

Unpacking Monitorships: Strategies for Managing to Positive Outcomes

Speakers

Michael Cherkasky, Executive Chairman, Exiger and the Monitor of HSBC

Michael Cherkasky is the Executive Chairman of Exiger and the Monitor of HSBC. A pioneering figure in the world of financial crime, fraud, corruption and money laundering enforcement and compliance, Cherkasky has held senior leadership roles with some of the most esteemed law enforcement agencies and multinational corporations in the world. He is responsible for the day-to-day operations of the HSBC monitorship and the company's ongoing engagement with financial institutions and multinational corporations to implement sustainable, global compliance programs. He co-founded Exiger with its President & CEO Michael Beber.



Matthew Biben, Partner, Debevoise & Plimpton LLP

Matthew L. Biben is a litigation partner and member of the firm's White Collar & Regulatory Defense Group, Banking and Consumer Finance and Cybersecurity and Data Privacy practices. His practice focuses on problem solving by advising organizations and individuals and investigating, negotiating and litigating complicated regulatory and enforcement matters of all types, with a particular focus on matters related to financial institutions and complex situations involving the government. Biben has extensive experience advising boards and senior management, and his enforcement and advisory work has been wide-ranging. It includes both domestic and international matters relating to mortgages and other consumer products and securitization claims, to data privacy breaches, anti-money laundering, False Claims Act and Bank Secrecy Act work.



Serina Vash, Executive Director, Program on Corporate Compliance and Enforcement, NYU School of Law

Serina M. Vash is the Executive Director of the NYU Program on Corporate Compliance and Enforcement. A seasoned former federal prosecutor and litigator, Vash brings with her two decades of practical experience and a passion for tackling the issue of deterring crime. Before joining NYU, Vash served for twelve years in the United States Attorney's Office for the District of New Jersey. While at the U.S. Attorney's Office, she supervised and prosecuted a wide range of federal crimes, including those involving securities fraud, money laundering, structuring, organized crime and racketeering, cybercrime, national security, and other financial frauds. In 2010, Vash was named the first-ever Chief of the Office's General Crimes Unit. Vash also served as Acting Deputy Chief of the Criminal Division, Senior Litigation Counsel in both the Organized Crime/Gang Unit and the National Security Unit, and a member of the Office's Trial Mentorship Program.



Moderator

David Lawrence, Founder and Chief Collaborative Officer, RANE

Regulators and corporate executives are increasingly looking to outside monitors to evaluate and oversee compliance with company policies and procedures, relevant laws and regulations, and corporate ethics programs.

As both mandated and self-imposed monitorships become more common, monitored entities must prepare for this type of oversight and the challenges it may bring. A monitor may require redeployment of resources, potentially resulting in significant business disruption, and recently, a debate has broken out over public access to reports compiled by government appointed monitors.

In a recent webinar co-hosted by RANE and Exiger, a panel of experts deconstructed monitorships to help attendees understand the role of a monitor, how they are selected, what the rules of engagement may be, and how companies can realize the benefits of working with a monitor. Highlights from the discussion follow:

Making Monitorships Work

- **Michael Cherkasky**, who made clear from the outset that none of his comments during the webinar reflected information acquired during his current HSBC monitorship, said that while independent monitors may be the only solution when a regulator or prosecutor is dealing with an institution that needs systemic change, “that solution needs to be restricted in scope, time and have clearly defined goals.”
- Chief among those goals is what **Cherkasky** termed “sustainable compliance.” “That means compliance with the regulatory requirements and the law, but also allows the company or the institution to compete in its industry,” he stated. “If what we do is so draconian and difficult that the company cannot be competitive, then when you leave, the company will revert to the past practices.”
- **Matthew Biben** asserted that from the perspective of an in-house counsel, monitors should be avoided at almost all costs, because they can be “very difficult on companies, notwithstanding the best aspirations of the monitor and/or the interest of the government” and can become “burdensome, onerous, expensive.” That said, **Biben** noted that if you cannot avoid them, you must embrace them at all costs.
- **Serina Vash** echoed **Biben’s** views on monitors, laying out what a company should seek to get out of a monitorship once it has no choice but to embrace it, “Where, in the process, can your company, can you, have input to make sure that what you want out of this, which is to remain a going concern, and at the same time comply with the law and regulations? How do you make sure that that happens, and how do you view a monitor as a person who can help you identify legal, regulatory, and ethical grey areas, give your people a platform to speak, and identify circumstances that put employees and departments within the company at risk?”
- **Cherkasky** argued that it’s not really right to say a company should avoid a monitorship at all costs, because “people agree to monitorships because of the

“You need someone that is able to do project management and face off with your institution in a way that is open and transparent.”

