

The Terms Every Monitorship Agreement Should Include

By **Scott Garland** (February 13, 2023, 3:02 PM EST)

Much of the recent discussion about corporate compliance monitorships has focused on how the government or court decides whether a particular case of noncompliance warrants a monitorship, and how those standards have evolved.

This discussion was sparked in 2021 and again in late 2022 by the U.S. Department of Justice's reaffirmation that monitors can be effective at assessing a corporation's compliance with a criminal resolution order, correcting compliance lapses and reducing the likelihood of future noncompliance, and the department's publication of revised guidance.[1]



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Little of the discussion has focused, however, on how to structure the monitorship to maximize its chances of success. Surely this, too, is important.

For example, law professor Veronica Root Martinez recently wrote in the Harvard Law Review that the public deserves to know whether each monitorship was successful, and therefore each monitor should be required to issue a public final report that summarizes the monitorship's successes and failures.[2]

But long before any post-mortem report, a monitorship's success can be facilitated at the start by carefully drafting the document that initiates the monitorship — the settlement agreement or enforceable order — to include clear, comprehensive and fair written terms and procedures.

This article specifies the terms and procedures to consider, all of which should work broadly for the varied substantive and procedural situations in which monitorships arise, including:

- At every level of government enforcement;
- In all types of enforcement — criminal, civil and administrative; and
- In all substantive areas, such as antitrust, anti-money laundering, cybersecurity, privacy, export controls and sanctions, consumer fraud, health care regulation, government contracting, etc.

I have tried to be party-agnostic by identifying what the government, the corporation and the court should all focus on.[3] Occasionally, however, I have recommended some terms and procedures that have worked well from the monitor's viewpoint.

A well-written monitorship document need not be long or complex. Much of it can be written without legalese. In general, the monitorship document should address the following.

The Monitorship's Term of Operation

The monitorship document should identify the monitorship's term of operation. This is a little more complicated than simply identifying a period of years and months. It must also identify when the monitorship begins, whether the beginning can be delayed, when it ends, and whether the end can be accelerated or extended.

When It Begins

The first thing to specify is when the monitorship begins. A specific calendar date might suffice, but this can often be overtaken by events such as selecting, getting approval and contracting with a monitor. These often take longer than anticipated, yet the monitorship cannot begin beforehand.

To avoid these problems, the document can specify that (1) the monitorship begins once the monitor has signed a contract or shortly thereafter; (2) this must occur by a specified realistic deadline following the document's effective date; and (3) the commencement will be delayed if these deadlines aren't met.

Without these provisions, the corporation might lack the incentive to retain the monitor within a reasonable time. Including the provisions should align the incentives correctly and avoid shortchanging the first monitoring period due to initial delays.

When It Ends

The second thing to specify is when the monitorship will end. Common lengths are three, five, seven, 10 or, in extreme cases, 20 years.

The problem with choosing a specific termination date mirror the problem of a specific beginning date: a lowered incentive for the corporation to select and contract with the monitor. It's better to specify the duration as relative to the beginning date, i.e., five years from the monitorship's commencement date.

A related complication is whether the end date can be extended for noncompliance and, if so, for what types, severity or timing of noncompliance and any subsequent remediation.

If the document addresses extensions, it should also specify who decides: the monitor, the government or the court.

The monitorship document could also specify how and when to terminate the monitorship early if the corporation completes its obligations early. This would give the corporation not only a tangible incentive to comply and save costs, but also a real benchmark to validate that it has corrected the deficiencies that led to the monitorship.

Selection of the Monitor

The monitorship document should address how the monitor should be selected; the monitor's qualifications; disqualifying conflicts; the monitor's ability to use its in-house staff and hire outside consultants and experts; and the process for selecting another monitor if a replacement is needed.

Procedure

Some monitorship documents specify the monitor by naming a person or organization.

If the document does not name a specific monitor, it should specify a selection procedure.

