

How to Survive a Monitor: Tips from Around the World

MATTHEW PAICE, CCEP-I, GROUP COMPLIANCE OFFICER, INCHCAPE SHIPPING SERVICES

ERIC R. FELDMAN, CFE, CIG, CCEP-I, SENIOR VICE PRESIDENT, AFFILIATED MONITORS, INC.

MARIA LANCRI, ATTORNEY, PARTNER, SQUAIR

AFFILIATED
MONITORS, INC.TM
INTEGRITY THROUGH COMPLIANCE

SQUAIR

INCHCAPE
SHIPPING SERVICES

© All rights reserved. May not be reproduced without express written consent of Affiliated Monitors, Inc.

1

Eric R. Feldman CFE, CIG, CCEP-I

- Senior Vice President and Managing Director, Corporate Ethics and Compliance Programs
- Retired from CIA in April 2011 with 32 years of federal service
- Government Accountability Office
- Department of Defense
- CIA/National Reconnaissance Office IG
- Senior Advisor for Procurement Integrity
- Different perspectives on business ethics:
 - senior agency official
 - law enforcement
 - corporate consultant
 - independent monitor

© All rights reserved. May not be reproduced without express written consent of Affiliated Monitors, Inc.



2

Matthew Paice, CCEP-I

- ▶ Group Commercial Officer at Inchcape Shipping Services
- ▶ 15+ years experience in US Government Contracting and Compliance
- ▶ Based in Dubai



3

María Lancri

- French Attorney
- Former Deputy General Counsel, Compliance Manager at Hachette Livre (Lagardère group)
- Different perspectives on business ethics:
 - Attorney
 - Monitor



© All rights reserved. May not be reproduced without express written consent of Affiliated Monitors, Inc.

© STEPHANIE FRAISSE

4

Agenda

-  History and Principles of the Independent Monitor
-  When is an Independent Monitor Appropriate?
-  What Does a Monitor Actually do?
-  Lessons Learned: The Monitor's Perspective
-  U.S., UK and France Guidelines
-  Lessons Learned: A Company Perspective

© All rights reserved. May not be reproduced without express written consent of Affiliated Monitors, Inc.

5

WHAT IS AN INDEPENDENT MONITOR?

- Objective, neutral party
- Assess Compliance
 - Deferred Prosecution Agreement (DPA)
 - Settlement Agreements
 - Consent Decrees
 - Suspension and Debarment
 - Anti-Trust/Merger Approvals
- Qualified
- Custom-tailored to fit unique requirements of each matter

6

7

WHY CHOOSE AN INDEPENDENT MONITOR?

➤ Government Perspective

- Address issues of Corruption / White Collar Fraud / Criminal, Civil, and Administrative Actions
- Taxpayer calls for greater accountability
- Not funded to provide specific oversight capabilities
- Fraud Prevention / Quality Control

➤ Contractor / “Regulated Entity” Perspective

- Increased scrutiny by government agencies
- Pressure to prosecute / suspend / debar
- Anti-corruption
- Foreign Corrupt Practices Act (FCPA)
- UK Bribery Act
- Anti-Trust Matters

7

8

MAJOR MOTIVATORS FOR USING AN INDEPENDENT MONITOR

- Avoid more severe sanctions / discipline
- Prevent suspension / debarment, loss of license, loss of network provider status, etc.
- Part of comprehensive remediation
- Improve controls and business practices
- Demonstrate due diligence
- Convince government that corrective actions have been implemented

8

WHERE DO THE REPORTS GO?

➤ Government Agencies

- Enforcement
- IG
- Regulators

➤ Law Enforcement

- Department of Justice
- Criminal Justice Agencies
- State Regulatory Agencies
- Attorney General

9

WHEN IS AN INDEPENDENT MONITOR APPROPRIATE?