- Michael Cherkasky

cost. No one volunteers to be monitored. They're doing it because the cost of a monitorship, they perceive, is a lower cost for an institution and is part of the settlement."

Selecting the Right Monitor

- All three panelists agreed that choosing the right person to serve as monitor is absolutely critical. "You have to do your best at the outset, through whatever the process is, to get someone who will be fair and someone who will listen to you and someone who you can trust, because they can wreak havoc, in terms of distraction, expense, and ultimately in terms of what they can do to your business," said **Biben**.
- **Cherkasky** noted that companies focus too much on whether a potential monitor has management experience that is specific to their industry, "You need someone that is able to do project management and face off with your institution in a way that is open and transparent."
- **Vash** agreed, stressing that while it is important to look at industry expertise, the project management component is more important. The most critical aspect of the monitor is somebody who can be an independent third party, "someone who can be exposed to C-suite personnel and line assistants and line employees, somebody who is going to be cooperative, and somebody who's going to understand the business, but be comfortable learning the business from the company itself."

Structuring the Monitorship Agreement

- If a monitorship agreement is not sufficiently detailed, that can be to the company's detriment. "Lawyers must make sure that their clients have a really, really clear, defined, thoroughly-negotiated contracts that is precise, and then pick someone who in fact you trust is going to live within those four corners" said **Cherkasky**. "Where it doesn't work is this creep of what you're going to cover, look at, and what the objectives are, and the time period."
- **Vash** noted that no matter how good the monitor is, that person typically is selected and begins his or her work after the agreement between the company and government has already been finalized. Because of that, she stated, the most critical part of the agreement is the mandate governing what the monitor will be able to do, how he or she understands the role and a detailed timeline of the engagement. "The agreement should set forth how disputes are going to be resolved, how privilege issues are going to be resolved, and how resources are going to be employed."
- **Biben** cautioned, however, that there will always end up being some room for interpretation. "As hard as lawyers work to draft very specific agreements, and as hard as you impress upon a monitor that they are a creature of contract, at the end of the day, there continues to be an asymmetry in that relationship between the government's influence and the company's influence," he said. "The company can end up in a position where, though they may be right under the contract in terms of scope, mission, focus and reporting, you still end up with judgment calls. And typically the company ends up on the unhappy side of those judgment calls."

"You need someone who can effectively help the monitor get around the company and manage the monitor from the company's perspective."

- Matthew Biben

Managing the Company-Monitor Relationship

- According to **Vash**, it is vital for a monitor to have a single point of contact in the company, ideally a member of the C-suite, someone well respected “who can make sure that the mandate of the agreement is carried out...and can speak to the monitor on behalf of the company and to the company on behalf of the monitor.”
- **Biben** agreed on the need for a single point of contact, but felt that C-suite is too senior for a day-to-day relationship. “You need someone who can effectively help the monitor get around the company and manage the monitor from the company’s perspective.”
- **Cherkasky** pointed out that there has to be a monitor liaison office, or host committee, that can say to the monitor, “you don’t have freedom to run wild, you don’t have freedom to get anything. You have to work through us.” At the same time, as long as the requests are within the scope of the agreement, the organization has to be prompt and fully cooperative, he added.
- Separate from that office, **Cherkasky** noted, it is key to have CEO involvement and to have the CEO build a relationship with the monitor by asking, “I care about what you are doing, monitor. I’m listening to what’s going on. Tell me what you need.”

“Make sure disputes can be resolved first with the monitor and the company, in good faith, and then he/she can go to the agency after the fact if they were unable to reach an agreement.”

