



U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General

Washington, D.C. 20530

October 11, 2018

TO: All Criminal Division Personnel

FROM: Brian A. Benczkowski
Assistant Attorney General

A handwritten signature in blue ink, appearing to read "Brian A. Benczkowski".

SUBJECT: Selection of Monitors in Criminal Division Matters

The purpose of this memorandum is to establish standards, policy, and procedures for the selection of monitors in matters being handled by Criminal Division attorneys.¹ This memorandum supplements the guidance provided by the memorandum entitled, "Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations," issued by then-Acting Deputy Attorney General, Craig S. Morford (hereinafter referred to as the "Morford Memorandum" or "Memorandum").² The standards, policy, and procedures contained in this memorandum shall apply to all Criminal Division determinations regarding whether a monitor is appropriate in specific cases and to any deferred prosecution agreement ("DPA"), non-prosecution agreement ("NPA"), or plea agreement³ between the Criminal Division and a business organization which requires the retention of a monitor.

A. Principles for Determining Whether a Monitor is Needed in Individual Cases

Independent corporate monitors can be a helpful resource and beneficial means of assessing a business organization's compliance with the terms of a corporate criminal resolution, whether a DPA, NPA, or plea agreement. Monitors can also be an effective means of reducing the risk of a recurrence of the misconduct and compliance lapses that gave rise to the underlying corporate criminal resolution.

¹ The contents of this memorandum provide internal guidance to Criminal Division attorneys on legal issues. Nothing in it is intended to create any substantive or procedural rights, privileges, or benefits enforceable in any administrative, civil, or criminal matter by prospective or actual witnesses or parties. This memorandum supersedes the June 24, 2009 Criminal Division memorandum on monitor selection.

² The Morford Memorandum requires each Department component to "create a standing or ad hoc committee...of prosecutors to consider the selection or veto, as appropriate, of monitor candidates." The memorandum also requires that the Committee include an ethics advisor, the Section Chief of the involved Department component, and one other experienced prosecutor.

³ Although the Morford Memorandum applies only to DPAs and NPAs, this memorandum makes clear that the Criminal Division shall apply the same principles to plea agreements that impose a monitor so long as the court approves the agreement.

Despite these benefits, 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. The Morford Memorandum explained that, “[a] monitor should only be used where appropriate given the facts and circumstances of a particular matter[,]” and set forth the 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 Memorandum also made clear that a monitor should never be imposed for punitive purposes.

This memorandum elaborates on those considerations. In evaluating the “potential benefits” of a monitor, Criminal Division attorneys should consider, among other factors: (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; (b) whether the misconduct at issue was pervasive across the business organization or approved or facilitated by senior management; (c) whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal control systems; and (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 compliance environment that no longer exists within a company, Criminal Division attorneys should consider whether the changes in corporate culture and/or leadership are adequate to safeguard against a recurrence of misconduct. Criminal Division attorneys should also consider whether adequate remedial measures were taken to address problem behavior by employees, management, or third-party agents, including, where appropriate, the termination of business relationships and practices that contributed to the misconduct. In assessing the adequacy of a business organization’s remediation efforts and the effectiveness and resources of its compliance program, Criminal Division attorneys should consider the unique risks and compliance challenges the company faces, including the particular region(s) and industry in which the company operates and the nature of the company’s clientele.

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.

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.

B. Approval, Consultation, and Concurrence Requirement for Monitorship Agreements

Before agreeing to the imposition of a monitor in any case, the Criminal Division attorneys handling the matter must first receive approval from their supervisors, including the Chief of the

relevant Section, as well as the concurrence of the Assistant Attorney General (“AAG”) for the Criminal Division or his/her designee, who in most cases will be the Deputy Assistant Attorney General (“DAAG”) with supervisory responsibility for the relevant Section.

C. Terms of Criminal Division Monitorship Agreements

As a preliminary matter, any DPA, NPA, or plea agreement between the Criminal Division and a business organization which requires the retention of a monitor (hereinafter referred to as the “Agreement”), should contain the following:

1. A description of the monitor’s required qualifications;
2. A description of the monitor selection process;
3. A description of the process for replacing the monitor during the term of the monitorship, should it be necessary;
4. A statement that the parties will endeavor to complete the monitor selection process within sixty (60) days of the execution of the underlying agreement;
5. An explanation of the responsibilities of the monitor and the monitorship’s scope; and
6. The length of the monitorship.

D. Standing Committee on the Selection of Monitors

The Criminal Division shall create a Standing Committee on the Selection of Monitors (the “Standing Committee”).

1. Composition of the Standing Committee:

The Standing Committee shall comprise: (1) the DAAG with supervisory responsibility for the Fraud Section, or his/her designee;⁴ (2) the Chief of the Fraud Section (or other relevant Section, if not the Fraud Section), or his/her designee;⁵ and (3) the Deputy Designated Agency Ethics Official for the Criminal Division.⁶ Should further replacements not contemplated by this paragraph be necessary for a particular case, the DAAG with supervisory responsibility for the Fraud Section will appoint any temporary, additional member of the Standing Committee for the particular case.

