

Hiring the Right Monitor to Help Your Company and Not Hurt It

Corporate Counsel (Online)

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CORPORATE COUNSEL

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Body

Like many of the really important things in life, corporate integrity and compliance monitors are generally not thought about until they are needed. In a crisis situation forethought is impossible. You're in the midst of negotiating the terms of a settlement of an enforcement action, and you now have to hire a monitor. This kind of rushed decision making can cost companies dearly in terms of time spent dealing with the monitor, efficiency of corporate operations, money, and lost opportunity to align the company with ethical and compliant business practices.

So let's plan for something you don't want and don't need-yet! What would a successful monitor for your company look like? As former federal enforcements officials, we have worked closely with companies that sought to redeem themselves in the eyes of the government through the use of independent corporate monitors, and, since we have left government service, we have served as monitors ourselves in civil and criminal contexts. This experience can help you plan (and, if necessary, negotiate) an effective corporate integrity and compliance agreement with the right monitor.

But first things first. A corporate integrity and compliance monitor is independent-neither working for the company nor for the government-engaged by contract to provide impartial analysis concerning a company's ethics and compliance programs and risks for certain types of misconduct. Monitors need unfettered access to a company, its records, and its people and generally will not be dissuaded from doing their jobs. Monitors can, and sometimes do, make recommendations that require substantial changes in company operations. But, when a company chooses the "right" monitor and approaches the engagement in the "right" way, the monitor can also advocate for a company with enforcement officials, helping the company regain the trust of the government and, in certain circumstances, exit the monitorship agreement early.

Monitors are often appointed pursuant to an administrative agreement between a suspension/debarment official and a government contractor that wants to continue doing business with the government. Monitors are also appointed to monitor Foreign Corrupt Practices Act compliance and in connection with securities enforcement actions. Federal prosecutors use monitors to ensure that companies follow a deferred prosecution agreement or non-prosecution agreement. In healthcare fraud matters, independent review organizations perform a monitoring role, and in serious quality of care cases a monitor may also be appointed.

Even if you think you will never need a monitor, every general counsel should give at least some thought and planning toward a possible future corporate monitoring engagement because of their increasing prevalence.

Or, stated more colloquially, "these days, all the cool kids have monitors." For example, HSBC, General Motors, Deutsche Bank and others have had monitors. Many smaller companies have monitors as well. Some have even tried to get rid of their monitors, and many of those efforts fail to receive government approval. Stated differently, once you engage a monitor, you're likely stuck with that monitor. So choose wisely.

What Am I Getting My Company into?

Brian Miller

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Fair questions. Poorly chosen monitors can do a lot of damage and are often hard to get rid of. So what are the guidelines for a monitor? Few and far between. And monitors can vary greatly. So what should we look for in a monitor?

The purpose of a monitor is to help. A monitor neither works for the corporation nor the government, but provides an independent, neutral, and impartial assessment of the corporation's improved compliance and corporate culture. A monitor documents what the company is doing to ensure future compliance. It's about the future, not the past, and rarely the present.

Now this is near and dear to our hearts: A monitor should want the company to succeed. As former federal enforcement officials, part of our duties involved addressing the future integrity of companies with which we dealt. The U.S. Department of Justice handles punishment for past conduct. As an Inspector General and a Suspending and Debaring Official, we also focused on future ethical and compliant conduct. And that is the goal here: following the rules and establishing internal controls that ensure future ethical behavior. Helping the company move forward with a compliance program that really works for that particular business is what really gets us excited and motivated.

That's the goal. Now how does a monitor achieve it? If the monitor wants the company to succeed, he or she will adopt a collaborative style. How the company reacts will also make a difference here. The company should view the monitorship as an opportunity to tell its story of how it has corrected the problem and put into place safeguards and controls and is building an ethical culture. Assuming the monitor agrees with the assessment, then the monitor's reports will then document the company's accomplishments.

The company will improve as well. Many times during our federal tenure companies told us that the enforcement process, and resulting integrity agreement and monitorship, was sometimes difficult (okay, we admit it, they said "always" difficult) but the company emerged better and stronger for it. And we see it now in private practice. Someone from the outside will see things that even your best chief compliance officer may not, simply because the monitor is looking in from the outside.

