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# The **Compliance Monitor** Dilemma

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The U.S. Department of Justice continues to churn out policies and guidance reflecting the view that it is not merely looking to *punish* companies for their employees' misdeeds, but to *help* the companies get better quicker.

Whether viewing the Fraud Section's recent "Evaluation of Corporate Compliance Programs"[1] or the National Security Division's "Guidance on Voluntary Self-Disclosures,"[2] the message is much the same: the Justice Department isn't just focused on deterrence and accountability, but is becoming more interested in ensuring that companies implement effective compliance programs to prevent and detect *future* misconduct. While these principles have long been ensconced in Chapter Eight of the U.S. Sentencing Guidelines, the subtle but growing focus on corporate get-well programs fits hand-in-glove with the Yates Memo's unstated raison d'etre:[3] Corporate penalties often fail to hit those who deserve it most.

The DOJ's growing interest in corporate compliance dovetails with the burgeoning trend, in both criminal and administrative enforcement actions, favoring the appointment of external corporate compliance monitors. What better way to ensure that a company stay on track than to embed an independent monitor at headquarters to oversee the company's progress? *But not so fast*, at least according to Walmart, which is reported to have recently rejected a DOJ settlement offer and taken a "not in my house" approach to DOJ's insistence on an external monitor.[4]

It's not difficult to speculate why Walmart, or any other company for that matter, might balk at the government's request. First, ask any criminal defendant who's been on pre-trial supervision whether he or she would trade a modicum of extra jail time for

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the elimination of post-sentence supervision, and you'll find an answer: Being snooped and second-guessed is never fun. Second, it's important to look to the purpose for imposing a monitor in the first place; that is, to ensure that the company satisfies a stated set of program objectives in order to remediate past shortcomings. But if the company has already done so, then why the need for a monitor? Last, one only has to click on a compliance blog to read stories of monitors-run-amok, hiring legions of support staff, imperiously fighting with senior executives, or acting as if they've discovered the key to transmuting lead to gold.

Of these concerns, the first and second can be tied together and rationally resolved by making an honest assessment of the company's current compliance program. If the program meets the government's compliance goals, there's no legitimate need for a monitor; if not, the company would probably benefit from a monitor, like it or not. But it's the third reason that really causes fits: Like the "military-industrial complex" long ago warned against by President Dwight D. Eisenhower, the government-monitor dynamic can create an alignment of interests that is capable of spinning away from its original, well-intentioned purposes.

Whether relying on the ABA's Monitor Standards[5] or DOJ's guidance for Selection of Monitors in Criminal Division Matters,[6] one point is perfectly clear: the touchstone for monitor selection is *independence*. Like an arbitrator or judge, a monitor cannot be beholden to either side or have an interest in any outcome. Thus it would be outrageous to say that a monitor's compensation should be tied to the early, or timely, completion of the consent agreement (or deferred prosecution, etc.), by means of an "early-completion" bonus, *right*? Such incentive would surely cause a monitor to lean too far in one direction and loose objectivity. Or *would it*? Think of the flip-side: offering a "late-completion" bonus for when a company struggles under its consent agreement and can't be let go on time. Equally outrageous? Perhaps not.

It would be unfair to suggest that a monitor-to-be might harbor a nefarious intent to line his or her pockets at the company's expense; but an ethical dilemma does arise. Years ago, in the heyday of the drug wars, it became the rage for state and local governments to pursue the civil and criminal forfeiture of cash, cars, houses, you name it. No doubt, the members of law enforcement engaged in this activity were well intentioned and set on depriving misfeasors of the fruits or instrumentalities of their illegal activity. But in some places law enforcement agencies were able to reap direct and substantial benefits from their forfeitures, and some prosecutors were known to drive to work in high-end luxury cars seized through non-criminal administrative processes. Studies have shown that, where law enforcement was able to "police for profit," forfeitures rose at astronomical rates and the incidents of injustice grew accordingly.[7] To put it plainly, even those with the best of intentions could find themselves leaning away from the center, consciously or not, when their own self-interests came into play. It's simple Freakanomics.

There is a solution to this dilemma. In most instances the company negotiating a settlement with the government has the initial say in the monitor selection process.[8] Obviously, one of the key factors will be fees. The challenge, however, is tying a billable rate to an often ill- or vaguely-defined scope of work, making it difficult to compare bids or predict true costs. But these variables can be

reduced or eliminated by insisting on fixed-fee arrangements. Better yet, the more mature the company's compliance program, the more competitive the bidding should become. Moreover, it would be wise to consider negotiating "term limits" with the government, which would allow the company to have the option of electing to select a new monitor at the end of a stated period, even if the company is not ready to be released by that time. While this may not be cost effective for a large company because of the time it would take for a new monitor to get up to speed, in other instances it may serve to counterbalance any implicit bias. Last, it may be appropriate to construct a fee arrangement that would grant the monitor the same set fee, regardless of whether the monitorship runs its full course, or ends early because of the company's ahead-of-schedule completion. This, perhaps as much as anything else, may serve to align all of the parties' interests.

Without doubt, a monitor can be a key ingredient to a company's get-well plan, especially when a company has struggled over time. For every horror story found in the blogs, there is a string of unwritten success stories of monitors helping companies overcome legacy weaknesses and construct best-in-class programs. Independent oversight most often will lead to fresh ideas, sober analysis, and a laser-focus on results. But with all well-intentioned ideas, the challenge is in implementation, and a creative approach to compensation will better ensure that a monitor's interest are wholly aligned with those of the government and company: the timely implementation of a durable compliance program.

1. U.S. Dep't of Justice, Criminal Division, Fraud Section, Evaluation of Corporate Compliance Programs (Feb. 8, 2017), https://www.justice.gov/criminal-fraud/page/file/937501/download. See also U.S. Dep't of Justice, Criminal Division, Fraud Section, "New Compliance Counsel Expert Retained by the DOJ Fraud Section" (Nov. 3, 2015), https://www.justice.gov/criminal-fraud/file/790236/download.

2. U.S. Dep't of Justice, National Security Division, Guidance Regarding Voluntary Self-Disclosures, Cooperation, and Remediation in Export Control and Sanctions Investigations Involving Business Organizations (Oct. 2, 2016), https://www.justice.gov/nsd/file/902491/download.

3. U.S. Dep't of Justice, Office of the Attorney General, Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), https://www.justice.gov/dag/file/769036/download.

4. Joann S Lublin, Aruna Viswanatha & Sarah Nassauer, "Obstacles Remain in Talks to Settle Wal-Mart Bribery Probe," Morningstar (Jan. 27, 2017), https://www.morningstar.com/news/dow-jones/us-markets/TDJNDN_201701278855/obstacles-remain-in-talks-to-settle-walmart-bribery-probe.print.html.

5. American Bar Association, Criminal Justice Division, ABA Standards for Monitors (2015), http://www.americanbar.org/groups/criminal_justice/standards/MonitorsStandardsFourthEdition-TableofContents.html.

6. U.S. Dep't of Justice, Criminal Division, Selection of Monitors in Criminal Division Matters (June 24, 2009), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/response3-supp-appx-3.pdf.

7. See, e.g., Marian R. Williams, Jefferson E. Holcomb, Tomislav V. Kovandzic & Scott Bullock, "Policing for Profit," Institute for Justice, (March 2010), http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf.

8. U.S. Dep't of Justice, Office of the Attorney General, Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (March 7, 2008), https://www.justice.gov/usam/criminal-resource-manual-163-selection-and-use-monitors.