- Deferred Prosecution / Non-Prosecution Agreement
- Plea or Settlement Agreement in Criminal or Civil Case
- Contract Requirement
- Agency Administrative Settlement (with or without conviction)
- International Organization Settlement
- Suspension or debarment proceedings
- Administrative and regulatory actions
- Other “probation” actions

10

HISTORY OF THE MONITORING RELATIONSHIP



11

11

HISTORY OF MONITORING - US

- Public Construction
- DOJ
 - Corporate monitorships – white collar
- Federal Regulatory Agencies
- Healthcare OIG HHS
- State Boards
- Suspension and debarment
- State Attorney's General Offices
- Federal, State, Municipal
- Inspector General Cases
- Proactive Monitoring

12

12

13

HISTORY OF MONITORING - ELSEWHERE

- UKBA
- French Sapin 2 Law (AFA + Experts)
- World Bank Integrity Guidelines (Monitor + ICO)
- ...

13

14

PRINCIPLES FOR INDEPENDENT MONITORS

- Objective, neutral player
- Qualified
- Technical expertise
 - Forensic Accountants
 - Legal
 - HR
 - Law Enforcement
 - Engineers
 - Billing and Coding Specialists
 - Ethics and Compliance
 - Other, depending on needs of case
- Custom-tailored to each monitorship

14

15

PRINCIPLES: INDEPENDENCE

- A monitor is an independent third party, not an employee or agent of the corporation to be monitored or of the government
- The government and the corporation should discuss in advance what role the monitor will play and what qualities, expertise, and skills the monitor should have

15

16

PRINCIPLES: RESPONSIBILITIES

- A monitor's primary responsibility is to assess and monitor a corporation's compliance with those terms of the agreement specifically designed to reduce the risk of recurrence of the misconduct
- Evaluate internal controls and the corporate ethics and compliance program
- Responsibility remains with the corporation, subject to the monitor's input, evaluation, and recommendations

16

17

PRINCIPLES: SCOPE

- Understand the full scope of the corporation's misconduct
- Tailored to the facts and problems in each case to address and reduce the risk of recurrence
- Avoid either too narrow or too broad a scope
- Engage in activities that facilitate implementation of the reforms intended by the parties

17

18

PRINCIPLES: COMMUNICATION

- Periodic written reports to the government
 - Progress / compliance with terms of the agreement
 - Changes necessary to foster the corporation's compliance
 - Corporation's failure to adopt monitor's recommendations
- Agreement should spell out whether previously undisclosed or new misconduct will be reported
 - Risks to public health, safety, environment
 - Involvement of senior management
 - Obstruction of justice
 - Criminal activity

18

PRINCIPLES: DURATION

- Tailored to the problems found and the types of remedial measures needed
 - Nature and seriousness of the underlying misconduct
 - Pervasiveness and duration of the misconduct, including complicity or involvement of senior management
 - The corporation's history of similar misconduct and the nature of the corporate culture
 - The scale and complexity of remedial measures, including the size of the entity or business unit
 - Extension or early termination options

19

WHAT DOES A MONITOR ACTUALLY DO?

- Audits / Record Reviews
- Risk Assessments
- Interviews
- Inspections and Direct Observation
- Surveys
- Internal Control Programs
- Data Analytics
- Ethics and Compliance Programs

20

MONITORING ISSUES TO CONSIDER

- Is specialized expertise needed?
- Team of monitors?
- Monitor / Investigator
- Monitor as Mentor
- Costs
 - Scope
 - Complexity
 - Frequency
 - Duration

21

WHAT DOES THE MONITOR SEE?

- Books / Records
- Real-time practices
- Customer/patient interactions (healthcare)
- Time and materials records
- Factory floor
- Billing and coding
- Corporate Ethics and Compliance Program in action

22

23

WHAT DOES THE MONITOR REPORT?

- Compliance with the terms of the government agreement
 - Good-faith efforts to comply
 - Monitor access to records and personnel
 - Any areas of concern
 - Company improvements and progress
 - Fulfillment of other obligations
 - Implementation / adherence to Ethics and Compliance Program
 - Recommendations for further improvement

23

24

THE MONITOR AS MENTOR

- Based on settlement agreement: case-by-case determination
 - A remedial approach is much more palatable and sustainable
 - Value proposition to those monitored
 - Meets DOJ principle of reducing recidivism
 - Risk assessment
 - Improvement of internal controls
 - Better business processes
 - Enhanced Ethics and Compliance capabilities

