



An Independent Corporate Monitor’s Perspective on Pre-Trial Diversion/Government Settlement Agreements

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Pre-Trial diversion or settlement agreements (“Agreements”) have been increasingly used as a tool by government agencies as a means of resolving corporate liability for misconduct or fraud perpetrated by an organization’s employees, sub-contractors, agents, representatives, etc. Such Agreements go by many names, such as, but not limited to: deferred prosecution agreements, non-prosecution agreements, plea agreements, consent orders, administrative agreements, corporate integrity agreements, and compliance agreements. While there may be some variances in the administration and oversight among these various titles, all of these Agreements generally strive to achieve a common purpose – to help ensure against similar misconduct by means of building and/or strengthening corporate compliance & ethics programs and internal controls¹.

In a growing number of instances, the government is incorporating into such Agreements the requirement that the organization engage an independent third-party² (“Monitor”) to verify to the government that the organization is adhering to the terms of an Agreement in a timely and effective manner and, in some instances, to also assess ethical tone and/or conduct specific examinations or audits. The organization is responsible for negotiating with, hiring and paying the Monitor, but does not control the Monitor’s work and is not the primary party to whom the Monitor makes reports.

The scope of a Monitor’s duties and responsibilities is dictated by the terms of the Agreement, which the Monitor had no part in creating or contributing to. One of, if not the primary area of focus of these Agreements, is the organization’s “Corporate Compliance and Ethics Program”³ (“Program”). While Agreements have generally improved much in terms of their understanding and addressing the elements of an effective Program over the last several years, they continue to vary greatly and sometimes lack a full appreciation for what constitutes, according to professional Corporate Compliance & Ethics Professionals, a realistic and broadly effective Program that makes sense for the organization at issue. Similarly, some Agreements focus too narrowly on just the compliance, control and ethical failures associated with the underlying misconduct at issue, leaving open opportunities for failures in other compliance, control and ethical risk areas that can lead to future misconduct of concern to the government.

¹ According to a DOJ Memorandum issued by Acting Attorney General Craig S. Morford to the United States Attorneys on March 7, 2008 (commonly called the “Morford Memo”), “A monitor’s primary responsibility should be to assess and monitor a corporation’s compliance with those terms of the agreement that are specifically designed to address and reduce the risk of recurrence of the corporation’s misconduct, including, in most cases, evaluating (and where appropriate proposing) internal controls and corporate ethics and compliance programs.”

² Many titles have been used for this independent third-party, including, but not limited to: Independent Corporate Monitor, Compliance Monitor, Third-Party Monitor, Special Compliance Officer and Business and Ethics Program Evaluator.

³ The title “Corporate Compliance and Ethics Program” is the commonly accepted nomenclature in the Corporate Compliance Industry. While Agreements use various titles in this regard, their underlying requirements share a common focus on corporate compliance program elements, including ethical tone, and generally conform to §8B2.1 of the United States Sentencing Guidelines Manual – “Effective Compliance and Ethics Program.”

Also, the specific section(s) of many Agreements concerning a Monitor, which may include, among other things, the selection process, independence requirements, specific scope, authority, access to people & records, liability, and reporting, may not include all of the issues, areas or aspects important to a Monitor's ability to successfully and efficiently fulfill his or her monitoring obligations. Currently, agencies vary greatly in how a Monitor is selected & approved and which authorities, qualifications and scope are believed necessary for the role.

Agencies also have varying levels of experience working with Monitors, with some doing so routinely while others are only just beginning to appreciate how such a role can improve the effectiveness of an agency's post-settlement oversight, freeing up their resources to meet current and future demands. Even some agencies that have required Monitors relatively frequently may not be using them to their full potential, perhaps out of a concern about costs to the company and/or not fully appreciating the capabilities and benefits available to them from an experienced and effective Monitor.

Because a Monitor has no role in creating or contributing to the Agreement, yet is bound by such Agreement in terms of scope and other considerations, an unanticipated quandary is created, which significantly contributes to one of the most contentious aspects of the monitoring process – scope. Scope is contentious because it dictates costs. Monitors normally work on an hourly rate, like most professional service providers, so the scope of the Agreement becomes the scope of the Monitor and the Agreement's scope drives the amount of work required by the Monitor to fulfill his or her reporting obligation(s).

Importantly tied to costs is the experience of the Monitor, which determines the efficiency and effectiveness by which the Monitor is able to determine and complete the work necessary as per the Agreement's scope. While the qualifications of a Monitor are many and varied, the single most important would arguably be their experience with Corporate Compliance & Ethics Programs and internal controls, along with their experience of having previously served as a Monitor.

The lack of input into the terms/requirements of an Agreement by the Monitor can create difficulties, any or all of which can cause conflict and ambiguity, leading to wasted time, ineffective end results, and additional costs. These could include, but would not be limited to:

1. The requirements of the Agreement may not capture and assure the Agreement's "spirit";
2. The Corporate Compliance & Ethics Program related requirements of the Agreement may not be consistent with that necessary to establish an effective Program in accordance with Corporate Compliance & Ethics industry standards and practices;
3. The requirements of the Agreement may not be sufficiently broad or too narrowly focused on the underlying substantive misconduct, leading to a Corporate Compliance and Ethics Program that is only partially complete and effective and not significantly reducing the likelihood of recidivism;
4. The requirements of the Agreement may incorporate timetables that are unrealistic and/or inconsistent with how a Corporate Compliance & Ethics Program should logically develop, encouraging a "check the box" attitude over one of "spiritual compliance" by the organization;
5. The Monitor may not be provided sufficient time, authority, resources, and access to records and people necessary to most effectively and efficiently meet the Monitor's obligations;

6. The Monitor's scope may be too narrowly defined or too broad, the former limiting the Monitor's ability to best serve both the organization and government agency, while the latter enabling inefficiencies and/or abuse of the Monitor's authority;
7. The Monitor may not have sufficient transparency and accountability for his or her work, recommendations, and/or fees; and
8. The Monitor's independence may not be sufficiently ensured.

