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Department of Justice Issues Guidance Regarding the Selection and Use of Monitors in Deferred and Non-Prosecution Agreements

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I. Introduction

On March 10, 2008, the United States Department of Justice (DOJ) released new internal guidelines governing the selection and use of monitors in deferred and non-prosecution agreements with corporations.[1] Initially used only in the context of charges against an individual, prosecutors have increasingly relied upon such pre-trial diversion agreements to resolve corporate criminal investigations. According to one report, there were 34 deferred and non-prosecution agreements in 2007, a significant increase over the 20 agreements reached in 2006, and the 5 agreements reached in 2003.[2] Such agreements may redress corporate misconduct by, for example, providing restitution and implementing corporate reforms more quickly than through prosecution, while at the same time preventing the collateral consequences to employees, shareholders and the public that may result from the conviction--and often the mere indictment--of a corporation. The growing use of deferred and non-prosecution agreements has brought increased scrutiny of their terms and of the circumstances under which they are reached.

II. Overview

Deferred and non-prosecution agreements are based primarily on the pre-trial diversion program, set forth in the United States Attorneys' Manual, and the United States Sentencing Guidelines, which create incentives for corporations to cooperate and implement reforms to prevent misconduct. Although the terms of such agreements may vary, they frequently include: (1) an acknowledgment of responsibility; (2) a continuing obligation to cooperate, including an obligation to operate lawfully and to make employees available for testimony; (3) an acknowledgement that, if the defendant commits similar criminal conduct during the period of the agreement, it will be subject to prosecution for any federal crimes about which the government has knowledge; (4) terms specifying what will happen in the event the government determines that the corporation has breached the agreement, including an acknowledgement that information provided by the corporation may be admitted in a subsequent prosecution resulting from any such breach; (5) waiver of the right to a speedy trial and of relevant statutes of limitation; (6) a requirement that the corporation cannot make

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any statements contradicting the representations in the agreement; and (7) the imposition of penalties and/or other restitution.

Agreements may also include provisions regarding the appointment of corporate monitors, implementation of compliance reforms and privilege waivers. The corporation typically retains and pays the monitor directly for performing the responsibilities specified in the deferred or non-prosecution agreement.

III. Growing Scrutiny of Deferred and Non-Prosecution Agreements

Commentators and others have expressed concern about the growing use of corporate pre-trial agreements, the lack of standards governing their use and the broad authority granted to some corporate monitors. Criticism intensified after the September 2007 appointment of former US Attorney General John Ashcroft as a monitor in a deferred prosecution agreement between New Jersey US Attorney Christopher Christie and Zimmer Inc., a medical device manufacturer. In filings with the US Securities and Exchange Commission, Zimmer Holdings, Inc., the parent company, estimated that fees and expenses relating to the monitor's work would average between $1.55 and $2.9 million per month, for a total of $27.9 to $52.2 million over an 18-month monitoring period.[3] Some commentators criticized US Attorney Christie's selection of his former boss as a monitor as a conflict of interest, and members of Congress introduced legislation to regulate the use of deferred prosecution agreements and monitors, scheduled hearings on the issue and called for an investigation by the US Government Accountability Office.[4] On the eve of the congressional hearing at which Mr. Ashcroft was scheduled to testify regarding his own appointment as a monitor, DOJ issued guidance on the selection and use of monitors in deferred and non-prosecution agreements.[5]

IV. DOJ Guidance Regarding Imposition of Monitors in Deferred and Non-Prosecution Agreements

The Justice Department issued a March 7, 2008, Memorandum from Acting Deputy Attorney General Craig S. Morford to Heads of Department Components and United States Attorneys regarding Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (Memorandum).[6] As described in the Memorandum, "a deferred prosecution agreement is typically predicated upon the filing of a formal charging document by the government, and the agreement is filed with the appropriate court. In the non-prosecution agreement context, formal charges are not filed and the agreement is maintained by the parties rather than being filed with a court."[7] The guidance applies to deferred and non-prosecution agreements with all types of business organizations.

The Memorandum articulates nine principles governing the selection and use of monitors in deferred and non-prosecution agreements and emphasizes the need for flexibility to ensure that such decisions are based on the particular facts and circumstances of each case. The principles address the selection of monitors, the scope of their responsibilities and the duration of monitorships. Prosecutors are advised to consider both a monitor's potential benefits to the corporation and to the public, as well as a monitor's cost and impact on corporate operations.

