

WEBINAR

A Strategic Approach to Compliance Monitorships

NOVEMBER 25, 2019

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Attorney Advertising



WEBINAR

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Webinar Guidelines

- Participants are in listen-only mode
- Submit questions via the Q&A feature
- Questions will be answered as time permits
- Offering 0.5 CLE credit in California and New York*

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Agenda

Today we'll discuss several topics foundational to an independent compliance monitorship:

- Transitioning from government investigation to monitorship;
- Preparing for a monitorship and ensuring a cooperative tone;
- The monitor's mandate and evaluation of the compliance program;
- The triangular relationship between company, government, and independent monitor;
- Responding to monitor recommendations to enhance compliance; and
- Creating and demonstrating a culture of ethical and compliant behavior.



Transitioning from Government Investigation to Monitorship

- Early on, impress upon relevant employees the importance of the monitorship to the company and the ways in which it differs from the underlying investigation.
 - Key element of resolution of the investigation and will be watched closely by the government;
 - Monitor is independent with responsibilities to monitor compliance with agreement and assist in improving company compliance.
- Consider ways to:
 - Combat investigation fatigue (e.g., take advantage of what may be lag time between settlement and appointment of the monitor);
 - Educate employees on the nature and purpose of the monitorship—independent, collaborative—in informal, low-pressure settings (e.g., employee town hall); and
 - Convey what the company would consider a successful monitorship (e.g., timely completion and a stronger compliance program brought about through realistic recommendations).



Preparing for a Monitorship

- Make clear that company leadership embraces the monitorship as one of its highest priorities, and will:
 - Make achieving the goals of the monitorship “everyone’s business,” including executive and Board leadership
 - Deploy resources as necessary to fully and promptly respond to monitor requests
 - Make employees available for interviews
 - Prepare for any site visits requested by the monitor
 - Promptly implement accepted monitorship recommendations into company culture, processes, and systems
 - Encourage candor with monitor with shared goal of a stronger compliance program



Preparing for a Monitorship

- Establish team of core personnel responsible for serving as points of contact for the monitor and guiding the company through the monitorship.
 - Compliance and legal participation, as well as participation from functions that may have had less involvement with the underlying investigation (e.g., Finance)
- Task this group with preparations such as:
 - Evaluating existing resources to work on monitorship and supplement where necessary
 - Develop clear and consistent lines of authority
 - Reviewing investigation work product for potential production to the monitor—no privilege exists with the monitor!
 - Establishing a protocol for responding to document requests
 - The monitor will have a set period in which to prepare an initial work plan and will make document requests prior to the start of the initial review period
 - Gathering what will be likely be responsive documents to monitor requests (e.g., compliance policies and audit reports)
 - Preparing initial briefings for the monitor
 - Understanding disclosure obligations and establishing a process for evaluating potentially reportable conduct



Ensuring a Cooperative Tone

- The period of your monitorship will likely be at least two years, and starting off on the right foot goes a long way toward establishing a cooperative working relationship for the duration of the monitorship. Consider:
 - Scheduling meetings with the monitor soon after retention for presentations on the company's business, structure, and leadership, including briefings from key control functions such as Compliance, Legal, Finance, and Audit to become acquainted with the company's systems and processes;
 - Sharing with the monitor the company's own perceptions on the root causes for the misconduct and how the company has responded to these root causes;
 - Specific welcomes from C-Suite personnel expressing support for the monitorship and emphasizing company's desire for a cooperative, collaborative process; and
 - Other ways to ensure adequate information—including responses to document requests—is transferred to the monitor in a timely fashion to allow them to start work and meet deadlines imposed by the settlement papers.
- The best monitorships are treated as partnerships from day one and there is very rarely occasion to take an adversarial tone.



The Government-Monitor-Company Relationship

- The monitor is independent, acting neither as lawyer for the company nor agent of the government. Accordingly, the monitor will have open and frequent dialogue with both the company and the government.
- There are circumstances and/or conduct the monitor is required to report to the company and the government jointly and, in some cases, to the government alone.
 - Frequent communications with the monitor and a commitment to real improvement in the compliance program should minimize situations where the government is learning about misconduct from the monitor rather than from the company
- Similarly, if the company discloses issues or misconduct to the government that is within scope of the monitorship, you should update the monitor.



The Monitor's Mandate

- Generally speaking, it is not the monitor's job to reinvestigate the facts of the underlying misconduct and the work of the monitor should be "risk-based."
 - Some aspects of the prior investigation, however, may be relevant to the monitor's inquiry (e.g., gaining an understanding of the areas of highest risk)
- A good monitor will work with the company and the government to craft work plans tailored to the risks at issue and be conscious of minimizing disruption to the day-to-day operations of the company.



The Monitor's Mandate

- In the context of verifying compliance with the NPA or DPA, the monitor will:
 - Assess the effectiveness of the corporate compliance and ethics program, both from a programmatic/structural perspective and as it operates in the field
 - Provide recommendations to improve or enhance the compliance and ethics program
 - Certify that the company's compliance program is reasonably designed and implemented to prevent and detect violations of the relevant laws



The Monitor's Mandate

- This work will be conducted against the backdrop of the government's expectations for a strong compliance program. These are generally spelled out in an attachment to the settlement and mirror considerations set forth in the DOJ's ["Evaluation of Corporate Compliance Programs:"](#)
 - High-Level Commitment
 - Policies and Procedures
 - Periodic Risk-Based Reviews
 - Proper Oversight and Independence
 - Training and Guidance
 - Internal Reporting and Investigation
 - Enforcement and Discipline
 - Third-Party Relationships
 - Mergers and Acquisitions
 - Monitoring and Testing (including Internal Audit function)



Responding to Monitor Recommendations

- The Monitor will periodically issue written reports documenting their findings.
- The Monitor's reports will include recommendations designed to improve the company's compliance program, such as:
 - Changing policies and/or the code of conduct;
 - Enhancing training programs;
 - Increasing staffing and resources (dedicated to compliance, finance and other areas);
 - Improving accounting/financial controls; and
 - Improving due diligence and monitoring processes.
- Because the company will have a limited period (usually around four months) to implement these recommendations, it is important to think strategically about your response and, where possible, begin implementation immediately. You must be prepared to provide the financial and operational resources to implement the monitor's recommendations in a timely manner.
 - Internal delays could lead the monitor and/or the government to believe that the company is not serious about improving its compliance program, which could result in an extension of the monitorship.



Creating and Demonstrating Compliance Culture

- Making compliance a core value to the company will be essential at all stages of the monitorship and critical to certification.
 - Ensure that there is an appropriate “tone at the top” -- all levels of management must be able to speak to the ways in which they message the importance of compliance and actively instill compliance through their day-to-day functions
 - Ensure that personnel in key control functions understand their role as “gatekeepers” and see themselves as owning compliance and furthering compliance culture
- Demonstrating a culture of compliance is also critical. In addition to tone at the top and successful implementation of monitor recommendations, consider:
 - Employee engagement surveys, including questions about reporting and retaliation
 - Full and regular compliance messaging in the field at the operator level
 - Trends in metrics demonstrating compliance within the organization



Questions

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