

Dos and don'ts for managing a monitor

By George A. Stamboulidis

36 directors & boards Regulatory oversight The duty of directors and management of any business is to protect the company and its shareholders' interests. In today's heightened regulatory enforcement environment, an additional core responsibility of the board and good management is setting a tone at the top of the organization that prioritizes ethical business practices and compliance with law. More and more companies are finding themselves negotiating with government enforcement agencies to settle cases involving questionable business practices without criminal charges, and the government has increasingly resorted to the use of independent monitors or examiners to resolve investigations of corporate misconduct. This article seeks to guide directors and business leaders in the selection and management of monitors that may be required to oversee and report on a company's compliance operations for a period of time under non-prosecution or deferred prosecution agreements with the government. At all stages and well before a monitor or examiner arrives to occupy office space on the company's premises, under the direction of the board, management needs to actively engage in the process of negotiating settlement agreements with the government. This includes demonstrating the company's commitment to a well-defined compliance program, collaborating on the selection of the monitor, and being responsive to the monitor to ensure she has access to pertinent information to execute her duties. We set forth below some dos and don'ts to provide guidance for directors once it becomes clear that a monitor is likely to be appointed to examine and oversee the company's operations.

Do: Play an active role in selecting the monitor When it becomes clear that a government investigation of company practices may be resolved on more favorable terms if a monitor is appointed, directors should play an active role in helping the government identify and select the monitor. The Department of Justice (DOJ) recently issued guidelines on the selection and use of monitors in

Dos and don'ts for managing a monitor Worried that a compliance issue may result in a government-imposed monitor in your midst? Be proactive to help select the monitor, demonstrate remediation, and avoid disruption of the company's operations.

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Bank, and the Bank of New York. Lauren J. Resnick, a litigation partner in Baker Hostetler's New York office, focuses her practice on white collar criminal and regulatory matters and internal corporate investigations. She has worked closely with Mr. Stamboulidis on the monitorships and is currently managing a team of attorneys and forensic specialists on the Bank of New York Mellon monitorship. The two are also working on matters in which Baker Hostetler has been engaged to conduct private monitoring work for other companies.

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Regulatory oversight non-prosecution and deferred prosecution agreements that allow companies to have a significant role in the selection of their monitor. The DOJ policy directs the government to confer in advance with the corporation to identify the qualifications, expertise, and skills the monitor should have, and companies are permitted to propose a slate of candidates or to select among candidates identified by the government. What qualities should directors look for in a monitor candidate? Independence is a key criterion of the government, so lawyers or consultants who have or are currently performing other services for the company are off-limits. Former government lawyers are often well qualified to serve as monitors of these agreements, as prosecutors and regulators tend to trust former government officials who "speak their language" and will more readily defer to their assessments of a corporation's compliance efforts. Directors should propose and select monitors who have prior experience examining business compliance programs, reporting to and managing the expectations of the government. While some industry background may be a plus, a monitor without such experience can engage subject matter specialists and forensic analysts to assist in her work. Most importantly, directors should do their research to ensure the proposed monitor is someone with integrity, a sense of fairness, and the judgment to solicit management's input about business challenges and remediation plans.

Do: Appoint an internal point person to manage the monitorship

Once the monitor is selected, directors need to make sure the company has created a central point person, typically the general counsel or her designee, to field information requests from the monitor and facilitate access to company meetings, programs, and operations. This point person should effectively but unobtrusively shadow the monitor, hold weekly progress and update sessions, arrange and attend the monitor's interviews with business personnel and members of the board, and provide timely access to materials concerning the subject matter of the review. Directors should request periodic progress reports from the general counsel, as well as quarterly updates from the monitor regarding the company's performance. In their oversight roles, directors need to make sure the monitor is receiving cooperation from business management and ensure sufficient resources are allocated to address the compliance concerns at issue.

Do: Create an infrastructure to deliver on the remediation

Delivery requires infrastructure, and no benefit will inure to a

company that negotiates a settlement agreement to resolve a government investigation and then fails to follow through on its commitments. The best way to welcome a monitor after a lengthy dance with the government is to present her with a comprehensive remediation plan that is already underway. It is up to the directors to make sure management has taken a comprehensive review of the business ethics or compliance issues, anticipated the monitor's likely concerns and created an infrastructure to develop policies and systems and to train employees. Oftentimes directors may recommend engagement of an outside firm or consultant to assist the company in developing a remediation plan, but it is imperative that the in-house control functions are given sufficient resources to support the enhanced program. Don't: Limit the monitor's access to meetings Business leaders may be chilled by the presence of an outside monitor at internal committee meetings and deliberations, and directors understandably have concerns that the process could disrupt the operations of the business. The wrong way to resolve those concerns is to deny the monitor access to compliance-related meetings or unnecessarily challenge the scope of the monitor's review. While a company may not be required to share all of its confidential strategic objectives with a monitor, any meetings relating to the subject matter of the review are fair game. The readier access provided to the monitor, the more likely the monitor is to accept representations from the company about the progress of its compliance program and report favorably on the board's commitment. Concerns about privilege may be addressed in limited waiver and confidentiality agreements with the monitor to ensure that the company receives notice and an opportunity to oppose any third-party requests to the monitor for company information learned during the course of the monitorship. Don't: Conceal criminal activity or other violations It goes without saying that a company, its directors & managers should not commit any crimes during the tenure of a monitorship or thereafter. Importantly, directors need to ensure that the company promptly discloses to the monitor any crimes or violations of law or the terms of the settlement agreement, or other instances of serious employee misconduct. Don't wait for the monitor to ask the "right" question. Your obligation as a director is to disclose any compliance failures to the monitor and oversee their remediation by systems enhancements, additional training, and disciplinary action where appropriate. Voluntary disclosure breeds trust with the monitor and will almost certainly guarantee a better outcome for the company if and when problematic conduct is identified. Pay heed to the monitor's recommendations to address employee misconduct and implement her feedback to the extent practicable. Protect your company, manage your monitor With the increased use of corporate monitors to resolve government

investigations, boards of directors need to be prepared to work with the government to select a qualified monitor and create an infrastructure to proactively manage the company's relationship with its monitor. While the prospect of having a monitor in your midst may strike a chord of concern for managers and directors alike, the creation of an infrastructure to ensure open communication and access with the monitor and delivery of a sustainable remediation program will best ensure a positive report on the company's performance and value to the shareholders. ■ The authors can be contacted at gstamboulidis@bakerlaw.com and lresnick@bakerlaw.com. Don't wait for the monitor to ask the 'right' question.