOC. INQUIRY 307, 320 (2004). For the discussion of VW and the drastic decline in sales the company felt after dieselgate, see *supra* Introduction. *See also* The Public Affairs Council and Morning Consult, *Fight or Flight: How Americans React to Corporate Crises and Controversies* (Mar. 2018), https://pac.org/wp-content/uploads/Crisis_Findings.pdf [https://perma.cc/6AT5-9HC8] ("When upset by corporate behavior, Americans are often more likely to quietly halt purchases from a company than to make negative comments about it. This is especially true for 'high-intensity' issues such as illegal campaign contributions, sexual harassment[,] and discrimination.").

39. *See* Sale, *supra* note 34, at 817 ("In cities in which both Lyft and Uber were well-established, these boycotts were problematic for Uber. . . . [T]he scandals, failures, and chaos at Uber, in combination with the process of publicness, increased Lyft's business opportunities.").

40. Mike Isaac, *What You Need to Know About #DeleteUber*, N.Y. TIMES (Jan. 31, 2017), https://www.nytimes.com/2017/01/31/business/delete-uber.html [https://perma.cc/XDW9-FB5Q].

the company turned off its surge-price feature.[41] The hashtag #DeleteUber trended online, and the company reported that hundreds of thousands of users deleted the app.[42]

Social license can also be enforced in more indirect ways, whereby public pressure leads to government action. The public may pressure government prosecutors and regulators to enforce compliance within a particular company or to increase or improve regulation in a particular industry.[43] For example, in response to the London Whale incident—in which J.P. Morgan suffered billions in trading losses—intense media pressure mobilized the federal government and resulted in an investigation and increased government regulation.[44] In this way, social license acts as a form of public control over business through the representative process.

Businesses must acquire social license to operate in a particular community, earned through consistent legitimacy, reputation, and trust. Social license can be revoked and may be enforced through the exercise of market power or through public pressure of government actors.

B. Corporate Criminality and Social License

Social license is "[an] essential ingredient for sustainable operation."[45] Because social license "must be earned with consistent, trustworthy behavior,"[46] it follows, then, that when corporations act in an untrustworthy manner, there may be a loss or revocation of social license. Untrustworthy behavior triggering the revocation of social license may involve actions rising to the level of corporate crime, although criminal action not a necessary condition for untrustworthiness. That said, social license may be particularly pertinent in cases of corporate criminality. Corporate crime—especially crimes of deceit or fraud—reflects a disregard for the rules of organized society and damages public trust.

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41. *Id.*

42. Paige Leskin, *Uber Says the #DeleteUber Movement Led to 'Hundreds of Thousands' of People Quitting the App,* INSIDER (Apr. 11, 2019, 5:26 PM), https://www.businessinsider.com/uber-deleteuber-protest-hundreds-of-thousands-quit-app-2019-4 [https://perma.cc/JLB3-NF7X].

43. Gunningham, Kagan & Thornton, *supra* note 38, at 322; Hillary A. Sale, *The New "Public" Corporation*, 74 LAW & CONTEMP. PROBS. 137, 141 (2011); *see also* Fiona Haines, Sara Bice, Colette Einfeld, & Helen Sullivan, *Countering Corporate Power Through Social Control: What Does a Social Licence Offer?*, 62 BRIT. J. OF CRIMINOLOGY 184 (2021), https://doi.org/10.1093/bjc/azab049 [https://perma.cc/7WTJ-5RD4].

44. Hillary A. Sale, *J.P. Morgan: An Anatomy of Corporate Publicness*, 79 BROOK. L. REV. 1629, 1654–55 (2014).

45. Elizabeth Pollman, *Here's The Term You've Been Looking For: Social License*, JOTWELL (September 16, 2019) (reviewing Hillary A. Sale, *The Corporate Purpose of Social License*, 94 S. CAL. L. REV. 785 (2021)).

46. *See* Sale, *supra* note 34, at 790.

Social license theory extends beyond the practical effect of negative public relations: the enforcement of social license leads to real consequences for the noncompliant corporation. The loss of license does not require corporate criminality; the loss of license can manifest in reaction to any number of behaviors or actions disfavored by the public. Consider the example of Uber: social license was exercised over the company for behavior merely perceived to be unethical or distastefully opportunistic.[47] Corporate behavior need not rise to the level of criminality to trigger enforcement of social license. However, social license may be particularly pertinent in instances of corporate criminality because of the potential for lasting damage to the corporation.

