Deferred Prosecution Agreements & Working with an Independent Monitor
Presented by: Bart M Schwartz

Utilities & Energy Compliance & Ethics Conference, Houston, TX
Society of Corporate Compliance and Ethics

February 28, 2011

© Guidepost Solutions LLC

What is a Deferred Prosecution Agreement?

- Voluntary alternative to adjudication following the filing of a formal charging document by the government
- Entered into between a prosecutor and defendant
- Grants amnesty in return for defendant’s adherence to certain requirements, e.g. fines, corporate reforms, cooperation, appointment of an independent monitor/expert/consultant
- Fulfilling requirements results in dismissal of charges
Variations on the DPA

- **Non-Prosecution Agreement**
  - An agreement not to prosecute, so no formal charges are filed by the government
  - Under the agreement the defendant may be required to pay fines, cooperate institute reforms, or retain an independent monitor or expert

- **Prosecution with monitor**
Why does the government appoint a Monitor?

- Serve the Public Interest by providing
  - Long Term Oversight
  - Supplementing or freeing up government resources
  - Maintaining jobs, products/service
  - Elevating industry standards
  - Protecting innocent shareholders
  - Deterrence
  - Early warning system for the government

Source: Gibson Dunn & Crutcher
Goals of the Monitorship

- Change and/or improve culture
- Create a system which outlasts the Monitor
- Be vigilant
- Do not limit oversight to narrow issues
- Seek to have a broad impact on the organization

Selecting the Monitor

- DOJ system- March 7, 2008
- Pre-approved list
- Veto power only
- Combinations
- Skill sets
  - Industry expertise
  - Investigative
  - Management
  - Prior monitorships
  - Teacher
  - Facilitator
  - Disciplinarian
  - Sometimes, even a cheerleader
Monitor’s “Contract”

- Negotiated by the subject and the government, without input from the Monitor
- Generally includes a scope which may be quite detailed
- May state what is NOT within the Monitor’s jurisdiction

Elements of a typical contract

- Term and internal deadlines
- Recitation of related matters e.g., DPA
- Representations
- Due diligence for new hires
- Code of conduct and training
- Retention of Monitor
- Funding of Monitor
- Secrecy of bills
- Duties and responsibilities of Monitor
- Privilege issues
Elements of a typical contract cont’d.

- Protection of propriety information
- Monitor reports
- Sale of Company/Unit
- Determination of violation
- Consequences of violation
- Indemnity
- Removal or replacement of Monitor

The Monitor is coming!

- Will the Monitor be able to deal with both government and corporate constituencies?
- Now there’s an outsider in my business!
- Can we “confide” in the Monitor?
- It looks like the Monitor has a “blank check”- Where will he go, what will he look at?
- Can the Monitor distinguish between bad conduct and mistakes or misjudgments?
- Will the Monitor understand and appreciate our business needs?
- How much will this cost?!
How to work with the Monitor

- Understand the Monitor’s responsibilities and requirements
  - Does the Monitor’s have to submit a work plan to the regulators?
  - What other reporting requirements does the Monitor have?
  - What is the timeline for reporting?

- Initial meeting-setting the tone
  - Understand the Monitor’s approach to the engagement.
  - Not all monitors are alike.

How to work with the Monitor cont’d.

- Designate a company response team as a resource for the Monitor
  - Appoint a key contact.
  - Include individuals from IT, Internal Audit, Legal and other functions on the team in order to be able to respond quickly to requests and meet the needs of the Monitor.

- Open communications at all times
  - Inform the company of the need to cooperate and reinforce message periodically.
  - Have regular interactions with the Monitor and his/her team.
  - Consider periodic status meetings to discuss the Monitor’s ongoing requirements.
  - Keep apprised of the Monitor’s level of satisfaction with the company’s cooperation.
How to work with the Monitor cont’d.

- Share corporate resources with the Monitor as appropriate
  - Collaborations with Internal Audit for specific reviews
    - Cost Savings
    - Training
    - Knowledge
  - Possible involvement of Legal in ad hoc investigations
  - IT assistance in investigations and other monitoring activity

Overcoming bumps in the road

- If problems arise during the course of the monitorship—either self-reported or discovered by the Monitor—address them immediately, openly and comprehensively.
- Demonstrate willingness to correct and discipline if appropriate.
- Consider using the problems as a “lessons learned” communication to employees.
Winding down but not out

- While the Monitor is still engage him/her in sustaining good practices and developing them into best practices.
- Use the Monitor’s experience with other companies and industries to help fashion a compliance program and culture that will become embedded in everyday activities.