A corporate monitor is an independent third party used to confirm compliance with the terms of an agreement usually between the corporate entity and a government agency. These agreements are designed to reduce and address the risk of recurrence of the corporation’s misconduct. The use of corporate monitors dates back almost two decades and is on the rise as a preferred risk assessment tool. This article provides an overview of key topics related to corporate monitors including: how the need for corporate monitors is determined; what credentials are important to the role; the monitor selection process; the duration of a monitor’s engagement; to whom the monitor reports; and the benefit to a corporation of using a corporate monitor.

**Determining the Need for a Corporate Monitor**

The requirement for a corporate monitor generally arises following a corporate guilty plea, deferred prosecution agreement (DPA) or non-prosecution agreement (NPA), and can be both court ordered or “installed by agreement” between a corporation and the overseeing entity. A corporate monitor should only be used “where appropriate, given the facts and circumstances of a particular matter.” Factors that could determine whether a monitor is appropriate include: 1) the seriousness of the offense; 2) the duration of the misconduct; 3) the pervasiveness of the misconduct, including whether the conduct cuts across geographic and/or product lines; 4) the nature and size of the company; 5) the quality of the company’s compliance program at the time of the misconduct; 6) and subsequent remediation efforts. Thus, it may be appropriate to appoint a corporate monitor for a company lacking an effective internal compliance program or internal controls, but not for a company who has ceased operations in the area where misconduct occurred.

**Key Credentials**

The necessary qualifications for a monitor also turn on the facts and circumstances of the case. Factors to be considered include: 1) the integrity, credibility, and professionalism of the monitor; 2) the expertise or experience in the industry or specific subject matter of the monitorship; 3) relevant skills and experience necessary to discharge the duties of the monitor as described in the court order or agreement; 4) the expected structure of the monitorship team and the ability of the monitor to access and deploy resources as necessary to discharge the duties of the monitor as described in the court order or the agreement; 5) and the commitment to serving as the monitor...
for the entire monitorship term. Attorney, particularly former government attorneys, have often been chosen to serve as corporate monitors given the skillset they possess. However, non-attorneys should not be overlooked — the skills of other individuals such as accountants, technical or scientific experts, and compliance experts, could in some cases be more appropriate depending on the tasks contemplated in the corporation’s agreement.

Selection Process

No one selection process fits all. The monitor selection process should ensure that the corporate monitor is a highly competent person or entity for the specific assignment and that the monitor possesses the requisite qualifications enumerated in any available guidance. The selection process should also encourage consideration of a broad range of monitor candidates, not artificially limited by demographic, professional, and geographic factors. If possible, at least three qualified monitor candidates should be considered. Additionally, in criminal matters involving the DOJ, the parties must agree to “endeavor to complete the monitor selection process within sixty days of the execution of the underlying agreement.” Matters involving the DOJ Criminal Division also require written documentation around the selection of a particular monitor.

Duration of Monitorship

Just as the selection process is not one size fits all, neither is the duration of the monitorship. Criteria to consider include: 1) the nature and seriousness of the underlying misconduct; 2) the pervasiveness and duration of misconduct within the corporation, including the complicity or involvement of senior management; 3) the corporation’s history of similar misconduct; 4) the nature of the corporate culture; 5) the scale and complexity of any remedial measures contemplated by the agreement, including the size of the entity or business unit at issue; and 6) the stage of design and implementation of remedial measures when the monitorship commences. The agreement should allow for extension of the monitor provision(s) at the discretion of the government in the event the corporation has not successfully satisfied its obligations under the agreement. Similarly, the agreement should contemplate the possibility of early termination if the corporation can demonstrate to the government that there exists a change in circumstances sufficient to eliminate the need for a monitor. In certain instances, hybrid monitorships are allowed, in which a monitor serves for approximately 18 months and the corporation self-reports for the following 18 months. In one case, the DOJ even agreed to defer to a pre-existing monitorship imposed by a different oversight organization (the World Bank).

Monitor Reporting

It may be appropriate for the monitor to make periodic written reports to both the government and the corporation regarding, inter alia: 1) the monitor’s activities; 2) whether the corporation is complying with the terms of the agreement; and 3) any changes necessary to foster the corporation’s compliance with the terms of the agreement. For monitors appointed subject to a court order, the same reports could be appropriate to make to the court itself. A monitor is not responsible to the corporation’s shareholders.
Access to monitor reports is one of the more controversial aspects of monitorships. The monitor reports include detailed and independent analysis of the state of a corporation’s compliance program and therefore their public release is sought out by many, including journalists.\textsuperscript{23} Government entities like the DOJ have taken the position that the public interest is served by maintaining confidentiality of monitor reports.\textsuperscript{24} This sentiment is also shared by many outside of the government, who fear that public release of the reports could have a chilling effect on monitors’ work, given the significant amount of confidential business information likely to be contained therein.\textsuperscript{25} Unfortunately, the mixed nature of judicial rulings to date has not provided a great deal of clarity on whether monitor reports will ultimately be kept from public disclosure.\textsuperscript{26}

**Benefits to the Corporation**

Despite the expense and potential work involved in submitting to a corporate monitorship, the corporation benefits from expertise in the area of corporate compliance from an independent party.\textsuperscript{27} As a result, “[t]he corporation, its shareholders, employees, and the public at large then benefit from the reduced recidivism of corporate crime and the protection of the integrity of the marketplace.”\textsuperscript{28} Corporate monitors can also contribute to a change in a corporation’s culture and approach to internal controls and compliance and ethics programs, as corporate monitors “force the company to direct attention and resources to compliance and ethics that more often than not were missing historically. . . . Both the regulatory body and the company routinely come out ahead because both entities do not have to expend what would otherwise be a huge amount of resources on an investigation and trial.”\textsuperscript{29}

**Conclusion**

Corporate monitors are a prevalent part of corporate compliance remediation and despite the controversy surrounding transparency of monitor reports, show no signs of diminishing. Corporations in need of a monitor and those interested in becoming corporate monitors should familiarize themselves with the available guidance in order to ensure that the most qualified individuals for a particular monitorship are chosen. Doing so will maximize the benefits corporate monitors can provide to the remediating corporations, as well as the public interest at large.

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A special thank you to Olivia Singelmann, associate, Foley & Lardner LLP for her contribution to this article.
Memorandum from Craig S. Morford, Deputy Att’y Gen., to All Component Heads and US Att’ys, Selection and Use of Monitors in Deferred Prosecution Agreements (March 7, 2008) (the “Morford Memorandum”).


Morford Memorandum, supra n.1.


Morford Memorandum, supra n.1.

ABA Standards for Monitors at 24-2.4.

Morford Memorandum, supra n.1.

See ABA Standards for Monitors at 24-2.1. See also, Morford Memorandum.

Id. at 24-2.2.

Morford Memorandum, supra n.1.

Memorandum from Lanny A. Breuer, Assistant Att’y Gen., to All Criminal Div. Personnel, Selection of Monitors in Criminal Division Matters (24 June 2009).

Id.

Morford Memorandum, supra n.1.

Id.

ABA Standards for Monitors at 24-3.2(2)(b).

Id. at 24-3.2(2)(c).

Lissack et. al., supra n.3 at §28.4.2.

Id.

Morford Memorandum, supra n.1.

ABA Standards for Monitors at 24-4.3(1).


Wood, supra n.23.

Id.

Morford Memorandum, supra n.1.

Id.

Lissack et. al., supra n.3 at §28.3.1.