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DOJ Announces Guidelines to Reduce the Imposition of Monitorships in Corporate Criminal Cases

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The Justice Department's Criminal Division has announced, by way of an October 11, 2018 memorandum from Assistant Attorney General Brian Benczkowski, updated policies and procedures related to the selection of corporate monitors in federal criminal cases. The memorandum makes clear that "the Criminal Division should favor the imposition of a monitor only where there is a demonstrated need for, and clear benefit to be derived from, a monitorship relative to the costs and burdens." In short, a monitor is now disfavored "[w]here a corporation's compliance program and controls are demonstrated to be effective and appropriately resourced at the time of resolution."

In counseling against the imposition of a monitor, the memorandum is divided into two parts.

First, the memorandum notes that factors negating the likelihood of future misconduct weigh most strongly in the Criminal Division's cost-benefit analysis. These include "whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal control systems" and "whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future."

Criminal Division attorneys are instructed to consider whether corporate misconduct occurred under past leadership or a prior compliance regime. They must also evaluate the adequacy of existing remedial measures, including termination of problematic business relationships. And, notably, Criminal Division attorneys are now authorized to consider external factors, "including the particular region(s) and industry in which the company operates and the nature of the company's clientele," as potentially weighing against imposition of a monitor. In sum, Criminal Division policy expressly counsels against the use of a monitor where culpable individuals and business relationships have been terminated and a company's compliance improvements correspond adequately to the risks inherent in its business.

Second, the memorandum details and centralizes the monitor approval and selection process. To include a monitorship in a corporate criminal resolution—whether through entry of a deferred prosecution agreement (DPA), a non-prosecution agreement (NPA), or a negotiated guilty plea—Criminal Division attorneys must first secure the approval of their Section chief, along with the concurrence of the Assistant Attorney General for the Criminal Division or his/her designee (in most cases the Deputy Assistant Attorney General (DAAG) responsible for the prosecuting Section). Any proposed DPA, NPA, or plea agreement must include an explanation of the monitor's responsibilities and the anticipated length of the monitorship.

The memorandum also contemplates the creation of a centralized standing committee—composed of the DAAG responsible for the Criminal Division's Fraud Section, the chief of the Fraud Section, and an internal DOJ ethics official—to assess monitor candidates proposed by targeted companies and recommended by line Criminal Division trial attorneys. This evaluation is to be based on a "Monitor Recommendation Memorandum," which, among other things, must explain why a monitor is required based on the cost-benefit factors enumerated elsewhere in the memorandum that generally counsel against the imposition of a monitorship.

The clear takeaway from these guidelines is that they are intended to complement other DOJ pronouncements, including, most notably, the FCPA Corporate Enforcement Policy announced in November 2017 (and memorialized at Section 9-47.120 of the U.S. Attorneys' Manual), in which the Department has stated that companies may avoid prosecution if they self-disclose illegal activity, cooperate with the government's investigation of such misconduct, and fully remediate through termination of culpable individuals and business partners and the adoption of enhanced compliance procedures.

The degree to which the Criminal Division's monitor policy will be followed in practice remains to be seen—current statistics demonstrate that a monitorship is imposed in about 1 in 3 corporate criminal resolutions. But given repeated references, amounting to a stated preference, in Benczkowski's memorandum to the need for the benefits of a monitorship to clearly outweigh its often outsized costs, companies—particularly those that have self-disclosed, cooperated, and remediated—now have added leverage to assert that the DOJ should reciprocate such good faith by way of a criminal resolution that excludes a monitorship.

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