

Deferred Prosecution Agreements and Federal Monitors

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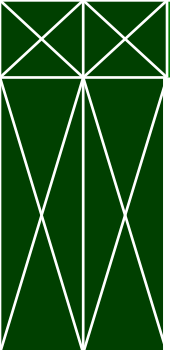
Who chooses the monitor?

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"> ✓ Design ✓ Implementation ✓ Effectiveness 	<ul style="list-style-type: none"> ✓ Design ✓ Some implementation 	<ul style="list-style-type: none"> ✓ Design ✓ Implementation ✓ Effectiveness 	<ul style="list-style-type: none"> ✓ Design ✓ Implementation ✓ Effectiveness 	<ul style="list-style-type: none"> ✓ Design only 	<ul style="list-style-type: none"> ✓ Design only

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

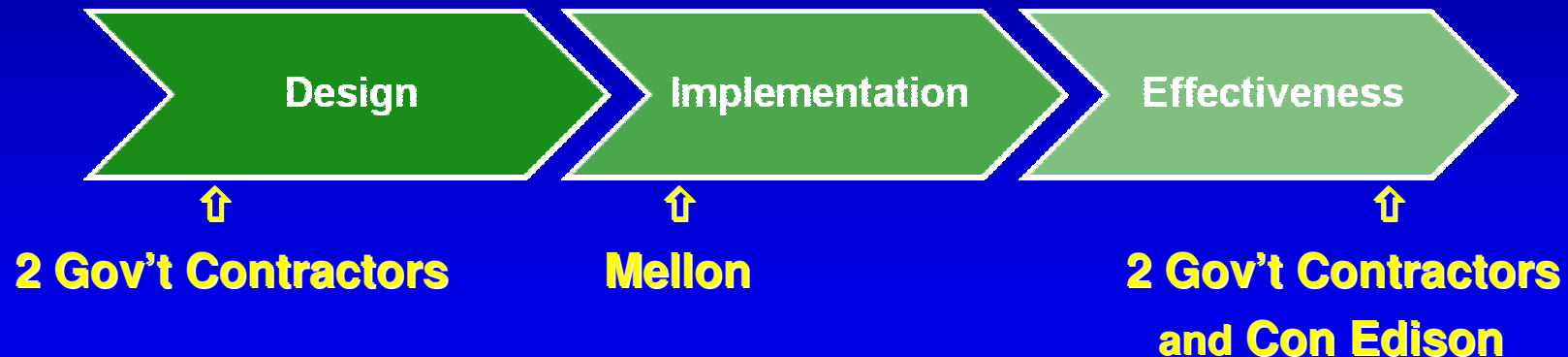
Implementation and Effectiveness

- **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



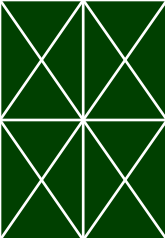
Working with the monitor

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"> ✓ Company ✓ Government ✓ Public 	<ul style="list-style-type: none"> ✓ Government 	<ul style="list-style-type: none"> ✓ Company ✓ Government 	<ul style="list-style-type: none"> ✓ Company ✓ Government 	<ul style="list-style-type: none"> ✓ Company ✓ Government 	<ul style="list-style-type: none"> ✓ Company ✓ Government

Issues for the Monitor

- Who is “the government”?

What Some Prosecutors Think



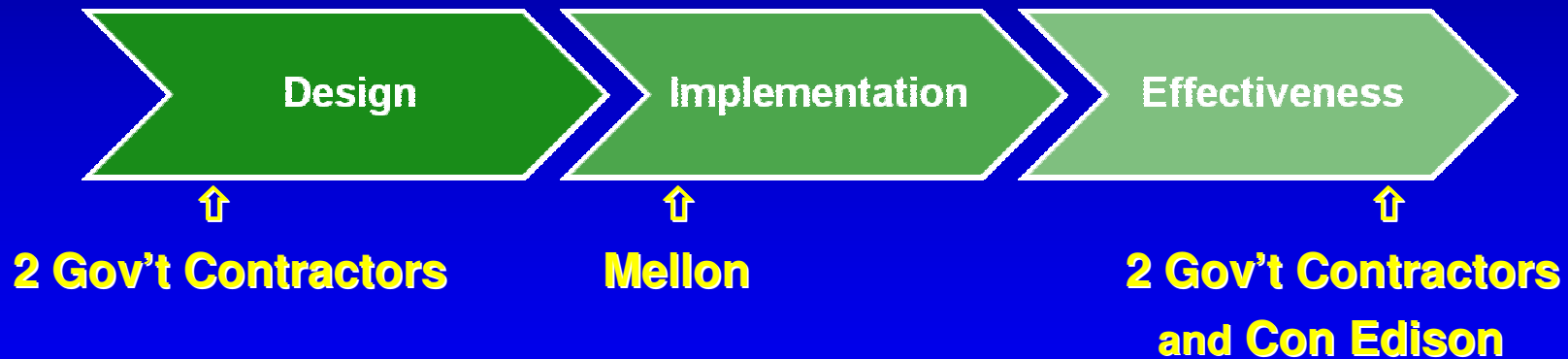
Issues for the Monitor

- **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.)**