A variety have been used. Their terms generally address:

- How the parties will identify potential candidates — for example, whether the corporation will first present the government with one or more candidates for consideration, or whether the corporation and the government simultaneously present each other a list of candidates;
- What happens if the government and the corporation cannot agree on a candidate; and
- Who has the final say in selecting the monitor.

Whatever the procedure, it should specify a final deadline and possibly a set of interim deadlines for intermediate steps. A deadline should give the corporation and the government an incentive not to object to or delay selection of the monitor unreasonably for strategic reasons.

Qualifications

The document can specify the monitor's necessary and desired qualifications and competencies, especially if the parties want the monitor to possess subject matter expertise.

If the monitorship requires multiple competencies, the document might identify whether these should be handled by multiple monitors or instead just one monitor who could hire other personnel with the necessary additional competencies.

Conflicts

The monitorship document should address any circumstances that could disqualify a monitor from serving. There are three types of conflicts.

The first is a preexisting conflict: Has the monitor candidate engaged in work that the parties consider disqualifying?

There are no universal right or wrong ways to define what constitutes a conflict. Two common conflicts are financial interests in the corporation or prior work for one side or the other.

Of course, some professional conflicts might be nonwaivable, such as a monitor candidate's preexisting attorney-client relationship with the corporation, or participation with the government in the underlying investigation.

The second type of conflict, although uncommon, consists of outside work done by the monitor during the monitorship.

In some cases it might make sense to preclude the monitor from working for certain clients or in certain

subject areas during the monitorship. If so, it might be prudent to specify whether the preclusion extends to all of the monitor's employees or only those working on the monitorship.

The third type of conflict is like the second: what work the monitor cannot perform after the monitorship concludes, and for how long. Again, although uncommon, this might sometimes be appropriate.

Some monitorship documents require the monitor to certify their lack of conflicts periodically, to ensure that circumstances have not changed throughout the monitorship.

In-House Staff and Outside Contractors and Experts

Monitorship documents often specify that the monitor may employ in-house staff and hire outside consultants and experts as necessary.

Although often handled in the monitor's contract, this can be helpful to address in the monitorship document so that potential monitor candidates can consider staffing solutions and so the parties can require the monitor's staff, consultants and experts to accept the same conflict and confidentiality restrictions imposed on the monitor.

Replacement

Some monitorship documents specify the criteria and procedures for replacing the monitor if one or both parties object to the monitor's work or the monitor becomes unable to complete the assignment.

Who Pays for the Monitor's Costs

The monitorship document should identify who pays for the monitor's costs.

The corporation always pays, not the government. If the monitorship covers multiple corporations, the document should specify how much each corporation must pay.

Another consideration can be the consequences if the corporation fails to pay.

Monitor's Mandate and Responsibilities

If the monitorship document specifies the monitor's mandate and responsibilities with care, the parties can avoid disputes midstream about the monitor's tasks, recommendations, bills and budget overruns.

Duty to Act Independently

The monitorship document usually identifies the monitor as independent, or specifies that the monitor must exercise independent judgment.

This sets the tone for the monitorship and gives the monitor support should one party unduly pressure the monitor to change its findings or recommendations.

Ability to Meet With Each Party Individually

Although the monitor must exercise independent judgment like a judge, the monitor must, unlike a judge, occasionally meet with one party outside the other party's presence.

The monitor must meet with the corporation outside of the government's presence to arrange monitoring activities, get information, interview personnel, etc.

Sometimes the monitor must meet with the government outside the corporation's presence to confer about how the government interprets the monitorship document and the monitor's ambit; to report criminal or serious misconduct, if required; or to learn from the government new facts about the corporation's conduct.

The document should therefore allow the monitor to meet with either party independently without becoming either's agent, with language such as:

It is understood that during this monitorship, the monitor will meet individually with either party without the presence of the other party and, in doing so, shall continue to act independently and exercise its independent judgment.

Disclaimer of Attorney-Client Relationship

The monitor's discussions with the corporation will often concern how to interpret the monitorship document or other legal or legal-adjacent matters.

To avoid confusion, monitorship documents often specify that the monitorship does not create an attorney-client relationship between the monitor and the corporation.

