

Corporate Monitorships: Avoiding Costly Pitfalls

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Use of corporate monitors has become an increasingly common means of oversight. Monitors are appointed in a variety of contexts: government agencies use monitors to oversee contract performance; a regulator may require a company to employ a monitor to oversee compliance efforts; and courts have used monitors as a remedial post-verdict measure. While monitorships can be a useful and powerful tool, it is essential for monitors, regulators and companies to understand and avoid common pitfalls associated with the practice.

Monitor Selection

The first critical task in ensuring an effective monitorship is the selection of the monitor. Regulators and companies should be mindful to select monitors with sufficient background in the area at issue, such as internal controls generally or a particular statute



or subject matter. Such familiarity typically results in lower costs to the company and in monitors providing the best possible compliance-related advice.

The monitor should be comfortable with and experienced in applying risk-based methodologies to determine what specific aspects of a company's operations to review. Assessing the risk of company noncompliance in various areas and focusing efforts accordingly is vital since an

overly broad scope of review can result in lengthy and expensive oversight efforts. Hiring a monitor with an otherwise diverse and busy practice can further help to avoid a situation where the monitor decides to review every aspect of a company's work, billing for every moment along the way.

Even when a monitor is appointed by a regulator or court, the company to be monitored typically should be involved in the selection process and have

input into the selection. See, e.g., Memorandum from Craig S. Morford, Acting Deputy Attorney General, to United States Attorneys (Mar. 7, 2008) (available at www.justice.gov/dag/morford-useof-monitorsmemo-03072008.pdf). Ultimately, a relationship between monitor and company that is not antagonistic will be beneficial to all parties. For example, if there is appropriate dialogue between the company and the monitor, the company and the monitor will be more likely to work out disagreements between themselves, ensuring only the most important issues are reported to regulators and decreasing time spent by regulators resolving petty disputes.

It is frequently a good idea for both the company and the regulator to interview monitor candidates. This can help gauge whether future cooperation among the parties will be effective, and can be used to ensure that the prospective monitor has an effective work plan and properly understands the monitor's role.

Defining the Monitor's Role

Oftentimes, the company being monitored views the monitor as

an agent of the government (or the court), which can result in unnecessary conflicts and inefficiencies. In most cases, monitors, companies and regulators should view the monitor as an agent of two principals: the regulator *and* the company. This allows the monitor to serve effectively as both a type of compliance officer for the regulator and a compliance counselor for the company.

Rather than leave the monitor's role undefined, a detailed set of monitorship guidelines should be created at the outset of the monitorship. The parties can look to the American Bar Association's *Monitors Standards* for a starting template. At a minimum, monitors should adhere to the following guidelines:

Remain independent of both the company and the regulator;

Be impartial and objective in all activities; and

Avoid conduct that may affect, or appear to affect, objectivity and impartiality.

Monitor's Work Plan

The parties should always create a work plan for the monitorship. Among other things, a work plan helps to avoid future

surprises and conflicts between the monitor and other parties.

While some monitors try to limit company involvement in the work plan because of their fear of being micromanaged, ideally all parties should work together in developing the plan. Such an approach fosters cooperation and transparency, and helps to avoid later disputes about work being performed.

Initial work plans need not be rigid or contain intricate detail, but at a minimum should generally contain:

A budget;

A timeline;

A designated point of contact for the company, monitor and regulator;

A description of the compliance procedures to be evaluated;

A preliminary list of relevant documents and necessary interviewees; and

Logistical processes to be used regarding, for example, monitor reports and maintaining confidentiality.

Avoiding these common pitfalls will go a long way toward establishing productive and efficient monitorships for all parties involved. •