A. Selection Process

The guidance encourages discussions between the corporation and the government regarding the monitor's qualifications before the selection process begins. The monitor's selection must be based on the merits and the selection process must be designed to ensure selection of a highly qualified and respected candidate, to avoid actual or potential conflicts of interest and to instill public confidence. To prevent conflicts of interest, the guidance requires, among other things, creation of a standing committee in the Department component or office to consider monitor candidates and approval by the Office of the Deputy Attorney General of each monitor. It also prohibits a corporation from hiring a monitor for one year after the end of a monitorship.[8]

B. Scope of Monitor's Responsibilities

The Memorandum states that "[a] monitor's primary responsibility should be to assess and monitor a corporation's compliance with those terms of the agreement that are specifically designed to address and reduce the risk of recurrence of the corporation's misconduct, including, in most cases, evaluating (and where appropriate proposing) internal controls and corporate ethics and compliance programs."[9] Although the guidance recognizes that a monitor may need to understand the entirety of a corporation's misconduct to fulfill its responsibilities, it advises that a "monitor's responsibilities should be no broader than necessary to address and reduce the risk of recurrence of the corporation's misconduct."[10]

The Memorandum also emphasizes the importance of open communication among the government, the corporation and the monitor. It suggests that if a corporation chooses not to adopt a monitor's recommendation, the monitor or the corporation should report to the government and provide the corporation's reasons. The government may then consider this in determining whether the corporation has satisfied its obligations under the agreement.[11]

C. Duration

Under the guidance, the duration of the agreement "should be tailored to the problems that have been found to exist and the types of remedial measures needed for the monitor to satisfy his or her mandate" and various factors should be considered.[12] Among other things, the Memorandum states that agreements should ordinarily provide both for the extension and early termination of the monitorship, to address the circumstances in which a corporation has not successfully fulfilled its contractual obligations or has demonstrated that a monitor is no longer necessary.

V. Conclusion

By articulating principles governing the selection of monitors, and the scope and duration of their duties, the DOJ guidance is likely to quell some of the recent controversy regarding the use of monitors in deferred and non-prosecution agreements. Although the guidance does not confer any enforceable rights on potential corporate defendants, it does provide some objective criteria for the exercise of prosecutorial discretion and, thus, a basis upon which defense counsel may argue for the fair and impartial exercise of that discretion.[13]

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[1] Under a deferred or non-prosecution agreement, a corporation may avoid criminal prosecution or criminal charges in exchange for complying with the terms of the agreement. In the context of a deferred prosecution agreement, the government typically files charges against the corporation, but then agrees to defer prosecution on the charges for an agreed period of time and to move for dismissal of the charges after the successful expiration of the agreement. In the context of a non-prosecution agreement, the government typically maintains the right to file charges against the corporation in the event it does not comply with the terms of the agreement.

[2] Lawrence D. Finder and Ryan D. McConnell, *Annual Corporate Pre-Trial Agreement Update - 2007*, Prepared for the March 2008 ABA White Collar Conference, at 1-2.

[3] Zimmer Holdings, Inc., Form 8-K (Oct. 25, 2007).

[4] *See, e.g.,* Press Release, Representative Frank Pallone, Jr. (D-NJ), Pallone Calls for More Transparency & Safeguards Against Abuse of Deferred Prosecution Agreements in Letter to Christie (Nov. 21, 2007); H.R. 5086, 110th Cong. (2d Sess. 2008); Letter from Representative John Conyers (D-MI) to John D. Ashcroft (Jan. 30, 2008); Letter from Senator Patrick Leahy (D-VT) and Representative John Conyers to David M. Walker, Comptroller General, U.S. Government Accountability Office (Jan. 16, 2008).

[5] *See* Philip Shenon, *Ashcroft Deal Brings Scrutiny in Justice Dept.*, N.Y. Times, Jan. 10, 2008, at A1; Carrie Johnson, *Ex-Officials Benefit From Corporate Cleanup*, Washington Post, Jan. 15, 2008, at A1; Editor, *Mukasey Says He Has No Timetable for Federal Monitor Review*, PolitickerNJ.com, Feb. 8, 2008, *available at* http://politickernj.com/mukasey-says-he-has-no-timetable-federal-monitor-review-16285.

[6] Memorandum from Craig S. Morford, Acting Deputy Attorney General, to Heads of Department Components and United States Attorneys (Mar. 7, 2008) (Memorandum), *available at* United States Attorneys' Manual, title 9 Criminal Resource Manual, art. 163.

[7] Memorandum at 1 n.2.

[8] *Id.* at 3.

[9] *Id.* at 5.

[10] *Id.*

[11] *Id.* at 6.

[12] *Id.* at 7.

[13] *See, e.g.*, Deferred Prosecution: Should Corporate Settlement Agreements Be Without Guidelines?: Hearing Before the H. Subcomm. on Commercial and Administrative Law, 110th Cong. (Mar. 11, 2008) (statement of Rep. Pallone); Press Release, Senator Patrick Leahy, On the New Policy from the Department of Justice On Selection and Use off Corporate Monitors (Mar. 11, 2008).

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