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Data Show Trend Away from Monitors for Voluntary Disclosures

By Rachel G. Jackson | May 31, 2012

Companies that voluntarily disclose potential Foreign Corrupt Practices Act violations to the Justice Department may be less likely to receive a compliance monitor as part of a settlement with the Justice Department, an analysis by Just Anti-Corruption has found. No company that has voluntarily disclosed a potential violation has been required to retain a corporate compliance monitor since 2008.

This trend is not the result of a single policy, experts familiar with Justice Department FCPA settlement negotiations said. It is instead the likely product of a variety of factors. Companies that disclose voluntarily have more time to get their houses in order, rather than being surprised by a government subpoena. They may be seen as having a genuine desire to fix the problem. And as more companies disclose smaller problems, the issues may be less egregious than the cases the DOJ chooses to pursue itself.

A year ago, many FCPA analysts wondered whether compliance monitors were on the way out. The costs of corporate monitors have been controversial since 2008 when former Attorney General **John Ashcroft**'s consulting firm received a no-bid monitorship contract worth up to $52 million from New Jersey U.S. Attorney **Chris Christie**, now the state's governor. Many corporations complained that the monitors were a costly and undue burden on companies already hit with massive fines and disgorgements.

All FCPA Corporate Monitorships from 2009 to 2012

(None of the disclosures were voluntary)

Year	Criminal fine	Company name
2012	$17.3 Million	Biomet Inc
2012	$16.8 Million	Smith & Nephew Inc
2011	$218.8 Million	JGC Corporation
2010	$92 Million	Alcatel-Lucent S.A.
2010	$4.4 Million	Universal Corporation
2010	$9.45 Million	Alliance One International Inc.
2010	$240 Million	Snamprogetti Netherlands BV
2010	$240 Million	Technip S.A.
2010	$93.6 Million	Daimler AG
2010	$14.1 Million	Innospec Inc.
2010	$400 Million	BAE Systems plc
2009	$18.2 Million	Control Components Inc.
2009	$402 Million	Kellogg Brown & Root LLC

Since 2008, an increasing number of companies instead agreed in settlements to self-monitor, using their own counsel to submit periodic reports to the Justice Department on their efforts to implement new or enhanced compliance programs.

But that trend may not be stable. Of the four companies that have entered into deferred or non prosecution agreements with the Justice Department so far in 2012, two — Smith & Nephew plc and Biomet Inc., which did not self-disclose — were required to retain compliance monitors.

