

# ECI BENCHMARKING GROUP ON MONITORS BEST PRACTICES PAPER

EXECUTIVE SUMMARY



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# EXECUTIVE SUMMARY

This ECI member report represents a comprehensive overview of the monitoring process. The report acknowledges there is a certain amount of overlap between the two types of monitoring, but addresses mandatory and voluntary monitoring separately.

The report begins by exploring the recent trends in monitoring. These trends encompass both the organizations who choose to engage a monitor and those who accept a monitor by agreement. In fact, one of the most recent trends is the number of organizations choosing to voluntarily engage a monitor.

Corporate culture has become increasingly recognized as a critical component of operational success, and so much so that organizations are electing an ongoing monitor-managed risk assessment. The reasons are either strategic (anticipated M&A or IPO) or are in response to an issue or event focused on operational performance and an ethical culture.

The report indicates that monitoring is on the rise and has become a vehicle for other agencies and jurisdictions. States' attorneys general, the FTC, FCC and others have joined the DOJ in using monitors to structure deferred prosecution agreements (DPA), non-prosecution agreements (NPA) and other administrative settlements. The role of the monitor in these cases is to provide oversight to the agreement rules, protect the enforcing agency, and to help avoid the organization falling back into prior behaviors. The report makes clear the monitor's responsibility is to observe demonstrated behaviors and not be an extension of law enforcement or continue the investigation.

The report includes details from the 2008 Morford Memo, in which the role of the monitor is clearly defined.

The balance of the report explores the engagement lifecycle between an organization and the monitor. The report identifies the first stage of the engagement to be selecting a monitor. The report suggests seeking a roster of approved monitors and basing agreements upon pre-negotiated monitoring terms. The critical diligence factors an organization should look for in a monitor are:

- » Experience and capability
- » Reputation
- » Approach of monitor
- » Adherence to rates/rate structure
- » Willingness to perform under attorney-client privilege.

Obviously, this is one of the significant differences between voluntary and mandatory. The report encourages an open and direct dialogue between government and organization prior to selection. For voluntary monitoring, the emphasis is on philosophy – culture vs. controls focus and a clear alignment with management's objectives.

**“[a] monitor’s primary responsibility is to assess and monitor a corporation’s compliance with the terms of the agreement specifically designed to address and reduce the risk of recurrence of the corporation’s misconduct, and not to further punitive goals.” – Morford Memo**

The report designates securing the monitoring agreement as the next phase. In addition to customary professional service terms, the following items are vital to a long-term productive arrangement:

- » Review process for reports
- » Scope of work and permitted additional work
- » Confidentiality and records
- » Attorney-client privilege issues
- » Dispute resolution

Managing the monitoring engagement follows with consideration of both the detailed work plan and the establishment of trust at the outset. Areas to resolve include:

- » Establishing the project team
- » Communications – protocol, expectations, points of contact
- » Duration of monitoring
- » Detailed work plan
- » Reasonable deadlines
- » Document review requirements
- » Surveys, focus groups, site visits and employee access

Reporting and resolving new issues is another area of voluntary and mandatory difference. Mandatory monitoring comes with agreement requirements, whereas voluntary engagements require a tight scope of issue management. These include, but are not limited to:

- » Ongoing vs. past misconduct
- » Employee concerns raised to monitor
- » Issues uncovered by monitor

Regardless if the relationship with the monitor is voluntary or mandatory, the report discusses how to maximize the value that can be created. At the beginning of the interviews and engagement discussions it is important to consider best practices to incorporate during the term. As difficult as it may be at the time, emphasizing broader objectives rather than specific actions and providing equal focus on culture and controls are critical. Most of all, the report emphasizes the structure should reflect a realistic timeline for change.

The final phase discussed in the report is transitioning out of a monitoring relationship and final reporting. In voluntary arrangements, the transition includes the plan for a final set of activities the monitor will conduct, detailed progress reporting and identifying ongoing risk areas, and providing close-out meetings with the company's executives and, if appropriate, board members.

In mandatory arrangements, the company should prepare well in advance of the expiration of the DPA, NPA, or other agreement and work with the monitor to identify whether:

- » Certain areas will be re-assessed
- » To re-conduct focus groups
- » To conduct any final process and control testing

Much like other corporate ethics and compliance activities, independent monitoring has evolved rapidly. Over the past several years it has developed from a mechanism used in limited cases to protect government interests to a broader tool now used in a wide variety of circumstances, including the proactive identification of compliance risks and prevention of future misconduct to enhance an organization's overall ethical culture.

# MONITORS BENCHMARKING GROUP

This report is a result of collaboration among a group of ECI members dedicated to advancing the discussion on independent monitors and providing valuable resources to fellow E&C practitioners.

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