Which Compliance Provisions to Monitor

The monitorship document should state explicitly which of its provisions the monitor will assess.

Without this specification, the monitor and the government will likely interpret the monitor's mandate to encompass all compliance provisions. This is fine if so intended.

If not, however, the document should explicitly limit the monitor's mandate to assess compliance with certain provisions enumerated by paragraph and subparagraph, and then refer to these provisions consistently throughout the document.

The document becomes ambiguous if one section limits the monitor's mandate to certain paragraphs, while another section refers to the mandate without limitation, i.e., to monitor "the agreement" or "the order."

It is better to identify the provisions the monitor will assess as "the monitored provisions," and then use this term throughout the document.

If the monitorship document has monitored and unmonitored provisions, what happens after noncompliance with the unmonitored provisions?

This often goes unaddressed. If an enforcement mechanism covers the monitored provisions, it should clearly state whether that mechanism also applies to unmonitored provisions, and if not, what

enforcement mechanism does.

What the Monitor Will Assess or Accomplish

The monitored provisions should specify what the monitor will evaluate or accomplish. These can be as narrow or broad as the parties or court desire, and can include:

- Evaluating compliance with specific tasks or metrics;
- Evaluating compliance with a statute, regulation or standard;
- Assessing and recommending improvements to policies, procedures and controls;
- Assessing and recommending improvements to the corporation's ethical culture;
- Designing, implementing, evaluating or revising an ethics and compliance program;
- Assessing directors' or executives' engagement with compliance personnel and issues;
- Training personnel;
- Setting up and monitoring a hotline for employee or customer complaints;
- Investigating or adjudicating those complaints;
- Reviewing marketing and advertising materials for false claims; and
- Reviewing conflict-of-interest firewalls.

The Monitoring Means and Methods

The monitorship document is often silent about the means and methods the monitor will use to carry out its mandate. This gives the monitor needed flexibility in how to conduct the monitorship and avoids the problem of specifying beforehand means that are impossible, impractical, too costly or of little utility.

Although the document should generally be silent regarding the monitor's means and methods, the parties and court should be aware of what is available.

Every monitorship raises the question about how much the monitor may rely on information it receives from the corporation and the government. If, for example, the monitor must determine whether the corporation has met a specific metric, the monitor could accept whatever number the corporation gives it.

Or it could require a high-level executive to attest to the number's accuracy. Or the monitor could dig deeper by reviewing the underlying data; reviewing the system that collected that data; interviewing employees who collected the data; surveying a sample of those who supplied the data to data collectors; or designing alternate procedures to test whether the corporation's metric is reliable.

If the monitorship document does specify means or methods, it should be clear whether they are necessary, recommended or at the monitor's independent discretion. Saying merely that the means or methods may be used can be ambiguous: Some might interpret "may" to mean "shall" or "should."

Work Plan

The monitoring document should usually specify the monitor's first task as drafting a work plan for what the monitor will do and how it will do it.

The document should give each party a chance to review the work plan and share comment or feedback, but not to give or withhold their approval.

The monitor generally has the independence and discretion to amend the plan as the monitor deems prudent.

The monitor should, however, not include work that lies outside the monitored provisions. And the parties should object to a work plan that does so.

Baseline Assessment

The monitoring document will likely specify that after creating the work plan, the monitor will conduct a baseline assessment to establish how the corporation is doing vis-à-vis the monitored provisions' compliance goals and to determine next steps.

The monitor usually begins without any evidence of noncompliance beyond the bare allegations in the monitoring document, government documents or public news reports, and also without any idea of the corporation's remedial efforts.

A baseline assessment lets the monitor understand the compliance situation as well as, if not better, than the parties.

To be clear, a baseline assessment need not be a full reinvestigation of past misconduct. However, the monitor should understand past misconduct and improvements in order to identify processes and controls to assess in the future.

Reports

Most, if not all, monitorships require the monitor to generate periodic reports.

Timing and Frequency

The monitorship document should address the reports' timing and frequency.