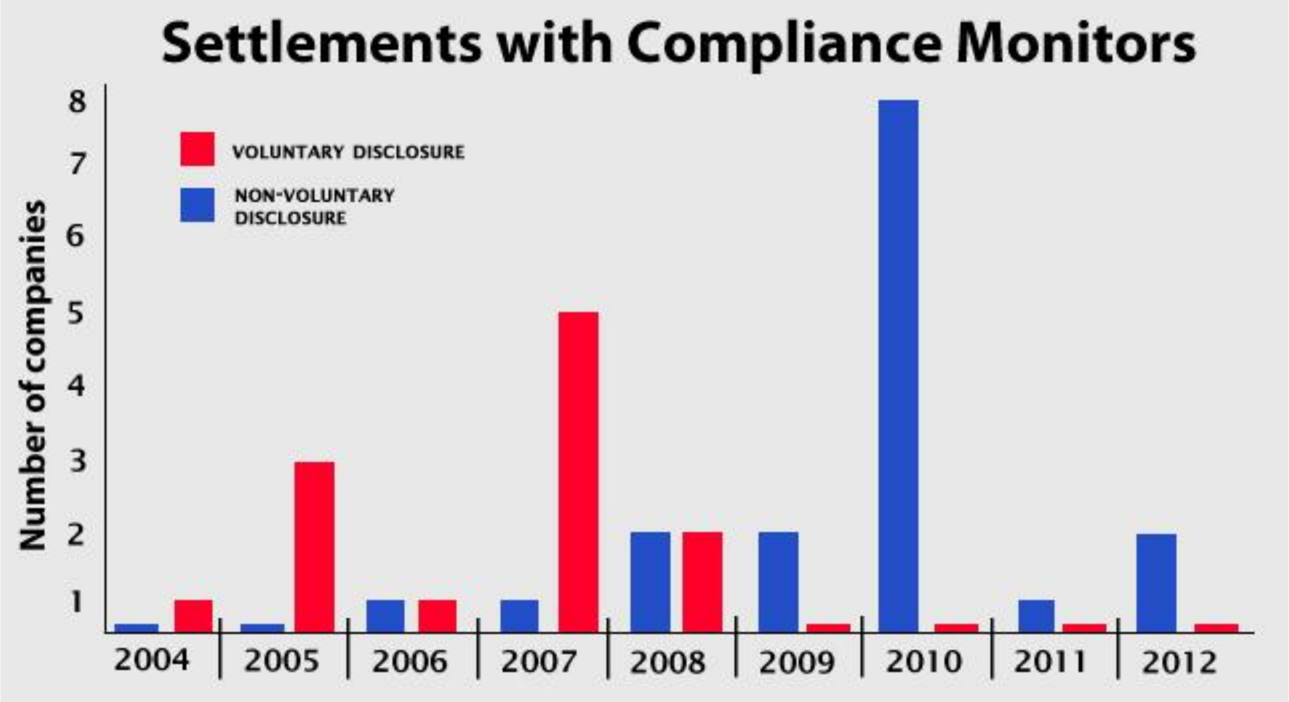
White collar law enforcement experts say companies that disclose voluntarily would like to receive a letter from the Justice Department declining to prosecute the violation, known as a declination. If no declination is forthcoming, companies would at least like credit from the department in settlement negotiations, which could lead to lower criminal fines or a less onerous self-monitorship.

“The government wants to give a company extra credit, if you will, for voluntarily disclosing things because they want to encourage it,” said **John Hanson**, a former FBI agent who investigated white collar criminal cases and now serves as a frequent corporate monitor as head of Artifice Forensic Financial Services LLC. ”It may play into part of that assessment.”

But, he added, defense lawyers’ increased experience with FCPA settlement negotiations also could be driving the decrease in compliance monitors in cases where the company discloses voluntarily.

“There have been so many FCPA matters in the last five or six years that counsel has gotten very wise to what they need to do to avoid the biggest penalties such as monitors,” Hanson said. ”FCPA counsel has a roadmap of what they need to do because they’ve got 100 plus FCPA agreements they can read and say, ‘Here’s what they’re going to require,’ and they can start doing that from the beginning of their investigation.”

He added: “They don’t have to rewrite the book. When they walk in the door to disclose to the DOJ they’ve checked all the boxes they know the DOJ is going to be interested in.”



Reasons to avoid monitors

Companies aren’t the only ones voicing concerns about monitorship costs.

U.S. District Judge **Ellen S. Huvelle** expressed doubts about the potential financial burden of a compliance monitor in a plea agreement hearing for Innospec Inc. The financially troubled chemical manufacturing company had pleaded guilty to paying bribes to Iraqi government officials in exchange for contracts under the United Nations’ Oil-for-Food program and agreed to pay $41 million in criminal and civil fines in the United States and United Kingdom.

“It’s an outrage, that people get $50 million to be a monitor,” Huvelle said at the hearing. “I’m not comfortable, frankly, signing off on something that becomes a vehicle for someone to make lots of money.”

The compliance monitor, **Kevin T. Abikoff** of Hughes Hubbard & Reed LLP, ultimately is projected to cost Innsopec $3.9 million over four years.

No company that has publicly disclosed FCPA monitor ships costs has paid near the amounts about which Huvelle appeared concerned. But the desire to avoid a corporate monitor goes beyond potential financial burdens.