24

ETHICS AND COMPLIANCE PROGRAMS

- Should be a part of every monitorship
- Comprehensive methodology for assessment
 - Ethical leadership: tone at the top
 - Ethical culture
 - CECO authority, resources, independence
 - Internal controls
 - Corporate Code of Conduct
 - Ethics training
 - Rewards and sanctions
 - Anonymous reporting
 - Internal investigative capability
 - Mandatory disclosures (federal contracts)

25

GOVERNMENT CONSIDERATIONS

- Encourages comprehensive improvement in all areas of operation – reduces the likelihood of recidivism
- Protects the taxpayer from continued contractor misconduct
- No cost to the government
- Oversight by properly qualified monitor
- Allows continued oversight necessary to protect the public
- Protects integrity of agency
- Alternative to contractor debarment
- Failure to comply with the terms of an agreement can result in the enforcement of originally contemplated penalties or other forms of corrective action

26

27

OTHER GOVERNMENT CONSIDERATIONS

- Promotes faster resolution of less serious cases – can alleviate backlogs
- Allows government agency to redirect limited resources
- Objectivity of reports allows regulators to make informed decisions

27

28

LESSONS LEARNED: THE MONITOR'S PERSPECTIVE

- Collaboration and independence are NOT mutually exclusive
- Avoid investigating or re-litigating old issues
- Avoid political issues and conclusions
- Benchmark best practices
- Assess corporate culture
- Give credit where credit is due
- Early sharing of observations / recommendations: no “gotcha”
- Foundational elements and controls

28

DIFFERENT MONITORING CONSTRUCTS

- On-site monitors
- Remote document review and interviews
- Independent review organizations for Medicare
- Sampling and testing / data analytics
- Intensity of monitoring: frequency, scope, and duration
- Creative use of monitors

29

United States Guidelines

- ▶ The October 2018 Benczkowski Memo on "Selection of Monitors in Criminal Division Matters"
- ▶ The April 2019 DOJ "Evaluation of Corporate Compliance Programs" – The 2019 Guidance
- ▶ The November 2019 "FCPA Corporate Enforcement Policy"
- ▶ The December 2019 DOJ "Export Control and Sanctions Enforcement Policy for Business Organizations" –
- ▶ The May 2019 DOJ "Guidelines for Taking Disclosure, Cooperation, and Remediation into Account in False Claims Act Matters"
- ▶ The Department of Treasury – "A Framework for OFAC Compliance Commitments"

30

United Kingdom Guidelines

- ▶ Evaluating a Compliance Program

31

France Guidelines

- ▶ Guidelines on the Implementation of the Judicial Public Interest Agreement (CJIP)
- ▶ Guidelines to help private and public sector entities prevent and detect corruption, influence peddling, extortion by public officials, unlawful taking of interest, misappropriation of public funds and favouritism
- ▶ AFA Controls Questionnaire Corporate Co-operation Guidance

32

Conclusion

- ▶ A common thread that runs through the various guidelines examined is that a company must adopt a risk-based compliance program that is incorporated into its day to day operations.
- ▶ An effective and adequate compliance program will confer some advantages on a company in the event of misconduct(s).
- ▶ An effective compliance program is one that among other things has the commitment of senior leadership with continuous risk assessment, internal controls and training.
- ▶ Also, the DOJ Antitrust Division in July 2019 incentivizes antitrust compliance. Compliance will be considered at the charging stage of antitrust criminal investigations.

© All rights reserved. May not be reproduced without express written consent of Affiliated Monitors, Inc.

33

My Experience With a Monitor

- ▶ Inchcape Shipping Services
- ▶ US Navy contracts and DoJ case
- ▶ Suspension and Admin Agreement
- ▶ Monitor selection



34

My experience as a Monitor Selecting a Monitor

- ▶ Satisfy authority
- ▶ Monitor reputation; history with authority
- ▶ Collaboration with company
- ▶ Provide advice and best practice
- ▶ Pricing structure best for company

35

Working With the Monitor

- ▶ Be honest whilst representing the company
- ▶ Consider it as a split reporting line
- ▶ Show flaws and improvements
- ▶ A good Monitor is not a fool
- ▶ Maintain regular contact and build a relationship
- ▶ Remember the Monitor is assessing Compliance staff
- ▶ Accompany the Monitor throughout their visits
- ▶ Take the Monitor's recommendations, even if not best fit