At present, there are no standards or "best practices" applicable or available to Monitors. The American Bar Association's Criminal Justice Section (ABA/CJS) created a Task Force to develop such Standards and best practices, but their work has not yet been completed. Also, the Association of Independent Corporate Monitors is only now in the process of being formed and it may be some time before it publicizes its Standards and best practices. With no such Standards or best practices currently existing, it is difficult to set expectations among the parties (Organization, Government Agency and Monitor) and hold the Monitor accountable for his or her actions.

The two key areas of an Agreement most relevant to a Monitor are: (1) those associated with what is required of the organization as it relates to a Corporate Compliance & Ethics Program and (2) that specifically related to the Monitor. The former section relates to that necessary to establish and maintain an effective Program⁴, which the Monitor will assess, test and report on, while the latter section concerns the selection, qualifications, authority and reporting (among other things) for the Monitor.

On the pages that follow is a "Sample Administrative Agreement"⁵ that includes language for each of these sections from the perspective of an experienced Monitor and Certified Compliance and Ethics Professional. Incorporated into it are Corporate Compliance & Ethics Program industry best practices, as well as best practices for Monitors according to a key member of both the ABA/CJS Task Force on Corporate Monitors and the Association of Independent Corporate Monitors.

Of particular note are paragraphs five (5), eight (8) and nine (9) under the "Terms and Conditions" section, which could be adopted in whole or piecemealed in accordance with the specifics of each matter (#5) and each Agency's particular policies/procedures as it relates to Monitors (#8 & #9). A Word version of the following Sample Administrative Agreement may be requested by emailing Information@IndependentCorporateMonitor.org.

⁴ In accordance with §8B2.1 of the United States Sentencing Guidelines Manual – "Effective Compliance and Ethics Program."

⁵ Though this "Administrative Agreement" was done in the context of a suspension and debarment matter, the concepts and language, particularly those in paragraphs 5, 8 and 9 under the Terms and Conditions section, could be adapted and applied in criminal or other regulatory Agreements.

SAMPLE ADMINISTRATIVE AGREEMENT

This Administrative Agreement (“Agreement”) is entered into and effective this *XX*th day of *MONTH, YEAR* (the “Effective Date”) between and among *XXXXXX*, on behalf of itself, *XXXXXX*, and *XXXXXX* (collectively, “*XXX*” or “the Company”) and the U.S. Department of *AAA* (“*AAA*”) to resolve the suspension of *XXX* that became effective on *XX/XX/XX*.

I. PREAMBLE

- ***BULLET POINTS AND BACKGROUND INFORMATION AS AAA DETERMINES APPROPRIATE***
- In order to ensure the *AAA* of its present responsibility as a government contractor, *XXX* agrees to take the remedial actions specified in this Agreement and to adhere to each of the Terms and Conditions of this Agreement.
- *XXX* acknowledges that each of the Terms and Conditions of this Agreement set forth below, including the retention of a third-party Monitor (“Monitor”) as set for herein at Paragraph 8 are central to the decision by the *AAA* to enter into this Agreement.
- The *AAA* has determined that, in light of all the information now available, including the information provided by *XXX* in response to the Notice of Suspension regarding actions taken and additional actions agreed to be undertaken by *XXX* as specified in the Terms and Conditions of this Agreement, adequate assurance exists that federal government procurement and non-procurement programs may no longer be at risk in doing further business with *XXX* and continued suspension is not necessary at this time to protect federal government interests.

XXX commits itself to exemplary corporate citizenship, best practices in effective corporate governance, the highest principles of honesty and professionalism, the integrity of the federal government contracting process and service, and a culture of openness, accountability, and compliance throughout the Company. To advance and underscore this commitment, *XXX* agrees to take the following actions as follows:

II. TERMS and CONDITIONS

1. ***Term.*** The period of this Agreement shall be three (3) years from its Effective Date. The Effective Date shall be the date this Agreement is signed by ***NAME OF GOVERNMENT OFFICIAL AND TITLE***, who also serves as the *AAA*’s Suspending and Debarring Official.
2. ***Termination of Suspension.*** Effective upon the execution of this Agreement by the Suspending and Debarring Official, the suspension of *XXX* terminates. The Suspending and Debarring Official agrees to promptly remove *XXX*’s ineligibility listing.
3. ***Employment of ZZZ***⁶. *XXX* agrees to exclude *ZZZ* from serving as an agent, representative, or principal, including being a key employee, for purpose of the performance of any federal procurement and non-procurement award pending the outcome of *ZZZ*’s debarment proceeding and during any period of debarment that may be imposed by the Suspending and Debarring Official. If and when *ZZZ* again is eligible to participate in federal government procurement and non-procurement and the Company decides to employ *ZZZ*, it will do so only after *ZZZ* has received the relevant training referenced under paragraph 5(J) and the Company is satisfied that *ZZZ* will comply with those rules.

⁶ This paragraph would be used in cases involving an individual(s) from the organization.

