# Trans-Atlantic Winds of Change for Corporate Monitorships?

DECEMBER 11, 2018

*This article first appeared in Fraud Intelligence.*

Corporate monitors have long formed part of the US government's white-collar crime enforcement toolkit, but recent developments suggest that Department of Justice (DOJ) enthusiasm for their use may be diminishing whilst, in contrast, the UK may be heading in the opposite direction. The recent appointment of Lisa Osofsky as Director of the Serious Fraud Office (SFO), herself a former corporate monitor, and the recent, more aggressive UK authorities' approach to corporate crime, suggests that the increased use of some form of monitor may become the new reality in the UK. If this is right, how have we got to this position and what lessons can be learnt from the US?

Before going any further, whilst many compliance professionals will be very familiar with monitors, it is worth clarifying their role. Essentially, a compliance monitor is an independent third party appointed to oversee and report on a company's internal controls and compliance functions during or after a criminal or regulatory investigation. A monitor may be appointed by a court, agreed between the company and the investigating agency, or hired voluntarily by the company in order to demonstrate cooperation during an investigation. Compliance monitors are often drawn from law firms, accountants, or specialist risk consultancies. Critically, a monitor is expected to act independently and, when a lawyer, does not owe a traditional lawyer-client duty to the company or its shareholders.

*Historical use of monitors in the US and UK*

Historically, the imposition of a corporate monitor has been a potential—and in some instances, likely—outcome of a US corporate settlement. In the US, monitors have been appointed in both civil and criminal resolutions with government enforcement agencies. Monitors can be imposed by state regulators, for example the New York Department of Financial Services, and federal entities including the DOJ and Securities and Exchange Commission (SEC), as well as agencies perhaps more commonly viewed as involved in regulatory rather than criminal enforcement, such as the Environmental Protection Agency. Monitors can be used for issues or legal violations other than the Foreign Corrupt Practices Act (FCPA), such as healthcare fraud, but they have been commonly imposed in conjunction with the DOJ's resolution of FCPA cases through deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs). The thinking, of course, is that the

independent compliance monitor will ensure that the settling company adheres to the terms of the settlement, obeys the law, and improves its compliance programme, thereby reducing the risk of recidivism.

In the UK, the use of monitors is more convoluted. Prior to the passage of the Crime and Courts Act 2013 (CCA), UK enforcement authorities had no formal statutory power to require companies to appoint compliance monitors. Nonetheless, compliance monitors were occasionally put in place through voluntary agreements between UK enforcement agencies and companies under investigation, or by order of the criminal courts after a guilty plea by a corporate defendant.

Notwithstanding the lack of statutory powers, the resolution of a number of cases has resulted in the appointment of some kind of monitor. Between 2008 and 2012, a form of monitor was used in relation to the resolution of alleged overseas bribery cases, separately, involving Balfour Beatty, Mabey and Johnson, BAE Systems, Innospec, Macmillan and Oxford University Press. The critical element in all of these cases was that the individual companies themselves put in place a form of monitor, as part of their negotiation with the SFO. These monitor roles were arguably less intrusive than those often seen in the US. Interestingly, the use of a monitor was regarded with some scepticism by certain judges involved in the process. Lord Justice Thomas said, in relation to Innospec in 2010, that a monitor was an "expensive form of 'probation order'" and likely "unnecessary for a company which will also be audited by auditors well aware of the past conduct and whose directors will be well aware of the penal consequences of any similar criminal conduct."

In 2014, DPAs were finally introduced in the UK. Schedule 17 of the CCA specifies that a DPA may require an organisation to implement or make changes to an existing compliance programme but does not mandate the appointment of an external monitor. In February 2014, after public consultation, the SFO and CPS published a joint Code of Practice in respect of DPAs, which provided detailed guidance regarding the potential appointment of compliance monitors. The guidance notes that it is important for a prosecutor to consider whether the organisation already has a "genuinely proactive and effective corporate compliance programme" and that the use of monitors "should therefore be approached with care." Ultimately, the guidance explains, "[t]he appointment of a monitor will depend upon the factual circumstances of each case and must always be fair, reasonable and proportionate."

So far, the UK authorities have entered into four DPAs, all of which have had some kind of monitoring, albeit no formal "monitor". Standard Bank was required to allow an independent review of its existing anti-bribery and corruption controls and to implement any recommendations made by the independent reviewer, PricewaterhouseCoopers LLP (PwC). In the XYZ DPA (confidential due to parallel proceedings), no independent compliance monitor was appointed; rather, the company's chief compliance officer was required to provide an annual report to the SFO regarding the company's own ongoing internal compliance review for the duration of the DPA. It has been suggested that this was because the company in question is relatively small and the appointment of a full-time monitor would have been unduly financially onerous.

The most significant informal monitor type role has been in relation to the Rolls-Royce Plc DPA in 2017. Under this DPA, Rolls-Royce agreed to pay nearly £500 million in financial penalties and

disgorgement of profits and to complete, at its own expense, a compliance review following the recommendations from Lord Gold, who was also the monitor in the BAE settlement in 2010. Rolls-Royce had first retained the services of Lord Gold — described by Sir Brian Leveson as a "quasi-monitor" — to lead a review of its compliance procedures in 2013 when the SFO investigation began. By the time the DPA was negotiated in 2017, Lord Gold had produced two interim compliance reports with a third on the way. Rolls-Royce agreed to provide the SFO with Lord Gold's third report by the end of March 2017 and to produce a written implementation plan setting out how it would give effect to his recommendations. The DPA required Rolls-Royce to implement or have sustainment plans to execute the plan to Lord Gold's satisfaction within two years of its commencement.