36

How to Get the Most Out of the Monitor

- ▶ Get leadership buy-in
- ▶ Have leadership alert the company
- ▶ Request authority to make the required changes
- ▶ Opportunity to accelerate change
- ▶ Visit locations before the Monitor's visits

37

Bibliography

- ▶ The October 2018 Benczkowski Memo on "Selection of Monitors in Criminal Division Matters" - <https://www.justice.gov/opa/speech/file/1100531/download>
- ▶ The April 2019 DOJ "Evaluation of Corporate Compliance Programs" – The 2019 Guidance - <https://www.justice.gov/criminal-fraud/page/file/937501/download>
- ▶ The November 2019 "FCPA Corporate Enforcement Policy" - <https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977>
- ▶ The December 2019 DOJ "Export Control and Sanctions Enforcement Policy for Business Organizations" - https://www.justice.gov/nsd/ces_vsd_policy_2019/download
- ▶ The May 2019 DOJ "Guidelines for Taking Disclosure, Cooperation, and Remediation into Account in False Claims Act Matters" - <https://www.justice.gov/jm/jm-4-4000-commercial-litigation#4-4.112>
- ▶ The Department of Treasury – "A Framework for OFAC Compliance Commitments" - https://www.treasury.gov/resource-center/sanctions/Documents/framework_ofac_cc.pdf

38

Bibliography

- ▶ Guidelines on the Implementation of the Judicial Public Interest Agreement (CJIP) <https://www.agence-francaise-anticorruption.gouv.fr/files/files/Lignes%20directrices%20PNF%20CJIP.pdf>
- ▶ Guidelines to help private and public sector entities prevent and detect corruption, influence peddling, extortion by public officials, unlawful taking of interest, misappropriation of public funds and favouritism <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000036246476&dateTexte=&categorieLien=id>
- ▶ AFA Controls Questionnaire <https://www.agence-francaise-anticorruption.gouv.fr/files/files/Questionnaire%20art.17%202018%20EN%20V5.pdf>
- ▶ Corporate Co-operation Guidance <https://www.sfo.gov.uk/download/corporate-co-operation-guidance/?wpdmml=24184>
- ▶ Evaluating a Compliance Program <https://www.sfo.gov.uk/download/evaluating-a-compliance-programme/?wpdmml=25403>

39

Questions?

Eric R. Feldman
Senior Vice President and Managing Director
Corporate Ethics and Compliance Programs
Affiliated Monitors, Inc.
efeldman@affiliatedmonitors.com
Phone: (866) 201-0903



Matthew Paice
Group Compliance Officer
InchCape
Matthew.paice@iss-shipping.com
Phone: +971 (0) 43038500



Maria Lancri
Attorney, Partner
Squair
mlancri@squairlaw.com
Phone: +33 6221 20522



© All rights reserved. May not be reproduced without express written consent of Affiliated Monitors, Inc.

40

Detailed Analysis

41

The October 2018 Benczkowski Memo on “Selection of Monitors in Criminal Division Matters”

© All rights reserved. May not be reproduced without express written consent of
Affiliated Monitors, Inc.

42

The October 2018 Benczkowski Memo on "Selection of Monitors in Criminal Division Matters"

- ▶ The Benczkowski Memo is the first major DOJ pronouncement regarding corporate monitors under the Trump Administration.
- ▶ It represents a significant shift from earlier guidelines, signaling to both prosecutors and businesses the Administration's view that monitorship appointments will not be taken lightly and will be required only when clearly warranted.
- ▶ It sets out the standards, policy and procedures for determining whether the appointment of an independent monitor is required in specific cases and any DPA, NDAs or plea agreements between the DOJ and business organizations.

© All rights reserved. May not be reproduced without express written consent of Affiliated Monitors, Inc.

43

Should a Monitor Be Appointed?

- ▶ The memo addresses two broad considerations identified in the previous DOJ guidance (Morford Memo) that should guide prosecutors when assessing the need and propriety for appointing a monitor:
 - ▶ "(1) the potential benefits that employing a corporate monitor may have for the corporation and the public, and
 - ▶ (2) the cost of a monitor and its impact on the operations of a corporation."

