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Demystifying the role of the monitor

By Anushka Ram, Arnaud Collombet, and Johanna Epe

Globally, there has been an increase in corporate criminal proceedings, with compliance monitorships used as a tool by governments and other organizations to ensure adherence to legal and regulatory requirements. A corporate criminal resolution may involve multiple regulators and include penalties, fines, disgorgement of proceeds, criminal guilty pleas, the appointment of a monitor, the requirement of a compliance officer or executive to certify the compliance environment, and self-reporting obligations. Various factors influence the decision to impose a monitor and aim to provide an independent and objective assessment of the company's compliance efforts post-resolution. This article demystifies the role of the monitor by examining their appointment, responsibilities, and approach while offering tips on how to work with a monitor and leverage their expertise successfully.

Selection of a monitor

Enforcement agencies globally impose monitors in order to independently evaluate compliance with the terms of a corporate compliance resolution. In the U.S., monitors are imposed by authorities such as the U.S. Department of Justice (DOJ), the Securities and Exchange Commission (SEC), and the Department of Financial Services. The Anti-Corruption Agency fills the same role in France, and in the U.K., the Serious Fraud Office appoints monitors.

Authorities appoint monitors in consideration of “(1) the potential benefits that employing a monitor may have for the corporation and the public, and (2) the cost of a monitor and its impact on the operations of a corporation.”^[1] The process by which a monitor is identified and selected depends on the type of monitorship.

Corporate compliance monitorships often follow published DOJ guidance to ensure a rigorous and consistent approach regarding the selection of monitors.^[2] This comprehensive guidance provides valuable insights into the factors considered during the selection process for monitors in corporate deferred prosecution agreements, nonprosecution agreements, and criminal guilty pleas. It emphasizes the importance of qualifications, independence, transparency, and avoiding conflicts of interest when appointing monitors. Most commonly, selecting a monitor begins with the company providing a shortlist of qualified candidates to the regulator. The regulator reviews the proposed candidates' experience, expertise, and independence and appoints the monitor. DOJ also considers its commitment to diversity, equity, and inclusion when selecting monitors.

In other instances—such as monitorships focused on enforcement—the regulator may independently identify several qualified candidates from which the company then makes the final monitor selection. Regardless of the type of monitorship, enforcement agencies and companies generally agree on the necessary qualifications of the monitor.

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