

Guide To Monitorships Is Essential Because of Lack of Statutes, Court Precedent

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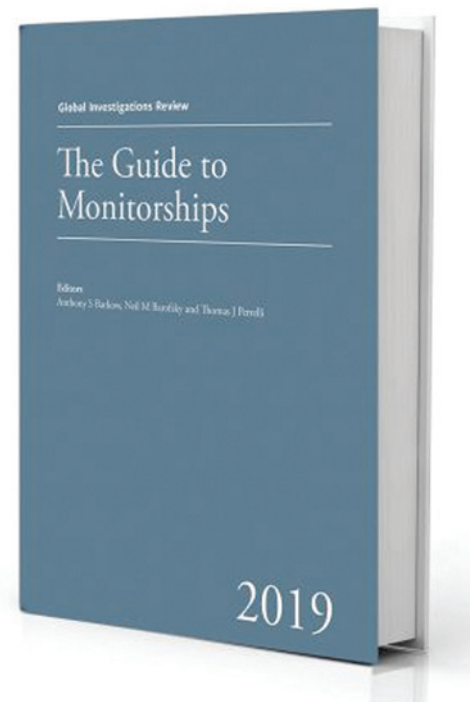
The Guide To Monitorships
Edited by A. Barkow, N. Barofsky, and T. Perrelli. Law Business Research Ltd., London. 253 pages.

With some regularity over the past 25 years, government actions against corporate actors have resulted in the imposition of independent monitors. “Monitor” can have multiple meanings, but is usually understood to be an independent third party appointed to ensure compliance with regulatory or court-ordered requirements, typically following the settlement of an enforcement action. Depending on the agreement or order in question, monitors often report on the entity’s internal controls and compliance functions and may be tasked with making recommendations aimed at reducing the risk of misconduct.

Monitorships have been imposed for compliance breaches

in a multitude of U.S. regulatory actions, such as violations of the **Foreign Corrupt Practices Act**, economic **sanctions**, **civil rights** violations, anticompetitive business practices under antitrust law, **accounting practices** and **environmental** crimes. These resolutions are no longer unique to the U.S., having been imposed in recent years in the **United Kingdom**. Although the imposition of monitors has slowed somewhat (**by design**) during the current presidential administration, they are in no danger of going away.

Because in the U.S. at least, monitors are generally creatures of contract or of equitable court remedies, statutes and court precedent do not answer the myriad issues raised by any given monitorship. Until now, a growing set of **academic literature** was the main place to go for substantive guidance on these issues. The Guide to Monitorships, from



the UK’s **Global Investigations Review**, fills this void, providing a valuable reference to any of the multidisciplinary professionals—lawyers, forensic accountants, auditors, investigators, compliance professionals, data specialists, and subject matter experts—that are tasked with staffing compliance monitorships. Notably, the book is designed as a companion to GIR’s larger work, *The Practitioner’s Guide to Global Investigations*.

The Guide to Monitorships is an edited anthology, with individual chapters drafted by a slate of well-respected professionals in the field. Intended for the novice and expert reader alike, the book contains an introduction and 19 chapters, almost all of which offer valuable insight and practical guidance. The excellent introduction by Anthony Barkow, one of the co-editors, and Michael Ross traces the legal basis and development of monitorships from DOJ's imposition of third-party **trustees in RICO cases** some 35 years ago to the contemporary compliance monitorships imposed in the DOJ or SEC enforcement actions today. Interestingly, Barkow and Ross examine the concept of the monitor from a penological standpoint, citing the deterrence, rehabilitation and even incapacitation resulting from the monitor's mere presence.

