

REDUCING THE COST OF FCPA MONITORING

June 11, 2014 | [Bank Securities Fraud](#), [The GEE Blog](#)

FCPA settlements with the SEC and the DOJ increasingly require an offending company to allow an independent monitor to keep watch over internal compliance efforts for a specified period of time. Regulators admittedly see monitoring as a way to reduce recidivism of corporate crime and to protect the integrity of the market place. As many companies have come to learn though, this process can prove both intrusive and expensive. Indeed, at least one former DOJ official has acknowledged that fees for “runaway monitors” can exceed \$50 million. There are, however, ways for companies to structure their monitoring relationships so as to minimize disruption and contain costs. **Negotiate a Cost-Effective Settlement**

Agreement The settlement agreement is the guiding text for any effective monitorship. It clarifies the mandate of the monitor and outlines his tasks and duties. Because the agreement defines the monitor-company relationship, it can be used as a shield against a monitor who would otherwise be inclined to expand his mandate and overspend. Decreasing the duration of the monitorship is one of the most effective ways to minimize costs, so a company will obviously want to negotiate for the shortest term possible. Alternatively, companies can negotiate an agreement that utilizes a hybrid monitorship. Hybrid monitorships use an independent monitor for a portion of the term, with the remainder consisting of self-monitoring and reporting. The financial benefits of such an arrangement are clear—if the independent monitor’s time is reduced, so are his fees. If a company is unable to negotiate for a hybrid monitorship, it should attempt to include an “early escape” provision upon satisfactory compliance. Settlement agreements should also include provisions that encourage use of internal company personnel and infrastructure. This will save money in monitor fees and will simplify the monitor’s task. **Choose a Monitor Wisely** Companies can play a significant role in selecting their monitor. They should establish a careful vetting process and conduct thorough due diligence of monitor candidates at the outset. This will minimize future conflicts and expenses. Monitor candidates should have extensive experience with the FCPA and knowledge of the relevant industry. This ensures that a company will pay less for the monitor’s on-the-job training and education. Companies should also assess the candidate’s attitude toward potential monitorship. Does the candidate seem like a zealot who will spare no cost, or will she be sensitive to the company’s financial and business needs? Will she look to assume an expansive role, or will she adhere to the tailored guidelines in the settlement agreement? Getting a sense of a candidate’s attitude toward monitoring can go a long way toward heading off runaway costs. Finally, it is important to require each candidate to provide an estimated budget and timeline. These estimates will give the company a better idea of the cost of the monitorship and will limit future expenses if the candidate is selected. The company should also look beyond the predicted total costs in the budget and determine the hourly fees charged. If the company knows the monitor’s fees in advance, it will be better prepared for any budget overages. **Cooperate With the Monitor** Once the settlement agreement has been carefully crafted and the monitor has been vetted and empowered, the final step is cooperation.

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Generally speaking, companies should maintain open channels of communication with the monitor and convey a sense that both parties are working together toward a common goal. Fostering positive monitor relations will increase collaboration, which should cut costs as well. To that end, a company should first designate a single point of contact for the monitor, likely the General Counsel. This point-person will humanize the company and facilitate efficient communication. Additionally, a company should try to simplify the monitor's task. For example, a company might assign specific personnel to work under the direction of the monitor. It can also conduct briefing presentations for the monitor on subjects such as the company's organizational structure, or the nature and context of the violations that occurred. This will have the joint benefit of reducing monitor fees and utilizing the already existing knowledge of company personnel. **Conclusion** With FCPA monitoring becoming an increasing trend in settlement agreements, it is important for companies to know how to approach the monitoring process. If managed properly, companies can effectively reduce the associated expense and intrusion.