© All rights reserved. May not be reproduced without express written consent of Affiliated Monitors, Inc.

44

Should a Monitor Be Appointed?

- ▶ In evaluating the potential benefits of a monitor, prosecutors are directed to consider, among other factors:
 - ▶ Whether the underlying misconduct involved manipulation of corporate books and records or the exploitation of an inadequate compliance program.
 - ▶ Was the misconduct pervasive across the business organization or approved or facilitated by senior management?
 - ▶ Did the corporation make significant investments in, and improvements to, its corporate compliance program and internal control systems.
 - ▶ Have remedial improvements to the compliance program and internal controls been tested to demonstrate that they would prevent or detect similar misconduct in the future?

© All rights reserved. May not be reproduced without express written consent of Affiliated Monitors, Inc.

45

When Should a Monitor Be Appointed?

The Benczkowski Memo summarizes the DOJ's position on whether a corporate monitor is necessary, stating that "the Criminal Division should favor the imposition of a monitor only where there is a demonstrated need for, and clear benefit to be derived from, a monitorship relative to the projected costs and burdens" on the corporation.

© All rights reserved. May not be reproduced without express written consent of Affiliated Monitors, Inc.

46

The April 2019 DOJ “Evaluation of Corporate Compliance Programs” – The 2019 Guidance

© All rights reserved. May not be reproduced without express written consent of Affiliated Monitors, Inc.

47

The April 2019 DOJ “Evaluation of Corporate Compliance Programs” – The 2019 Guidance

- ▶ The 2019 Guidance is an update to the 2017 Evaluation of Corporate Compliance Programs.
- ▶ It is made further to the “Principles of Federal Prosecution of Business Organizations” which enumerates factors Prosecutors should consider in the investigation, charging or resolution of corporate crimes.
- ▶ One of the factors include “the adequacy and effectiveness of the corporation’s compliance program at the time of the offense, as well as at the time of a charging decision” and the corporation’s efforts “to implement an adequate and effective corporate compliance program or to improve an existing one.”
- ▶ Fundamental questions Prosecutors should consider in reaching a decision as to the effectiveness and adequacy of a corporation’s compliance program at the time of the offense for the purpose of determining the appropriate form of prosecution or resolution.

© All rights reserved. May not be reproduced without express written consent of Affiliated Monitors, Inc.

48

Fundamental Questions

- ▶ In deciding the adequacy and effectiveness of a company's compliance program, Prosecutors are requested to consider 3 fundamental questions -
 - ▶ "Is the corporation's compliance program well designed?"
 - ▶ "Is the program being applied earnestly and in good faith?" In other words, is the program being implemented effectively?
 - ▶ "Does the corporation's compliance program work" in practice?

-- These questions are not a rigid formula as the guidance recognizes the differences in each company's risk profile. In other words, compliance programs must be tailored to address company specific risks.

© All rights reserved. May not be reproduced without express written consent of Affiliated Monitors, Inc.

49

"Is the corporation's compliance program well designed?"

- ▶ The following are to be considered -
 - ▶ Risk Assessment - Prosecutors should understand the company's business from a commercial perspective, how the company has assessed and identified its risk profile and the resources devoted to deal with such risks. Is the program designed to detect the misconducts that are likely to occur in the company's line of business?
 - ▶ Policies and Procedures – Has the company established policies and procedures that incorporates a compliance culture into its day to day operations? Prosecutors should consider the company's process for designing and implementing new policies and procedures, the comprehensiveness of the program, accessibility, responsibility for integrating policies and procedures and the training and guidance provided to those with control responsibilities.

© All rights reserved. May not be reproduced without express written consent of Affiliated Monitors, Inc.

50

“Is the corporation’s compliance program well designed?”

- ▶ Training and Communications – Company steps towards integration of policies and procedures through effective training and the manner of relaying information. Risk based training must be part of the program.
- ▶ Confidential Reporting Structure and Investigation Process – Existence of an efficient system for confidential reporting of misconduct and the company’s complaint-handling process - from receiving complaint to post investigation actions.
- ▶ 3rd Party Management – Is the company procurement and vendor management processes integrated into the company’s risk? What is the rationale for contracting third parties. Is the compensation commensurate with the work to be performed? The company due diligence process and mechanisms to address identified red flags.