In terms of self-assessment, a monitor is invaluable. But the company has to be open to the process. It's hard to let an outsider in and to open up, especially following a period of federal investigation and enforcement defense. The mind-set needs to change. Everyone in a monitoring context should be on the same side working toward the same goal: Mending the relationship with the government/regulator, fixing the problems, and enhancing the ethical corporate culture.

The company should educate the monitor regarding its business. The better the monitor understands the everyday demands and pressures of the business, the more likely the monitor will have realistic expectations and provide realistic advice. In conclusion, here are some tips for hiring the right monitor and avoiding the wrong one:

Things to Avoid

1. The monitor is not simply another investigator. DOJ guidance reminds us: [*"The monitor's mandate is not to investigate historical misconduct."*](#)
2. The monitor should not be overly disruptive. By definition, a monitor will disrupt business by requesting documents, interviewing executives and workers and having meetings. An effective monitor should minimize this disruption by being as flexible as possible and as efficient as possible.
3. The monitor should avoid making demands that would force the company to waive its legal privileges and protections. A monitor must be sensitive to the duties and obligations that the general counsel owes the client. The goal is not to put the general counsel in an ethical dilemma. Attorneys who act as monitors may be more sensitive to issues such as client confidences and attorney-client privilege.

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4. The monitor should not prolong the length of the monitorship and should move for early termination when appropriate, even though contrary to the monitor's financial interests.
5. The monitor should not expand the scope of the monitorship. A key factor for any monitor is following the scope of what is to be monitored, and a monitor should never venture out from what is laid down in the monitoring agreement. Remember, the monitor is not the internal investigator charged with righting every wrong. In fact, a monitor is not charged with righting any wrongs. The monitor reports on what the company has accomplished, and the duties of the monitor are bound by contract in the monitorship engagement letter and monitoring agreement.
6. The monitor should communicate regularly with the corporation and with the government. Open communication is essential for an effective monitor. This is not a game of "gotcha." Quite the opposite. A "no surprises" strategy works well for everyone. But the monitor must have solid communication skills, and the company needs to be open with the monitor.
7. The monitor should not try to run the corporation. A monitor is there for a very limited purpose and should leave business decisions and operations to the businesspeople. While there are monitors who, like one of the authors, have business degrees and consulting backgrounds, those skills are better used to understand and relate to the business. The monitor must decline invitations or motivations to do more than what he or she was engaged for. One of the authors, a former federal inspector general, knows that running the agency you are overseeing ends in disaster for everyone. The limitations on the monitor must be strictly observed and respected.

What to Look For

A good choice in a monitor is:

1. Someone with an excellent reputation for ethical conduct, within and outside of the government. Obviously, a monitor has to be ethical and command respect. It should be someone with a deep understanding of and commitment to ethics and compliance. A monitor should be someone who is highly qualified and respected and who will instill confidence.
2. Someone who knows how the government operates and what the government is looking for. It should be someone known to those in government as well and well-respected.
3. Someone who understands corporate culture and can interact easily with corporate executives, but also who can easily interact with employees at every level of the company. A monitor may need to talk with those on the shop floor as well as those in the C-Suite to gauge how well the leader's vision is being received and acted upon. In other words, the monitor needs to have good listening skills.
4. Someone who appreciates business operations. One of the more common complaints we have heard in our federal and private practice careers is that some monitors do not have a good sense of how much compliance costs, or how to recommend steps that align with corporate culture. This is different from a monitor advocating for more resources for legal and compliance efforts, which is a common recommendation. In order to have the monitor's recommendations stand the test of time and improve the company, they need to be attuned to company operations and fit within the culture. Business understanding helps in this regard.
5. Someone who will maintain credibility and objectivity. However tempting, the corporation does not want a monitor that becomes too close to the corporation. A monitor will lose credibility with the regulators if this happens. To be effective, the monitor must walk the thin line of being tough and objective yet understanding and sympathetic.

Time spent planning for the use of a corporate monitor is time well spent. Companies do not expect to need a monitor or be faced with a corporate integrity agreement, and decisions made in a crisis environment can be rushed and cause unintended consequences. Advanced planning can reduce risk and stress, and in many cases lead to a better result.

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