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The Future of Corporate Monitorships: Lessons Learned From the Walmart Case

The Department of Justice appears to be taking a more nuanced and tailored approach to oversight via monitorships.

By Matthew Boxer and Michelle Goldman

Last year, Assistant Attorney General Brian A. Benczkowski issued a memorandum to all Department of Justice (DOJ) Criminal Division personnel providing new guidance for the selection of corporate monitors. The Benczkowski Memo sets forth, among other things, considerations for determining whether a monitor is needed in a particular case, which include whether the misconduct involved exploitation of inadequate internal controls, whether the misconduct was pervasive across the business organization, whether the company has made significant improvements to its compliance programs and internal controls, and whether those improvements have been tested to demonstrate effective deterrence for similar misconduct in the future. The Memo also instructs that DOJ should take into consideration "whether the changes in corporate culture and/or leadership are adequate to safeguard against a recurrence of misconduct," as well as whether adequate remedial measures were taken to address the misconduct.

There has been much discussion following the Benczkowski Memo about the extent to which DOJ still views monitorships as a helpful

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and worthwhile compliance tool. Earlier this year, DOJ provided an affirmative answer to that question, imposing a two-year monitorship on Walmart as part of a non-prosecution agreement.

That non-prosecution agreement resolved a multi-year inquiry surrounding alleged violations of the Foreign Corrupt Practices Act by Walmart subsidiaries in Mexico, Brazil, China and India. The approach taken by DOJ offers several important lessons for companies, their counsel, and compliance personnel regarding corporate monitorships.

Lesson 1: Even after the Benczkowski Memo, DOJ monitorships are not a thing of the past.

Although DOJ's insistence on imposition of corporate monitors has seemingly waned recently in recognition of the cost and burden monitorships impose on companies, DOJ's post-Benczkowski Memo decision to impose a monitorship on Walmart shows that monitorships remain in DOJ's oversight and enforcement tool kit. Although DOJ seems to be taking a more cautious approach regarding monitors, employee or corporate misconduct can still result in imposition of a monitor—even when a company has thoroughly addressed the misconduct, fixed its internal controls, and otherwise ostensibly satisfied many of the criteria set forth in the Benczkowski Memo.

Lesson 2: Companies do themselves no favors by sweeping periodic employee misconduct under the rug.

For nearly a decade, in subsidiary operations in multiple countries,

Walmart repeatedly ignored red flags and weaknesses that had been identified in its internal accounting controls related to anti-corruption. Those red flags included recommendations from audit reports, anonymous whistleblower allegations, and recommendations from its own corporate security group. In one instance, a Walmart official working at Walmart's Mexico subsidiary, who was aware of alleged bribery-related misconduct while it was occurring, was later tasked with investigating those same allegations. Unsurprisingly, the official exonerated those accused of misconduct.

Such less-than-independent investigations and failure to deal appropriately with red flags culminated in Walmart's eventual determination that it needed to self-disclose misconduct to DOJ, followed by numerous investigations and ultimately a monitorship. There were numerous missed opportunities in which Walmart could have taken steps to remediate its compliance programs, address potential misconduct, and strengthen internal accounting controls. With Walmart repeatedly failing to do so, the situation reached a point at which a costly, intrusive, and embarrassing monitorship became unavoidable.

Lesson 3: Last-minute remedial measures will not be enough to save a company from a monitor, even where those measures are substantial.

What is perhaps most notable in the Walmart case is that DOJ imposed a monitorship despite its acknowledgment that Walmart ultimately had undertaken "significant remedial measures," including hiring a Global Chief Ethics & Compliance Officer, an International Chief Ethics & Compliance Officer, and "a dedicated Global Anti-Corruption Officer, with separate reporting lines to the Audit Committee of the Board of Directors"; conducting "enhanced monthly and quarterly anti-corruption monitoring" across each of the company's markets "by dedicated Company Financial Controls and Continuous Improvement Teams"; "enhancing annual anti-corruption risk assessments across all international markets"; and "enhancing anti-corruption related internal accounting controls on the selection and use of third parties."

Walmart ultimately spent more than seven years addressing the fallout from its earlier oversight failures, and millions of dollars overhauling its internal controls and compliance program. None of that saved Walmart from a monitorship. That is, despite the robust compliance overhaul, DOJ imposed a monitorship to "ensure that the Company's compliance program is operating effectively and adequately tested," especially in light of the "nature and seriousness of the offense conduct." It is clear that once a company finds itself in DOJ's crosshairs, even substantial remedial measures may not be enough to avoid a monitorship, especially where the misconduct is widespread or significant.

Lesson 4: Companies now have greater ability to control the parameters (and expense) of the monitorship imposed.

Although companies found to have engaged in misconduct still have to contend with the imposition of a DOJ monitor, they need not give the monitor free rein. In a departure from previous typical practice, DOJ allowed Walmart to control the scope of the monitor's duties, and directed that the monitor "shall not conduct a comprehensive review of all business lines, all business activities, or all countries," but rather was to focus on predefined key risk areas. Moreover, while monitors often have had the discretion to decide upon a written work plan, if any, after being appointed, Walmart already had the monitor's written work plan in place, and his duties circumscribed, by the time the non-prosecution agreement was executed.

The *Walmart* case thus shows that DOJ appears to be taking a more nuanced and tailored approach to oversight via monitorships. Companies may now have far greater ability to control the scope and parameters of a monitorship to prevent a broad, costly and burdensome scope of review.

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