IMPOSITION OF COMPLIANCE MONITORS IN FCPA SETTLEMENTS IS DOWN, BUT RECENT COURT RULING INCREASES THE RISK OF PUBLIC ACCESS TO MONITOR REPORTS

The government is imposing compliance monitors less frequently in FCPA settlements, but a recent ruling by a federal court in Washington, D.C. compounds the risks associated with having a monitor. An analysis performed by Willkie Farr & Gallagher LLP indicates that the imposition of independent compliance monitors and consultants as part of Foreign Corrupt Practices Act ("FCPA") settlements with the Department of Justice (the "DOJ") and the Securities and Exchange Commission (the "SEC") has declined markedly since 2010. But companies that do receive monitors must now be concerned that their reports may be publicly disclosed.

From 2004 to 2009, every FCPA settlement that resulted in sanctions greater than $3 million included the imposition of an independent compliance monitor or consultant. The burdens associated with such monitors are well known. Companies have long been troubled by the opaque process by which monitors traditionally were selected, the uncertainty or inability to contain the scope of monitors' work, the potential to undermine existing compliance systems and personnel, and the virtually unchecked and often excessive cost of monitors. Opposition to monitors galvanized in early 2008, when former U.S. Attorney General John Ashcroft estimated that eighteen months of his work as a monitor would cost between $28 million and $52 million. Congress subsequently convened hearings into potential problems and abuses in the use of monitors, and in March 2008, the DOJ issued guidance called the Memorandum on the Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations, commonly known as the "Morford Memo," after then-Acting Deputy Attorney General Craig S. Morford.

Although the Morford Memo did not address the circumstances under which a monitor will be imposed, the use of corporate compliance monitors in FCPA settlements has declined markedly. Since 2010, monitors have been imposed in approximately one out of every three FCPA settlements with sanctions greater than $3 million; in 2011, only one of twelve such FCPA settlements included a monitor. This is not to say that enforcement authorities will cease to use monitors altogether—so far in 2012 three of the four corporate FCPA settlements have included a monitor—but it appears that the DOJ and SEC are making more judicious use of monitors as a settlement tool. Regulators will still consider the same factors in assessing whether monitors are appropriate, including the gravity and scope of the misconduct, the involvement or acquiescence by senior management in the misconduct, the nature of any compliance or internal controls deficiencies, and any remedial measures taken by the company of its own accord. However, they appear to be doing so with a more exacting standard.

Although the use of monitors may be on the decline, a recent ruling by the United States District Court for the District of Columbia has increased the risk that, when a monitor is imposed, his or her reports to the government may be publicly disclosed. On April 16, 2012, in *SEC v. Am. Int'l Group, Inc.*, No. 04-2070 (D.D.C. Apr. 16, 2012), U.S. District Judge Gladys Kessler granted the motion of a news reporter and ordered the release of corporate monitor reports concerning transactions entered into by AIG leading up to the financial crisis of 2008.[1] AIG agreed to retain an independent compliance consultant as part of its settlement of alleged federal securities law violations in December 2004. The independent compliance consultant was to review certain transactions to determine if any were designed to violate generally accepted accounting principles ("GAAP") or SEC rules. The consultant was required to provide reports on his or her findings to the SEC, the DOJ, and AIG's audit committee.

In ordering the release of the reports to the public, Judge Kessler held that the public had a common law right of access to the reports. Applying the D.C. Circuit's two-step test for the common law right of access to judicial records, Judge Kessler first concluded that the reports constituted judicial records. She then balanced the interests of the SEC and AIG in maintaining the confidentiality of the reports against the public's interest in their disclosure, concluding that "the public's interest in favor of disclosure of [the monitor reports] . . . is overwhelming." In reaching this conclusion, Judge Kessler cited: (1) the absence of a confidentiality provision in the SEC's original consent order (the consent order was amended after the entry of a final judgment to include a confidentiality provision limiting dissemination of the monitor's reports to the entities designated in the consent order); and (2) the prominence of AIG in the financial crisis of 2008.

Notably, Judge Kessler rejected the reporter's argument that the First Amendment right of access to judicial proceedings mandated disclosure of the monitor's reports. In doing so, she noted that the D.C. Circuit has limited the First Amendment right of access to judicial proceedings to *criminal* proceedings—not *civil* proceedings such as the SEC's action against AIG—thereby leaving the door open for an additional argument that the First Amendment would mandate public disclosure of corporate monitor reports in the context of a *criminal* settlement.

The decline in the use of monitors in FCPA settlements is good news for companies that may face investigations or enforcement actions brought by the DOJ and SEC. But companies will want to take steps to ensure that, should a monitor be imposed as part of a settlement, the monitor's reports will remain confidential. At a minimum, companies should seek to include confidentiality provisions to this effect in settlement documents. The failure to keep such sensitive reports confidential could expose companies to follow-on civil litigation as well as additional potential commercial and reputational damage.

[1] The opinion is available online at: http://pdfserver.amlaw.com/cc/KesslerFOI_opinion.pdf.

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April 20, 2012