

## **INDEPENDENT CORPORATE MONITORS: A COMPANY’S FRIEND OR FOE?**

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### **Independent Corporate Monitors**

When the government completes an investigation into alleged violation of federal law, typically the government either prosecutes the target of the investigation, declines to prosecute, or offers the target a Deferred Prosecution Agreement (“DPA”) or Non-Prosecution Agreement (“NPA”). DPAs and NPAs essentially divert prosecution for a set period of time in which the company must satisfy specific requirements imposed by the government. While a DPA is filed in court along with a charging document, an NPA is a letter agreement between the company and the government. At the conclusion of the set period of time, if the company has complied with all of the terms of the DPA or NPA, then the case is dismissed and the company avoids a guilty plea with all of its attendant consequences.

One of the conditions often imposed by the government in a DPA or NPA is the appointment of a corporate monitor. A corporate monitor is an independent third-party used to verify a company’s compliance with a formal agreement with the government, typically a DPA or NPA. The monitor reports to the government but the company being monitored is responsible for all legal fees associated with the monitorship. The duration of the monitorship is dependent on the nature of the misconduct and the necessary remedial action. In most cases, the settlement agreement with the government provides for extension of the monitorship in the event that the company has not satisfied all of its obligations under the agreement, as well as early termination if the company can demonstrate that a monitor is no longer necessary.

In 2008, the Department of Justice, established nine basic principles pertaining to corporate monitors.<sup>1</sup> The nine basic principles describe the selection of a monitor, scope of duties, and duration of the monitorship, all with the aim of ensuring objective and efficient evaluation of the company’s compliance with the settlement agreement and implementation of measures needed to prevent similar future misconduct. The American Bar Association has also established a Task Force on Corporate Monitors designed to develop best practices and standards for corporate monitors, which is currently in progress.

### **Role of the Corporate Monitor**

The monitor is not retained to re-investigate the matter, nor provide legal advice to the company, but is there to observe, test, report and recommend. The monitor is not an agent for either the government or the corporation. The primary role of the monitor is to oversee the company’s compliance with the settlement agreement and its implementation of a compliance program to prevent future violations of the law.

The monitorship usually begins with an approved work plan. The monitor prepares a work plan that is specific to the case and meets all of the objectives of the settlement agreement with the government. An integral part of most monitorships, following approval of the work plan, is the preparation of periodic reports, usually on a quarterly basis. Such reports detail the progress of the monitorship and the company’s satisfaction of its settlement agreement with the government,

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<sup>1</sup> Memorandum from Craig S. Morford, Acting Deputy Attorney General, *Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations* (March 7, 2008).

as well as evaluate the company's compliance program. The monitor submits the report to both the government and the company, and the company then has the opportunity to respond to the report. At the end of the monitorship period, the government determines whether the company has satisfied all of its obligations and has sufficient compliance measures in place, and relies chiefly on the monitor's recommendation in making this assessment.

### **Selection of the Corporate Monitor**

According to the basic principles outlined by the Department of Justice, the monitor must be objectively selected on the merits, avoiding all potential conflicts of interests, and should have all of the necessary qualifications to be suitably selected for the particular circumstances of the case. At the present time, there are no specific requirements mandating who selects the monitor, but the government and the company are expected to work together in making the selection. Depending on the nature of the case, either the company may select the monitor or the pool of potential candidates, with the government having the ability to veto the selection or choose from the pool of candidates, and in other cases, these roles may be reversed. In any event, the goal is to select a well-qualified independent monitor who has the necessary ability and experience, and whose motives would not be questioned by the public.

One way to ensure the lack of any bias or impartiality is to not only require that there be no present conflicts of interests, but also to require that the monitor pledge to avoid any business affiliation with the company for a period of not less than one year from the date the monitorship is terminated. This provision is included in the basic principles provided by the Department of Justice and is usually reinforced in the written settlement agreement with the government.

### **Government's Continued Use of Corporate Monitors**

In 2012, the government continued to utilize DPAs and NPAs as a means of resolving federal investigations, particularly with respect to allegations of fraud, FCPA, trade sanctions, and Anti-Kickback violations. The government recovered a record \$9 billion in monetary penalties in 2012 related to DPAs and NPAs, which is almost triple the amount recovered in 2011. In September 2012, the head of the Department of Justice's Criminal Division, Assistant Attorney General Lanny Breuer, touted the benefits of DPAs and NPAs, explaining that such a practice provides a middle ground between criminal prosecution and no prosecution.<sup>2</sup> According to Mr. Breuer, some misconduct would not be addressed if the only option for doing so is a criminal indictment.