4. Refund of Profits from the Contract. The Company shall refund to the AAA all profits from the Contract.
5. Corporate Compliance and Ethics Program. XXX will enhance its existing Corporate Compliance and Ethics Program (“Program”). XXX’s Program shall exercise due care and due diligence to implement and/or enhance its Program designed to prevent and detect criminal conduct and/or ethical misconduct, to promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law and applicable regulatory requirements and obligations, and satisfies fully each element of an effective compliance program as set forth in Section 8B2.1 of the United States Sentencing Guidelines as in effect during the term of this Agreement. XXX’s Program shall be reasonably designed, implemented and enforced so that the Program is generally effective in preventing, detecting and responding to criminal conduct and/or ethical misconduct, including, but not limited to the following specific actions:
 - A. Governing Authority: XXX’s governing authority (hereafter referred to as the “Board”) shall be knowledgeable about the content and operation of the Program and exercise reasonable oversight with respect to the implementation and effectiveness of the Program. The Board may be assisted in accomplishing this direct oversight responsibility by using a Compliance and Ethics Committee of the Board and pursuant to a Compliance Charter, which the Board shall adopt.
 - B. Chief Compliance and Business Ethics Officer: XXX will appoint, subject to AAA and AAA OIG’s approval, a Chief Compliance and Business Ethics Officer (“CBEO”) who shall (1) be assigned overall responsibility for the Program; (2) have direct and unfettered access to the Board; (3) be of sufficiently high-level rank within the Company; (4) be empowered and provided with the budget and resources necessary to maintain an effective Program throughout the organization; (5) have the requisite level of knowledge and experience, in the opinion of the AAA OIG or the Monitor to design, implement and administer an effective Corporate Compliance and Business Ethics Program within the Company; and (6) have a reputation for honesty and integrity and, as verified through reasonable efforts and due diligence, not have engaged in illegal activities or other conduct inconsistent with an effective Compliance and Business Ethics Program.
 - C. Compliance Advisory Council: XXX will establish a Compliance Advisory Council (“CAC”), chaired by the CBEO and consisting of an appropriate number of senior management and other key roles/persons. The Compliance Charter shall set forth the composition and responsibilities of the CAC.
 - D. Annual Compliance and Business Ethics Program Risk Assessment: Within ninety (90) days of the Effective Date of this Agreement and annually thereafter, the CBEO will conduct a risk assessment to identify all compliance and ethics risks reasonably facing XXX. The CBEO shall prioritize and document such risks in the form of a report (“XXX’s Annual Compliance and Business Ethics Program Risk Assessment”), which the CBEO shall present to the Board for review, comment, input and approval.
 - E. On-Going Compliance and Business Ethics Risk(s) Monitoring: The CBEO will establish a system to continuously monitor, identify and document relevant emerging compliance and business ethics risks for the Company.
 - F. Annual Compliance and Business Ethics Program Workplan: The CBEO will develop an annual Workplan (“Annual Compliance and Business Ethics Program Workplan”) designed to address XXX’s risks, as prioritized and approved by the Board and documented in XXX’s Annual Compliance and Business Ethics Program Risk Assessment. The Workplan shall be presented to the Board for review and approval before being implemented. The Workplan will detail what actions the CBEO will take in

exercising the CBEO's assigned responsibility for the Program and should, at a minimum, include the areas covered and agreed to in this Agreement.

- G. **Code of Business Conduct:** XXX shall adopt and/or update its Code of Business Conduct to assure that the Company establishes an ethical tone consistent with responsible government contractors and otherwise endorses and sets forth an expectation that all employees demonstrate a high degree of ethical integrity and responsibility. The Code of Business Conduct shall be (1) approved and endorsed by the Board; (2) communicated to all employees by Executive/Senior Management; and (3) published and easily available/accessible to all employees.
- H. **Compliance Policies:** In accordance with XXX's policy submission and approval process/procedure (i.e. Legal review, Board approval, etc.), XXX shall review, update, revise and/or create Compliance Policies ("Policies"). Such policies shall (1) address the areas of prioritized risks identified in and in accordance with the Annual Compliance and Business Ethics Program Risk Assessment; (2) be in languages and otherwise easily understandable for all XXX employees; and (3) be published, disseminated and easily available/accessible to all employees. XXX also will institute a system to timely communicate new policies or policy updates to all employees, require certifications within a reasonable period of time, and track and enforce certifications.
- I. **Compliance Certifications:** Within sixty (60) calendar days of the Effective Date of this Agreement and annually thereafter, XXX shall require all employees (full-time, part-time and temporary) at all levels, including the Board, to certify that the employee (a) has received a copy of, read and understands XXX's Policies and Code of Conduct, and (b) has been advised that compliance with XXX's Policies and Code of Conduct is a condition of continued employment at XXX (to the extent permitted by law). XXX will (1) institute a system to track and assure all employees complete their initial and annual certifications timely; (2) require that new hires complete Certifications within thirty (30) days of hire; (3) require and track certifications associated with new or updated policies (see 5.(H) above); and (4) maintain a record of all Certifications.
- J. **Training:** XXX will provide training as follows:
- I. **Specific to the Agreement:**
- a. **Training by External Contractor:** XXX shall hire an external party, who is approved by the AAA, to conduct a full-day training session on laws and regulations applicable to government contractors. The training must also include specific training on (INSERT THOSE AREAS/VIOLATIONS WHICH GAVE RISE TO THE AGREEMENT). XXX shall hire the external contractor within thirty (30) calendar days of the Effective Date of this Agreement. This period may be extended by the Suspending and Debarring Official for good cause. This training session shall be attended by (INSERT RELEVANT PARTIES WHOM THE AAA DETERMINES SHOULD RECEIVE THIS SPECIFIC TRAINING). XXX will complete this training by (INSERT DATE). XXX will record the training session or otherwise make the training materials available for employees unable to attend the live-training session. XXX will track and assure that all required persons receive this training.
- b. **Ethical Leadership:** XXX shall hire an external party, who is approved by the AAA, to conduct a full-day training session on the topic of ethics in leadership and how the leaders of organizations can effectively and positively impact the ethical tone of employees throughout the organization. XXX shall hire the external contractor within thirty (30) calendar days of the Effective Date of this Agreement. This period may

be extended by the Suspending and Debarring Official for good cause. This training session shall be attended by (SHOULD BE HIGHER LEVELS OF LEADERSHIP - INSERT RELEVANT PARTIES WHOM THE AAA DETERMINES SHOULD RECEIVE THIS SPECIFIC TRAINING). XXX will complete this training by (INSERT DATE). XXX will record the training session or otherwise make the training materials available for those unable to attend the live-training session. XXX will track and assure that all required persons receive this training.

- c. Quarterly Training: Beginning (INSERT DATE AND/OR TIMING) and continuing for each quarter for the duration of this Agreement, XXX will conduct quarterly seminars focused primarily on the compliance aspects of federal contracting. These supplementary training sessions shall be attended by (INSERT RELEVANT PARTIES WHOM THE AAA DETERMINES SHOULD RECEIVE THIS TRAINING) and XXX will track and assure that all required persons receive this training. Upon the implementation of risk-based training (see 5.II.c. below), this quarterly training requirement may be removed if so recommended by the Monitor and approved by the AAA.

