Professional Perspective

Strengthening Corporate Environmental, Health & Safety Compliance Programs

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Editor's Note: Wilson served as the court-appointed monitor overseeing Duke Energy's compliance with its criminal plea agreements following the Dan River coal ash spill in 2014. Wilson also served as the Deputy Monitor for Energy & Environmental Issues in the Volkswagen "Dieselgate" monitorship. Landfried assisted Wilson in both monitorships. Apple assisted Wilson in the Duke Energy coal ash monitorship.

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Court-appointed monitorships are a powerful tool in the federal prosecutor's toolbox. High-profile environmental matters like the Duke Energy coal ash spill and the Volkswagen diesel emissions scandal have demonstrated federal prosecutors' willingness to not only exact substantial criminal penalties but also to impose intensive oversight of internal corporate compliance systems, when faced with serious environmental, health and safety (EHS) violations. The Biden administration will likely rely more frequently on this heavyweight enforcement tool in EHS and other contexts.

Based on our experience implementing the Duke Energy and Volkswagen corporate monitorships over the past five years, this article aims to assist corporate counsel, compliance leaders, and senior executives in understanding:

- How to evaluate and monitor their company's internal compliance systems before the company faces a criminal or enforcement event that could lead to imposition of a monitorship
- Expectations of courts and governments during monitorships
- How companies subjected to a monitorship can emerge stronger
- Expectations for the use of monitorships during the Biden administration.

Actions to Prevent the Need for a Monitorship

A strong compliance program is your best measure for preventing criminal prosecution, which could potentially include the imposition of a monitorship. DOJ strongly emphasizes the efficacy of a corporate compliance program when weighing whether to bring charges against corporations and individual officers. The agency has continuously refined its corporate prosecution policies over the last 20 years, including its position regarding monitors. The policies are reflected in a series of memoranda and remarks by the department's leaders.

If DOJ finds that a company has a high-quality compliance program in place, even when serious violations have been identified, current guidance in the 2018 Benczkowski memo indicates that a monitor should not be imposed.

DOJ has issued detailed guidance for prosecutors on this precise question, Evaluation of Corporate Compliance Programs (June 2020). The guidance elaborates on the three main questions that prosecutors are instructed to ask:

- **Is the corporation's compliance program well-designed?** Identify a company's range of operational risks, and ensure that the highest risks are subject to the most stringent system of compliance assurance. For instance, high-risk activities likely should be subject to multiple levels of compliance assurance, including independent auditing. No company has infinite compliance resources, so resources must be strategically employed to the highest-risk areas.
- **Is the compliance program being applied earnestly and in good faith? In other words, is the program adequately resourced and empowered to function effectively?** This question goes to the heart of a company: its internal culture. That culture starts from the top. The corporate directors and officers set the tone, and if they do not prioritize corporate compliance, it is unlikely that lower managers and employees will either. As a starting point, adequate resources—labor and money—must be provided. Said otherwise, the company must have more than a "paper program."

- **Does the corporation's compliance program work in practice?** The company must conduct continual testing, review, and improvement of their compliance performance to demonstrate that the program actually works. DOJ recognizes that the "existence of misconduct does not, by itself, mean that a compliance program did not work or was ineffective at the time of the offense." Indeed, if a company does identify misconduct and timely remedies and reports it, that is a "strong indicator that the compliance program was working effectively."

To make sure your program is up to snuff, consider relying on an outside party to conduct an assessment. For example, the Ethics & Compliance Initiative provides industry-specific self-assessment tools based on benchmarking from hundreds of companies in a variety of industries. Standards such as ISO 14000 can also provide external validation of your program's strength.

What to Do When an Environmental Incident Occurs

DOJ will consider imposition of a monitor in cases of egregious misconduct or negligence. In the 2018 Benczkowski Memo, DOJ articulated the circumstances in which it will consider imposing a monitor. DOJ weighs the following factors:

- Manipulation of corporate books and records
- Exploitation of an inadequate compliance program or internal controls
- Misconduct pervading the entire organization and sanctioned by senior management
- Whether the corporation has bolstered and improved its compliance program and internal controls since the misconduct occurred
- Whether improvements to the corporate-compliance program and internal controls have already demonstrated that they can prevent similar misconduct in the future

DOJ therefore not only weighs heavily the strength of a corporate compliance program, but also considers the program's status at the time the matter is resolved. As a result, it's not "too late" to improve your systems if a serious incident occurs—in fact, you should immediately conduct a review and consider improvements that need to be made to detect and prevent similar incidents going forward. DOJ will consider these improvements in evaluating whether a monitor is merited.

