Strategies For Navigating Compliance Monitorships

By **Ronald Machen, Preet Bharara and Erin Sloane** (April 11, 2024)

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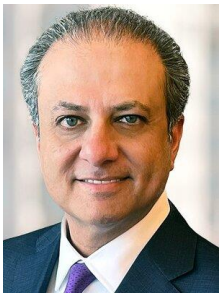

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The imposition of an independent compliance monitor continues to be a favored tool of the government in resolving corporate enforcement matters.

Indeed, in 2022, both the U.S. Department of Justice and the U.S. Securities and Exchange Commission imposed an independent monitor on Stericycle Inc., an international waste management company, for two years.[1]

For companies on the receiving end, successfully navigating a monitorship can be both unfamiliar and challenging.

Moreover, the DOJ has recently issued a series of memoranda and statements that indicate the department's renewed focus on the use of monitorships.[2]

For instance, Deputy Attorney General Lisa Monaco stated in an October 2021 keynote address, "[t]o the extent that prior Justice Department guidance suggested that monitorships are disfavored or are the exception, I am rescinding that guidance."[3]

Accordingly, it is important that corporate counsel understand when the government may consider imposing a monitorship.

This article will explore that subject, as well as the best practices for in-house and outside counsel to utilize in navigating and successfully completing a monitorship, particularly in light of March statements by the DOJ regarding the department's expectations that compliance changes be implemented early in a monitorship.[4]

When Compliance Monitorships Are Imposed

First, it is important to note that not every settlement of a corporate enforcement matter will involve an independent compliance monitor. The Corporate Enforcement, Compliance and Policy Unit within the DOJ is responsible for "evaluating corporate compliance programs and determining whether an independent compliance monitor should be imposed as part of a corporate resolution."[5]

To determine if a monitor is needed, the DOJ considers 10 nonexhaustive factors.[6] These factors include:

- "Whether, at the time of the resolution and after a thorough risk assessment, the corporation has implemented an effective compliance program and sufficient internal controls to detect and prevent similar misconduct in the future";

- "Whether, at the time of the resolution, the corporation has adequately tested its compliance program and internal controls to demonstrate that they would likely detect and prevent similar misconduct in the future";

- "Whether the underlying criminal conduct was long-lasting or pervasive across the ... organization or was approved, facilitated, or ignored by senior management, executives, or directors (including by means of a corporate culture that tolerated risky behavior or misconduct, or did not encourage open discussion and reporting of possible risks and concerns)"; and

- "Whether the underlying criminal conduct involved the exploitation of an inadequate compliance program or system of internal controls."[7]

As a general principle, the DOJ has taken the position that "[w]here a corporation's compliance program and controls are untested, ineffective, inadequately resourced, or not fully implemented at the time of a resolution, Department attorneys should consider imposing a monitorship."[8]

What is made clear by the DOJ's recent guidance, then, is that the best way to avoid a compliance monitorship is to ensure a robust and established compliance program, which has been assessed and is continuously evolving to meet the business needs of the organization.

Navigating a Monitorship

Selection Process

Selecting a monitor is a complex process of its own. The DOJ's guidance on choosing a monitor "based on the unique facts and circumstances of each matter and the merits of the individual candidate" does not offer much transparency.[9]

The most important objective of the process is to identify a monitor that is both highly qualified and free of any real or perceived conflicts. Before a monitor is approved, the vetting process includes multiple rounds of review from various stakeholders in the department.

The selection process begins with the corporation: Within 20 business days of the execution of a nonprosecution agreement or a deferred prosecution agreement, the corporation submits a written proposal that identifies three candidates to the DOJ.[10] The proposal must include various certifications aimed at ensuring each candidate is free of any possible conflicts of interest.

Next, the DOJ attorneys handling the matter perform an initial review of the candidates. This review includes an interview of each candidate to assess five factors, including the candidate's experience and degree of objectivity.[11]

After this review, the DOJ attorneys may determine that a candidate is not qualified, notify the corporation and ask for an alternative proposal. Once there are three qualified candidates, the DOJ attorneys will decide which one they wish to support and draft a monitor recommendation memorandum.