To demonstrate, take the case of Wells Fargo. From 2002 to 2016, Wells Fargo opened over three million fake bank accounts without customer authorization.[48] Since the fraud was discovered, Wells Fargo has paid billions in sanctions and reparations for consumers, but it most importantly has sacrificed its good reputation among customers.[49] In 2018, about two years after the scandal broke, Wells Fargo reported its deposits were "down $30 billion, or 2%, from the year before."[50]

In some cases, the revelation of corporate crime may trigger the enforcement of social license as well as legal ramifications. Although social license may be enforced in the absence of corporate action rising to the level of crime, social license may be particularly pertinent in cases of corporate criminality. Not only is corporate crime likely to induce government intervention, but public trust will be damaged as well, putting social license at risk.

III. Monitorship as a Vehicle for Restoring Social License

To the extent that corporate criminality and crises lead to a breakdown in public trust—thereby leading to the revocation of social license—the prosecution thereof may further impact public perception. Part III argues that in the wake of corporate criminality, an independent corporate compliance monitor—as part of a negotiated prosecution agreement—offers an avenue for restoring social license. Monitorship provides the corporation with both a safe haven (the monitor as a proxy) and a platform (the monitor as evidence of change). Additionally, this perspective offers a conception of corporate monitorship that harmonizes its dueling roles.

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47. *See supra* Part II.A.

48. Emily Flitter, *The Price of Wells Fargo's Fake Account Scandal Grows by $3 Billion*, N.Y. TIMES (Feb. 21, 2020), https://www.nytimes.com/2020/02/21/business/wells-fargo-settlement.html [https://perma.cc/RM8S-XSSM].

49. *Id.*

50. Matt Egan, *Wells Fargo Customers Are Fed Up. They Could Yank Billions of Dollars in* Deposits, CNN, (Oct. 10, 2018), https://www.cnn.com/2018/10/10/business/wells-fargo-bank-customers-scandal/index.html [https://perma.cc/8RKB-VKXL].

A. The Monitor as a Proxy

If social license may be revoked because of untrustworthy corporate behavior, it follows that corporate action that builds public trust may restore social license. This subpart argues that monitorship can be viewed as a vehicle for restoring social license in part because the monitor steps into the role of proxy. When the corporation shows deference to the monitor's findings and recommendations, the corporation abdicates some control while retaining power over final decision-making as to implementation.

As an independent third-party, a monitor is not an arm of the prosecutor and does not look like or act like imprisonment.[51] In terms of theories of punishment, monitorship more closely resembles rehabilitation.[52] When viewed as the overseer of the corporation's rehabilitation, the monitor offers the corporation an abdication of responsibility, something the corporation can reference as direct of evidence of the corporation's rehabilitation for smooth "reentry" to society. The independent corporate compliance monitor's lack of allegiance to or internal role in the corporation legitimizes its ability to objectively assess the corporation and make recommendations unrestricted by internal pressures.[53] The monitor thus carries a guarantee of trustworthiness, which the corporation may benefit from by allowing the monitor to step into the role of apparent proxy. For example, after "dieselgate" erupted, VW seemingly embraced the independent compliance monitor appointed to oversee the company's compliance with a negotiated agreement. In September 2020, the monitor of VW successfully concluded.[54] In a press release, VW lauded the independent corporate compliance monitor for its "integral" role in the company's "transformation."[55] In the statement the company leaned heavily on the trustworthiness of the monitor, stating "[the independent compliance monitor's] independent, unbiased, outside view of our company helped create the systems and processes that allowed [VW] to grow as an organization."[56] When the monitor acts as proxy, making authorized decisions on behalf of the corporation for the betterment of the corporation, it thus confers that trustworthiness on the internal changes proposed by the monitor and adopted by the corporation.

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51. *See* Morford Memorandum, *supra* note 8, at 2 (describing the independence of the monitor and emphasizing that in accordance with its primary responsibilities, monitorship is not meant to be punitive).

52. *See* Diamantis, *supra* note 32, at 75.

53. *See* Morford Memorandum, *supra* note 8, at 4–5.

54. *Volkswagen AG Successfully Completes Independent Compliance Monitorship Under Agreements with U.S. Authorities*, VOLKSWAGEN AG (Sept. 14, 2020), https://www.volkswagenag.com/en/news/2020/09/volkswagen-ag-successfully-completes-independent-compliance-moni.html [https://perma.cc/V3QZ-98PS].

55. *Id.* at 2.