Unfortunately, some companies may still find themselves facing a potential monitorship. The Duke Energy and Volkswagen monitorships offer valuable lessons learned for every corporate counsel facing criminal inquiry into corporate compliance programs.

- **Be honest and transparent with government regulators.** As is well-documented in the Volkswagen case, the company repeatedly lied to government regulators even when directly pressed about emissions testing discrepancies for their "clean diesel" vehicles. In addition to the seriousness of the violation, Volkswagen's repeated dishonesty contributed to DOJ's pursuit of the largest environmental penalties in U.S. history and the inclusion of a monitor in the settlement.

When prosecutors do not trust a corporate defendant, they may be especially inclined to bring in an outside party to closely monitor the corporation's behavior going forward. Therefore, if an issue has already been identified and government regulators are involved, you need to demonstrate your trustworthiness and your capacity to handle the issues without external oversight.

- **Work diligently to fix any identified issues immediately.** In both the Duke Energy and Volkswagen cases, the companies knew or should have known about the potential for environmental harm. In the decades leading up to the Dan River spill, Duke Energy management knew that a corrugated metal pipe underlying an ash basin was aging and leaking, and yet funds were repeatedly denied for inspections and repairs.

At Volkswagen, many people in the company knew about the emissions fraud but said nothing. Courts and DOJ do not expect perfection from corporate defendants, but they do expect that corporations act decisively when they discover such issues. Failure to do so erodes trust and increases the likelihood of a monitorship.

- **Consider voluntarily appointing a monitor.** Companies who have discovered serious misconduct should consider voluntarily appointing their own independent third party to evaluate and track the company's remediation efforts. Voluntary appointment of a monitor sends a strong signal to DOJ that the company takes the misconduct seriously and is taking robust measures to address the root causes.

Voluntarily appointing a monitor can help reduce penalties and minimize the likelihood of a government-appointed monitor. This entity should be well-versed in the issues at hand and your industry, have limited prior affiliations with the company, be able to direct teams with both legal and technical expertise, and be ready to build effective rapport within the company while still remaining independent.

- **If you have a government monitor, dedicate sufficient resources to them.** There is no getting around it: Imposition of a monitor is intrusive and resource-intensive. Once a monitor has been imposed, resist the urge to limit their access or hours spent. Your task now is to prove to the government and to the monitor that the company takes the issues that have occurred just as seriously as they do. In both the Duke Energy and Volkswagen matters, the companies established responsive, professional "project management organizations."

The companies staffed the PMOs with experienced company personnel who were tasked with liaising with the monitor, responding to inquiries, organizing visits, preparing documents, and otherwise smoothing the monitor's path throughout the organization. These PMOs served not only to facilitate the monitor's work in both cases, but also to help demonstrate to the monitor that the company was committed to a lasting, collaborative relationship and improvement of its corporate compliance programs.

- **Appreciate the opportunities a monitor may bring.** Personnel throughout your company may have knowledge of compliance gaps or other issues that they might not have felt comfortable raising in the past. In both the Duke Energy and Volkswagen situations, we met with internal stakeholders who viewed the monitor as a welcome opportunity to improve the company. The monitor could give voice to concerns that employees felt hadn't been heard previously, and could strengthen the case for an enhanced budget or other resources where necessary.

As corporate compliance counsel, you will rarely have such intense management focus and attention to your needs and challenges. Use the opportunity to create lasting change. Both Duke Energy and Volkswagen substantially improved their internal systems and processes during the years under a monitor. In the end, both companies received praise for the improvements, and internal stakeholders felt that the monitorship had strengthened the company overall.

Future of Environmental Monitorships

Before 2016, DOJ's Environmental and Natural Resources Division (ENRD) frequently advocated for the use of third-party monitors. As explained by former ENRD head John Cruden, monitors provide greater assurance that defendants will meet consent decree or plea agreement requirements and allow greater transparency to the public, who more readily can see the benefits of enforcement and learn about the changes being made. Monitors also promote cost efficiencies for DOJ because they are company-funded.

Under this approach, ENRD imposed major monitorships on Duke Energy, Volkswagen, BP (following the Deepwater Horizon oil spill) and Princess Cruise Lines (following its illegal oil dumping and subsequent cover-up). In the final status hearing of the Duke Energy monitorship, DOJ remarked to the federal district court that "the compliance plan and the court-appointed monitor … were key to fulfilling the goal of making sure the defendants did not become recidivists" and that DOJ "cannot say enough about how crucial the [Monitor] and his team were to this process."

Looking forward, the Biden administration will be increasingly likely to rely on monitors when warranted, particularly in cases of significant harm, deceptive or misleading conduct, evasion of the regulatory system, and repetitive violations.