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Is the Opaque World of Corporate Monitorships Becoming More Transparent?

By Amy Walsh

An independent monitor is an individual whose job it is to create and supervise an organization's implementation of a compliance program, often with a particular focus on an area of activity within the organization that has been the subject of a governmental investigation. Although the details and parameters of a monitor's role can vary, the essence of the job is to serve as a compliance watchdog, independent from both the organization it watches and the governmental bodies that regulate and investigate that organization. An independent monitor, therefore, has enormous power to effect change within large organizations, and yet, the selection and functioning of a monitor has historically remained opaque.

Recently, the American Bar Association (ABA) brought some clarity to the relatively murky world of monitorships when it adopted in August 2015 the *Monitor Standards* proposed by the ABA's Criminal Justice Section. The *Standards* were the culmination of three years of work by an ABA task force in consultation with judges, prosecutors, defense counsel, court personnel, and academics.

The outcry for guidance surrounding monitorships began in the fall of 2007 when then U.S. attorney Chris Christie approved a contract worth approximately $52 million for his former boss (and former attorney general) John Ashcroft to be the compliance monitor for the medical device company Zimmer Holdings for 18 months. See www.nytimes.com/2008/01/10/washington/10justice.html?pagewanted=all. This event led to Congressional hearings and the Department of Justice's issuance of guidelines on the selection of monitors, commonly referred to as the "Morford Memo," named after then acting deputy attorney general Craig S. Morford, who issued the guidelines.

The Morford Memo established guidelines and a decision-making procedure within DOJ to ensure that any monitor selected by DOJ is qualified, has no conflicts of interests, and does not have a relationship with any of the parties that would cause the public to question the monitor's impartiality. Although the Morford Memo provided some guidance on the role of a monitor, it did not specifically address the expected conduct and parameters of the monitor's job once selected.

Moreover, public wrangling regarding the appropriate role of monitors occurred as recently as May 2015, when Apple Inc. moved to disqualify its antitrust monitor for what it viewed as excessive billing and unprofessional conduct. See *United States v. Apple, Inc. et al.*, (No. 14-60) (May 29, 2015). Although the district court denied Apple's motion, and the Second Circuit affirmed the denial, the Second Circuit judges hearing the case noted that the issues on appeal "have considerable resonance because the fairness and integrity of the courts can be compromised by inadequate constraint on a monitor's aggressive use of judicial power."

In spite of the unique and important role monitors play in the business world and the controversy that sometimes envelopes them, it was not until the ABA's adoption of the *Monitor Standards* that any organization issued specific guidelines for monitors. The *Standards* provide guidance related to three major aspects of monitorships: monitor selection; establishing the monitorship; and conducting the monitorship.

With regard to monitor selection, the *Standards* address two interesting features. First, the *Standards* state that "[a]bsent extraordinary circumstances, both the [corporation] and the Government should be allowed to have a significant role in the selection process." Over the years, DOJ and the corporation under investigation have developed a practice, reflected in many deferred prosecution agreements, in which the corporation submits three potential candidates for the monitorship, and DOJ selects one of the three to become the monitor. Although this practice has the benefit of providing efficiency for DOJ and some level of control for

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the corporation, it also has the potential for creating conflicts of interest because monitor candidates know that reaching the DOJ phase in the process depends in part on the corporation's affinity for a given candidate. Moreover, the selection process may create incentives for a corporation to include two candidates who are far less qualified than the third in order to make it more likely that DOJ will choose the corporation's favorite.

The second interesting feature of the *Standards* relating to the selection of monitors is the statement that "[w]hen possible, the Government should announce the decision to select a Monitor so that appropriate persons or entities may submit indications of interest." Although the deferred prosecution agreements and non-prosecution agreements are often publicized on the webpages of the relevant section within the DOJ, there is no formal announcement or request for proposal for applications from potential monitors. For example, the monitor position for the recent deferred prosecution agreement between GM and the U.S. Attorney's Office for the Southern District of New York can only be found on the employment page of the Southern District's website, rather than attached to the press release announcing the case or the district's homepage. It will be interesting to see whether DOJ develops a more formalized method of soliciting applications in order to encourage consideration of a broad range of monitor candidates, as the ABA suggests.

