GIR Global Investigations Review

The Guide to Monitorships - Fourth Edition

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Since ***WorldCom***, the United States Department of Justice and other agencies have imposed more than 80 monitorships on a variety of companies, including some of the world's best-known names. The terms of these monitorships and the industries in which they have been used vary widely, yet many of the legal issues they raise are the same. To date, there has been no in-depth work that examines them.

GIR's ***Guide to Monitorships*** fills that gap. Written by contributors with first-hand experience of working with or as monitors, and edited by Anthony S Barkow, Neil M Barofsky, Thomas J Perrelli, Erin Schrantz and Matt Cipolla of ***Jenner & Block, the fourth edition of this esteemed guide*** discusses all the key issues, from every stakeholder's perspective, making it an invaluable resource for anyone interested in understanding or practising in the area.

Generated: May 21, 2024

GIR Global Investigations Review

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How to avoid and resolve pitfalls during a monitorship's life cycle

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Summary

This chapter addresses practical concerns and possible challenges that a monitor may face during the course of a monitorship, as well as advice for how to avoid or resolve these issues as they arise.[2] Much of this chapter reflects its authors' learned experience serving as a monitor or counsel for a monitored entity, although several anecdotes come from publicly known incidents and the academic literature. Studying these past cases will provide helpful guidance for navigating some of the potential pitfalls of serving as a monitor, but, ultimately, success will depend on the strength of the monitor's team and an assiduous focus on adhering to the underlying agreement,[3] even while managing the day-to-day realities of the monitorship.

INTERPRETING THE AGREEMENT

Monitorships are the product of an agreement between the government and a company, and that agreement is the ultimate basis for all of the monitor's powers and responsibilities.[4] Accordingly, it is vital for the monitor to understand the scope and requirements of the agreement as early as possible. Vague language, in particular, can become the subject of intense debate once the monitorship is fully under way, so it is advantageous to identify and resolve such vagueness as early as possible in the monitorship, before the parties' interests become entrenched. Ideally, the parties will come to a mutual resolution about such ambiguities, but the monitor can help too, mediating that process by providing interpretations likely to appease both sides. Indeed, ultimately, it is the monitor's responsibility to interpret the settlement language as he or she sees fit, and the monitored company and government will need to abide by that interpretation.

One source of vague language can be the government's effort to ensure that the monitor watches out for all relevant misconduct and strengthens the company's controls to prevent and detect such misconduct going forward. To that end, the government sometimes includes non-technical, ambiguous terms in the underlying agreements that require clarification. For example, the agreement might require the monitor to report any violations of a particular statute – a precise type of misconduct, often mirroring the predicate offence for the monitorship – and 'any other relevant misconduct'. This formulation raises the question whether 'any other relevant misconduct' is redundant and simply covers conduct violating the same specific statute or includes other offences as well. Although evidence of almost any misconduct at the company could signal that its controls are not working and of possible corporate cultural issues, it is important that the monitor not unwittingly become (or allow the government to assume that it is acting as) a catch-all regulator within the company. Indeed, when this issue arose in one of our prior monitorship engagements, we confirmed with the government that an ambiguous requirement to report certain forms of misconduct was limited to apparent violations of the operative statute, rather than all forms of misconduct – legal or not. Without this early clarity, the monitorship team would have risked either unnecessarily expanding the scope of its review – and the associated costs for the company – or failing to fulfil its mandate.

Similarly, the monitor must be aware of the context in which the agreement is formed, even if it is the actual language of the agreement that establishes the monitor's duties and powers. In our experience, a monitored company's understanding of the monitor's remit may depend on parole evidence or earlier drafts of an agreement. These sources of guidance do not trump the plain language of the agreement, however, and it is important to clarify how the monitor and parties understand the actual agreement as early as possible.

For example, in one of our prior engagements, a company subject to a multi-year monitorship believed that only the first-year review would involve extensive document inspection and interviews, with the subsequent years involving only a limited check-in to see whether any major changes had arisen at the company. It was not until our team circulated the year-two work plan that the company realised that these limitations on the follow-up reviews, which it had discussed with the government, were not reflected in the final agreement, which instead required extensive reviews each year of the monitorship.