Along with the continued use of DPAs and NPAs to resolve federal investigations, is the use of independent corporate monitors. Approximately one-third of all DPAs and NPAs entered into by the Department of Justice in 2012 included the appointment of an independent corporate monitor.

### **Friend or Foe?**

So who benefits from a monitorship? It is clear that a monitorship can be an effective enforcement tool for the government and a way to ensure compliance without expending government resources, but does the company also benefit? Yes.

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<sup>2</sup> Lanny A. Breuer speech to the New York City Bar Association (September 13, 2012).

First, a corporate monitorship is a tool that the company has to negotiate a deferred prosecution instead of a criminal indictment. As noted by Assistant Attorney General Breuer, sometimes the government's investigation reveals conduct that warrants enforcement action but is not necessarily deserving of prosecution.<sup>3</sup> In trying to negotiate a deferred prosecution with the government, the company should consider the offer of a corporate monitorship. A corporate monitorship strengthens the nature of the enforcement action, which is attractive to the government, and may tip the balance in favor of a deferred prosecution rather than a criminal indictment. Companies under investigation should, therefore, explore the possibility of a corporate monitorship with the government as a way to avoid prosecution.

Second, a corporate monitorship enhances a company's compliance program. Acting Deputy Attorney General Craig Morford noted that corporate monitorships allow corporations to benefit "from expertise in the area of corporate compliance from an independent third party."<sup>4</sup> A corporate monitor is there, in part, to help ensure that the company has a satisfactory compliance program and has implemented sufficient measures toward preventing future violations of federal law. Having a monitor there who is focused on compliance would surely enhance the company's compliance program, and the fact that the monitor is independent and objective greatly strengthens and complements the monitor's role, as well as the benefit to the company. Furthermore, when the monitorship is terminated, and the monitor has endorsed the company's compliance program, the company can then rely on and utilize this independent and objective endorsement.

Third, a corporate monitorship may help the company avoid future investigations and enforcement actions by the government. Acting Deputy Attorney General Morford identified one of the benefits of corporate monitorships as the reduction in recidivism of corporate crime.<sup>5</sup> When a monitorship is terminated, that means that a company has satisfied all of the requirements of its settlement agreement with the government and has established a compliance program sufficient to convince the government that monitoring is no longer needed. If a compliance program, endorsed by the monitor, is sufficient to meet these goals, then the company is well on its way to avoiding future investigations and enforcement actions. Although there is no guarantee against a rogue employee's actions, or the degradation of the company's compliance program, the fact that the company has established a compliance program which satisfies both the monitor and the government is perhaps the best prophylactic measure that the company can take to avoid prosecution in the future.

Fourth, a corporate monitorship could serve as a way to reduce the amount of the applicable fine. When attempting to negotiate an acceptable fine with the government, the company can implore the government to reduce the amount of the fine due to the anticipated expense of the corporate monitorship. The cost of the monitorship can be offset against the amount of the fine and can help sway the government in favor of a reduced fine. This can also benefit the company in another way. Fines are generally due and payable in one lump sum at the time of sentencing, but the fees associated with a corporate monitorship are usually billed on a monthly basis, as such

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<sup>3</sup> *Id.*

<sup>4</sup> *See note 1.*

<sup>5</sup> *Id.*

fees are accrued. A smaller monthly expenditure may be more attractive to some companies, rather than paying one large lump sum.

### **Conclusion**

Although a corporate monitorship allows an outside overseer into the company, and imposes fees on the company, the benefits of a monitorship can far outweigh these aspects. If you can avoid an indictment or future investigation, the cost of the monitorship is well worth it, especially if that cost can be offset against any fine to be paid. Additionally, the company reaps these benefits while at the same time strengthening and improving its compliance program, which every company should continually strive to do.

One way to help decrease the costs associated with a monitorship is to appoint someone with prior experience as an independent corporate monitor. Familiarity and experience with the role, which is not common among white collar practitioners, not only helps reduce initial expenditures, such as with the preparation of a work plan, but also helps ensure efficiency throughout the period of the monitorship.

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