DOJ Announces New Policy on Assessing the Need for and Selection of Corporate Monitors

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On October 12, 2018 in remarks made at the NYU School of Law Program on Corporate Compliance and Enforcement's Conference on Achieving Effective Compliance, Assistant Attorney General for the U.S. Department of Justice Criminal Division Brian A. Benczkowski announced a new guidance memorandum: Selection of Monitors in Criminal Division Matters ("2018 Monitor Memorandum"). The 2018 Monitor Memorandum incorporates certain principles from prior DOJ guidance and makes explicit numerous additional considerations for assessing the need for, and potential scope of, a corporate monitor. And, importantly, unlike prior guidance that applied only to DPAs and NPAs, the new policy also extends to guilty pleas.

Both Benczkowski's prepared remarks and the text of the 2018 Monitor Memorandum note that the new policy supersedes guidance contained in the 2009 Breuer Memorandum regarding the selection of corporate monitors, but does not replace prior guidance issued in 2008 by then-Acting Deputy Attorney General Craig Morford ("Morford Memorandum"). That said, as detailed further below, there are in fact few procedural selection differences between those set forth in the 2009 Breuer Memorandum and those defined in the newly released 2018 Monitor Memorandum. Indeed, Benczkowski's remarks, in which he telegraphed some of the thinking behind the new guidance, and the 2018 Monitor Memorandum's introductory section, which sets forth new principles for determining whether a monitor is needed in a particular case and the scope of any such monitorship, are more noteworthy than the underlying procedural changes to the selection of monitors—the title of the new memorandum notwithstanding.

Finally, Benczkowski also announced what appears to be a significant change in the Department's approach to assessing corporate compliance programs more generally, which had most recently been the purview of a dedicated Compliance Consultant. Since the departure of the first consultant to hold the position—Hui Chen—that position has remained unfilled despite two separate postings for the job. This change, as well as specifics from the new 2018 Monitor Memorandum, are detailed below.

Benczkowski Remarks

Before addressing the new guidance, Benczkowski detailed the significant corporate enforcement

work completed by the Criminal Division in the past year, highlighting recent enforcement actions from the Fraud Section's FCPA Unit, Securities and Financial Fraud Unit, Health Care Fraud Unit, and Money Laundering and Asset Recovery Section. He observed: "While these cases involve many different industries and fact patterns, one constant is that every case will at some stage require a deep look into the sufficiency and proper functioning of the subject company's compliance program. As companies continue to grow in size, scope and complexity, and as international business becomes the norm rather than the exception, compliance is of ever greater importance in ensuring that companies operate efficiently and within the bounds of the law." This, Benczkowski explained, required DOJ prosecutors to have a strong understanding of what constitutes an effective approach to compliance and noted that the Department had previously addressed the need for this expertise by hiring a single compliance counsel.

Interestingly, Benczkowski dismissed the Department's previous reliance on compliance counsel as "shortsighted from a management perspective," noting that such a position confers expertise and an imprimatur that will result in strong interest from the private sector that may add to turnover in the position. Benczkowski's remarks seemingly make clear that the Department will not be hiring a new compliance counsel; rather, it appears that compliance expertise will be achieved by building teams of DOJ attorneys not only with prosecutorial experience, but "also those who bring compliance experience to the table."

This approach, Benczkowski said, will ensure that DOJ attorneys are addressing all relevant factors as they weigh appropriate resolutions: "I believe our prosecutors should consider the adequacy of a compliance program at the same time they are considering, for example, a company's remedial actions or the timeliness of any voluntary self-disclosure." Benczkowski noted his expectation that the Criminal Division will develop a training program that addresses compliance programs generally, as well as issues specific to each section and unit. He added his belief that this renewed approach "should be a plus for companies and defense attorneys that find themselves across the table from us," as such compliance knowledge can aid in discussion of compliance-related issues relevant to the resolution of enforcement actions, including whether the case warrants the imposition of a corporate monitor, a decision Benczkowski described as the imposition of a "significant, but often times necessary burden on a company."