BUILDING A MONITORSHIP TEAM

It is important that the monitor develop a team that has the skills to address all aspects of the agreement's assignment. Although many monitorship teams comprise primarily lawyers, these legal crews sometimes require additional assistance from accountants, forensic auditors and other professionals.[5]

The monitor should take a flexible, fiscally minded approach to expanding the team. For example, in one case, the government insisted that the monitorship team hire an accountant, but the monitored company successfully proposed leveraging its internal audit team to serve the same purposes – a practice that today some settlement agreements even anticipate. Although the monitor should not hesitate, to the extent permissible, to retain the assistance necessary to fulfil his or her mandate, which sometimes requires hiring specialised third-party vendors, collaborating with the monitored company's internal audit team has a number of advantages over hiring a third party. For the monitorship team, collaborating with in-house personnel allows it to leverage the company's existing systems and avoid onboarding an additional third-party team. From the company's perspective, collaborating with the monitorship team can help to reduce costs and to train the internal audit personnel how to protect against and quickly detect any future misconduct after the monitorship ends. This collaboration can also allow the monitorship team to understand a company's culture more intimately and to see the effort that compliance personnel are expending to comply with the agreement. The monitorship team must remain neutral throughout the monitorship, but, under ideal circumstances, it will use the information gained from these close collaborations to describe the company's cooperation favourably in subsequent reporting to the government.

The monitor must also build flexibility and a certain level of redundancy into the monitorship team. Team members, including the monitors themselves, sometimes have to depart the team, and it is important to build in systems and overlap to ensure that the departure of one team member does not materially affect the project.

DEVELOPING THE WORK PLAN AND SETTING GROUND RULES

The monitor's first written product is normally a work plan, which establishes the scope and timeline for the monitor's review of the company. The work plan drafting and revision phase is also the last clear chance to iron out any ambiguities in the agreement and to level set on the monitor's, government's and monitored party's understanding of the scope of the upcoming review.[6]

Given this expectation-setting dimension, it is helpful to share a draft of the work plan with the government and the monitored company to receive feedback, as well as sign-off on any proposed constructions of the agreement. Although this revision process may invite pushback to the monitorship team's plans, locking in agreement to the nature and scope of the review process from the start is important and will prevent the parties (especially

the company) from changing course mid-review and resisting a necessary aspect of the monitorship team's process.

Raising such issues during the formulation of the work plan also prevents the monitored company from having unrealistic expectations about the intrusiveness, timeline and costs of the monitorship. Although the government agreed to a narrow construction of an ambiguous requirement to report certain forms of misconduct in our case (as noted above), it would have been even more important to clarify a broad reading prior to initiating the review process because, if the monitored company disagreed with the broad interpretation, it may have become less cooperative. Under such circumstances, the monitor must execute his or her mandate, even if that requires reporting that the company is not fulfilling its obligations under the agreement, but it is best to avoid these types of conflicts in the first place.

For similar reasons, it is important to establish operating procedures and ground rules early in a monitorship. We have participated in some monitorships, for example, where the monitored company insisted on its legal counsel being present in all interviews. This practice is understandable; monitored companies often wish to understand what information the monitorship team is receiving that may ultimately appear in the monitor's reports to the government and, possibly, the public. Indeed, from the monitor's perspective, the involvement of counsel may even be helpful for coordination and transparency during the monitorship. But despite these potential advantages, it is vital that employees are able to communicate unilaterally with the monitor too, because the presence of counsel can lead some employees to be less candid and to worry about their criticisms – potentially of the counsel's office itself – resulting in backlash.[7] Accordingly, we complemented the formal interviews with confidential office hours, when employees could speak out or report problems as necessary. Depending on the physical footprint of the monitored company and the timeline of the monitorship, a monitorship team may also be able to secure a designated office at the company where employees can drop by as needed to provide relevant information, whether solicited or not, to the extent that this could serve the monitor's mandate.

Privilege is another topic that requires early consultation with both the government and the company. Although the monitor is normally retained by the company itself, no fiduciary or attorney–client relationship is formed. Rather, the monitor serves as a neutral third party. Accordingly, sharing privileged documents with the monitorship team risks waiving privilege. Many agreements contain provisions contemplating this risk and permitting the company to withhold privileged materials and to provide alternative information sufficient to answer the monitor's questions, but in the event of a dispute, the monitorship team should establish a clear protocol for referring such privilege issues to the government or otherwise resolving them.