56. *Id.*

As previously mentioned, the monitor provides recommendations based on its evaluations, but the ultimate responsibility for creating and implementing policies and procedures designed to prevent misconduct remains in the hands of the corporation.[57] The monitor thus provides a safe haven for the corporation, whereby the monitor may act as a proxy, the corporation can point to the monitor authority to justify changes, all while the corporate executives retain ultimate control over decisions relating to the monitor's recommendations.

B. The Monitor as a Platform

Monitorship can be viewed as an avenue for restoring social license by providing corporations with a platform (actual and perceived) to renounce past practices and communicate to the public how those policies have been changed, overhauled, replaced, etc., all under the supervision of an independent third-party expert. Controlling the narrative around an independent corporate compliance monitor, the corporation can point to progress under the monitor as evidence of change, as well as of willingness to change.

A powerful example can be drawn not from the corporate world but from the world of policing. In 2011, the DOJ investigated the Seattle Police Department (SPD) for patterns or practices of unlawful policing through discrimination and excessive force.[58] In 2012, the DOJ entered into an agreement with the City of Seattle to reform SPD, subject to an independent monitor.[59] In 2016, the monitor reported favorably that SPD "ha[d] not only fully embraced a community-oriented policing approach, but ha[d] demonstrated . . . a willingness to engage and join with the community in an effort that is impressive in focus and shows early signs of success."[60] Importantly, the monitor also reported that a survey conducted found the overall approval of SPD improving and disapproval of the department decreasing.[61] During this relevant time period, monitorship provided SPD with a platform to renounce

57. *See* Morford Memorandum, *supra* note 8, at 5 (providing that "[a] monitor is not responsible to the corporation's shareholders. . . . [F]rom a corporate governance standpoint, responsibility for designing an ethics and compliance program that will prevent misconduct" remains in the hands of the corporation "subject to the monitor's input, evaluation and recommendations").

58. *Justice Department Announces Agreement with City of Seattle to Implement Reforms of Seattle Police Department*, U.S. DEP'T OF JUST. (July 27, 2012), https://www.justice.gov/opa/pr/justice-department-announces-agreement-city-seattle-implement-reforms-seattle-police [https://perma.cc/C6DL-BV79].

59. *Id.*

60. *Assessments of Public Confidence And Community Trust in the Seattle Police Department Filed with Court*, U.S. DEP'T OF JUST. (Jan. 28, 2016), https://www.justice.gov/usao-wdwa/pr/assessments-public-confidence-and-community-trust-seattle-police-department-filed-court [https://perma.cc/G9XX-VGC5] (ellipses in original).

61. *Id.*

its past practices and communicate to the public how those policies have improved under the supervision of the independent monitor.

It is worth noting in this discussion that the integration of corporate responsibility at the highest level of business operations is becoming the norm. The theory of "Social License to Operate" shows the vitality of corporate recognition of the power of consumers in a socially conscious global society.[62] Companies, especially global companies, are finding that corporate social responsibility—"integrating social, ethical, and environmental concerns together with the usual measures of revenue, profit, and legal obligation"—is becoming increasingly compulsory.[63] Monitorship is, of course, compulsory, but once a company accepts that a monitor is an inevitability, the monitorship can be construed as providing the company a platform or an opportunity to show the company's prioritization of ethical concerns along with its usual business considerations.

The above subparts (A and B) have discussed the benefits of a monitor almost exclusively in terms of the optical benefits or the benefits it has in terms of public perception. This is not to undermine the potential for a monitor to suggest and help implement real, impactful changes for the corporation that would result in actual reduction in the likelihood of recidivism. That, too, will serve to restore social license in the long term as the corporation builds up its credibility among the public as a corporation that acts in a consistently trustworthy manner.

C. Public and Private, Harmonized

Viewing monitorship as an avenue for restoring social license—as both a proxy and a platform—provides a way to meaningfully harmonize the seemingly dueling roles of a monitor. Structurally, the public and private functions of the monitor provide a route towards restoring the monitored corporation's social license in a meaningful and sustainable manner. An independent compliance monitor not only functions to transpose the appearance of compliance on the corporation but also results in internal change to ensure future compliance.

Social license theory in the corporate context itself is a byproduct of the public and private nature of the corporate form, articulating the dynamic whereby a corporation can only pursue its private endeavors with the approval of society writ large.[64] Social license theory provides the necessary context to recognize that the form and function of a corporate monitor is an acknowledgment of the interconnectedness of society. To the extent that

62. Kathleen M. Wilburn & Ralph Wilburn, *Achieving Social License to Operate Using Stakeholder Theory*, J. INT. BUS. ETHICS 2011, at 3, 4.