⁴ Should the DAAG be recused from a particular case, the Assistant Attorney General will appoint a representative to fill the DAAG’s position on the Standing Committee.

⁵ Should the Chief of the Section be recused from a particular case, he/she will be replaced by the Principal Deputy Chief or Deputy Chief with supervisory responsibility over the matter.

⁶ Should the Deputy Designated Agency Ethics Official for the Criminal Division be recused from a particular case, he/she will be replaced by the Alternate Deputy Designated Agency Ethics Official for the Criminal Division or his/her designee.

The DAAG with supervisory authority over the Fraud Section, or his/her designee, shall be the Chair of the Standing Committee, and shall be responsible for ensuring that the Standing Committee discharges its responsibilities.

All Criminal Division employees involved in the selection process, including Standing Committee Members, should be mindful of their obligations to comply with the conflict-of-interest guidelines set forth in 18 U.S.C. Section 208, 5 C.F.R. Part 2635 (financial interest), and 28 C.F.R. Part 45.2 (personal or political relationship), and shall provide written certification of such compliance to the Deputy Designated Agency Ethics Official for the Criminal Division as soon as practicable, but no later than the time of the submission of the Monitor Recommendation Memorandum to the Assistant Attorney General for the Criminal Division (“the AAG”).

2. Convening the Standing Committee:

The Chief of the relevant Section entering into the Agreement should notify the Chair of the Standing Committee as soon as practicable that the Standing Committee will need to convene. Notice should be provided as soon as an agreement in principle has been reached between the government and the business organization that is the subject of the Agreement (hereinafter referred to as the “Company”), but not later than the date the Agreement is executed. The Chair will arrange to convene the Standing Committee meeting as soon as practicable after receiving the Monitor Recommendation Memorandum described below, identify the Standing Committee participants for that case, and ensure that there are no conflicts among the Standing Committee Members.

E. The Selection Process

As set forth in the Morford Memorandum, a monitor must be selected based on the unique facts and circumstances of each matter and the merits of the individual candidate. Accordingly, the selection process should: (i) instill public confidence in the process; and (ii) result in the selection of a highly qualified person or entity, free of any actual or potential conflict of interest or appearance of a potential or actual conflict of interest, and suitable for the assignment at hand. To meet those objectives, the Criminal Division shall employ the following procedure⁷ in selecting a monitor, absent authorization from the Standing Committee to deviate from this process as described in Section F below:

1. Nomination of Monitor Candidates:

At the outset of the monitor selection process, counsel for the Company should be advised by the Criminal Division attorneys handling the matter to recommend a pool of three qualified monitor candidates.⁸ Within at least (20) business days after the execution of the Agreement, the Company should submit a written proposal identifying the monitor candidates, and, at a minimum, providing the following:

⁷ The selection process outlined in this Memorandum applies both to the selection of a monitor at the initiation of a monitorship and to the selection of a replacement monitor, where necessary.

⁸ Any submission or selection of a monitor candidate by either the Company or the Criminal Division should be made without unlawful discrimination against any person or class of persons.

- a. a description of each candidate's qualifications and credentials in support of the evaluative considerations and factors listed below;
- b. a written certification by the Company that it will not employ or be affiliated with the monitor for a period of not less than two years from the date of the termination of the monitorship;
- c. a written certification by each of the candidates that he/she is not a current or recent (*i.e.*, within the prior two years) employee, agent, or representative of the Company and holds no interest in, and has no relationship with, the Company, its subsidiaries, affiliates or related entities, or its employees, officers, or directors;
- d. a written certification by 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
- e. A statement identifying the monitor candidate that is the Company's first choice to serve as the monitor.

2. Initial Review of Monitor Candidates:

The Criminal Division attorneys handling the matter, along with supervisors from the Section, should promptly interview each monitor candidate to assess his/her qualifications, credentials and suitability for the assignment and, in conducting a review, should consider the following factors:

- a. each monitor candidate's general background, education and training, professional experience, professional commendations and honors, licensing, reputation in the relevant professional community, and past experience as a monitor;
- b. each monitor candidate's experience and expertise with the particular area(s) at issue in the case under consideration, and experience and expertise in applying the particular area(s) at issue in an organizational setting;
- c. each monitor candidate's degree of objectivity and independence from the Company so as to ensure effective and impartial performance of the monitor's duties;
- d. the adequacy and sufficiency of each monitor candidate's resources to discharge the monitor's responsibilities effectively; and
- e. any other factor determined by the Criminal Division attorneys, based on the circumstances, to relate to the qualifications and competency of each monitor candidate as they may relate to the tasks required by the monitor agreement and nature of the business organization to be monitored.