II. Compliance and Ethics Program Based Training:

- a. All Employees: Upon completion and/or revision of the Policies and Code of Conduct, as per the Terms of this Agreement (Paragraphs 5.(G) and 5.(H)), the Company shall provide a general training session for all employees and thereafter require and provide general training on the Code of Conduct and Policies on an annual basis. The CBEO shall track and assure that all employees receive this training.
- b. Board Members and Senior Leadership: In addition to the training requirements as per Paragraph 5.(A) and 5.(J)(b). above, the Company shall provide annual training specifically on XXX's Code of Conduct and Policies to all Board Members (i.e. members of XXX's governing authority). The CBEO shall track and assure that all Board Members receive this training.
- c. Risk-Based Training: Conduct in-depth training on specific Policies, in accordance with risks (see Paragraph 5.(D) - Annual Compliance and Business Ethics Risk Assessment) and applicability, for relevant employees⁷. The CBEO shall track and assure that all required persons complete such training.
- d. Agents & Third Parties: Assess and determine the necessity to train third-parties who act on behalf of or represent XXX's business (i.e. subcontractors) on XXX's Code of Conduct, compliance & ethics Policies and/or specific risk-based policies. The CBEO shall track and assure that all required persons complete such training.
- e. New Hires: Institute and require training on XXX's Code of Conduct and Policies for all newly hired persons as part of the new hire orientation process or as otherwise appropriate, but within thirty (30) days after being hired. This includes full-time, part-time and temporary employees, regardless of level or position. The Company's Director of Human Resources or employee in charge of hiring personnel shall track and assure that all newly hired persons complete such training.

⁷ For example, if gifts are identified and prioritized by XXX as a high compliance risk, employees subject to such risk should be identified and receive specific training on XXX's Gift Policy, while "backoffice" employees with little or no risk for violating this policy may not need to receive such specific training.

- f. **Embedment:** Seek and identify opportunities to incorporate compliance and ethics training points into routine meetings and communications, as appropriate, throughout the Company.
- K. **Internal Controls:** Annually, in accordance with XXX's Annual Compliance and Business Risk Assessment, review and test the effectiveness of internal controls in preventing and detecting Policy and/or Code of Conduct violations and violations of laws or regulations. XXX will remediate any control weaknesses identified.
- L. **Excluded Parties:** XXX will develop an internal policy that XXX shall not knowingly hire or engage an individual or party who is suspended or debarred or otherwise declared ineligible for federal programs to work as an employee, agent, subcontractor, vendor, supplier, joint venture, teaming partner, representative, or principal, including being a key employee, to work on any federal procurement or non-procurement award.
- I. **New Hires:** Incorporate into XXX's new hire process checks of all prospective employees against the System for Award Management (www.sam.gov - "SAM") and/or Excluded Parties List System (<https://www.epls.gov> - "EPLS") and maintain documentation of results in company files.
 - II. **Current Employees:** Assure that XXX's current employees are not prohibited from working on federal contracts and incorporate into XXX's Annual Compliance and Business Ethics Program Workplan statistical sampling of current employees for testing against SAM/EPLS.
 - III. **Third Parties:** Assure that all currently active agents, representatives, subcontractors, vendors, suppliers, joint ventures, teaming partners or others with whom XXX may do business with are not prohibited from working on federal contracts. XXX will also institute a system to check all new third parties against SAM/EPLS and Federal Awardee Performance and Integrity Information System ("FAPIIS") as part of the opportunity/bidding and/or new vendor setup process, as appropriate, and incorporate statistical sampling of such parties into XXX's Annual Compliance and Business Ethics Program Workplan.
- M. **Internal Investigations:** Create a policy and procedure detailing how all internal investigations will be conducted, documented and reported to assure:
- I. CBEO awareness of all complaints and allegations concerning compliance violations and/or ethical misconduct
 - II. CBEO oversight of or high-level involvement⁸ with all internal investigations involving compliance violations and/or ethical misconduct
 - III. The conducting of all internal investigations in a manner that satisfies independence requirements and best practices
 - IV. Anonymity of complainants, as appropriate
 - V. Appropriate notifications are made to the Board and/or Executive Management
 - VI. Appropriate disciplinary actions or criminal referrals are made for those violating policies, laws or regulations
 - VII. Persons in "gatekeeper" or internal control roles are held accountable for failures
 - VIII. Disclosures are made in compliance with the FAR Mandatory Disclosure Rule, other requirements and best practices
 - IX. Identification and remediation of any internal control failures or weaknesses
 - X. Application and effectiveness of XXX's Non-Retaliation Policy

⁸ For significant matters (i.e. those which may require independent external investigations, necessitate specific expertise, or be deemed by the Board to require attorney/client privilege) the CBEO need not have oversight responsibility, but should remain involved and/or informed of the investigation to the extent permissible.

- XI. *Complainants are updated on actions and results of investigative actions, as appropriate*
- XII. *CBEO includes a listing of all complaints, allegations and investigations to the Board in his/her scheduled Board Reports*
- XIII. *Documentation of investigation in a manner that complies with investigative best practices (i.e. memos of interviews, audits, etc.)*
- XIV. *Formalized reports detailing the investigation and findings*

N. **Incentives/Disciplinary Measures:** *Create incentives for employees to perform in accordance with the Program, Policies and Code of Conduct, including, at a minimum, incorporating compliance and ethics components into employee annual performance goals and reviews with an understanding that failure to meet such annual performance requirements may result, to the extent permitted by law, in appropriate disciplinary actions. Also, create, enforce and publicize internally, in a manner consistent with applicable employment laws and policies (i.e. hypothetically or as otherwise deemed appropriate and consistent with XXX's Policies and applicable laws and regulations), disciplinary actions for violations of Policies or the Code of Conduct. Disciplinary actions shall apply equally to all employees, regardless of level or seniority within the Company and be fair and just, in accordance with the violation(s).*

O. **On-Going Monitoring of the Program:** *Design and implement on-going procedures, monitoring and/or auditing to test and assure compliance by employees and other relevant parties with XXX's Program, Policies and Code of Conduct, including at a minimum:*