As a whole, the guide contains a good amount of overlapping material, with different authors giving somewhat duplicative treatment to the same topics. That is a common feature of anthologies, which are not designed to be consumed from cover-to-cover. For example, in several chapters, The Guide to Monitorships discusses the selection of monitors—a process that varies from agency to agency

and is not typically designed to be transparent. Overlapping or not, this comprehensive guide gives expert treatment to some of the thorniest and most complex issues in contemporary monitorships, including, notably, cross-border issues where U.S.-based professionals may need to navigate restrictive statutes and regulations—such as the EU's General Data Protection Regulation, the French blocking statute, the China Internet Security Law, or various bank secrecy laws. For the expert reader, the guide also has a series of chapters that present a sector-specific analysis of different kinds of monitorships, such as in the health care and financial services industries.

Three particular chapters stand out. Co-editor Thomas Perrelli's chapter on the "lifecycle" of a monitorship is essential reading for professionals executing their first monitorship, as well as any corporate insider at a monitored entity seeking insight into this process. He traces the typical project, from the engagement letter to crafting the work plan, budgeting, and assembling a monitor team, and finally to testing and reporting. Perrelli sensibly focuses on the importance of the written documentation undergirding the monitorship,

particularly the engagement letter that is usually (but not always) entered into between the monitor and the entity. As he advises, the monitor can avoid disputes later in the engagement by clearly setting forth at the outset the parties' understanding as to the scope of the engagement, budget, confidentiality, and parameters of access to information.

Equally thought-provoking is co-editor Neil Barofsky's chapter on "Changing Corporate Culture." As he notes, "Misconduct by employees on a scale that leads to the imposition of a monitorship will often find its roots in a flawed or dysfunctional corporate culture." Barofsky argues convincingly that transformational cultural change can be hard, and can only be achieved if senior company stakeholders buy-in. A successful monitor, he tells us, will develop "a keen understanding of the entity's business to understand what drives its profitability and growth, and use that understanding to convince the business that a more compliant business is not incompatible with a growing and more profitable business." Barofsky also recommends that a monitor respect and work within the remedial framework created by the company to solve previously identified issues, even if

flawed. Rejecting the company's efforts to date "risks demoralizing and undermining the stature of the existing compliance personnel, and setting an adversarial tone for the monitorship," which will prove unproductive. Sustainable change, he argues, must come from within lest it dissipate quickly after the monitorship ends.

Finally, Frances McLeod's chapter makes a compelling case for the centrality of forensic firms to monitorship engagements. She extols the benefits of such companies' serving as monitors, or alternatively, as adjuncts to monitors in areas such as forensic accounting, data analytics, and compliance testing. But most notable is McLeod's discussion of monitored entities themselves hiring advisory firms as, to use her term, "monitor-response teams."

Such monitorship advisory professionals are rarely discussed but can be a crucial adjunct to entities facing the crushing burden of a monitorship. Among other things, McLeod tells us, support teams can (1) serve as liaison to the monitor on requests for data and access to employees; (2) help to interpret the monitor's recommendations and "develop, execute, test, and communicate

any remediation plans, as well as provide training" to company employees; and (3) help anticipate those areas that are likely to be of potential concern to the monitor and front-run the engagement by formulating remedial efforts that may shape the course of the ensuing monitorship. Particularly in larger cases, a support firm with monitorship experience can be crucial to helping the company through the sometimes overwhelming burdens, as well as identifying "scope creep"—where the monitor seeks information outside the agreed-upon purview of the engagement.

A notable omission from this otherwise comprehensive guide is a discussion of monitorships as prophylactic measures, such as when "integrity monitors" are engaged by governments to ensure that construction projects are not plagued by fraud. These types of **proactive monitorships** have been used for the oversight of public construction projects for decades, and have expanded beyond construction. Most significant is the FCC's imposition in the Obama administration of independent monitors (called "independent compliance officers") as a condition of its approval of the mergers of **Charter and Time-Warner Cable** or **AT&T and**

DirecTV. Among other benefits, proactive monitors in any area can deter misconduct and boost public confidence in a company or project challenged by reputational concerns.

Although corporate compliance monitorships are bespoke engagements, with features tailored to meet the demands of each unique regulatory disposition and monitored entity, general lessons can be universally applied. The Guide to Monitorships is an indispensable resource to professionals in the field.

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