63. *Id.* at 3.

64. *See supra* Part I.

corporations must remain responsive to the community in which they operate to maintain social license, monitorship assists the noncompliant corporation in that endeavor.

Monitorship provides an alternative route to the effective imprisonment of the corporate form by instead addressing a company's internal policies and procedures and restoring integrity to its operations.[65] In doing so, it provides something more: an avenue for the corporation to regain public trust and restore social license. The viability of a corporation is secured not only by the uninterrupted continuance of its operations but also by helping the company restore its social license.

Returning to the VW emissions scandal, VW's independent compliance monitor appears to have assisted in a lasting, self-perpetuating trend toward compliance. Although VW's sales rebounded by 2017, almost two years after the diesel scandal erupted, compliance efforts have not stopped. For example, VW has recently intensified business partner due diligence.[66] In November 2021, in reference to this new policy, VW's Chief Compliance Officer made the statement, "[I]f you believe the monitorship was successful . . . [and] then relax[] and reduc[e] your efforts, I believe you are making a big mistake."[67] VW's improved internal ethics and compliance policies increase the likelihood that VW will continue to display trustworthy behaviors over time, making social license more sustainable.

If monitorship is a vehicle for restoring social license, the public and private functions of the monitor is the structure that restores social license in a meaningful and sustainable manner. The monitor's role as both a proxy and a platform not only gives the appearance of compliance to the public but also results in actual internal changes that will ensure compliance over the long run. The appearance of improved compliance is necessary to restore public trust. The actual implementation of improved internal policies and procedures to prevent future misconduct act as evidence of consistent trustworthy behavior necessary for social license.

65. Memorandum from Mark Filip, Deputy Att'y Gen., U.S. Dep't of Just., on Principles of Fed. Prosecution of Bus. Orgs. to the Heads of Dep't Components, U.S. Attorneys 18 (Aug. 28, 2008), http://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf [https://perma.cc/G3AZ-KWPQ].

66. Aly McDevitt, *Volkswagen Not Resting on Laurels Post-monitorship*, COMPLIANCEWEEK (2021), https://www.complianceweek.com/risk-management/volkswagen-not-resting-on-laurels-post-monitorship/31051.article [https://perma.cc/DHX3-LLCJ].

67. *Id.*

IV. A Proposal for Reform: Increased Transparency

It is imperative to acknowledge that social license cannot be restored if it hasn't been revoked. The trust of the community in which the corporation operates cannot be earned back where trust was never lost. If the untrustworthy behavior of the corporation is never publicly known, the status of the corporation's social license to operate goes largely unaffected. In this Note's argument, a necessary consideration is how prosecutors conduct a criminal disposition after discovering corporate criminality. Where corporate criminality is resolved under the table or behind closed doors, figuratively speaking, there may be no catalyst that would lead to the revocation of social license. Part IV argues that increasing transparency around monitorship would strengthen the capacity of monitorship to act as a vehicle for restoring social license.

Historically, there has been a considerable lack of transparency surrounding the prosecution of corporate crime. Prior to April 2020, the DOJ had never kept a publicly available record of the active corporate monitors.[68] Further, corporate monitor reports—for understandable reasons—are not public documents.[69] Lack of transparency or access to information on the part of the Justice Department provides incentive for corporations to proactively disclose. Further, because monitors intentionally lack standardization to remain flexible to the facts of a given case or corporation,[70] it would be difficult if not impossible to hypothesize how a particular monitor is carrying out its mandate.

The historical lack of transparency on the part of the Justice Department—and the desire of corporations to resolve issues of noncompliance with as little information released to the public as feasible—results in a pattern defined by opaqueness. The public is unable to exercise its power to revoke social license if corporate criminal prosecutions lack transparency. However, as previously noted, the media, too, plays a significant role in reporting on corporate crime and may predate and induce prosecutorial action.

Certain reforms in the universe of corporate monitorship would further the restoration of social license and may even have other unintended benefits.

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68. Caryn Trombino, *DOJ Now Publishing Names of Active Compliance Monitors*, PERKINS COIE: WHITE COLLAR BRIEFLY (Apr. 16, 2020), https://www.whitecollarbriefly.com/2020/04/16/doj-now-publishing-names-of-active-compliance-monitors/ [https://perma.cc/MW5A-BQDV]; *see also List of Independent Compliance Monitors for Active and Previous Fraud Section Monitorships*, U.S. DEP'T OF JUST., https://www.justice.gov/criminal-fraud/monitorships [https://perma.cc/6EW7-J2UD].