- I. **Hotline:** *XXX will (IMPLEMENT/CONTINUE) its toll-free, 24-hour dedicated Hotline and/or online capability to anonymously report suspected Policy/Code of Conduct violations, criminal actions and/or misconduct relating to federal procurement. XXX will advertise/publicize the Hotline to all employees and other parties, as appropriate, including through the use of posters⁹ in highly visible and conspicuous areas, in employee manuals/handbooks, on XXX's intranet, and within XXX's Policies. XXX shall also design and implement a Hotline Policy/Procedure, consistent with XXX's Internal Investigations Policy (see Paragraph 5.(M) above), that includes: (1) a log of all calls, allegations and complaints; (2) CBEO and management notification plan; (3) incorporation into XXX's Incentives/Disciplinary Measures, as appropriate (see Paragraph 5.(N) above); (4) complainant follow-up actions/process; and (5) reporting.*
- II. **Employee Interviews:** *As part of XXX's Compliance and Ethics Program Workplan, conduct interviews¹⁰ of employees to assess the effectiveness of compliance training(s) and internal controls, as well as employee understanding and application of XXX's Policies and Code of Conduct.*
- III. **Surveys:** *Incorporate into XXX's Annual Compliance and Business Ethics Program Workplan a "Compliance and Ethics Survey" of all or a statistically relevant sample of XXX's employee population. This survey should include metrics as determined appropriate by XXX's CBEO.*
- IV. **Audits:** *XXX will incorporate into XXX's Annual Compliance and Business Ethics Program Workplan audits designed to test the effectiveness of internal controls and employee understanding and compliance with XXX's Policies and Code of Conduct. Audit focus areas should be selected in accordance with XXX's Annual Compliance and Business Ethics Risk Assessment and take into*

⁹ Such Hotline posters should, at a minimum, contain the Hotline's contact information, the ability to report anonymously, that employees have an obligation to report and a reference to XXX's Non-Retaliation Policy.

¹⁰ The use of statistical and random sampling is appropriate.

consideration factors relevant to the genesis of this Agreement, industry dynamics and audit best practices.

- P. Reporting: The CBEO shall formalize annual reporting to the Board (or a Committee thereof) that will include sufficient information to enable the Board to exercise sound and effective oversight and governance of XXX's Compliance and Business Ethics Program.
6. OIG Fraud Awareness Training. XXX agrees to permit AAA OIG to conduct fraud awareness training in any XXX office, as requested for the duration of this Agreement. These training sessions shall be attended by all XXX managers and employees involved in the procurement or management of federally funded work. This training shall be provided at no cost to XXX.
7. Reporting. XXX shall submit a semi-annual written report to the Monitor (see Paragraph 8 below), the AAA Suspending and Debarring Official and AAA OIG by the close of business (INSERT DATES – I.E. MAY 31ST AND NOVEMBER 15TH) for each year of the Agreement. In each report, XXX shall describe the measures it has taken to comply with each of the Terms of this Agreement. Within the report, associated with its relevant paragraphs in the Agreement, XXX will also include:
- A. Compliance and ethics training conducted and relevant information concerning persons who attended;
 - B. Informal notifications or initiatives related to the compliance program;
 - C. Any significant changes in the directives, instructions, policies or procedures implemented in furtherance of XXX's Compliance Program and/or which XXX believes to demonstrate actions that go above and beyond the requirements of this Agreement;
 - D. The status of any federal or state investigation or audit of XXX's own conduct or conduct by its principals, employees and/or former employees that might be imputed to XXX, and legal proceedings related to such investigation resulting in search warrants, subpoenas, criminal charges, or civil agreements with governmental agencies (excluding EEOC or State Human Rights Commission issues, Department of Labor wage and hour issues, and other such complaints, issues or settlements unrelated to government contracting compliance and financial record-keeping matters);
 - E. A listing of DCAA audits and related actions (routine or otherwise) during the period;
 - F. Notwithstanding XXX's obligations as per Paragraph 11 of this Agreement, all Hotline activity and other investigations by the CBEO. The report shall summarize all complaints made to the hotline, and all other instances of compliance or ethical misconduct reported to the CBEO. The report shall include, at a minimum, the nature of the reported or suspected misconduct, the results of the internal investigation, and any corrective action taken by the Company. Subject to the attorney-client privilege and reporting party confidentiality, details on each case shall be made available to the AAA upon request;
 - G. Progress on the Monitor's "Recommendations" (see Paragraph 9 below); and
 - H. Any other information required by this Agreement.
8. Third-Party Monitor. XXX agrees that until the expiration of this Agreement, it will retain at its own expense an independent third-party ("Monitor") to evaluate and monitor XXX's compliance with this Agreement.
- A. Retention, Approval and Administration:
 - I. The Monitor must be an independent third party, and not an employee or agent of the Company or the AAA. If the Monitor is an attorney, no attorney-client relationship shall be formed or deemed to exist between the Monitor and the Company. The AAA will endeavor to approve highly-qualified Monitor candidates, free of any potential or actual conflict of interest, and suitable for the assignment at hand, from a pool of candidates proposed by XXX. XXX will have thirty (30) calendar days from the Effective Date of this Agreement to propose candidates to the AAA. Though the AAA prefers that XXX identify and

present candidates independently from the AAA, the AAA will, at the Company's request, provide the identities of potential Monitor candidates whom the AAA has determined, in its sole discretion, to be qualified and acceptable to the AAA for this matter. The AAA and XXX will endeavor to complete the Monitor selection process within forty-five (45) days of the Effective Date of this Agreement. If no acceptable candidates have been presented to the AAA within forty-five (45) calendar days of the execution of this Agreement, XXX will retain the Monitor of AAA's choosing. The AAA will make efforts to approve/select a Monitor with the following qualifications: (1) access to sufficient resources to carry out the duties of the Monitor as described in this Agreement; (2) expertise in corporate compliance and ethics programs; (3) experience with internal investigations or the investigative process; (4) absence of a prior relationship with XXX for the three (3) years preceding this Agreement (unless such relationship was/is as a Monitor for XXX); and (5) absence of a conflict of interest relative to both XXX and AAA. The following qualifications will also be considered: (1) prior monitorship or corporate oversight experience; (2) experience with the federal regulations, requirements and standards associated with government contracting; and (3) experience evaluating and improving Corporate Compliance and Ethics Programs. XXX agrees that it will not employ or be affiliated with the Monitor for a period of not less than one (1) year from the date the monitorship is terminated.