The document should specify how often the monitor will issue a report; whether the monitor's baseline assessment will constitute the first periodic report or will instead precede the first periodic report; and whether reports will become more or less frequent depending on the corporation's noncompliance or compliance.

The document should set deadlines that are sensitive to any delays outside of the monitor's control.

Whether to Include Binding or Nonbinding Recommendations

The monitorship document should specify whether the report may or must contain recommendations and, if so, whether those recommendations are binding or nonbinding — and, if binding, the procedure for the parties to comply or object.

Without this clarity, the monitor's recommendations might appear to be binding but leave their enforceability in doubt.

How to Release Reports to the Parties and the Court

The monitorship document should specify how the monitor will release reports to the government, the corporation and a court if one is involved.

Any sequence is possible: simultaneous release to all; a preview to one party with a chance for factual review, followed by a final release to all; or a preview to all with a chance for factual review before a final release.

The corporation should usually get the first preview, but only to correct factual inaccuracies or omissions rather than to negotiate findings, conclusions or recommendations.

A factual review is fair because it minimizes surprises to the corporation and allows the monitor to then identify the corporation's accomplishments and shortcomings accurately in the final report.

Objections and Responses

The time for objections and responses to the monitor's findings, conclusions or recommendations usually follows the finalized report. Consequently, the monitorship document usually includes a process for the parties to respond or object within two to four weeks of the final report's release.

Whether the Report Will Be Released Publicly

The monitorship document should specify whether the monitor's reports will become public.^[4] Many, if not most, are not.

If they will be made public, the document should address how to deal with sensitive nonpublic information, such as confidential business information or personal identification information.

If the report might contain sensitive nonpublic information, the monitorship document should specify whether to keep the entire report nonpublic or whether the monitor should create a redacted version for public release.

The monitorship document should then specify a schedule for all to agree on redactions before the public release.

If the report will be made public, the monitorship document usually specifies that it will be released by the parties or the court, not the monitor.

Post-Report Meetings

Some monitorship documents require the monitor to meet with the government and/or the company to review any recommendations in person after each report is finalized.

Reporting Ongoing Criminal or Significant Misconduct

Some monitorship documents require the monitor to report ongoing criminal or other significant misconduct to the government or court without notice to the corporation.

To be clear, this usually pertains only to criminal or otherwise serious misconduct, not to standard violations, which are generally reported through the standard reporting process.

Confidentiality

The monitorship document typically requires the monitor and their agents to maintain the confidentiality of any confidential information received during the monitorship and to use it for no purpose other than to conduct the monitorship.

The document might also specify how the monitor will acknowledge the duty of confidentiality, such as by signing a copy of the monitoring document or a separate nondisclosure agreement.

Budget, Caps, Variable Work, Work Outside the Budget and Expenses

One sticky issue is whether the monitorship document should include a budget and, if so, how specific it should be.

A reasonable budget can be difficult to estimate before selecting the monitor and identifying the monitorship activities in a solid work plan. Consequently, a good practice is to specify that the monitor will be reimbursed for reasonable fees and expenses; that a copy of the invoice will go to both parties; and that disputes will be decided by the government or the court.

Another possibility is to require the monitor to provide a budget each year for the parties' review.

If the monitorship document includes a budget or a billing scheme, it should cover whether the monitor will charge a flat fee, an hourly fee subject to a cap, an hourly fee with no cap, or a mixture of flat and variable fees, depending on the monitorship phase or task.

If the fee will be flat or variable with a cap, the document might address whether the monitor will be paid for necessary fees and expenses that exceed the flat fee or cap.

This is important because of the difficulty in estimating what work will be necessary, especially work for which the necessity and length will depend on circumstances that are unforeseen or outside the monitor's control, such as unexpected noncompliance or a variable number of consumer or employee complaints to investigate.

In addition, the document might also specify whether the monitor can bill for some items not subject to the flat fee or cap, such as:

- The monitor's costs for out-of-pocket expenses, e.g., travel;
- The cost of hiring specialized consultants or obtaining specialized technical tools; or
- The cost of performing services for which the volume is outside the monitor's control, e.g., reviewing, investigating or adjudicating employees' or customers' complaints, or revising the monitoring plan due to a corporate reorganization.

