The Fraud Guy and Corporate Monitors under the FCPA

Most compliance practitioners are aware of the use of corporate monitors. There are many benefits to the use of a corporate monitor for a company coming out of a lengthy Foreign Corrupt Practices Act (FCPA) investigation. Some of these benefits can include increased corporate awareness of compliance and the integration of *best practices* into a company's compliance program. A corporate monitor can also boost shareholder, employee and public confidence in a company which has had a lengthy FCPA investigation and enforcement action.

One of the more vexing questions which a General Counsel or Chief Compliance Officer may face is how to select and interact with a corporate monitor? There is very little helpful guidance for compliance practitioners on this subject. However, one such resource has arisen in the past year which is welcome addition for the compliance practitioner, it is "***The Monitor"*** and it is issued by Artifice Financial Forensic Services, LLC, and its head, John Hanson. Hanson is a CPA, CFE and, furthermore, he's a former FBI Agent, who also publishes a very useful blog entitled "***The Fraud Guy".***

In September, Hanson presented a session on corporate monitors at the 9th Annual Compliance & Ethics Institute of the Society of Corporate Compliance and Ethics (SCCE) entitled, "*Understanding and Working Effectively With Independent Corporate Monitors*". In this session Hanson outlined some of the key points a compliance practitioner needs to understand when engaging or dealing with a corporate monitor. In this presentation, which included panelists Doug Lankler, Senior VP and Chief Compliance Officer of Pfizer, Inc., and Jacob Frankel, partner in the law firm of Shulman Rogers, Hanson noted that a corporate monitor is one who is an independent third-party used to verify an company's compliance with an Agreement between the company and a Governmental Agency or Agencies (think Department of Justice [DOJ] and Securities and Exchange Commission [SEC] and a Deferred Prosecution Agreement [DPA] or Non-Prosecution Agreement [NPA]). Additionally a corporate monitor has the primary responsibility to assess and monitor a corporation's compliance with the terms of a DPA, NPA or other relevant Agreement.

Hanson suggested several qualifications that a company should look towards in selecting a corporate monitor. These include the capability of the monitor candidate to handle a large and potentially multi-year assignment. A determination should be made on the credibility and integrity of the business and professional reputation of the corporate monitor. There must be real and perceived independence and objectivity by the corporation monitor, who should not have had prior business dealings with the company. A corporate monitor should have desirable, relevant experience and must have the staying power to remain on the job during the entire term of the monitorship.

Hanson emphasized that the role of the corporate monitor should be driven by the relevant DPA, NPA or other Agreement. The over-riding goals of the corporate monitor should be independent verification of a company's compliance with the terms and conditions of its relevant agreement, whether DPA, NPA or other Agreement. This focus is primarily through corporate compliance assessments. A corporate monitor should primarily observe, test and report. While a corporate monitor may utilize some investigative techniques, it is generally not within the corporate monitor's scope to investigate. To this final point, Hanson has recently published an article entitled, "*Corporate Monitor Not an In-House Investigator*" which further expanded on this issue.

Hanson discussed the need for transparency in the monitorship. This begins with the negotiations involved with the work plan, including the projected costs of the monitorship. The cost of a corporate monitor has been identified as a significant issue with even US Federal District Court judges so care should be taken so that the corporate monitor cost itself does not become an issue. We recommend the following list of topics be considered by any company in regards to the cost of a corporate monitor: hourly rate v. fixed fee; expenses; rate adjustments, both upward and downward. If other personnel are to be used in the process, there should be full disclosure of the personnel and their rates. One item that Hanson related was that the bulk of costs for a corporate monitorship occur during the initial reporting period.

With regard to the Report itself, its scope and timing are determined by the DPA, NPA or other relevant Agreement. However, both the company and the governmental agency should agree on the form and content of the Report. Generally, there should be no review by the company of the report prior to the delivery to the governmental agency. However, if during the pendency of the reporting period, there is sharing of concerns, observations and findings, there should not be any surprises in the final Report, absent extraordinary circumstances. The Report itself should include the presentation method, it should address any potential inaccuracies in reporting and it should highlight any expansions or contractions in overall monitorship scope. The Report should also list appropriate remedial measures that the company should employ but note both positive compliance actions and any self-corrective actions by the company during the pendency of the reporting period.

Hanson recommends that to work effectively with a monitor, a company should assume a non-adversarial, collaborative position with the corporate monitor with open and frequent communications. The company should have a full understanding of the monitor's roles and responsibilities as well as its own role and responsibility in the monitorship. Hanson ended by emphasizing that the company should recognize that there is joint effort for any monitorship to succeed between the company and corporate monitor. By working collaboratively with a corporate monitor, the company puts itself in the best position to work through any obligations it may have assumed in a DPA, NPA or other Agreement and come through the process as one of its industry's leaders in compliance.

We recommend John Hanson, his newsletter "***The Monitor"*** and website ***"The Fraud Guy"*** to all FCPA compliance practitioners as an excellent resource for the issue of corporate monitors.