- II. The Monitor may retain, at the Company's expense, consultants, accountants, lawyers or other professionals whom the Monitor deems reasonably necessary to assist the Monitor in the execution of the Monitor's duties. The Monitor will assure that such parties are sufficiently qualified, have the necessary resources to carry out their duties and are free from real or perceived conflicts of interest with the Company and the AAA. Before the retention of such persons, excluding legal counsel, the Monitor shall consult with the Company and the AAA. The Company and the AAA will have ten (10) calendar days to object to such persons. XXX agrees that it will not employ or be affiliated with any parties the Monitor retains for a period of not less than one (1) year from the date the monitorship is terminated.
- III. The Monitor shall have unfettered, immediate and, if requested, real-time access to all non-privileged Company documents and information that the Monitor determines are reasonably necessary to assist in the execution of his or her duties. The Monitor shall be empowered to provide no prior notice or only minimal prior notice if the Monitor determines, in his or her sole discretion, that the needs or exigencies of his or her monitoring require immediate access or communication. The Monitor shall report promptly to the AAA and AAA OIG any refusal by the Company to provide the requested access.
- IV. The Monitor shall have the authority to meet with and/or interview any officer, employee, or agent of the Company. Such meetings should be conducted in person, but may be done telephonically or as otherwise deemed appropriate by the Monitor in his or her sole discretion. The Company shall use its best efforts to have its employees and agents cooperate fully and meet with the Monitor, without representatives of the Company or its counsel present. The Monitor shall be empowered to offer anonymity to all persons he or she interviews, absent a concern for injury to persons, threats against life or property, or the receipt of information that cannot be otherwise independently verified or developed.
- V. If requested by the Monitor, XXX will provide the Monitor and his or her staff with suitable and secure office space at XXX's headquarters or as otherwise most appropriate. Such space shall include furniture, network access, internet access, equipment and supplies. XXX will also provide the Monitor with

adequate enclosed conference room space or access for confidential meetings with XXX's employees or as otherwise necessary to the Monitor.

- VI. *XXX will not take any measures to monitor the Monitor's activities or communications with any persons, either live or after the fact.*
- VII. *XXX shall pay timely all fees, costs and expenses (including travel and associated costs) of and associated with the Monitorship. The Monitor shall submit to the Company itemized invoices with a reasonable description of work performed in connection with all fees, costs and expenses.*
- VIII. *Failure to cooperate fully and promptly with the Monitor's inquiries, document and information requests, and other monitoring activities will be considered a material breach of this Agreement and may result in the AAA reinstating the suspension of XXX, including all its divisions or other organizational elements and, if appropriate, initiating debarment proceedings.*
- IX. *XXX hereby agrees that the Monitor and his or her employees and agents shall be released from, held harmless from, and indemnified against any claims, demands, liabilities, obligations, damages, suits or costs of any sort whatsoever, whether to XXX or to any third party, arising out of or relating in any way to the Monitor's agreement, reporting of facts and/or opinions to the AAA, presence at XXX or performance of his or her duties and obligations as set forth herein.*

B. Duties:

- I. *The Monitor shall verify XXX's compliance with the Terms and Conditions of this Agreement and evaluate the effectiveness of such compliance. The Monitor will design a workplan that generally outlines his or her expectations as to the amount and type of activities necessary for the Monitor to verify and evaluate XXX's compliance with each Term of this Agreement. The Monitor will review the workplan with XXX and the AAA, make any adjustments that the Monitor deems appropriate, and seek approval from the AAA prior to workplan execution.*
- II. *The Monitor will conduct an initial assessment of the ethical tone at XXX and conduct such on-going assessments in each reporting period.*
- III. *Pursuant to Paragraphs 8.(C)(III.) and 9 below, the Monitor shall verify XXX's compliance with the Monitor's Recommendations and evaluate the effectiveness thereof.*
- IV. *As requested by the AAA, the Monitor shall cooperate with the AAA OIG, AAA Suspension & Debarment Official and any other federal, state or local government agency or department with interest in the matter, and, as requested by the AAA, provide information about XXX's compliance with the Terms and Conditions of this Agreement.*

C. Reports:

- I. *The Monitor shall report to and be responsible to the AAA, and shall be free to communicate with the AAA without interference or participation by XXX. The AAA and Monitor may communicate on a confidential and informal basis, and without disclosure to XXX.*
- II. *The Monitor shall promptly report to the AAA and AAA OIG all instances of non-timely responses, non-compliance and non-adherence to the recommendations and requests of the Monitor.*
- III. *The Monitor will provide written reports ("Reports") to the AAA on a semi-annual basis concerning XXX's compliance with this Agreement. In these Reports, the Monitor shall make Recommendations to the Company of actions that the Monitor reasonably believes are necessary for the Company to effectively comply with the Terms and Conditions of this Agreement and otherwise fulfill XXX's commitment to exemplary corporate citizenship, best*

practices of effective corporate governance, the highest principles of honesty and professionalism, the integrity of the federal government contracting process and service, and a culture of openness, accountability, and compliance throughout the Company. The first Report to the AAA shall be due six (6) months after the Effective Date of this Agreement, but in any event, no less than sixty (60) days after the appointment of the Monitor, and subsequent Reports shall be made every six (6) months thereafter. Should the Monitor determine that more time is necessary for any Report, he or she may request an extension of no more than thirty (30) days, subject to the AAA's approval.