Relatedly, in the context of a US government monitorship, the monitorship team should discuss with the government how it anticipates handling subpoenas and Freedom of Information Act (FOIA) requests for any reports or other work-product generated by the monitorship. On several occasions, including one of our prior monitorship engagements, the Department of Justice has litigated to protect documents created as part of the monitorship process from disclosure pursuant to a FOIA request, citing various exemptions under FOIA to protect our work-product.[8] The court recognised that our interview notes, internal analyses and report drafts were at least partially protected by the deliberative process privilege,[9] which is a form of executive privilege that shields from inspection the pre-decisional deliberations of a government agency.[10]

More generally, the government's invocation of the deliberative process privilege offers at least some protection to a monitorship team's communications with the government and work-product from civil discovery.[11] Accordingly, the monitorship team should reach out to the government early on to raise the question of whether it would invoke privilege and exemptions under FOIA to prevent the disclosure of the monitor's work-product, because it is ultimately the government, not the monitor, that owns the relevant privileges.

WRITING A REPORT

Most agreements require the monitor to submit a report, often at the conclusion of each year or defined review period.[12] Reports are the monitor's primary work-product, and they serve several important functions. First, reports update the government about how the monitorship is proceeding and permit the government to assess both the company's performance and the effectiveness of the monitor. Second, reports provide the company with a clear progress report that summarises the monitor's assessment of the company's relevant strengths and weaknesses, as well as any recommendations for necessary improvements during the monitorship (typically, to its compliance programme). As discussed below, reports also provide the company with an opportunity to assess whether the monitor has any misconceptions about the company or is evaluating the company unfairly. Third, reports provide an important record of the company's relevant compliance programmes and the progress made during the monitorship. In those cases where the monitorship is public, these written records inform the public about this key information, but even in non-public, confidential cases, written reports will be essential in evaluating any future misconduct by the company and making an appropriate charging decision.

In our experience, sharing a draft of the report with the monitored company and permitting it to provide feedback allows the monitor to double-check the accuracy of the report and to limit the company's uncertainty about the report. For example, many agreements require the monitor to assess the monitored company's risk profile and likelihood of committing further misconduct. Producing such a risk assessment often requires the monitorship team to learn about the company's industry, its role within that industry, the company's regulatory and other legal obligations, and the corresponding legal risks associated with the company's profile. The monitorship team must also review the company's various control functions and how they identify, assess and track risk. Particularly during the first year of a monitorship, it can be helpful to share a draft of the risk assessment with the company to ensure that the monitorship team understands and is describing accurately how the company operates and the relevant business and regulatory landscape.

Importantly, though, the monitor must be careful not to allow the monitored company to dictate the monitor's evaluation of the company, including the monitor's qualitative assessment of the company's controls, risk profile and adherence to the underlying agreement. It is helpful to hear the company's feedback and to consider its views, particularly because the difference in perspective may be based on the monitor's misunderstanding of how the company operates, but, ultimately, the monitor must maintain independence and make an objective judgement.

CONCLUDING THE MONITORSHIP

Bringing a monitorship to a close can be a complicated process, as the monitorship team tries to shepherd final changes within the monitored company, sometimes on a significantly shortened timeline. New considerations include whether the recommendations

implemented during the monitorship have been memorialised in a durable way and whether the relevant employees feel empowered to speak up and report any potential future misconduct. For example, the incorporation of policy changes into a formal written document or into annual compliance trainings will prove more durable after the conclusion of a monitorship than a one-off presentation or announcement. The monitorship team must also ensure that any last-minute changes at the company, especially those that the company rushed to complete on the eve of the monitorship's termination, are reliably implemented and that no new risks are inadvertently introduced.

Indeed, in some instances, the final year of a monitorship can become the crunch time for implementing important structural changes. For example, in one of our prior engagements, it took until the lead-up to the certification of the monitorship for the monitored company to satisfy one of the monitor's first recommendations, which required a technological overhaul of a system. Such last-minute scrambling is not ideal, particularly because it leaves little time for the monitorship team to observe the implementation of the new system or policy, making an assessment of its effectiveness difficult. But the monitor should be flexible in trying to allow the company to make the advancements necessary to avoid future misconduct, which is the essential goal of almost every monitorship. Although the monitor may consider recommending an extension to the monitorship, which many agreements contemplate as an option if the company does not make satisfactory progress or commits further misconduct, the monitor should never choose this path lightly, as there should be clear and convincing reasons for extension.

In most monitorships, however, the necessary adjustments in the final year are not essential, but rather involve slight modifications to existing policies and procedures, or follow-up advice regarding the implementation of an earlier recommendation. One method of providing such feedback without requiring the company to implement a series of recommendations between submission of the final report and certification – which can often occur within a short time frame – is to float soft 'suggestions' during the final year of the monitorship, which the monitored company can address on a rolling basis. Providing such suggestions allows the company to continue to improve throughout the monitorship process and provides the monitorship team with helpful anecdotes to describe the company's ongoing efforts and to demonstrate that certification, to the extent required by the agreement, is appropriate.

