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SEC-Imposed Monitors

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As discussed in chapter 7, the SEC may require companies, broker-dealers, investment advisers, and others to engage a compliance monitor as part of a settled enforcement action. This chapter addresses SEC and DOJ guidance for determining whether to impose a monitor, the monitor's responsibilities, and other terms of the monitor's engagement.

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Overview

Q 8.1 What is a corporate compliance monitor or independent consultant?

The SEC defines a monitor as "an independent third party who assesses and monitors a company's adherence to the compliance requirements of an agreement that was designed to reduce the risk of recurrence of the company's misconduct."[1] Monitors, in contrast to forensic investigators, typically look forward and assess whether a company's compliance program is adequate to guard against future misconduct. Monitors serve under various titles and can be an individual or firm.

There are generally two types of SEC-imposed monitors: an "independent compliance consultant" and an "independent compliance monitor." The basic difference between these two monitors is their scope of responsibility: independent compliance monitors have a more expansive role than independent compliance consultants. The differing scope and authority of each type of SEC-imposed monitor is discussed below in Q 8.4. An independent compliance consultant is generally imposed in civil cases[2] as part of the settlement of a stand-alone SEC enforcement action,[3] while an independent compliance monitor is generally imposed in parallel criminal and civil cases when the company simultaneously enters a plea, a Deferred Prosecution Agreement

(DPA), a Non-Prosecution Agreement (NPA), consent order, or decree with the Department of Justice (DOJ).[4]

Q 8.2 What other agencies impose monitors?

In addition to the SEC, numerous federal and state government and quasi-government agencies use monitors as an enforcement remedy, including the Drug Enforcement Agency, the DOJ, the Environmental Protection Agency, the Food and Drug Administration, the Federal Trade Commission, FINRA, the Department of Health and Human Services, the National Highway Traffic Safety Administration, the New York State Attorney General's Office New York State Department of Financial Services (NYSDFS), the Port Authority of New York and New Jersey (PANYNJ), the New York Metropolitan Transportation Authority (MTA) and the U.S. Department of State. In addition, governments outside the United States (e.g., Canada, France, Germany, South Africa, Singapore, Switzerland); quasi-government agencies (World Bank); and self-regulatory organizations (FINRA, NCAA) impose monitors. These regulators refer to monitors variously as "Independent Review Organizations,"[5] "Financial Monitors,"[6] "Independent Compliance Auditors,"[7] "Integrity Monitors" and, in the U.K., "Skilled Persons."[8] The U.K.'s monitors include the Serious Fraud Office (SFO) and Financial Conduct Authority (FCA). Some regulators occasionally use monitors to supplement the agency's investigative resources.[9]

Q 8.3 When does the SEC impose monitors and independent compliance consultants?

The SEC appoints monitors in resolutions of civil suits and administrative proceedings where an organization requires remediation and the agency requires verification. The Exchange Act authorizes the SEC in civil actions to seek "any equitable relief that may be appropriate or necessary for the benefit of investors," which includes imposition of a monitor.[10] The SEC has been imposing monitors in settled enforcement actions since the early 1990s.[11] The SEC has imposed monitors to assess a wide range of matters, such as compliance programs relating to the issuance and transfer of securities,[12] the preparation of performance reports,[13] the underwriting of municipal securities,[14] anti-money laundering,[15] the application of generally accepted auditing standards,[16] the books and records provisions of the FCPA,[17] the disclosure of fees by investment advisors,[18] insider trading,[19] and even the calculation of credit ratings for mortgage-backed securities.[20]

SEC guidance on monitors appears in a Resource Guide co-authored with the DOJ Criminal Division ("Resource Guide"),[21] which explains:

> Appointment of a monitor is not appropriate in all circumstances, and a monitor should never be imposed for punitive purposes, but it may be appropriate, for example, where a company does not already have an effective internal compliance program or needs to establish necessary internal controls.[22]

The SEC and DOJ consider many of the same factors in deciding whether to impose a monitor as they do in determining whether to file criminal charges[23] or enforcement proceedings,[24] including the:

- Seriousness of the offense;
- Duration of the misconduct;
- History of similar misconduct;
- Pervasiveness across geographic and product lines;
- Risk profile of the organization, taking into account nature, size and product lines;
- Quality of compliance program at time of misconduct;
- Adequacy of the remediation and corrective measures; and
- Implementation and testing results of the current compliance program.

After an investigation has begun, companies and counsel can affect only the final factor; that is, they cannot after the fact change the seriousness, duration, and pervasiveness of the misconduct, nor the nature and size of the company. Similarly, the company can seek to defend, although it cannot change, the pre-existing compliance program. The SEC's decision about whether to impose a monitor often depends on whether it trusts the company and its commitment to ethics and compliance. Upon learning of misconduct or an investigation,