69. *E.g.*, John Wood, *Will Corporate Monitor Reports Become Public?*, LAW360 (Apr. 24, 2017), https://www.law360.com/articles/914502 [https://perma.cc/KYS3-GQ5C] (discussing how corporate monitor reports often contain sensitive and confidential business information).

70. *See* Morford Memorandum, *supra* note 8, at 2 ("Given the varying facts and circumstances of each case . . . any guidance regarding monitors must be practical and flexible.").

Part IV will separate and offer recommendations for reform in the current approach to corporate monitorship—with explanations for the recommendations thereof—for corporations and the Justice Department in turn. In sum, both actors should embrace increased transparency for the desirable effect of increasing public knowledge and trust. For the corporation, this may further serve the purpose of increasing public trust and restoring social license.

A. For Corporations, Transparency is Power

This subpart argues that improving general transparency can be empowering for corporations. The corporation can control the narrative and improve public perception of the corporation as trustworthy. A corporation that has reached a negotiated agreement (the terms of which include the appointment of an independent corporate compliance monitor) should embrace transparency for the benefit of the corporation. Transparency in this context means self-contained publicity of the misconduct, the negotiated agreement, and most importantly, the monitor's findings and recommendations and the corporation's response. It may seem counterintuitive, but in fact, transparency—in other words, telling the truth—will likely reduce public perception that the corporation is engaged in deception.[71]

Recall the Seattle Police Department; public trust in SPD increased in the years following the implementation of an independent monitor.[72] The SPD monitor provides an impressive example of a monitorship where the involved parties embraced transparency and public access to information. The Seattle Police Department published the DOJ's Investigations and Findings on its website alongside other important documents related to the settlement agreement and other publications.[73] The independent monitor itself maintains a website providing updates on the progress of the monitor and an archive of important documentation, including assessments and reports.[74] Arguably, the public access to information surrounding the monitorship of SPD contributed to the increase in public trust in SPD during the relevant time period.

Increased transparency can be accomplished through a variety of different actions on the part of the corporation. The suggestions for reform that

71. *See* Gary Davies & Isabel Olmedo-Cifuentes, *Corporate Misconduct and the Loss of Trust*, 50 EUR. J. MKTG. 1426, 1439 (2016), (concluding from empirical analysis of how individuals respond to corporate misconduct that "'[b]ending the law' and 'not telling the truth' consistently emerged as the two corporate behaviours most likely to create distrust, irrespective of context . . . and the characteristics of the [study] respondent").

72. *See supra* Part III.

73. *Publications and Reference Information*, SEATTLE.GOV, http://www.seattle.gov/police/about-us/professional-standards-bureau/publications [https://perma.cc/9J49-5L7X].

74. SEATTLE POLICE MONITOR, https://seattlepolicemonitor.org [https://perma.cc/ZDS9-RZFF].

follow closely mirror the earlier discussion in this Note as to how corporate monitorship may be viewed as a vehicle for restoring social license. These parallels are drawn intentionally; transparency on the part of the corporation is central to the effectiveness of a monitor as a vehicle for restoring a corporation's social license.

First, transparency as to the misconduct that led to the disposition resulting in the appointment of a monitor may serve to establish that the corporation has taken responsibility for its past actions and, conversely, is not shirking responsibility. In an increasingly socially conscious society, the general public is more likely to value a corporation taking accountability for its wrongdoing.[75] This is not a groundbreaking recommendation. Indeed, the corporate misconduct that led to prosecution is likely already public knowledge. However, the corporation has the option to acknowledge the wrongdoing through its own modes of communication with the public, effectively reclaiming the narrative around the misconduct and its aftermath.[76]

Second, corporations can increase transparency during the lifetime of the monitorship in order to publicly demonstrate not only a desire to change but an adoption of policies and procedures that demonstrate change. This can be accomplished in a variety of ways, including by releasing portions of the monitor's findings and recommendations and offering tailored responses to the recommendations, ideally by showcasing proactive changes in internal policies and procedures at the corporation. In this way, one could argue that the path of least resistance is the shortest to restoring social license. To illustrate, Elizabeth Pollman has argued that social license acts as a constraining force on regulatory arbitrage—taking advantage of loopholes in laws and regulations—in that regulatory arbitrage may have certain social costs that outweigh the business benefits.[77] Monitorship is another form of regulation that corporations can take advantage of; social license can constrain regulatory arbitrage because corporations under supervision of a corporate monitor should understand the value of demonstrating a desire to change internal policies that resulted in the wrongdoing. Being opaque is not in the best interest of corporations seeking to restore or sustain social license because it may be viewed by the public as another form of regulatory arbitrage—or the legal or

75. For an extended discussion of the social license to operate in an increasingly socially conscious society, see *supra* Part II.