- IV. *The Monitor shall report¹¹ immediately the following types of alleged or actual misconduct directly to the AAA and not XXX: (1) any misconduct that poses a significant risk to public health or safety; (2) any misconduct that involves senior management of the Company; (3) any misconduct that involves obstruction of justice; (4) any misconduct that involves a violation of any federal or state criminal statute, or otherwise involves criminal activity; (5) any misconduct that otherwise poses a significant risk of harm to any person or to any federal or state entity or program; or (6) any efforts by the Company or its employees or agents to impair or impede the work of the Monitor. The Monitor is under no obligation to provide such report or anticipated report to the Company. In instances where the Monitor deems allegations of misconduct as not credible¹² or involving actions of individuals outside the scope of the Company's business operations, the Monitor may decide, in the exercise of the Monitor's discretion, that the allegations need not be reported directly to the AAA.*
- V. *The form of the Monitor's semi-annual Reports shall be as agreed to by and between XXX and the AAA. Such semi-annual Reports need not necessarily be written narratives, so long as each semi-annual Report, in itself or with verbal presentation, informs sufficiently the AAA of XXX's compliance with the Agreement. The Monitor's final Report shall be a written narrative Report that addresses XXX's compliance with each Term of the Agreement and all adopted Recommendations from prior Reports. The final Report should include any further Recommendations as well.*
- VI. *The AAA and XXX shall meet, along with the Monitor, within thirty (30) calendar days of each Report to discuss each Report's findings and Recommendations. Within thirty (30) calendar days following such meeting, the Monitor shall meet with XXX's Board or otherwise appropriate leadership designated by the Board to discuss the findings and Recommendations in each Report, XXX's progress to date, and XXX's ongoing compliance with the Terms and Conditions of the Agreement and Monitor's Recommendations.*

D. *Disputes: XXX and the Monitor should first work together to resolve any concerns or disputes that XXX may have about the Monitor's work (i.e. scope, performance, etc.). Notwithstanding Paragraph 8.(A)(VI) of the Agreement, XXX may engage, at their own expense, an independent third-party expert on Monitors and/or compliance and ethics programs as a means to facilitate their understanding of the monitoring process, their coordination with the Monitor, and to assist in resolving disputes. If XXX and the Monitor cannot resolve their dispute(s), the Company and the Monitor shall present their dispute(s) to the AAA for its consideration and final decision, which is non-appealable. Any dispute that is not resolved within five (5) business days shall be submitted promptly to the AAA for resolution.*

¹¹ The AAA will determine whether to also immediately report said misconduct to the Company.

¹² The Monitor may conduct preliminary inquiries and investigations into allegations or "red flags" for the purposes of determining his or her reporting responsibilities in accordance with this Agreement.

9. Adopting Recommendations of the Monitor: XXX shall have ten (10) calendar days after it receives a Report to object in writing to the AAA regarding any Recommendations made by the Monitor. Such written objections shall set forth clearly the Recommendation, the basis for the objection, and any proposed alternative resolution to address the Recommendation. Any Recommendations not objected to within this time frame shall be considered accepted by XXX as a required action, subject to the Terms and Conditions of this Agreement and on-going monitoring by the Monitor. If XXX's objections cannot be resolved directly with the Monitor, the Company and the Monitor shall present the issue to the AAA for its consideration and final decision, which is non-appealable.
10. Documentation: XXX shall maintain documentation sufficient to demonstrate compliance with the requirements of this Agreement.
11. Investigations and Audits: In addition to the periodic written reports required under paragraph 7, XXX shall promptly notify the Monitor, AAA and the AAA OIG in writing of any credible evidence of criminal conduct or serious wrongdoing by, or criminal investigations of, XXX, its officers, directors, employees and agents, of any type that become known to XXX after the Effective Date of this Agreement. XXX shall provide the Monitor, AAA and AAA OIG with all relevant non-privileged documents and information concerning such allegations, including but not limited to internal audit reports, letters threatening litigation, "whistleblower" complaints, civil complaints, and documents produced in civil litigation. In addition, XXX shall report to the Monitor, AAA and AAA OIG concerning its planned investigative measures and any findings and resulting remedial measures, internal and external. The Monitor, in his or her discretion, may conduct an investigation¹³ into any such matters, and nothing in this paragraph shall be construed as limiting the ability of the Monitor to investigate and report to the Company, AAA and AAA OIG concerning such matters. XXX will also notify the Monitor, AAA and AAA OIG within five (5) business days of the time XXX learns of the initiation of any non-routine audit of XXX by any federal, state or local department or agency (for example, routine Defense Contract Audit Agency audits need not be reported under this paragraph).
12. Similar Misconduct. If, during the course of this Agreement, XXX learns that the employee misconduct or similar misconduct that occurred on the (INSERT PROCUREMENT MATTER/CONTRACT IN QUESTION) also occurred on or in connection with other federal contracts or non-procurement transactions, XXX will promptly notify the Suspending and Debarring Official as well as the subject agency's Office of Inspector General, or responsible investigating authority, of the discovery. XXX will also perform an inquiry to determine if PERSONS, or any other XXX employee, engaged in any similar activity in violation of 48 C.F.R. § 9.505-2(a)(1), with any (INSERT NAME OF GOV'T AGENCY) employee, to include PERSONS, in the award of any prior contracts, to include the award of a contract involving (INSERT RELEVANT INFORMATION). XXX will provide a report to the Suspending and Debarring Official and AAA OIG within three (3) months from the Effective Date of this Agreement concerning the actions taken in order to perform this inquiry, and the results of the inquiry.
13. Release. XXX hereby releases the AAA, its agents and employees in their official and personal capacities of any and all liability or claims arising out of or related to the AAA OIG investigation, the Notice of Suspension, the discussions leading to this Agreement and discussions and actions taken during the course of the term of this Agreement. Similarly, as set forth previously in Paragraph 8.(A)(IX), the Monitor and his or her agents and employees are released of any and all liabilities or claims arising out of the Monitor's work pursuant to and under this Agreement.
14. Unallowable Costs. All costs defined in FAR part 31.205-47 by or on behalf of XXX's performance of this Agreement, or associated with the monitoring of this Agreement by the Monitor, and all costs incurred by XXX in negotiating, implementing, and abiding by the Terms

¹³ The focus of the Monitor's investigation shall be the internal controls, ethical tone, and compliance and ethics program related aspects associated with and/or impacted by the actions at issue.

