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redress. The Sentencing Council recognises that in some cases the fine may have the consequence of putting the offender out of business, but notes that this may be appropriate where offending is particularly serious.

Avoiding and navigating compliance monitorships

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For corporations settling violations of the Foreign Corrupt Practices Act (FCPA), a common part of a deferred prosecution agreement (DPA) or non-prosecution agreement (NPA) between a corporation and the US regulators often has been to require the offending company to appoint a compliance monitor. A monitor is an independent third party who assesses and monitors a company's adherence to the compliance requirements of an agreement designed to reduce the recurrence of FCPA violations. From 2004 to 2010, more than 40 per cent of all companies that settled an FCPA violation were required to retain a compliance monitor. In recent years, however, monitorships have become scarcer due, in large part, to the fact that companies and their counsel have become more adept at heading off FCPA compliance issues. Nevertheless, companies should be aware of when the Department of Justice and Securities (DOJ) and Exchange Commission (SEC) typically insist on compliance monitorships, how to avoid them, what monitorships entail, and how to navigate an FCPA monitorship.

The FCPA focuses on two main goals: preventing bribery of foreign officials and requiring publicly traded companies to maintain accurate books and records and reasonably effective internal controls. An FCPA action can result in either civil or criminal liability. Criminal penalties include fines and possible suspension and debarment, and civil penalties may include fines and disgorgement of profits. However, additional costs can be incurred when a compliance monitor (usually a law firm) is a condition of the corporate settlement in either a criminal or civil action at the company's expense.

In November 2012, the DOJ and the SEC released A Resource Guide to the US Foreign Corrupt Practices Act (the 'Guide'), a detailed compilation of helpful information about the FCPA. The Guide addresses multiple aspects of FCPA enforcement, including the conditions under which the DOJ and SEC believe that a corporate monitor is warranted as an element of a settlement. The Guide lists six factors that the DOJ and SEC consider when determining whether a compliance monitor is appropriate: the seriousness of the offense; the duration of the misconduct; the pervasiveness of the misconduct; the nature and size of the company; the quality of the company's compliance programme at the time of the misconduct; and subsequent remedial efforts by the company. While these six factors are not necessarily new, it is useful for FCPA practitioners that the DOJ and SEC have now set them out clearly in the Guide.

Where the DOJ and SEC have discovered a pervasive culture of corruption as opposed to one or two offending employees, the agencies are more likely to insist on a compliance monitorship as part of a settlement. For example, in Siemens, multiple segments of the company across the world were alleged to have made thousands of corrupt payments to foreign officials totalling approximately US$1.4bn, and therefore Siemens was required to enter into a monitorship. Similarly, Total, SA, a French oil and gas company which was alleged to have made approximately US$60m in bribe payments to Iranian officials, was also required to enter into a monitorship as part of its recent DPA. Conversely, the violations by Omega Advisors, Inc, were confined to a single employee, and thus the company did not require a monitorship provision in its NPA.

The existence of an effective corporate compliance program is a key factor that the SEC and DOJ consider when deciding whether to insist on a compliance monitorship, and it is a critical step for a company to take to avoid a monitorship in the first place. US prosecutors heavily weigh the presence and effectiveness of a company's internal compliance mechanisms

when considering whether to require a monitorship. However, the mere presence of a compliance programme will not be sufficient to avoid a monitorship where the programme is considered to be neglected or ineffective. According to the United States Sentencing Guidelines, for a compliance programme to be effective, companies must:

- establish standards and protocols to prevent and detect criminal conduct;
- require organisational leaders to supervise the programme;
- use reasonable efforts to exclude individuals who have engaged in illegal conduct from supervising the compliance programme;
- regularly train employees and provide them with information regarding the organisation's compliance programme;
- monitor, evaluate, and publicise the organisation's compliance programme to ensure effectiveness;
- promote the compliance and ethics programme through incentives to act and disciplinary measures for failing to adhere to the programme's requirements; and
- take reasonable steps if criminal conduct is discovered to address the conduct and avoid future noncompliance.

