

INSIGHT: Key Steps in Preparing for a Corporate Compliance Monitor

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By Timothy J. Treanor, David M. Rody, Joan M. Loughnane, and Alexa Poletto

Sidley Austin attorneys detail steps for companies to take in advance of working with corporate compliance monitors. Key steps include making sure the monitor is vetted, clarifying its mandate, and fostering a cooperative relationship.

Federal and state agencies settling corporate enforcement actions have frequently appointed independent monitors to review the effectiveness of compliance controls at companies, particularly when addressing corruption offenses or money laundering and sanctions violations within banks.

More recently, foreign government agencies have begun using corporate compliance monitors to ensure companies are properly prepared to prevent and detect misconduct. Some companies have even found themselves under the scrutiny of multiple monitors at the same time.

Corporate officers and directors first confronting the reality that they will have to operate with the oversight of a monitor often have no frame of reference for understanding the relationship and need to get up to speed fast.

The following are some initial steps company leaders should focus on when preparing for a monitor.

Clearly Define the Monitor's Mandate

It is imperative to clearly define the scope of the monitor's mandate from the outset to ensure that the company, the relevant government agency, and the monitor all share a common understanding of the scope of the monitor's authority.

Ambiguous mandates can contribute to unwanted scope-creep, and once a monitor has commenced work and developed an interest in a particular issue, it can be difficult for a company to convince the monitor or government agency that the issue falls outside of the mandate.

A monitor's mandate is typically addressed in the settlement agreement between the company and the government agency, but the scope of the mandate can be further refined in the engagement letter between the company and the monitor. In these documents, a company should seek, to the extent possible, to clearly define the mandate with reference to specific issues, products, services, countries, business areas, and compliance controls, and the mandate should of course define the time frame of the monitor's review.

The company should also seek to determine:

- the access the monitor will have to documents, data, internal systems, and controls for testing;
- how often the monitor will report to the company and government agency; and
- whether the company will have an opportunity to comment on any government reports.

Choose a Monitor Wisely

Some government agencies, including the Department of Justice, permit companies to propose a slate of credible candidates from which the agency will choose the monitor.

The relationship between a company and a monitor is a challenging one that is fraught with the potential for conflict and can cause calamity within a company if not handled skillfully. As a result, it is important for a company to seriously vet monitor candidates and to propose only candidates that are well-qualified.

A successful monitor will have sufficient experience to understand both the relevant industry and its unique compliance challenges and will have a level of sophistication and maturity to effectively interact with corporate leaders as well as the temperament to navigate serious problems.

Other important qualifications include being conflict free and having access to sufficient, high-quality resources, including legal capabilities, forensic accounting skills, and controls testing experience.

Lay a Supportive Foundation

It is wise to prepare ahead of time to support the monitorship. A monitor typically requests many documents, conducts numerous interviews, reviews transactions, inspects systems, and tests controls. Being responsive to the monitor's requests will set an appropriate tone of cooperation and collaboration that will help to ensure a timely end to the monitorship.

A company and its monitor will no doubt disagree at times, but the relationship, if handled properly, should not be adversarial. Ideally, the parties will view themselves as working toward a common goal—ensuring the development of an effective compliance program within the time frame contemplated in the settlement agreement.

Accordingly, a company should designate early on sufficient and specific resources, including a project supervisor of suitable seniority, to respond to the monitor's requests and help the monitor to navigate the company.

It is also prudent to establish a committee of senior executives within the company, including the general counsel and chief compliance officer, to address critical issues and make necessary decisions.

Furthermore, the company should retain outside legal advisers to work through complicated legal questions, including defining compliance-related legal requirements and addressing data protection and bank secrecy laws.

Establish a Positive Dialogue

Crucial to a successful monitorship is a constructive relationship with the monitor. To ensure an auspicious beginning, the company should prepare employees for the arrival of the monitor by educating them about the monitor's responsibilities, anticipated activities, and the importance of supporting the monitor.

The company should also take steps throughout the monitorship to ensure that employees are forthcoming and helpful at all times in interviews and other interactions.

A positive and cooperative dialogue with the monitor will go a long way toward communicating the company's commitment to addressing compliance challenges and toward convincing the monitor that company leaders and employees alike have the right attitude to sustain an effective compliance program. Such a dialogue will also build credibility for a company that needs to take on serious disagreements with the monitor on critical issues.

Actively Participate in the Process

Finally, a company that engages closely with the monitor will be able to understand in real time any concerns and misperceptions and be able to quickly address them. To facilitate such engagement, the company should prepare to host regular meetings with the monitor and team members to discuss both process and substantive issues, and the company should plan to stay in regular contact with the relevant government agency to speak to any pending concerns.

Addressing each of these steps when preparing for the arrival of a monitor will help maximize the chances that a company will be discharged from the monitorship in a timely fashion.

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Author Information

Timothy J. Treanor is a partner and global co-leader of Sidley's White Collar: Government Litigation and Investigations practice. He has managed compliance monitorship engagements from every angle—appointing and overseeing a monitor as a DOJ prosecutor, serving as lead counsel to a monitor, and advising companies under monitors.

David M. Rody is a partner in Sidley's White Collar: Government Litigation & Investigations practice. He is a former federal prosecutor in the U.S. Attorney's Office for the Southern District of New York and has represented a monitor and institutions under monitorships.

Joan M. Loughnane is a partner in Sidley's White Collar: Government Litigation & Investigations practice. She is a former acting deputy U.S. attorney in the Southern District of New York, and she focuses her practice on counseling and representing clients in connection with government investigations, enforcement actions, and prosecutions.

Alexa Poletto is an associate in Sidley's White Collar: Government Litigation & Investigations practice. She represents clients in connection with monitorships, internal investigations, and regulatory enforcement actions.

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