Following that, the Criminal Division's Standing Committee on the Selection of Monitors

reviews the memorandum and supporting materials, and votes on whether to accept the recommendation.

Then, the standing committee's recommendation is sent to the assistant attorney general, who notes their concurrence or disagreement with the candidate.

Finally, the memorandum — which includes both the standing committee and the assistant attorney general's input — will be sent to the deputy attorney general, who ultimately approves the monitor.

Preparation

Once a monitor is selected, but before the monitorship officially begins, there are several steps a company should take to help prepare and ensure the process runs as smoothly as possible.

First, early on, the corporation should impress upon relevant employees the importance to the company of successfully and timely completing the monitorship, and the ways in which it differs from the underlying investigation.

The posture of the monitor is different from the position of an enforcement authority during an investigation into the company, as the monitor is independent of both the government and the company, with responsibilities to ensure that the company meets its compliance-related obligations contained in its resolution papers.

Even though the monitor is independent, the monitor and the company share a common goal of strengthening the compliance program — and that goal should be communicated to all employees, along with the encouragement of candor and cooperation with the monitor to achieve that goal.

Second, the company should consider the resources necessary to allow for a comprehensive and prompt response to the monitor's requests. Such response will likely include making key employees available for interviews, coordinating the scheduling and arrangements for site visits, and implementing revisions to internal processes and systems based on the monitor's recommendations.

These steps invariably take time and resources — but can be more efficiently carried out if the company's leadership has thought about how best to accommodate them in advance.

Third, and relatedly, a team of core personnel responsible for serving as points of contact for the monitor and guiding the company through the monitorship is highly recommended. Ideally, this group will include individuals from compliance, legal, finance and other functions related to the subject of the agreement — e.g., audits or investigations.

This group should be tasked with establishing a protocol for responding to the monitor's document and interview requests. The monitor may start issuing document requests before the start of the initial review period to help prepare their work plan, so setting up a protocol to handle such requests early will help ensure a smooth beginning to the monitorship.

Even before document requests roll in, it would be wise for this team to proactively gather core materials for the monitor's review: Key documents about the company's structure and operations, coupled with initial briefings for the monitor on the current status of the company's compliance policies and procedures, will help the monitor understand the

company before the review period commences.

In addition to responding to monitor requests and facilitating the monitor's review, this team should take the time to fully understand its disclosure obligations throughout the duration of the monitorship and establish a process for evaluating potentially reportable conduct to the monitor.

Throughout the monitorship, there is no privilege between the company and the monitor. Accordingly, companies should carefully consider whether to waive attorney-client or work-product privilege in sharing information with the monitor.

This team would also be best positioned to develop clear and consistent lines of authority for implementing monitor recommendations to avoid confusion and ensure accountability.

Fourth, before the monitorship begins, the company should hold the monitor accountable for developing an appropriately tailored work plan, which clarifies the scope of document collection and production, site visits and interviews, risk assessment, surveys, and other analysis.

Setting the scope of the monitorship clearly before it begins will empower the company to object to unreasonable and unnecessary requests if the monitor attempts to expand the scope of its inquiry.

The company will have an opportunity to comment on the plan before the DOJ approves it — and all companies should actively take advantage of this process.

After the Monitor's Arrival

Once a monitorship begins, there are several steps a company should take to ensure a productive and amicable relationship.

First, it will be important to adopt a cooperative tone with the monitor. Monitorships generally last for at least two years, with many lasting longer; starting off on the right foot goes a long way toward establishing a cooperative working relationship for the duration of the monitorship. An adversarial tone can unnecessarily lengthen the monitorship and make the monitorship period taxing on both the monitor and the company.

Second, corporations should take time to establish a proper tone from the top about the monitorship. All levels of management must be responsible for communicating the importance of compliance and actively embody compliance in their day-to-day functions. Executive buy-in is critical and must be sustained for the duration of the monitorship in order to maximize the effectiveness of the exercise.

