
Corporate Monitorship: An Effective Compliance Tool Following A Federal Investigation

By Patricia M. Sulzbach / Feb 14, 2013

When the government completes an investigation into alleged violation of federal law, the government either prosecutes the target of the investigation, declines to prosecute, or offers the target a Deferred Prosecution Agreement ("DPA") or Non-Prosecution Agreement ("NPA"). DPAs and NPAs essentially divert prosecution for a set period of time in which the company must satisfy specific requirements imposed by the government. While a DPA is filed in court along with a charging document, an NPA is a letter agreement between the company and the government. At the conclusion of the set period of time, if the company has complied with all of the terms of the DPA or NPA, then the case is dismissed and the company avoids a guilty plea with all of its attendant consequences.

In 2012, the government continued to utilize DPAs and NPAs as a means of resolving federal investigations, particularly with respect to allegations of fraud, FCPA, trade sanctions, and Anti-Kickback violations. The government recovered a record \$9 billion in monetary penalties in 2012 related to DPAs and NPAs, which is almost triple the amount recovered in 2011. In September 2012, the head of the U.S. Department of Justice's Criminal Division, Assistant Attorney General Lanny Breuer, touted the benefits of DPAs and NPAs, explaining that such a practice provides a middle ground between criminal prosecution and no prosecution.

One of the conditions often imposed by the government in a DPA or NPA is the assignment of a corporate monitor. A corporate monitor is an independent third-party used to verify a company's compliance with a formal agreement with the government, typically a DPA or NPA. The monitor reports to the government but the company being monitored is responsible for all legal fees associated with the monitorship.

The monitor is not retained to re-investigate the matter, nor provide legal advice to the company, but is there to observe, test and report. The monitor oversees the company's compliance with the agreement with the government and its implementation of a compliance program to prevent future violations of the law. An integral part of the monitorship is the preparation of quarterly reports detailing the progress of the monitorship and the company's satisfaction of any agreement with the government. The quarterly reports are prepared by the monitor and submitted to the government. The company then has the opportunity to respond to the report. At the end of the monitorship period, the government determines whether the company has satisfied all of its obligations, and relies chiefly on the monitor's recommendation in making this assessment.

So who benefits from a monitorship? It is clear that a monitorship can be an effective enforcement tool for the government and a way to ensure compliance without expending government resources, but does the company also benefit? Yes. As noted by Assistant Attorney General Breuer, sometimes the government's investigation reveals conduct that warrants governmental action but is not necessarily deserving of prosecution. Without the middle ground of a DPA or NPA with a corporate monitorship, the government may be more inclined to indict the company. Companies under investigation should, therefore, explore the possibility of a corporate monitorship with the government as a way to avoid prosecution.

Additionally, a corporate monitor is there to help ensure that the company has a satisfactory compliance program and has implemented sufficient measures toward preventing future violations. When the monitorship is terminated, and the monitor has endorsed the company's compliance program, the company can then rely on and utilize this independent and objective endorsement.

Clark Hill's White Collar Criminal Defense Team has experience with corporate monitorships and is available to answer any questions that you may have.