

# Alternative Remedies

## Corporate Monitors and U.S. Antitrust Enforcement

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## U.S. Antitrust Monitorships

- To date, U.S. federal courts have imposed monitors for violations of competition laws in two matters:
  - *United States v. AU Optronics Corp.*, CR 09-00110-10SI (N.D. Cal. 2012) (criminal prosecution of liquid crystal display cartel conspirator)
  - *United States v. Apple, Inc.*, 12 CIV 2862 (DLC) (S.D.N.Y. 2012) (civil finding of illegally colluding to raise the prices of e-books)
- The Monitors in each of these matters have been former federal prosecutors
  - One from the U.S. Attorney's office in Chicago
  - The other from the U.S. Attorney's office in New York City



## United States v. AU Optronics Corp.

- First appointment of a Corporate Monitor in U.S. Department of Justice Antitrust Division (“Antitrust Division”) enforcement history
- AU Optronics Corp. (“AUO”) was convicted of conspiring to fix prices in the liquid crystal displays (LCD) industry
- Following an LCD cartel jury trial, Judge Susan Illston imposed as part of a September 2012 sentence the imposition of a 3 year corporate monitorship and a record USD 500 Million fine
- The AUO Monitor is directed to provide 12 quarterly Monitor reports, which to date have been confidential.
- The reports are sent to the U.S. Probation Office, with copies to AUO counsel and Antitrust Division counsel



## United States v. Apple, Inc.

- Second appointment of a Monitor (but in a civil case)
- After a non-jury trial, Apple, Inc. (“Apple”) was found to have engaged in price fixing in the e-book industry
- In October 2013, Judge Denise Cote imposed a Monitorship for Apple
- Apple appealed her order to the Second Circuit Court of Appeals
  - Apple contended, *inter alia*, that the appointment of a monitor was unwarranted and presented a major intrusion into its business practices
- In February 2014, the Second Circuit upheld her ruling appointing a Monitor in this price fixing matter

## Primary Source of U.S. Federal Monitorships

- The U.S. Foreign Corrupt Practices Act, as amended, 15 U.S.C. §§ 78dd-1, *et seq.* (“FCPA”), is a U.S. statute combatting global corruption
- The U.S. Department of Justice Fraud Section has a robust history of appointing Monitors over companies that violated the FCPA. Over a dozen FCPA corporate monitors have been appointed
- Monitors are typically appointed for 3 years, though they can be appointed for up to 5 years
- FCPA Monitor reports are typically filed annually
- There is a recent trend towards FCPA “Monitor Lites”: 18 months term and/or the company is allowed to self-report to DOJ.

## Corporate Monitorship Issues

- Selection and background of Monitor candidates
- Often former U.S. federal judges or U.S. federal prosecutors with significant compliance experience
- Authority of a monitor to obtain corporate documents (including ESI) and conduct interviews
- Frequency and confidentiality of proceedings and reports
- Audience and recipients of Monitor reports (including copies to company counsel, the Antitrust Division and the U.S. federal district court)
- Additional Monitor resources (*e.g.*, economists and forensic accountants)
- Monitoring steps that may advantage competitors



## Tarun's Thoughts and Recommendations on Corporate Monitorships

- Principal goal of a Monitor is to have the company succeed in its respective lines of business through ethical, competitive business practices, and to implement a company-wide “state of the art” compliance program to prevent recurrence of the misconduct that led to the imposition of a monitorship
- Monitorship must be fair to both the company that is being monitored and to the U.S. Department of Justice Antitrust Division
- If the Probation Officer and/or other person is the principal party to whom the Monitor will report, determine if the parties can obtain a Probation Officer or other person who has significant business crime experience



## Tarun's Thoughts and Recommendations on Corporate Monitorships (Cont.)

- Identify and interview the company's Chief Compliance Officer and understand the program's strengths and weaknesses as well as his or her independence, role at the time of the misconduct, resources and reporting chain(s)
- Meet with the company's board of directors promptly, outline the Monitor goals and plan and enlist their support in enhancing the company's compliance program
- Assess which current products and markets present the greatest anti-competition risks and prioritize those products and markets while not ignoring throughout the course of the monitorship other products and markets

## Tarun's Thoughts and Recommendations on Corporate Monitorships (Cont.)

- Review the underlying criminal charges, trial transcripts and key exhibits
- Assess the corporate compliance culture -- particularly “the tone at the very top” (e.g., the board of directors, CEO, CFO, and senior pricing and sales executives)
- Regularly consider and recommend appropriate compliance measures (e.g., antitrust policy, training, discipline, monitoring and messaging), and provide examples as appropriate in Monitor quarterly reports
- Ascertain from publicly available information what other industry competitors have put in place for their compliance programs (e.g., clear and practical codes of conduct)

## Tarun's Thoughts and Recommendations on Corporate Monitorships (Cont.)

- Conduct a First Round of Monitor Interviews that:
  - Reviews the charged misconduct but does not re-investigate the entire antitrust/competition matter. It is important to understand what is the nature of the misconduct, what culture led to the cartel behavior and what controls failed or did not exist.
  - Includes the principal pricing and sales personnel of the company
  - Assesses whether the company's business model has changed (e.g., new products, new markets and new competitors)
- Try to resolve disputes privately – with the input of the Probation Office, the Company, and the Antitrust Division



