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COMPLIANCE MONITORS ARE ONCE AGAIN "IN VOGUE"

In this article, the authors begin by discussing the current administration's signals that monitors are no longer disfavored and may be required by the DOJ whenever it finds it is appropriate to do so. They then address when a monitor should be appointed, the monitor selection process, the monitors' role, and recent examples of monitors being appointed. They conclude with 10 best practices and other tips for companies that are required to engage a monitor.

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I. WHAT IS A MONITOR?

"A monitor is 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] The Department of Justice ("DOJ") first set forth the guiding principles for when a corporate monitor should be appointed in the "Morford Memo" in 2008. The DOJ has since supplemented this guidance with the 2009 "Breuer Memo," the 2010 "Grindler Memo," and the 2018 "Benczkowski Memo." Yet from 2018 until recently there has been a strong presumption in and around the DOJ against the use of corporate monitors. Even so, Deputy Attorney General Lisa O. Monaco ("DAG" Monaco) spearheaded a mission to bring corporate compliance monitors back in style. In the past two to three years, there has been a shift in the use of monitors. No longer are monitors "shrouded in secrecy" and "disfavored" among government attorneys. This is mainly because of DAG Monaco's initiative to increase the use of monitors in non-prosecution agreements ("NPAs") or deferred prosecution agreements ("DPAs").

II. MONITORS "IN VOGUE" AGAIN

The use of monitors has ebbed and flowed over the years. The current administration has signaled that imposing compliance monitors at the resolution of an enforcement action may be back in fashion.

On October 28, 2021, DAG Monaco stated that "to the extent that prior Justice Department guidance suggested that monitorships are disfavored or are the exception, I am rescinding that guidance. Instead, I am making clear that the department is free to require the imposition of independent monitors whenever it is appropriate to do so in order to satisfy our prosecutors that a company is living up to its compliance and disclosure obligations under [a] DPA or [an] NPA . . . For clients negotiating resolutions, there is no default

[1] DOJ and SEC, "FCPA — A Resource Guide to the U.S. Foreign Corrupt Practices Act," Washington DC (July 2020) *at* https://www.justice.gov/criminal-fraud/file/1306671/download.

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