76. *See, e.g.*, Edward Segal, *How Companies Are Trying to Discourage and Detect Misconduct by Executives*, FORBES (Feb. 9, 2021), https://www.forbes.com/sites/edwardsegal/2021/02/09/how-companies-are-trying-to-discourage-and-detect-misconduct-by-executives/ [https://perma.cc/H8JS-RBQP] ("The sooner an organization responds to allegations of a CEO's misconduct, the sooner it will be able to defend its brand.").

77. Elizabeth Pollman, *Tech, Regulatory Arbitrage, and Limits*, 20 EUR. BUS. ORG. L. REV. 567 (2019).

permitted avoidance of regulatory force on a corporation already found to be in violation of some adopted law or regulation.

A valid rebuttal to this argument is that publicity of corporate crime is usually not in the corporation's best interest. Corporations prefer the resolutions of their transgressions to be handled privately and without high-profile publicity, and for good reason. For increased transparency to have the benefit of restoring social license, social license must first be revoked, which necessarily requires the public to learn about the criminal act in the first place. But if they never learn of the criminal act, there is no scandal and no revocation of the social license. So why would a corporation ever want its dirty laundry aired? There are two simple reasons: to secure confidence in compliance among industry competitors and to quell concern about future discovery of the misconduct.

From a corporate governance standpoint, a corporation may reach an impasse where it is faced with a decision between ethical business practices and maintaining or gaining a competitive edge over its competitors.[78] These decisions may become more frequent in a reality in which there are fewer publicized prosecutions of corporate transgressions. The lesser the likelihood that a corporation will face public or criminal consequences for bending or breaking the law, the more likely the corporation may perceive that its competitors are taking advantage of this same opportunity, ethical considerations aside.

This dynamic should encourage transparency not only on behalf of the corporation but also on behalf of the government. Increased transparency means increased publicity, which shows corporations that they and their competitors are being held accountable, thus acting as a deterrent for corporate criminality.[79] Further, increased transparency shows society that the government is holding big business to account.

An initial reaction to this argument is to challenge the assumptions on which it rests. Although, obviously, the publicization of the fact that a corporation has violated some law or regulation will negatively impact the public's trust of the corporation in a vacuum, it is important to recognize that the public revelation of such misconduct will often predate the prosecution of said

78. *See* Robert Hughes, *Breaking the Law Under Competitive Pressure*, 38 LAW & PHIL. 169, 169 (2019) ("When laws are incompletely enforced, people face an ethical question whether to comply with law for reasons other than narrow self-interest. This ethical question is acute when individuals or businesses face pressure from law-breaking competitors.").

79. *See Assistant Attorney General Leslie R. Caldwell Delivers Remarks at New York University Law School's Program on Corporate Compliance and Enforcement*, U.S. DEP'T OF JUST. (Apr. 17, 2015), https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-university-law [https://perma.cc/7RD9-FDK9] ("But to achieve deterrence, the Criminal Division must transparently communicate its expectations and the consequences of corporate misconduct. An opaque or unreasoned enforcement action carries little deterrent effect.").

misconduct (over which the corporation will have little to no control). The media, too, functions as a source of public control of a corporation by reporting on and commenting on the actions of the corporation.[80] In addition, the optics of an independent corporate compliance monitor has the potential to be less prejudicial to the corporation than, say, the imposition of a DOJ prosecutor to oversee the terms of the plea agreement. One could argue by analogy that public perception of a monitor resembles the public perception of a probation officer in the individual criminal system, or an ankle monitor; however, the monitor is even further removed from the optics of the criminal justice system in terms of stigma. The analogy can be extended: although there is no presumption of innocence at play where a corporation has entered into a negotiated agreement with the government, the independence of the corporate monitor metaphorically dresses the corporation in civilian clothing and preserves the public's perception of the corporation without extended influence from government action.[81]

B. For Prosecutors: Transparency is Restorative

The benefits of increased transparency surrounding corporate monitorship are not limited to the monitored corporation. The DOJ can and should embrace transparency and proactive reporting for several reasons. As discussed in subpart III(C), if companies faced significant public backlash to criminal actions—if their social license was threatened—then the desired deterrent effect could prevent corporate criminality or recidivism.[82] Further,

80. *See* Hillary A. Sale, *The Corporate Purpose of Social License*, 94 S. CAL. L. REV. 785, 789 (2021) (defining "publicness" as the "interplay between inside corporate governance players and the outside actors who report on, recapitulate, reframe, and, in some cases, control the company's information and public perception," which includes the media).