ENDNOTES

[1] Michael S Diamant, George J Hazel and Kristen C Limarzi are partners at Gibson, Dunn & Crutcher LLP. The authors would like to thank and acknowledge their colleague Matthew Butler for his substantial contributions and assistance in preparing this chapter.

[2] For the purposes of this chapter, we define a monitor as an '(i) independent, private outsider[], (ii) employed after an institution is found to have engaged in wrongdoing, (iii) who effectuate[s] remediation of the institution's misconduct, and (iv) provide[s] information to outside actors about the status of the institution's remediation efforts.' Veronica Root Martinez, 'Modern-Day Monitorships', 33 ***Yale J. on Reg.*** 109, 123 (2016).

[3] Such agreements include, but are not limited to, settlement agreements, non-prosecution agreements, deferred prosecution agreements, consent judgments and conditions of probation.

[4] See Veronica Root, 'The Monitor-"Client" Relationship', 100 ***Va. L. Rev.*** 523, 540 (2014) ('[E]ach monitorship has the potential to be entirely unique because the overarching structure and parameters of a monitorship are determined by the terms of the agreement between the government and the corporation. This creates a challenge in attempting to provide a generic description of monitorships.').

[5] Root, 'The Monitor-"Client" Relationship', 100 ***Va. L. Rev.*** at 532 ('Depending on the scope of the investigation into the organization, a monitor will often employ a large staff to complete the day-to-day investigation.').

[6] See Amy Walsh, 'Is the Opaque World of Corporate Monitorships Becoming More Transparent?', ***Business Law Today*** (Dec. 2015), at 2 ('[T]he formulation of the work plan becomes a central and important aspect of the monitorship. Typically the corporation wants certitude and predictability as to exactly what the monitor plans to do, and the monitor wants flexibility because of uncertainty over what issues may arise once work begins.').

[7] Walsh, 'Is the Opaque World of Corporate Monitorships Becoming More Transparent?', at 2 ('As a practical matter, any monitor should feel free to interview employees without company counsel present, assuming such interviews are a reasonable way under the circumstances to obtain information about the compliance issues at hand. As long as the monitor explains the monitor role—that the monitor is not a prosecutor, is not investigating historical conduct, and needs certain information to help the company achieve compliance going forward—a corporate employee may be much more candid and forthcoming with a monitor outside the presence of other corporate employees (i.e., corporate counsel).').

[8] See, e.g., ***100Reporters LLC v. US Department of Justice***, 248 F. Supp. 3d 115, 125–26 (D.D.C. 2017); ***New York Times Co v. US Department of Justice***, No. 19 CIV. 1424 (KPF), 2021 WL 371784, at *20 (S.D.N.Y. Feb. 3, 2021).

[9] See ***100Reporters LLC***, 248 F. Supp. 3d at 149.

[10] ***United States Fish & Wildlife Service v. Sierra Club, Inc***, 592 U.S. 261, 267 (2021) ('To protect agencies from being forced to operate in a fishbowl, the deliberative process privilege shields from disclosure documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.' (internal quotations omitted)).

[11] See, e.g., ***Carter v. US Department of Commerce***, 307 F.3d 1084, 1088 (9th Cir. 2002) (explaining that the deliberative process privilege under FOIA is coextensive with the deliberative process privilege 'in the civil discovery context' (quoting ***NLRB v. Sears, Roebuck & Co***, 421 U.S. 132, 149 (1975))); ***Texaco Puerto Rico, Inc v. Department of Consumer Affairs***, 60 F.3d 867, 884 (1st Cir. 1995) ('The deliberative process privilege shields from public disclosure confidential inter-agency memoranda on matters of law or policy.' (internal quotation marks omitted)).

[12] Although the monitor must ultimately adhere to the reporting requirements set forth in the agreement, the government and monitored company may agree to alternative forms of reporting as suits their mutual interests. See Veronica Root Martinez, 'Public Reporting of Monitorship Outcomes', 136 ***Harv. L. Rev.*** 757, 763 (2023) ('There is no legal requirement for corporate monitors to issue a written report; it is a custom. As a result, there is nothing stopping the monitor from providing a different method of disseminating information to the firm and governmental actor that required the retention of the monitor.').

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