© All rights reserved. May not be reproduced without express written consent of Affiliated Monitors, Inc.

51

“Is the program being implemented effectively?”

- ▶ The 2019 guidance distinguishes between a “paper program” and an effective compliance program. The following factors are to be considered in deciding the effectiveness of a company’s compliance program –
 - ▶ Commitment by Senior and Middle Management – Conduct at the top, Shared commitment of senior leaders and middle management, and oversight by the board of directors and/or external auditors.
 - ▶ Autonomy and Resources - The autonomy of those charged with carrying the compliance function and the resources available to them.
 - ▶ Incentives and Disciplinary Measures - The incentives for compliance and the dis-incentives for non-compliance.

© All rights reserved. May not be reproduced without express written consent of Affiliated Monitors, Inc.

52

“Does the corporation’s compliance program work” in practice?

- ▶ It recognizes that the existence of a misconduct does not necessarily mean that a company’s compliance program is ineffective.
- ▶ To determine if the compliance program works in practice, the guidance considers both a retrospective and current review process – the effectiveness of the program at the time of the incident(s) and its evolution at the time of the charging decision or resolution.
- ▶ The factors to consider in determining the effectiveness of a company’s compliance program at the time of the offense includes - how the misconduct was detected, the investigation resources available to investigate misconducts and the remedial efforts in place.
- ▶ At the time of a charging decision or resolution, the factors to be considered includes - whether there is continuous improvement in the compliance program and internal control systems and the ability of the improvements to prevent or detect similar incident(s) in the future through periodic testing and reviews.

© All rights reserved. May not be reproduced without express written consent of Affiliated Monitors, Inc.

53

The November 2019 “FCPA Corporate Enforcement Policy”

© All rights reserved. May not be reproduced without express written consent of Affiliated Monitors, Inc.

54

The November 2019 “FCPA Corporate Enforcement Policy”

- ▶ Companies that self disclose, fully cooperate and timely and appropriately implement remedial actions in the absence of aggravating factors, will be accorded a 50% reduction of the low-end fine range (declination) and will generally not be subjected to an independent monitor if at the time of the resolution, an effective compliance program has been implemented.
- ▶ Aggravating factors includes executive management involvement in the misconduct, company profited from misconduct, criminal recidivism, and pervasiveness of the misconduct within the company.
- ▶ Up to 25% reduction of the low-end fine range will be accorded to companies that did not voluntarily disclose a misconduct(s) but cooperates fully with investigation and implement remedial actions.

© All rights reserved. May not be reproduced without express written consent of Affiliated Monitors, Inc.

55

The Corporate Enforcement Policies - Elsewhere

France

- ▶ 2019 French National Financial Prosecutor's Office and French Anticorruption Agency Guidelines on the Implementation of the Judicial Public Interest Agreement (CJIP)
- ▶ 2016 French Anticorruption Agency Guidelines to help private and public sector entities prevent and detect corruption, influence peddling, extortion by public officials, unlawful taking of interest, misappropriation of public funds and favouritism
- ▶ 2018 French Anticorruption Agency Audits Questionnaire

© All rights reserved. May not be reproduced without express written consent of Affiliated Monitors, Inc.

56

The Corporate Enforcement Policies - Elsewhere

UK

- ▶ SFO Operational Handbook – 2019 Corporate Co-operation Guidance
- ▶ UKBA Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)
- ▶ SFO Operational Handbook – 2019 Evaluating a Compliance Programme

© All rights reserved. May not be reproduced without express written consent of Affiliated Monitors, Inc.

57

The December 2019 DOJ “Export Control and Sanctions Enforcement Policy for Business Organizations”

© All rights reserved. May not be reproduced without express written consent of Affiliated Monitors, Inc.

58



The May 2019 DOJ “Guidelines for Taking Disclosure, Cooperation, and Remediation into Account in False Claims Act Matters”

© All rights reserved. May not be reproduced without express written consent of Affiliated Monitors, Inc.

59



The Department of Treasury – “A Framework for OFAC Compliance Commitments”

© All rights reserved. May not be reproduced without express written consent of Affiliated Monitors, Inc.

60