“The fundamental tenet of FCPA compliance is ensuring that a corporation’s assets are spent effectively and in keeping with core values,” **Kate Atkinson** of Miller & Chevalier Chartered said. ”So an effective FCPA compliance program goes to the heart of the company and I think sometimes you can have tensions arise.” Atkinson was recently a compliance monitor for KBR Inc., which, along with its former corporate parent Halliburton Co., paid $579 million to the Justice Department and Securities and Exchange Commission to settle FCPA charges in 2009.

Hanson explained that many corporate officers and boards don’t initially understand the scope necessary to implement an effective compliance program. “Ultimately an FCPA compliance program is a misnomer,” he said. “It’s an element of a larger compliance and ethics program.”

To successfully implement a compliance program, monitors often need access to proprietary information. As monitor’s reports are not privileged, this access can create problems.

“An FCPA monitor’s report will discuss in varying levels of detail how a company does business,” Atkinson said. “The release of internal processes that a company uses to the wider public could in fact by used by competitors in a way that could harm the company.”

“I do think the question of privilege and confidentiality is one of the areas in which we have probably not yet come to the right solution for monitorships, generally,” she added. “There are good reasons for [their reports] to not be privileged, but other the other hand it is essential that monitors have access to business proprietary information.”

Atkinson said that corporate monitors typically request confidential treatment for any such information when they submit reports to the Justice Department and that, with third party litigation such as shareholder derivative suits, companies are using strategies such as limiting which documents a monitor has physical copies of.

“With third parties chasing the monitors for their reports, you’ve got to be very very careful with them,” Hanson said. “They contain sensetive information that could be used to a competitor’s advantage. They’re not privileged. A FOIA request might serve to get the reports.”

The government is able to redact confidential business information when responding to a FOIA request, but must be aware what in the report falls under that category.

Such issues are not always worked out before the monitorship begins.

In April U.S. District Judge **Gladys Kessler** ordered the release of a redacted monitor’s reports for American International Group after **Sue Reisinger**, a senior reporter with Corporate Counsel magazine, argued the reports on transaction controls were essential to shed light on the financial industry’s 2008 collapse. Both the Securities and Exchange Commission and AIG argued against the release of the reports, which were part of a civil settlement between the commission and the company. They said the reports contained confidential information. The SEC had previously denied a FOIA request from Reisinger on the same grounds.

“That’s the best example of a situation in which the expectations and intent were not as clear at the outset, and perhaps the issue of what could and should be released to the public at what time hadn’t been thought through,” Atkinson said.

Inexperienced monitors

Many of the issues involving confidentiality and the costs of compliance monitors stem from a lack of training, Hanson said.

“Many of the people who are chosen for a monitorship have never done a monitorship,” Hanson said. “Its not like providing consulting services or legal services. Many people enter a monitorship not really focused on the settlement agreement and the scope of the agreement. The purpose of a monitor is to verify an organized, timely and effective compliance with the terms of the agreement.”

Inexperience and not sticking to a concise workplan can drive up costs, Hanson explained, especially when monitors bill by the hour.

“No best practice against which to hold monitors accountable is a big cause of poor monitors,” he said. “And the company is unable to address it or really do anything.” Hanson is currently working to form a professional association for corporate monitors to allow them to dicuss and develop strategies for approaching monitorships.

“I do think we could make more progress in terms of oversight on monitors and fees,” Atkinson said. “One piece of that is to define the client. To the extent that monitors have been lawyers, who’s your client? Some people say it’s the government, some people say it’s the board. I think of the client as a hypothetical long-term shareholder.”

“I think a monitor has to be careful in how he or she spends the money that belongs to the shareholders,” she added.

“Starting a monitorship is like starting a shotgun marriage,” Hanson said. “There’s all the distrust and fear, but, if you’re doing it right, after a period of just a few months it becomes a good relationship.”