- Serina Vash

Turning the Monitor Into an Advocate (and Opportunity)

- According to **Biben**, a company that has truly been successful in embracing the monitor is one that has created an advocate for the company. If the C-suite is able to establish a certain level of trust by showing commitment and creating a situation in which both sides are committed to not surprising each other, they can actually end up having an advocate with the Justice Department and other regulators.
- **Cherkasky** agreed that it is critical to avoid having an adversarial relationship with the monitor. “I think really good monitors are folks who are going to understand the management’s perspective and put it into real terms to the regulator or law enforcement. In those moments, you are independent, but still being an advocate for the right position.”
- If companies are able to look at the monitorship opportunistically and use the monitor as a vehicle for management to rally around, to fix things that have long been neglected, then they can earn credit from various stakeholders, **Biben** argued.
- “By showing both internally and externally that you’re welcoming to change, that you want to get to the bottom of how the processes went wrong, what happened, and make sure that it doesn’t happen again, that’s really the message that’s going to resonate both with shareholders, with employees, with third-party vendors, with the government, and with the monitor,” said **Vash**.

Dealing With Unanticipated Issues

- When a monitor stumbles upon a new finding that could be evidence of additional

unlawful conduct or is confronted by a whistleblower, there are a lot of different ways that he or she can react, and many of them, if not most of them, are detrimental to the company. However, **Biben** argued, if a company has created a good relationship, the monitor will be more likely to give management the opportunity (unless it is an extreme situation) to actually help marshal information around whatever the issue or complaint may be.

- **Vash** stressed that such unanticipated issues can also be (at least partially) mitigated in the initial negotiations of the monitorship agreement. During this period, you should already be strategizing how you can use the monitor in your best interest to advocate for the company. "Make sure disputes can be resolved first with the monitor and the company, in good faith, and then he/she can go to the agency after the fact if they were unable to reach an agreement."
- **Cherkasky** agreed, saying it is in the best interest of both parties to have the handling process of unexpected issues sorted out from the very beginning. Either way, a monitor who is looking to do his or her job well should be embracing the fact that management is a critical part of solving problems.

RELATED READING

[HSBC Ruling Could Bring Big Changes to Monitorships](#), Corporate Counsel, February 1, 2016.

[A New Penalty Structure for Corporate Involvement in Atrocity Crimes: About Prosecutors and Monitors](#), Harvard International Law Journal, July 7, 2016.

[Prosecutors Refuse to Release Siemens FCPA Monitor Report](#), Corporate Crime Reporter, August 24, 2016.

[Greater Transparency in Monitor Reports: An Unintentional Result?](#), NYU: Compliance & Enforcement, June 15, 2016.

[The Rules of the Road for Corporate Monitors](#), Compliance Week, June 2016.

[SEC Official: Company Reforms Can Make Monitorships Unnecessary](#), The Wall Street Journal, October 15, 2014.

[Is the Opaque World of Corporate Monitorships Becoming More Transparent?](#), American Bar Association, December 2015.

[The Problem with Corporate Monitorships](#), The New York Times, November 12, 2014.

ABOUT EXIGER

Exiger is a global regulatory and financial crime, risk, and compliance firm. Exiger arms financial institutions and multinational corporations with the practical advice and solutions they need to prevent compliance breaches, respond to risk, remediate major issues, and monitor ongoing business activities. Exiger was initially launched to lead the court-appointed monitorship of HSBC the largest, most comprehensive monitorship to date. Exiger works with regulators in the U.S., UK, and around the world to evaluate the effectiveness of HSBC's money laundering and sanctions compliance controls across its approximately 6,000 offices operating in nearly 70 countries. In addition to its monitorship engagements, Exiger works with clients worldwide to assist them in effectively managing their critical compliance challenges while developing and implementing the policies, procedures, and programs needed to identify and avoid them in the future. Exiger has offices in New York City, Hong Kong, London, Silver Spring, Singapore, and Toronto. Click [here](#) for more on Exiger's Monitorship Advisory capabilities. For more information, please visit www.exiger.com.

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