Third, the company should keep an eye out for cost overruns and delays. Delays in the monitorship — whether caused by the monitor or by the company — can be due to a number of reasons and create additional costs.

A company may seek too much input from the monitor or ask the monitor to advise on the company's compliance program to a degree that is not appropriate or conducive to the monitor's mandates. A company may also be uncooperative in producing documents or arranging for interviews or site visits. Striking a balance of monitor involvement and corporate cooperation is crucial.

It is also essential to implement the monitor's recommendations in an efficient and timely manner. If there is a concern about whether the company can implement a given recommendation, it should be communicated to the monitor as soon as possible so a resolution can be reached early on.

Fourth, companies should be mindful of the triangular relationship involving the monitor and the government. The monitor is independent, acting neither as lawyer for the company nor agent of the government. Accordingly, the monitor will have open and frequent dialogue with both the company and the government.

Some monitor conversations will be with both the company and the government, but others will be with the government alone. Ensuring that the monitor maintains neutrality and balance in these conversations, and exercises judgment on what information to share and when, is difficult but necessary.

Conclusion

While the DOJ has indicated a focus on monitorships as part of their corporate criminal resolutions, this is not cause for concern. There are many factors the DOJ considers before instituting a monitorship, and corporations can preemptively ensure their compliance programs are robust and well tested to help decrease the chances a monitorship will be imposed.

Moreover, if a monitorship is imposed, there is no need to panic. Compliance monitorships can be daunting, but with proper planning, corporations can navigate them smoothly and come out of the process with an enhanced compliance program that is narrowly tailored to address the companies' most significant and high-risk business practices.

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[1] Order Instituting Cease-and-Desist Proceedings, In the Matter of Stericycle, Inc., Rel. No. 94760, File No. 3-20826 (Apr. 20, 2022); Department of Justice Press Release No. 22-401: Stericycle Agrees to Pay Over $84 Million in Coordinated Foreign Bribery Resolution (Apr. 20, 2022), https://www.justice.gov/opa/pr/stericycle-agrees-pay-over-84-million-coordinated-foreign-bribery-resolution.

[2] See Kenneth A. Polite, Jr., Assistant Attorney General, Criminal Division, Revised Memorandum on Selection of Monitors in Criminal Division Matters (Mar. 1, 2023), https://www.justice.gov/criminal-fraud/file/1100366/download; Kenneth A. Polite, Jr., Assistant Attorney General, Criminal Division, Remarks at NYU Law's Program on

Corporate Compliance and Enforcement (Mar. 25, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-nyu-law-s-program-corporate.

[3] Lisa O. Monaco, Deputy Attorney General, Keynote Address at ABA's 36th National Institute on White Collar Crime (Oct. 28, 2021), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute.

[4] Global Investigations Review, DOJ official: avoid monitorship extensions by implementing compliance changes early (Mar. 22, 2024).

[5] DOJ, Corporate Enforcement, Compliance, and Policy Unit; An Overview (updated Aug. 11, 2023), https://www.justice.gov/criminal/criminal-fraud/corporate-enforcement-compliance-and-policy-unit#:~:text=The%20Corporate%20Enforcement%2C%20Compliance%2C%20%26,of%20corporate%20resolutions%3B%20evaluating%20corporate. Relevant here, the CECP is also responsible for "working with and advising prosecution teams on the structural, monetary and compliance components of corporate resolutions" and "overseeing post-resolution matters, including the selection and oversight of monitors and compliance and reporting obligations."

[6] Kenneth A. Polite, Jr., Assistant Attorney General, Criminal Division, Revised Memorandum on Selection of Monitors in Criminal Division Matters (Mar. 1, 2023), at 2-3, https://www.justice.gov/criminal-fraud/file/1100366/download.

[7] Id.

[8] Id. at 3.

[9] Id. at 5.

[10] While each United States Attorney's Office will have their own rules for establishing monitorships that may differ slightly, they generally track these Department guidelines. Further, the Department of Health and Human Services, Office of Inspector General, and other agencies also impose monitorships.

[11] Id. at 7-8.