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DOJ Required to Produce to Media Organization Certain Information Related to Siemens AG Monitor

Companies subject to independent compliance monitors appointed as part of corporate resolutions with the U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC) have, until recently, enjoyed a presumption that information and documents provided to the monitor, who in turn may provide them to the DOJ or SEC, would remain confidential. Yesterday, however, a federal court in the District of Columbia ruled in *100Reporters LLC v. U.S. Dept. of Justice*, No. 14-1264 (RC), (D.D.C. June 13, 2018), that, pursuant to a Freedom of Information Act (FOIA) request submitted by a media organization, DOJ must produce certain records related to the monitorship imposed on Siemens AG as part of its 2008 plea agreement to resolve its liability under the Foreign Corrupt Practices Act. DOJ had attempted to withhold or redact documents under exemptions to FOIA that would permit withholding sensitive commercial or personal information or information related to DOJ's decision-making process regarding its ongoing review of Siemens' compliance with mandated remedial measures.

After conducting an in camera review of the records, the court held that DOJ was justified in withholding the annual monitor reports, drafts of reports and work plans, and related correspondence with the monitor and monitor's counsel. These materials generally included information on the monitor's opinions, recommendations, and deliberations with DOJ concerning what steps the monitor should take to enable him to fulfill his mandate. The court, however, held that DOJ must produce the monitor's final work plans, Siemens compliance plans, training materials, and numerous related documents, including documents submitted with the monitor reports, subject to legitimate redactions for commercial or personal information. The court found that such information simply conveyed steps that were already taken by the monitor or information about Siemens operations or subsidiaries that was not subject to a FOIA exemption.

The court was sensitive to DOJ's argument that information used to generate monitor reports should not be disclosed because companies provide monitors with complete access to records only if they believe the information they provide will remain confidential. Nevertheless, the court held that if the information did not relate to DOJ's decision-making process or otherwise fall within a recognizable exemption to FOIA – such as information that can be deemed trade secrets, confidential commercial or financial information, or personal information – FOIA required its disclosure. The court did allow DOJ

to propose redactions to materials, but required DOJ to properly identify material it proposed to withhold from production.

In light of the court's decision, companies negotiating potential independent compliance monitor agreements with DOJ and SEC must be mindful that information supplied to DOJ and SEC during the course of a monitorship may no longer be easily withheld from media organizations and other third parties seeking such information under FOIA. Accordingly, companies producing documents to monitors should take precautions to ensure that any

information which could qualify as trade secrets, confidential commercial or financial information, or personal information of their employees, is clearly identified and designated as such. In addition, companies may request that DOJ and monitors likewise handle such material with heightened care, such that DOJ can more easily defend non-production of such information under a FOIA request. We will provide further analysis of this decision and its implications for corporate monitorships in the near future.

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