Benczkowski then went on to introduce the new corporate monitor guidance by noting that its goal is to further refine the factors that go into the determination of whether a monitor is needed in a particular case, and to clarify and refine the monitor selection process. He also described the guidance as consistent with the Department's "longstanding practice" of imposing corporate monitors as the exception rather than the rule.

The new guidance, Benczkowski explained, would offer a "pragmatic approach to monitors" and ensure careful evaluation of the specific facts of each case, including "a careful assessment of a company's corporate compliance program at the time of resolution."

2018 Monitor Memorandum: "Principles"

Although the new guidance briefly notes the beneficial aspects of corporate monitors, it explicitly

states that “the imposition of a monitor will not be necessary in many corporate criminal resolutions, and the scope of any monitorship should be appropriately tailored to address the specific issues and concerns that created the need for the monitor.” At the outset, the new guidance thus seems to suggest a tempering of the imposition of corporate monitors and a potential narrowing of their scope within a company.

This tempering is reinforced by the policy’s inclusion of specific factors that Criminal Division attorneys should consider when assessing the need for the imposition of a corporate monitor in a particular case—factors that are perhaps the most significant aspect of the new policy. After noting the Morford Memorandum’s two “broad considerations” that should guide prosecutors when assessing the need and propriety of a monitor—(1) the potential benefits that employing a monitor may have for the corporation and the public, and (2) the cost of a monitor and its impact on the operations of a corporation—the 2018 Monitor Memorandum “elaborates” on the first of these considerations by adding the following factors for consideration:

> a) Whether the underlying misconduct involved the manipulation of corporate books and records or the exploitation of an inadequate compliance program or internal control systems;
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> b) Whether the misconduct at issue was pervasive across the business organization or approved or facilitated by senior management;
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> c) Whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal control systems;
>
> d) 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.

Where misconduct occurred under different corporate leadership or within a previous compliance environment, the new guidance further directs Criminal Division attorneys to consider “whether the changes in corporate culture and/or leadership are adequate to safeguard against a recurrence of misconduct.” Finally, the 2018 Monitor Memorandum concludes its recital of additional factors to consider when assessing the need for a monitor by explaining that DOJ attorneys should also take into account whether adequate remedial measures were taken to address problematic behavior by employees, management, or third-party agents and that, in making this assessment, the unique risks and compliance challenges faced by the company should be considered.

The new guidance also suggests that even where a monitor may be appropriate after considering these factors, the monitor’s role should be tailored to minimize burden: “In weighing the benefit of a contemplated monitorship against the potential costs, Criminal Division attorneys should consider not only the projected monetary costs to the business organization, but also whether the proposed scope of a monitor’s role is appropriately tailored to avoid unnecessary burdens to the business’s operations.”

Notably, the “Principles” section of the new guidance concludes by stating: “In general, 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 projected costs and burdens. Where a corporation's compliance program and controls are demonstrated to be effective and appropriately resourced at the time of resolution, a monitor will likely not be necessary."

It is thus clear that the Department now has a more detailed playbook for determining whether to impose a compliance monitor in connection with a corporate resolution. It appears that the Criminal Division intends to give companies greater opportunity to demonstrate during the resolution process that a monitor is not warranted, whether by overhauling a compliance program in tandem with an investigation, taking strong remedial action, or simply arguing successfully that the misconduct was the result of a few rogue actors and was not pervasive. (Remarks offered by United States Attorney for the Southern District of New York Geoffrey Berman at the same conference at which Benczkowski announced the new policy reiterate this view; Berman "suggest[ed] the steps an entity should consider taking if it wanted to improve its chances of avoiding the appointment of a monitor," and noted that if a company makes certain changes or enhancements "before the conclusion of the government's investigation, there will be a strong record from which to argue that the company is capable of full remediation on its own and a monitor is unnecessary.") All in all, these new principles may reduce the number of corporate compliance monitors and their reach within corporations undergoing a monitorship.