A flat fee or cap could stay level across all years, or it could vary: Early years are usually more expensive, due to one-time startup costs such as developing the initial work plan, meeting stakeholders, understanding what data is available and how to transfer it and conducting a baseline assessment.

Also, the document might allow renegotiating the budget in later years dependent on the corporation's compliance.

Corporation's Responsibilities

The document should specify the corporation's responsibilities and the consequences of noncompliance.

Cooperate With the Monitor

Though obvious, the monitorship document should spell out that the corporation must cooperate fully with the monitor.

Supply Requested Information

Similarly, the monitorship document usually specifies that the corporation must provide the monitor with any information that the monitor requests, in a timely manner and without need of legal process, with exceptions for information that is overly burdensome or protected by the attorney-client privilege or the work-product doctrine.

The document can also address how to resolve disagreements about what information is produced.

Usually, the corporation agrees to attempt to resolve any dispute with the monitor in good faith, with unresolved disputes subject to an abbreviated dispute resolution process.

Provide Access to Personnel and Facilities

The monitorship document should require the corporation to provide the monitor access to its personnel — likely for consultation, interviews, surveys and focus groups — and to its facilities for the same purposes and site visits, if appropriate.

The document should also specify whether the corporation's counsel may attend or observe personnel interviews and, if so, whether there are any exceptions.

This will be case-specific: It can be tricky to balance the corporation's desire to understand its situation and protect its rights against the monitor's and government's desire for corporate personnel to give information uninhibited by the presence of corporate leadership.

Facilitate Access to Third Parties

The monitorship document can also require the corporation to help facilitate access to third parties, such as vendors, agents, consultants and former personnel, for much the same purposes as providing access to current employees.

Although the corporation might be unable to guarantee third parties' cooperation, it should try nonetheless.

Adopt Recommendations or Resolve Objections

If the monitorship document requires the monitor to make binding recommendations, it should require the corporation to adopt the recommendations or to object and resolve objections through a specified process.

That process should specify the deadline to cure or object; the duty to meet the monitor and confer about the objection in good faith; how, when and to whom to raise unresolved objections; who resolves the objections; and the standard they should use to resolve them.

The Consequences of Noncompliance

The monitorship document should give the corporation a reasonable opportunity to cure noncompliance, with consequences for unresolved or egregious noncompliance.

Those consequences could include accelerating the frequency of monitoring or reporting; extending the monitorship's term; imposing financial penalties; contempt of court or other judicial remedies.

Conclusion

None of these provisions will guarantee a trouble-free monitorship. But they can help it proceed smoothly and minimize debate about what is allowed and what is not, and what to do next.

A successful monitorship can be challenging. The rules of the road should be the easy part, and should be addressed before the work begins.

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[1] See Deputy Attorney General Lisa O. Monaco, U.S. Department of Justice, Corporation Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies at 4-5 (Oct. 28, 2021), available at https://www.justice.gov/d9/pages/attachments/2021/10/28/2021.10.28_dag_memo_re_corporate_enforcement.pdf (last accessed Jan. 25, 2023); Deputy Attorney General Lisa O. Monaco, U.S. Department of Justice, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporation Crime Advisory Group at 11-14 (Sep. 15, 2022), available

at <https://www.justice.gov/opa/speech/file/1535301/download> (last accessed Jan. 25., 2023).

[2] Veronica Root Martinez, Public Reporting of Monitorship Outcomes, 136 Harvard L. Rev. 757 (Jan. 2023).

[3] To ease discussion, I refer to "the government," "the corporation," "monitor," and "the monitorship document," throughout but intend the discussion to apply equally to monitorships that involve private oversight bodies, multiple corporations and individuals, monitors identified by different titles, and any type of agreement, court order, or administrative order that establishes a monitorship.

[4] See supra note 2 for that author's discussion and recommendations.