- and Conditions of this Agreement shall be accounted for as unallowable costs, whether direct or indirect, for government contract purposes. **XXX** agrees to account for these unallowable amounts separately by identifying any such costs incurred through (i) accounting records to the extent possible; (ii) memoranda, including diaries and logs, regardless of whether such records are part of official Company documentation where accounting records are not available; or (iii) through good-faith itemized estimates where no other accounting basis is available. The cost of all self-governance, compliance, or ethics programs, and activities in existence before the **AAA** Notice of Suspension was issued on **(INSERT DATE)** or continued by the Terms and Conditions of this Agreement shall be allowable costs to the extent otherwise permitted by law or regulation.
15. Successors and Assigns. For the duration of this Agreement, the terms, conditions and obligations of this Agreement shall survive the reorganization of **XXX**'s corporate structure and shall be fully binding upon any organization that is a successor in interest or an assign to substantially all of the assets or shares of **XXX**, with respect to the **XXX** assets acquired. The Successor or Purchaser may request that the Suspending and Debarring Official review the need for continuation of the Terms and obligations of this Agreement.
 16. Implementation by **XXX**. During the term of this Agreement, **XXX** shall promptly implement all provisions of this Agreement, including its Corporate Compliance and Business Ethics Program, in any business that has federal government contracts that **XXX** acquires or establishes after the Effective Date of this Agreement.
 17. Cooperation by **XXX**. When requested, **XXX** shall cooperate fully with any investigation of suspected wrongdoing involving **XXX**'s operations or activities and shall encourage present and past employees of **XXX** to make a full and candid disclosure of their personal knowledge of the facts and circumstances of any such suspected wrongdoing. **XXX** shall continue to cooperate with the **AAA** **OIG** subpoena issued to the Company.
 18. Representations. **XXX** represents that all written materials and other information related to factual matters supplied to the **AAA** by the Company's authorized representatives during the course of discussion preceding this Agreement are true and accurate to the best information and belief of **XXX**'s signatory to this Agreement. **XXX** understands that this Agreement is executed on their behalf of the **AAA** in reliance upon the truth and accuracy of all such representations.
 19. No Waiver. Nothing in this Agreement limits the **AAA** or any other federal agency from initiating administrative actions, including suspension or debarment, should information indicating the propriety of such action come to the attention of the **AAA** Suspending and Debarment Official or any other federal agency.
 20. Breach. **XXX** and the **AAA** agree that the causes for **(SUSPENSION/DEBARMENT)** survive the execution of this Agreement and the **AAA** may initiate suspension and/or debarment proceedings against **XXX** on these grounds if there is a material breach of any provision of this Agreement. **XXX** and the **AAA** agree that repeated violations of non-material requirements of this Agreement may cumulatively become and constitute a material breach of this Agreement. **AAA** **OIG** will provide written notice to **XXX** of any alleged failure to meet its material obligations under the Terms and Conditions of this Agreement. **AAA** shall have the sole and exclusive authority to determine what constitutes a material breach hereunder. If **XXX** fails to submit an acceptable plan of corrective action to the **AAA** **OIG** within fifteen (15) calendar days of receipt of such notice, or as otherwise permitted by the **AAA** **OIG**, the **AAA** **OIG** may recommend immediate commencement of a suspension and/or debarment action against **XXX**.
 21. **(INDIVIDUAL SUSPENSION ACTION – AS APPROPRIATE)**. If at any time during the course of the suspension and/or debarment proceedings of **(INSERT PERSON/TITLE)** new information is received by the Suspending and Debarring Official that constitutes a separate cause for action against **XXX** or enlarges exposure to the federal government, the Suspending and Debarring Official retains all powers under the federal regulations to reinstate the suspension of **XXX** and

any affiliates in accordance with those regulations. The AAA OIG will provide written notice to XXX of any new information that constitutes a separate cause for action against XXX. If XXX fails to submit an acceptable plan of corrective action to the AAA OIG within fifteen (15) calendar days of receipt of such notice, or as otherwise permitted by the AAA OIG, the AAA OIG may recommend a suspension and/or debarment action be taken against XXX and any affiliates.

22. Entire Agreement. This Agreement constitutes the entire agreement between the parties and supersedes all prior agreements and understandings, whether oral or written, related to the subject matter hereof.
23. Authority of the United States. The provisions of this Agreement in no way alter or diminish the rights and responsibilities of the United States to carry out its lawful functions in any proper manner.
24. Authorized Signatories. The signatory of each party is fully authorized to execute this Agreement and represents that he or she has the authority to bind the AAA or XXX, as the case may be.
25. Severability. In the event that any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect other provisions of this Agreement.
26. Notices. Any notices or information required hereunder shall be in writing and delivered by facsimile with receipt or mailed by registered or certified mail, postage prepaid, as follows:

If to XXX: COMPANY PERSON
 ADDRESS

If to the AAA: GOVERNMENT OFFICIAL
 TITLE
 ADDRESS

If to the AAA OIG: GOVERNMENT OFFICIAL
 TITLE
 ADDRESS

Or such other address as any party shall have designated by notice in writing to the other party.

27. Public Document. This Agreement, including all attachments, is a public document.
28. Contractor Past Performance Databases. AAA reserves the right to include the information concerning the misconduct that served as the basis for the suspension of XXX in any federal government database concerning contractor past performance.
29. Headings. Section and paragraph headings are intended for the convenience of the parties and are not to be used to interpret this Agreement.
30. Amendment. This Agreement may be amended or modified only by a written document signed by both parties.
31. Certification. By signature hereto, the individual executing this Agreement on behalf of XXX certifies that he understands that the provisions of 18 U.S.C. 1001 are applicable to the statements and representations contained herein.
32. Execution. This Agreement may be executed in counterparts which, taken together, shall have the same force and effect as a single instrument, and executed copies may be delivered electronically or via facsimile, with originals to follow as soon as practicable.