

What Does an Effective FCPA Monitorship Look Like?

As initially reported yesterday by the FCPA Professor, there is an invaluable article out, recently published in the University of Pennsylvania Journal Of Business, entitled “*Somebody’s Watching Me: FCPA Monitorships and How They Can Work Better*” by Gibson Dunn & Crutcher attorneys Joseph Warin, Michael Diamant, and Veronica Root. This article is a ‘must read’ for any attorney working in the Foreign Corrupt Practices Act (FCPA) arena, whether in private practice or in-house counsel.

In a section entitled, “*What an Effective FCPA Monitorship Looks Like*” the authors posit that the “benchmark for any monitor’s success is fulfilling the terms of the applicable settlement agreements.” The authors identify five key components which help to bring a monitorship to a successful conclusion.

1. The Settlement Agreements Constitute the Monitor’s Bible

The initial starting point for any monitorship is the company’s agreement(s) with the Department of Justice (DOJ) and Securities and Exchange Commission (SEC). These settlement agreements will set forth the specific components of the monitorship including length of monitorship, number of monitor compliance reviews, certifications required, nature and structure of fieldwork and any work product which the monitor must submit to the government. All of these should be reflected in the monitor’s work plan, which should be thoroughly vetted and agreed to by all parties to the settlement agreements. The authors point out the key is trust, and setting expectations, and then not exceeding those expectations, is an important step for all parties.

2. The Monitor’s Work Must Reflect Knowledge of the Business

More than simply being a technical expert in a compliance program, a FCPA monitor must be able to understand the overall business, in the context of its compliance program. Without an understanding of the business a monitor cannot create an appropriate risk profile or design internal controls to manage any such risks. A monitor should fundamentally change a business model only as a last resort; the monitor should try to work with the ongoing business to make recommendations within the company’s current structure.

3. A Detailed Work Plan Creates Trust

The authors discuss, in several places, the need for trust between the company and the monitor. The building block for this is the monitor’s work plan. The authors propose that the work plan include the following:

- An overview of the monitor’s role and objectives, rooted in the text of the settlement agreements, to ensure that all parties understand how the monitor views his or her mandate;

- A proposed timeline for the monitorship based on the settlement agreements, including the date on which the monitor will submit a final report to the government and company;
- A description of relevant compliance policies and procedures to evaluate;
- A list of relevant documents to review;
- A list of interviewees (company employees and others, such as independent directors, external auditors, ombudsmen, and maybe even external vendors);
- A list of proposed site visits (with proposed dates); and
- A list of tests, studies, and analyses to conduct and how they will be conducted (including whether external or internal audit resources will be utilized).

The authors conclude this section by noting that the more detailed a monitor's work plan, the easier it will be for all to follow it and to understand their respective obligations.

4. The Monitor's Report Should Set Forth the Scope of the Review and Any Recommendations

The authors point out that the monitor should fully record the areas of the company which they have concentrated on and include their methodology. If there are conclusions which lead to evaluations, all such work needs to be fully documented. However, most importantly, there should be recommendations, including the time frame for implementation of the recommendations, together with an evidentiary basis for said recommendations. This will be the road map for the company going forward, this section of the monitor's report should have "the utmost clarity in explaining the contours of, rationale for, and evidence supporting a set of concrete, specific, and implementable recommendations."

5. Cooperation is Vital

The monitor should strive, whenever possible, to have a cooperative attitude with the company. An adversarial attitude does not benefit anyone or any party to the process. To facilitate this, there must be clear direction from the very top of the company that it will provide full cooperation, so that the monitor can perform the tasks assigned. There should be a primary point of contact between the company and the monitor and there should be frequent telephone conferences and face-to-face meetings to ensure full cooperation. As the authors note, "the goal should be no surprises for either the monitor or the company, so constant communication is imperative and should include interactive work plans, planning meetings prior to any substantive work, and mid-review meetings, to name a few."

We certainly applaud the authors for setting all of these factors out in their article. The highlights discussed in this blog are a very small portion of the overall article and we recommend the entire article as a 'must read' for any FCPA practitioner.

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