2018 Monitor Memorandum: Selection Procedures

As noted above, there is little substantive difference between the newly announced procedures and those set forth in the 2009 Breuer Memorandum. Aspects of the monitor selection process that remain the same include: (1) the need for resolution documents requiring the retention of a monitor to contain certain elements (e.g., a description of the monitor's necessary qualifications and an explanation of the monitor's responsibilities); (2) the creation of a Standing Committee on the selection of monitors within the Criminal Division—the composition of which is largely unchanged from that detailed in the 2009 Breuer Memorandum; (3) the responsibility of all Criminal Division attorneys involved in the selection process to provide written certification of their adherence to conflict of interest guidelines; (4) the obligation of the company to propose three qualified monitor candidates to the Department within twenty business days of resolution; (5) the Department's initial review of the candidates; (6) the review of the candidate selected by the DOJ attorneys handling the matter by the Standing Committee and the Assistant Attorney General and approval by the Office of the Deputy Attorney General of the candidate; and (6) processes for the departure of the enumerated procedures when flexibility is warranted.

The 2018 Monitor Memorandum introduces a few new aspects to the monitor selection process.[1]

- First, the policy requires any DPA, NPA, or plea agreement requiring the retention of a monitor to (1) describe the monitor selection process, and (2) describe the process for replacing the monitor during the term of the monitorship should such action be necessary.
- Second, the 2009 Breuer Memorandum had included the Chief of the relevant section as a member of the Standing Committee; the new policy omits this member of the committee and establishes a three-member committee as opposed to four.
- Third, in setting forth the process for a company's nomination of the monitor candidates to

the DOJ, the new policy includes two additional requirements: (1) a written certification from each of the candidates "that he/she has notified any clients that the candidate represents in a matter involving the Criminal Division Section (or any other Department component) handling the monitor selection process, and that the candidate has either obtained a waiver from those clients or has withdrawn as counsel in the other matter(s)" and (2) a statement from the company identifying which of the three candidates is the company's first choice to serve as the monitor.

- Finally, with respect to the memorandum that must be submitted by the DOJ attorneys handling the matter to the Standing Committee with their recommended selection, the new policy requires a description of why the selected candidate is being recommended and a description of the other candidates put forward for consideration by the company.

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Both Benczkowski's remarks and the text of the 2018 Monitor Memorandum suggest that future corporate resolutions with the Criminal Division will include a closer assessment of a company's compliance program. Indeed, Benczkowski's speech indicates that Department is actively working to deepen its talent pool when it comes to the ability to assess corporate compliance programs—and to evaluate the "potential benefits" of a corporate monitor. The tenor of Benczkowski's remarks and the text of the 2018 Monitor Memorandum both appear to suggest, at the very least, a closer look by the Department prior to imposing a monitor—and perhaps ultimately an overall decline in the number of resolutions requiring a monitorship as a condition of settlement.

1. Although the new guidance, like prior policies, allows the Criminal Division attorneys handling the matter to consider "any other factor determined . . . based on the circumstances to relate to the qualifications and competency of each monitor candidate as they may relate to the tasks required," the 2018 Monitor Memorandum does not make explicit the diversity factor that received significant attention after its inclusion in an April 2018 DPA filed by the Department. The April 30, 2018 DPA stated that "[m]onitor selections shall be made in keeping with the Department's commitment to diversity and inclusion."

Authors

Ronald C. Machen

PARTNER

Chair, Litigation/Controversy Department

ronald.machen@wilmerhale.com

+1 202 663 6881

Erin G.H. Sloane

PARTNER

erin.sloane@wilmerhale.com

+1 212 295 6458

Howard M. Shapiro

PARTNER

howard.shapiro@wilmerhale.com

+1 202 663 6606

David W. Ogden

PARTNER

Chair, Government and Regulatory Litigation Practice Group

david.ogden@wilmerhale.com

+1 202 663 6440

Kimberly A. Parker

PARTNER

Vice Chair, Litigation/Controversy Department

kimberly.parker@wilmerhale.com

+1 202 663 6987

Jay Holtmeier

PARTNER

jay.holtmeier@wilmerhale.com

+1 212 295 6413

Stephen A. Jonas

RETIRED PARTNER

+1 617 526 6000

Emily L. Stark

COUNSEL

emily.stark@wilmerhale.com

+1 202 663 6237