

# Deferred Prosecution Agreements and Federal Monitors

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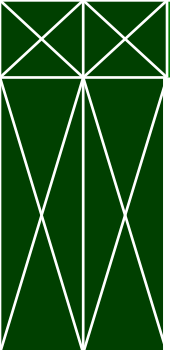
# Who chooses the monitor?

# Swenson Cases

- **Con Edison – monitor the monitor**
- **Mellon Bank – report confidentially to DOJ directly**
- **One very large and three smaller government contractors – Evaluate the company's c/e program and report to both the company and government**

# What is the monitor's scope?

# Different Cases, Different Levels of Review

	Con Edison	Mellon Bank	Large Gov't Contractor	Small Contractor #1	Small Contractor #2	Small Contractor #3
Level of Review	<ul style="list-style-type: none"> <li>✓ Design</li> <li>✓ Implementation</li> <li>✓ Effectiveness</li> </ul>	<ul style="list-style-type: none"> <li>✓ Design</li> <li>✓ Some implementation</li> </ul>	<ul style="list-style-type: none"> <li>✓ Design</li> <li>✓ Implementation</li> <li>✓ Effectiveness</li> </ul>	<ul style="list-style-type: none"> <li>✓ Design</li> <li>✓ Implementation</li> <li>✓ Effectiveness</li> </ul>	<ul style="list-style-type: none"> <li>✓ Design only</li> </ul>	<ul style="list-style-type: none"> <li>✓ Design only</li> </ul>

# Design Review – Do They Have Best Practice Elements?

## Best Practices Associated with FSG Requirements:

- Risk-based standards and procedures
- Direct management role and board oversight
- Designated CCO, “DTD” person (+ other infrastructure)
- Care in delegating authority
- Communications and universal training on roles/risks
- Internal reporting and advice systems
- Auditing, evaluation
- Discipline and incentives
- Response – investigation, remediation, and disclosure

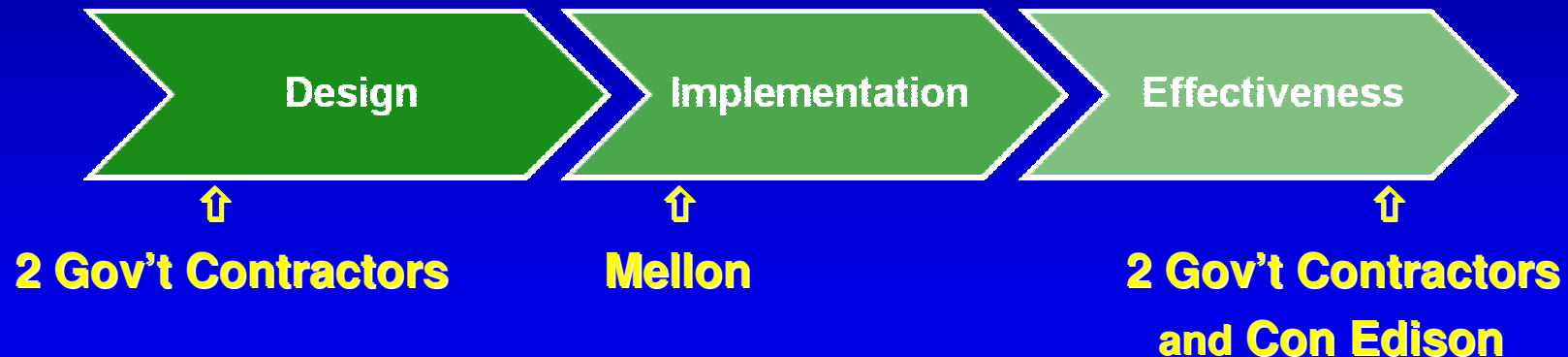
# Implementation and Effectiveness

- **Implementation Review: Are they doing what they say they are supposed to be doing?**
- **Effectiveness Review: Will conversations with company personnel reveal that compliance/ethics program is actually working?**
  - **Confidential focus groups**
  - **Confidential interviews**

# Scope – Nature of Program Review and Degree of Sensitivity

*Lower Sensitivity*

*Higher Sensitivity*



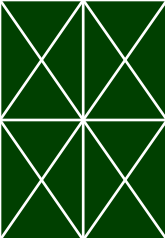
# Working with the monitor

# Lessons from the Trenches

- **Be helpful, but resist the temptation to steer or lobby the monitor.**
- **Prepare the troops, BUT be careful how you prepare the troops.**
- **Be on guard for executive hubris.** (Noun – Hubris: overbearing pride or presumption)
- **Stay positive.**

# The Report

# Swenson Cases

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Where Does the Report go?	<ul style="list-style-type: none"> <li>✓ Company</li> <li>✓ Government</li> <li>✓ Public</li> </ul>	<ul style="list-style-type: none"> <li>✓ Government</li> </ul>	<ul style="list-style-type: none"> <li>✓ Company</li> <li>✓ Government</li> </ul>	<ul style="list-style-type: none"> <li>✓ Company</li> <li>✓ Government</li> </ul>	<ul style="list-style-type: none"> <li>✓ Company</li> <li>✓ Government</li> </ul>	<ul style="list-style-type: none"> <li>✓ Company</li> <li>✓ Government</li> </ul>

# Issues for the Monitor

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- Who is “the government”?

# What Some Prosecutors Think



*"The entire West Coast division must go. Make it look like an accident."*

# Issues for the Monitor

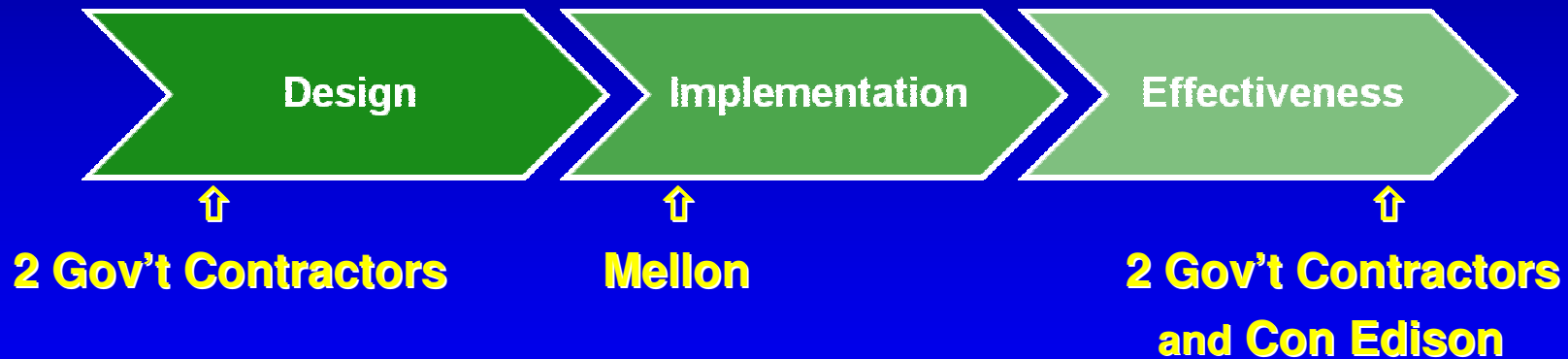
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- **How to balance accuracy and candor with the potential for creating confusion and undue risk to the company.**

# Report

*Lower Sensitivity*

*Higher Sensitivity*



# Report

- **Anticipate this issue and negotiate it before the monitor begins work.**
- **(The same is true for any third-party evaluation.)**