Once it has been decided that a company will be subject to a compliance monitorship as part of a settlement with US authorities, the terms must still be negotiated. Each compliance monitorship takes a different form depending on the violations of the corporation and the government's concerns. Typically, an FCPA agreement will not specify who the monitor will be, but rather will require the company to choose candidates subject to the government's approval usually within 60 days of the finalisation of the agreement. Although the separate agreements of the DOJ and SEC with a company rarely require the same monitor, the DOJ and SEC often closely coordinate so that a single monitor may enforce both agreements.

The selection process of a monitor must be designed to select a highly qualified person or entity for the given circumstances (usually a law firm), avoid potential and actual conflicts of interest, and otherwise instil public confidence. The government should determine what the most effective process will be as early in the negotiations as possible and ensure that the process is designed to choose the most qualified and independent monitor. While attorneys often may be the most appropriate monitors, in some situations accountants, technical experts, or compliance experts might be more suitable, including non-US monitors for non-US companies (albeit with the support of US experts).

The monitor remains independent and is an employee of neither the government nor the corporation. Despite the requirement of complete independence, a successful monitorship requires an open dialogue between the corporation, the government, and the monitor for the duration of the agreement. Throughout the monitorship, the monitor's primary responsibility is to assess the company's compliance with the terms of the agreement designed to remedy their FCPA violations. The monitor evaluates the company's internal controls and compliance programs with an eye towards preventing future violations. The scope of the monitor's duties is tailored towards the facts of the specific case and will require that the monitor have a thorough understanding of the company's misconduct.

During the monitorship, the monitor makes recommendations to the corporation to ensure successful compliance. The monitor also may find it suitable to make written reports to the government on the progress of the company. If the monitor makes a recommendation which the corporation chooses not to comply with, the corporation or the monitor should report this to the government along with the reasons for noncompliance. The government then will take this into account when ultimately deciding whether the corporation has fulfilled its obligations under the agreement.

A compliance monitorship can last anywhere from a few months to four years, commonly lasting around three years. It is possible, as in Siemens, that a settlement agreement may include language allowing for the monitorship's duration to be decreased or increased if needed. Such a clause may incentivise a company to quickly remedy their violations to cut the costs of an expensive monitorship. On the other hand, a clause allowing for an extension may result in a long and burdensome monitorship.

Because the monitor's duties and power extend only so far as a company's settlement agreement with the government, a company must focus on negotiating a precise agreement that clearly delineates the role of the monitor. For instance, a company should pay close attention to timelines and obligations, the scope of the monitor's duty to report a newly discovered violation, and how the monitor will deal with uncooperative

employees. Companies also may want to insist on a sunset provision allowing for early termination where the need for a monitor disappears to avoid unnecessary costs and burdens.

Furthermore, obtaining an estimated budget and timeline is crucial to limiting the costs of a monitorship. Before the monitorship begins, a company should request a budget projecting the estimated expenses of key activities and reports. By assigning a timeline to the budget, a company also can increase the efficiency of the monitor's activities and set benchmarks for reports, meetings, and other important events. Additionally, assigning a single point of contact within the company to work with the monitor will ensure that the company's interests are represented in the process and that decisions related to the monitorship can be made authoritatively.

While DPAs have been present in the realm of fraud settlements in the US for quite some time, they have emerged only recently in the UK through the Crime and Courts Bill. On 27 June 2013, the UK's Serious Fraud Office published a draft Code of Practice concerning its use of DPAs as a new tool for dealing with companies accused of fraud, bribery, and other economic crimes. The Code outlines the circumstances for when a prosecutor should consider a DPA, the criteria to apply when making this decision, and possible disclosure approaches. Paragraphs 43-52 of the draft Code deal with the use of monitors in DPAs and contain much of the same practices used in the US, including the consideration of existing internal compliance programmes when deciding on the necessity of a monitorship, the requirement of a timeline, and the fact that the terms of the monitorship will be unique to the given case. In light of the new Code, the UK could see the emergence of monitorships very similar to those in the US in the coming years.

The bottom line is that monitorships are here to stay and companies should take care to preempt their imposition by instituting and maintaining their own internal compliance programs to prevent corruption and minimise the possibility of any FCPA violations. Companies who fail to take adequate precautions may find themselves burdened with an expensive monitorship for years after entering into a settlement agreement with US regulators.