81. *See* Estelle v. Williams, 425 U.S. 501 (1976) (holding that the presumption of innocence, enshrined in the right to a fair and impartial jury as guaranteed by the Fourteenth Amendment, would be jeopardized unless a criminal defendant is guaranteed the right to appear in civilian clothing).

82. *See Assistant Attorney General Leslie R. Caldwell Delivers Remarks at New York University Law School's Program on Corporate Compliance and Enforcement*, U.S. DEP'T OF JUST. (Apr. 17, 2015), https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-university-law [https://perma.cc/7RD9-FDK9] ("But to achieve deterrence, the Criminal Division must transparently communicate its expectations and the consequences of corporate misconduct. An opaque or unreasoned enforcement action carries little deterrent effect."). Another suggested reform, not discussed in this Note, is for the DOJ to implement performance measures to determine how effective DPAs and NPAs are for combatting corporate crime in order to determine if this approach actually achieves specific and general deterrence. U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-110, CORPORATE CRIME: DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS 29 (2009), http://www.gao.gov/assets/300/299781.pdf [https://perma.cc/KL53-VZDK] ("By developing performance measures to evaluate DPAs and NPAs, DOJ will be better positioned to gauge whether they are effective tools in deterring and combating corporate crime.").

these practices may have the adjacent effect of increasing public trust in the government.

Recent policy changes in the Justice Department reflect incremental movement toward transparency. On October 28, 2021, the office of Deputy Attorney General Lisa Monaco issued a memorandum on the subject of the "Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies."[83] In this memorandum, Monaco outlined three changes to the Justice Department's approach to corporate crime, two of which are relevant here. First, the changes "clarify a corporation's obligation to provide all information concerning all persons involved in corporate misconduct in order to receive cooperation credit," meaning that corporations will be required to name all individuals involved in the misconduct under the new policy.[84] Second, the changes superseded, in part, the policy under the Trump-era Justice Department disfavoring monitorship.[85] Monaco reemphasized the use of monitors where appropriate.[86]

The current administration should continue to embrace this trend toward increased transparency. Without considering any significant overhaul of the current structural approach to monitorship, three suggestions for reform would increase transparency in a meaningful way.

First, the DOJ should continue to publish and maintain the list of companies actively undergoing monitorship. In April 2020, for the first time, the DOJ published a list of the companies with active monitors currently in progress.[87] This practice should be embraced as a simple step towards transparency and accountability.

Second, the DOJ should consider publishing monitor reports—albeit likely in a redacted form.[88] Monitor reports are generally kept secret: they are filed with the court under seal or kept private between the DOJ and the company. This is for good reason; publishing monitor reports may impair the

83. Memorandum from Lisa O. Monaco, Deputy Att'y Gen., U.S. Dep't of Just., on Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies to Assistant Att'y Gen., Crim. Div. et al. (Oct. 28, 2021), https://www.justice.gov/dag/page/file/1445106/download [https://perma.cc/3SS5-5TQT] [hereinafter Monaco Memorandum].

84. *Id.* at 1–3.

85. *Id.* at 4 n.3; *see* Benczkowski Memorandum, *supra* note 21, at 2.

86. *See* Monaco Memorandum, *supra* note 83, at 4 ("The Department is committed to imposing monitors where appropriate in corporate criminal matters.").

87. *See supra* note 68.

88. RICK CLAYPOOL, PUBLIC CITIZEN, SOFT ON CORPORATE CRIME: DOJ REFUSES TO PROSECUTE CORPORATE LAWBREAKERS, FAILS TO DETER REPEAT OFFENDERS 54 (2019), https://www.citizen.org/article/soft-on-corporate-crime-deferred-and-non-prosecution-repeat-offender-report/ [https://perma.cc/S36F-RKDB] (arguing in favor of making monitor reports—and any other DOJ documents tracking the progress of a DPA or NPA—public in order to increase transparency).

monitor's ability to conduct due diligence in a meaningful way.[89] A monitor receives unparalleled access to the corporation's employees, leadership, internal records, and policies and processes as it investigates the breakdown in corporate governance that led to the misconduct. Recognizing the validity of this argument, reports should be published in a redacted form in certain circumstances with the agreement of the corporation and the monitor.