Regarding the establishment of monitorships, the *Standards* highlight the practical importance of the work plan in shaping the precise contours of the monitor's job. Usually, the deferred prosecution agreement or non-prosecution agreement that gives the monitor a mandate sets forth broad goals without any guidance on how to achieve those goals. Understandably, the parties may think it more efficient and productive for the monitor and the corporation to agree on the methods and procedures for monitoring compliance in a separate and more detailed document. Based on this model, the formulation of the work plan becomes a central and important aspect of the monitorship. Typically the corporation wants certitude and predictability as to exactly what the monitor plans to do, and the monitor wants flexibility because of uncertainty over what issues may arise once work begins.

Although the corporation's motives relating to predictability are understandable, the monitor must always remember that the work plan is not a contract or binding agreement—it is simply an agreed-upon guide. The only binding agreement at play in a monitorship is the agreement between the parties that gives rise to the appointment of the monitor and contains the monitor's mandate, e.g., the deferred prosecution agreement, the settlement agreement, or the consent decree. Anyone acting as a monitor, therefore, must exercise independent judgment about what should and should not be done to fulfill his or her mandate, and should avoid being overly hemmed in by the parameters of a work plan.

With regard to the tasks that need to be accomplished during the course of the monitorship, one of the most controversial issues to navigate can be the monitor's desire to interview employees. The *Standards* state that the relevant court order, agreement with the government or engagement letter between the company and the monitor should address the issue of an employee's rights that may arise during the monitorship, including privacy rights and the right to counsel. Employees in the United States generally have a right to have personal counsel present during an interview by a monitor, and the *Standards* explicitly state that "[m]onitors should not suggest to the [corporation] that the employee should receive any adverse treatment solely as a consequence of the employee's decision to have counsel present during the interview."

What the *Standards* do not address are complicated variations on that theme. Should the monitor allow counsel for the corporation to attend the employee interviews? If the monitor needs to interview employees in a foreign country, how does the monitor navigate through the privacy and other laws of that country in light of the need to obtain information? If the employee asserts his or her Fifth Amendment rights and declines to answer questions, should the monitor include that fact in the written public report? Although the *Standards* briefly address employee interviews, there are many issues and scenarios for which those involved in monitorships may want guidance.

As a practical matter, any monitor should feel free to interview employees without company counsel present, assuming such interviews are a reasonable way under the circumstances to obtain information about the compliance issues at hand. As long as the monitor explains the monitor role—that the monitor is not a prosecutor, is not investigating historical conduct, and needs certain information to help the company achieve compliance going forward—a corporate employee may be much more candid and forthcoming with a monitor outside the presence of other corporate employees (i.e., corporate counsel). Regarding other rights an employee may have—privacy rights in different countries, and the right to personal counsel here—the monitor must be particularly sensitive to those issues. Indeed, in the context of a monitorship of a multinational corporation with offices all over the world, the monitor should work closely with corporate counsel to obtain expert legal advice relating to privacy and data protection laws in those various countries.

In the end, those involved in this field—prosecutors, judges, corporations, and the monitors themselves—should welcome the ABA's guidance as providing some parameters on how to discharge their respective responsibilities during a monitorship. However, only time will tell whether these *Standards* will be used in a dynamic and meaningful way, and whether they will lead to further clarity and transparency for practitioners and the public about the monitorship process.

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ADDITIONAL RESOURCES
For other materials related to this topic, please refer to the following.

Business Law Section Program Library

The Independent Monitor—Ally or Adversary to the Corporation? (PDF) (Audio)
Presented by: White-Collar Crime, Corporate Compliance
Location: 2015 Annual Meeting

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In the Know

Corporate Governance: Hot Button Issues for Board Advisors (Access PDF, Audio, and Video here)
Expectations about the board's role in regulatory compliance and risk oversight continue to expand, causing these issues to rank high on the list of board concerns. This program will provide guidance from leading practitioners on: (1) sources of expanding expectations related to regulatory matters; (2) recent developments related to board oversight of regulatory and litigation issues; (3) practical application of fiduciary responsibilities concerning regulatory compliance; (4) when to use—and not use—a special committee of the board; (5) understanding the pros and cons of inside vs. outside counsel; (6) advising boards on monitoring conflicts of interest in the wake of Rural Metro; (6) practical approaches to risk oversight; and (7) related implications for committee and board leadership structures.

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