## Tarun's Thoughts and Recommendations on Corporate Monitorships (Cont.)

- General Interview Practices
  - Make clear at the outset who the Monitor as counsel represents and does not represent: to be clear the Monitor represents neither the company or its employees nor the Antitrust Division
  - Prepare careful notes of interviews in order to narrow the scope of follow-up interviews and avoid covering the same material in any such interviews
  - Consider obtaining photographs of the employees in order to be able to later recall the employee-interviewees when interviewing dozens of employees and later reviewing multiple memoranda of interviews



## Tarun's Thoughts and Recommendations on Corporate Monitorships (Cont.)

- General Interview Practices (Cont.)
  - Solicit officer and employee opinions on why the misconduct at issue is unlikely (or likely) to recur
  - Pose real world hypotheticals to the interviewees
  - Take steps in advance to secure an interpreter where necessary
  - Treat the employees and officers with respect and fairly but do not hesitate to be firm and repeat the question whether the answer has not been responsive, due to language difficulties, cultural differences or other reasons.

# Tarun's Final Thought and Recommendation

- Reports and Grades
  - Consider various categories of “grades” for the company including Code of Conduct, Training, Disciplinary, Document Production, Tone at the Top and issue grades annually, semi-annually or, in problem areas, even more frequently
  - Without grades, there is a risk that the company and its officers may read what they want to read, see only the positive and miss criticisms and unsatisfactory progress
  - Grades can timely identify problem areas that need to be addressed and prioritized for improvement.
  - All cultures basically understand As, Bs, Cs and Ds .

## Robert W. Tarun



Robert W. Tarun (robert.tarun@bakermckenzie.com) is a partner at Baker & McKenzie LLP, in its Chicago and San Francisco offices. He has handled over 100 sensitive internal investigations in the United States and over 55 foreign countries. He regularly counsels public companies on antitrust, Foreign Corrupt Practices Act (FCPA) and corporate governance matters. He has conducted antitrust and anti-bribery training for multinational clients on five continents. Mr. Tarun represents and defends U.S. and non-U.S. corporations and executives in federal grand jury investigations, Securities and Exchange Commission proceedings, and in trials across the country involving conspiracy, criminal antitrust (price fixing and bid rigging), export violations, financial fraud, FCPA charges, import violations, mail and wire fraud, securities fraud (accounting, insider trading, and revenue recognition), and tax fraud (U.S. and international) matters. He also represents corporations and executives in commercial litigation matters. He has tried over 50 federal jury trials across the country. In 2012, Mr. Tarun was appointed the first corporate antitrust monitor ever. *United States v. AU Optronics*.

Mr. Tarun served as a federal prosecutor for 10 years in Chicago, where he was the Executive Assistant U.S. Attorney from 1982 to 1985. In 1993 he co-authored and has since annually updated the treatise CORPORATE INTERNAL INVESTIGATIONS (Law Journal Press 1993-2014). In 2010, he authored the ABA best selling THE FOREIGN CORRUPT PRACTICES HANDBOOK: A PRACTICAL HANDBOOK FOR MULTINATIONAL GENERAL COUNSEL, TRANSACTIONAL LAWYERS AND WHITE COLLAR CRIMINAL PRACTITIONERS (ABA 3d. 2013). In 2010, he, along with Peter P. Tomczak, wrote the Introductory Essay for the Twenty-Fifth Anniversary White Collar Crime Survey – *A Proposal for a United States Department of Justice Foreign Corrupt Practices Act Leniency Policy*, 47 Am. Crim. L. Rev. 153 (Spring 2010).

In 1992, Mr. Tarun was inducted into the American College of Trial Lawyers, chaired its Federal Criminal Procedure Committee from 1999 to 2002, and served on its Board of Regents from 2003 to 2008. He drafted its *Report on the Proposed Codification of Disclosure of Favorable Information under Federal Rules of Criminal Procedures 11 and 16*, 41 Am. Crim. L. Rev. 93 (Winter 2003), and served as the Regent Liaison for its report *Recommended Practices for Companies and Their Counsel in Conducting Internal Investigations*, 46 Am. Crim. L. Rev. 73 (Winter 2009).

From 2000 to 2005, Mr. Tarun taught “White Collar Criminal Practice” as a Lecturer-in-Law at the University of Chicago Law School. He has served on the planning committee and chaired and been a regular panelist at the annual American Bar Association National Institute on White Collar Crime and the ABA/IBA International Cartel Workshops in Paris, Rome, San Francisco and Vancouver. Mr. Tarun is listed in Best Lawyers in America (Commercial Litigation and White Collar Criminal Defense), Chambers USA America’s Leading Business Lawyers, Who’s Who Legal The International Who’s Who of Business Lawyers – Business Crime Defence, Illinois Leading Lawyers—Commercial Litigation and Criminal Defense, The 100 Top Lawyers in Illinois, Who’s Who Legal Illinois Leading Business Lawyers, and Who’s Who Legal California Leading Business Criminal Lawyers. In 2009, the Ethisphere Institute named Mr. Tarun to its first annual Top Guns List, a national list of leading white-collar criminal attorneys who assist corporations in effectively handling corporate compliance issues, and was the only lawyer west of Washington, D.C. so recognized. Mr. Tarun is admitted to practice before the California and Illinois bars, numerous federal circuit courts of appeals, and the United States Supreme Court.