Finally, the SFO announced a fourth DPA with Tesco Stores Limited ("Tesco") on 10 April 2017. Reporting restrictions have been imposed on the agreement due to the ongoing related prosecutions of three individual Tesco executives, and therefore the terms of the DPA have not yet been released. However, a Final Notice in a linked matter, issued by the Financial Conduct Authority ("FCA") on 28 March 2017, indicates that the DPA will require Tesco to commission Deloitte to report on and make recommendations for improvements to its internal compliance procedures.

*US Guidance*

Whilst the UK authorities have issued broad guidance on the appointment of monitors within the context of a DPA, in the US the DOJ, beginning in 2008 and most recently last month, has issued a number of memoranda or "guidance" documents on the imposition and selection of corporate monitors. First, in 2008, the Morford Memorandum (so named because its author was Acting Deputy Attorney, General Craig Morford) issued guidance setting forth "a series of principles for drafting provisions pertaining to the use of monitors" in connection with settlement agreements. Next, in 2009, the Breuer Memorandum, a supplement to the Morford Memorandum, established procedures for the selection of monitors in matters being handled by the DOJ's Criminal Division. In 2010, the Grindler Memorandum outlined the role of the DOJ in resolving potential disputes between a company and its DOJ-mandated monitor.

Most recently, a document that, if convention holds, will be referred to as the 'Benczkowski Memorandum' incorporated certain principles from prior DOJ guidance. The 'Benczkowski Memorandum' is broader than previous DOJ guidance because it explicitly states its applicability to DPAs, NPAs, and plea agreements (prior guidance stopped short of including plea agreements). It is the DOJ's most detailed playbook yet with respect to assessing the imposition of a corporate compliance monitor.

Significantly, the October 2018 'Benczkowski Memorandum' suggests a tempering of the appointment of corporate monitors and a potential narrowing of their scope within a company. In particular, it states that the DOJ must consider additional factors when assessing the need for a corporate monitor, including whether the corporation has made significant investments in, and improvements to, its corporate compliance programme and internal control systems. The guidance also suggests that even where a monitor may be appropriate after considering these new factors, the monitor's role should be tailored to minimise the burden on the business's operations.

Moreover, it appears that the Criminal Division intends to give companies greater opportunity to demonstrate during the resolution process that a monitor is not warranted, whether by overhauling a compliance programme in tandem with an investigation, taking strong remedial action, or simply arguing successfully that the misconduct was the result of a few rogue actors and therefore not pervasive. Accordingly, these new principles may reduce the number of corporate compliance monitors and their reach within corporations undergoing a monitorship.

*The UK – a new approach?*

So, whilst it appears the US may be reducing its use of monitors, the SFO may be looking to increase their use. On 21 June 2018, Camilla de Silva, the SFO's Joint Head of Bribery and Corruption, gave a speech in which she discussed both DPAs and monitorships. De Silva emphasised that DPAs should not be seen as simply the "cost of business" but rather should be used where they will enhance public confidence in the UK's criminal justice system. Compliance monitors may be imposed, she said, as a condition of a DPA where a monitor is necessary "to positively and genuinely assist in changing corporate behaviour." De Silva noted that the decision about whether to impose a monitor "will be informed by the extent to which the programme of corporate governance enhancements is complete at the time of the DPA resolution." These remarks are in keeping with the SFO's practice of rewarding cooperation during an investigation with more lenient DPA terms, and suggest that companies taking the initiative with respect to enhancing compliance programmes once an investigation begins are more likely to avoid the onerous costs of an independent monitorship when entering into a DPA.

Lessons from the US

Despite the formal and publicly disclosed US guidance, the imposition and selection of monitors has not been without controversy. Lack of transparency, for example, is a common critique of the process, although the tide may be changing in this respect. Earlier this year the federal district court in Washington, DC ruled that the DOJ must give a journalist the names of candidates nominated to serve as compliance monitors and records relating to the selection process, as it would serve the public interest.

Another significant issue is cost. In the US monitors' fees, borne by the company, can run to many millions of dollars and all parties on both sides of the prosecutorial divide have expressed a desire that UK monitorships should not be an additional punishment on top of any fine. That said, any kind of independent oversight of a company is a significant imposition both in terms of the monitor's own costs and the resources required from the company to engage with the monitor and implement any recommendations.

Finally, in the UK it is clear that a company is more likely to be offered a DPA if it establishes some kind of compliance review under a quasi-monitor at an early stage of the investigation. As long as the individual is credible then - in contrast to the monitor being imposed by the DOJ in the US - the company can choose its own monitor. Any suggestion of lack of independence is mitigated by the eventual judicial oversight of any DPA.

The use of DPAs and monitors in the UK is still at a relatively early stage, and it remains to be seen whether there will be a significant upsurge under the new Director of the SFO. It may be that the new US guidance in fact creates a more harmonious process between the two jurisdictions, resulting in slightly fewer monitors in the US and slightly more in the UK. What is clear, however, is that monitors will remain a powerful tool in prosecutors' armoury on both sides of the Atlantic.

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