As judges have increasingly expressed discomfort with these agreements and their secrecy, some judges insist on having the monitor's findings provided to the court, as is the case with the district judge overseeing the deferred prosecution of State Street Corp.[90] However, this comes at the risk of reversal on appeal, as was the case in 2016 when a district judge ordered a monitor's report related to HSBC Holdings Plc's progress towards improving its internal procedures to protect against money laundering.[91] There must be compromise to preserve the legitimacy of these negotiated deals without jeopardizing the company and its proprietary information.

Third, the DOJ should increase standardization and oversight, or at least communicate *some* standards. If there were some universally applicable standards set forth by the DOJ in the lifetime of a monitor (from appointment to conclusion) that would increase the transparency of the process, or how these things are carried out, and the desired compliance effectuated. The general lack of standardization serves to only push monitorships further into the shadows, to undermine the credibility of monitorship as an alternative to conviction, and to usurp its power as a vehicle for restoring social license.

For example, in *United States v. Apple, Inc.*,[92] Apple requested on appeal the vacatur of the district court's decision to appoint an independent monitor to oversee Apple's compliance with an order enjoining Apple from certain agreements regarding limiting its pricing authority for e-books.[93] Circuit Judge Dennis Jacobs, writing in dissent, recognized the dangers implicit in the lack of oversight or standards outlining the boundaries of permissible actions by the independent monitor—the independent monitor "started his inquiry immediately on his appointment; he multiplied interviews, document inspections, and discontents; he demanded to interview Apple executives without the presence of Apple's chosen counsel"[94]—and diagnosed that

89. *See, e.g.*, Julie DiMauro, *Let's Keep the Compliance Monitor's Report Confidential*, FPCA BLOG (Jan. 21, 2016, 8:18 AM), https://fcpablog.com/2016/01/21/julie-dimauro-lets-keep-the-compliance-monitors-report-confi/ [https://perma.cc/B3Z9-RHMP].

90. Nate Raymond, *State Street Judge Says She's No 'Rubber Stamp,' Wants to Know Monitor's Findings*, REUTERS (June 10, 2021, 5:44 PM), https://www.reuters.com/legal/transactional/state-street-judge-says-shes-no-rubber-stamp-wants-know-monitors-findings-2021-06-10/ [https://perma.cc/TP92-F3P7].

91. *Id.*

92. 791 F.3d 290 (2d Cir. 2015).

93. *Id.* at 335.

94. *Id.* at 353 (Jacobs, J., dissenting).

"[o]nce the Department of Justice selected [the independent monitor] and approved his hourly fee, [he] drew up his own mandate."[95]

In August 2015, after three years of work by a task force that consulted various judges, attorneys, and academics, the American Bar Association adopted standards to guide the process of selecting monitors, establishing the monitorship, and conducting the monitorship. Without commenting on the merit of this body of work or the likelihood it will influence internal DOJ policies, it is worth noting that this is the first time an organization outside of the DOJ has issued specific guidelines of this kind for monitors.[96]

Notably, in listing the reasons behind the Justice Department prioritizing fighting corporate crime, Deputy Attorney General Monaco said the following in her department-wide memo: "[W]e ensure public confidence in the fairness of our economic system and make clear that no one is above the law."[97] This statement recognizes the connection between public trust and social license in economic institutions like corporations, as well as the effect that a successfully deployed prosecution may have on future corporate criminal conduct.

Conclusion

Where corporate criminality has resulted in significant public backlash—rising to a revocation of the corporation's social license—corporate monitorship should be viewed as a vehicle for restoring social license. The role of an independent corporate compliance monitor to oversee the terms of the negotiated agreement provides the corporation with both a safe haven (the monitor as a proxy) and a platform (the monitor as evidence of change). Small reforms in the form of increased transparency would strengthen the effects of this argument. Increased transparency on the part of the corporation would expedite the restoration of social license. And further, increased transparency on the part of the DOJ may increase the effectiveness of the monitor by deterring future corporate criminal conduct and recidivism.

95. *Id.*

96. Amy Walsh, *Is the Opaque World of Corporate Monitorships Becoming More Transparent?*, AM. BAR ASS'N (Dec. 15, 2015), https://www.americanbar.org/groups/business_law/publications/blt/2015/12/08_walsh/ [https://perma.cc/7TMZ-KZ7S]; *see generally Criminal Justice Standards: Monitors*, AM. BAR ASS'N, https://www.americanbar.org/groups/criminal_justice/standards/MonitorsStandards/ [https://perma.cc/YE32-MYND].

97. *See* Monaco Memorandum, *supra* note 83, at 1.