



To monitor or not to monitor? DOJ Criminal Division issues new policy guidance regarding the imposition of corporate monitorships

Compliance Alert

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On October 11, 2018, Brian A. Benczkowski, Assistant Attorney General for the Department of Justice (DOJ) Criminal Division, announced the implementation of an internal DOJ memorandum that provides new guidance to prosecutors on when a corporate monitor should be imposed in connection with a corporate criminal resolution (the Monitorship Memorandum).

Speaking at an invitation-only program at New York University's School of Law, Benczkowski stated that the "approach to the [Monitorship Memorandum] began with the foundational principle that imposition of a corporate monitor is never meant to be punitive...imposing corporate monitors should be the exception, not the rule."

The Monitorship Memorandum reflects a growing distaste for the imposition of corporate monitorships – which were at an all-time high in DOJ Non-Prosecution and Deferred Prosecution Agreements as recently as 2016 – and suggests that, going forward, the DOJ is unlikely to require the retention of a corporate monitor unless (1) imposing a monitor will provide clear, demonstrable benefits to the monitored company and the public; and (2) those benefits outweigh the monetary costs and the burdens imposed on the corporation and its business operations as a result of the monitorship.

The Monitorship Memorandum is a positive development for corporations concerned about the costs associated with DOJ-imposed monitorships and the potential interference such monitorships could have on their business operations.

Cost/benefit analysis

The focal point of the Monitorship Memorandum is a cost/benefit analysis, which provides that the DOJ will weigh the "potential benefits that employing a monitor may have for the corporation and the public" against "the cost of a monitor and its impact on the operations of a corporation" before imposing a corporate monitor. The DOJ will favor the imposition of a monitorship "only where there is a demonstrated need for, and clear benefit to be derived from, a monitorship relative to the projected costs and burdens."

On the costs side of the analysis, the Monitorship Memorandum clarifies that the DOJ will 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." An assessment of the costs of a monitor will necessarily require an examination of the scope of the monitorship, the length of the monitorship, the responsibilities of the monitor, and the degree to which the monitorship is specifically tailored to address the underlying misconduct.

In contrast, when weighing the "potential benefits" of imposing a corporate monitor, the DOJ will consider the nature and pervasiveness of the underlying conduct, including whether the misconduct involved the manipulation of corporate books and records, exploitation of an inadequate compliance program or internal controls, or senior management approval and/or facilitation; the effectiveness of any remedial measures taken to address the misconduct; and the degree to which the internal controls and compliance processes have improved since the underlying misconduct occurred.

Further, the DOJ will consider the potential benefits of a monitor from the date of the criminal resolution, and thus, the DOJ observes that monitorship "will likely not be necessary" so long as a corporation's compliance program and controls are "demonstrated to be effective and appropriately resourced at the time of resolution." Thus, even where the facts surrounding the initial misconduct would tend to suggest that a monitor would be beneficial, those ostensible benefits can be offset by subsequent remedial measures and post-misconduct changes to corporate culture, leadership, and compliance practices.

Essential terms and procedures for selecting monitors

In addition to the refined cost/benefit analysis, the Monitorship Memorandum clarifies that any agreement requiring the retention of a corporate monitor should contain the following essential terms:

- a "description of the monitor's required qualifications"
- a description of the monitor-selection process
- a description of the agreed-upon process for replacing the monitor should it become necessary to do so
- a statement of intent to complete the monitor selection process within 60 days
- a detailed description of the monitor's responsibilities and
- the length of the monitorship.

It also sets out internal DOJ procedures for selecting an independent corporate monitor, which includes the creation of a Standing Committee on the Selection of Monitors tasked with overseeing the process of selecting of all monitors.

Takeaways from the Monitorship Memorandum

Corporations concerned about the costs and burdens associated with the imposition of independent corporate monitors should find solace in the Monitorship Memorandum, which provides ample opportunities for corporations to (1) argue against the imposition of corporate monitorships altogether, or at very least, (2) argue for the imposition of tailored corporate monitorships.

First, a corporation can use the "potential benefits" considerations in the Monitorship Memorandum to argue that a monitor would not lead to significant benefits to the public or the monitored corporation. Such arguments could be premised on the underlying misconduct itself; that is, the corporation can argue that the underlying conduct, while

wrongful, is not the type of pervasive misconduct that warrants the imposition of a monitorship.

Moreover, because the "potential benefits" of a monitor must be assessed as of the date of the criminal resolution, the Monitorship Memorandum permits corporations to resist a corporate monitor by highlighting the significant changes they've made to their leadership, compliance practices, and internal control systems since the underlying misconduct occurred. And, similarly, when stressing ongoing corporate efforts to remediate compliance issues, corporations should highlight any "unique risks and compliance challenges" they face due to the particular industries and regions in which they operate and the nature of their clientele.

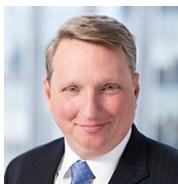
Second, corporations can highlight the significant monetary costs that they will incur in the event a monitor is required by the DOJ Criminal Division. In addition, a corporation facing a potential monitorship can supplement financial arguments by stressing the ways in which a monitor would impose "unnecessary burdens to the business's operations." Where those costs outweigh the benefits and do not clearly establish a "demonstrated need for" a monitor, the Monitorship Memorandum strongly suggests that the imposition of a monitor is unwarranted. Indeed, this is a significant development, as a monitorship can cost tens of millions of dollars and can be extended over a company's objection.

Finally, even when a corporation is unable to resist the imposition of a corporate monitor, it still may be able to invoke the Monitorship Memorandum to limit the scope and duration of the monitorship at the outset. As a result, a corporation might be able to negotiate favorable terms relating to the monitorship by arguing that a monitorship will satisfy cost-benefit criteria only if the DOJ Criminal Division agrees to significant limitations on the scope and duration of the monitorship. Find out more about the Monitorship Memorandum by contacting any of the authors.

The full text of Benczkowski's speech and the Monitorship Memorandum are available on the DOJ website.

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