If the attorneys handling the matter and their supervisors decide that any or all of the three candidates lack the requisite qualifications, they should notify the Company and request that counsel for the Company propose another candidate or candidates within twenty (20) business days.⁹ Once the attorneys handling the matter conclude that the Company has provided a slate of three qualified candidates, they should conduct a review of those candidates and confer with their supervisors to determine which of the monitor candidates should be recommended to the Standing Committee.¹⁰

3. Preparation of a Monitor Recommendation Memorandum:

Once the attorneys handling the matter and their supervisors recommend a candidate, the selection process should be referred to the Standing Committee. The attorneys handling the matter should prepare a written memorandum to the Standing Committee, in the format attached hereto. The memorandum should contain the following information:

- a. a brief statement of the underlying case;
- b. a description of the proposed disposition of the case, including the charges filed (if any);
- c. an explanation as to why a monitor is required in the case, based on the considerations set forth in this memorandum;
- d. a summary of the responsibilities of the monitor, and his/her term;
- e. a description of the process used to select the candidate;
- f. a description of the selected candidate's qualifications, and why the selected candidate is being recommended;
- g. a description of countervailing considerations, if any, in selecting the candidate;
- h. a description of the other candidates put forward for consideration by the Company; and
- i. a signed certification, on the form attached hereto, by each of the Criminal Division attorneys involved in the monitor selection process that he/she has complied with the conflicts-of-interest guidelines set forth in 18 U.S.C Section 208, 5 C.F.R. Part 2635, and 28 C.F.R. Part 45 in the selection of the candidate.

⁹ A Company may be granted a reasonable extension of time to propose an additional candidate or candidates if circumstances warrant an extension. The attorneys handling the matter should advise the Standing Committee of any such extension.

¹⁰ If the Criminal Division attorneys handling the matter, along with their supervisors, determine that the Company has not proposed and appears unwilling or unable to propose acceptable candidates, consistent with the guidance provided herein, and that the Company's delay in proposing candidates is negatively impacting the Agreement or the prospective monitorship, then the attorneys may evaluate alternative candidates that they identify in consultation with the Standing Committee and provide a list of such candidates to the Company for consideration.

Copies of the Agreement and any other relevant documents reflecting the disposition of the matter must be attached to the Monitor Recommendation Memorandum and provided to the Standing Committee.

4. Standing Committee Review of a Monitor Candidate:

The Standing Committee shall review the recommendation set forth in the Monitor Recommendation Memorandum and vote whether or not to accept the recommendation. In the course of making its decision, the Standing Committee may, in its discretion, interview one or more of the candidates put forward for consideration by the Company.

If the Standing Committee accepts the recommended candidate, it should note its acceptance of the recommendation in writing on the Monitor Recommendation Memorandum and forward the memorandum to the AAG for ultimate submission to the Office of the Deputy Attorney General (“ODAG”). In addition to noting its acceptance of the recommendation, the Standing Committee may also, where appropriate, revise the Memorandum. The Standing Committee’s recommendation should also include a written certification by the Deputy Designated Agency Ethics Official for the Criminal Division that the recommended candidate meets the ethical requirements for selection as a monitor, that the selection process utilized in approving the candidate was proper, and that the Government attorneys involved in the process acted in compliance with the conflict-of-interest guidelines set forth in 18 U.S.C. Section 208, 5 C.F.R. Part 2635, and 28 C.F.R. Part 45.

If the Standing Committee rejects the recommended candidate, it should so inform the Criminal Division attorneys handling the matter and their supervisors of the rejection decision. In this instance, the Criminal Division attorneys handling the matter, along with their supervisors, may either recommend an alternate candidate from the two remaining candidates proposed by the Company or, if necessary, obtain from the Company the names of additional qualified monitor candidates, as provided by Section E.1 above. If the Standing Committee rejects the recommended candidate, or the pool of remaining candidates, the Criminal Division attorneys and their supervisors should notify the Company. The Standing Committee also should return the Monitor Recommendation Memorandum and all attachments to the attorneys handling the matter.

If the Standing Committee is unable to reach a majority decision regarding the proposed monitor candidate, the Standing Committee should so indicate on the Monitor Recommendation Memorandum and forward the Memorandum and all attachments to the Assistant Attorney General for the Criminal Division.

5. Review by the Assistant Attorney General:

Consistent with the terms of the Morford Memo, the AAG may not unilaterally make, accept, or veto the selection of a monitor candidate. Rather, the AAG must review and consider the recommendation of the Standing Committee set forth in the Monitor Recommendation Memorandum. In the course of doing so, the AAG may, in his/her discretion, request additional information from the Standing Committee and/or the Criminal Division attorneys handling the matter and their supervisors. Additionally, the AAG may, in his/her discretion interview the candidate recommended by the Standing Committee. The AAG should note his/her concurrence

or disagreement with the proposed candidate on the Monitor Recommendation Memorandum, or revise the memorandum to reflect this position, and forward the Monitor Recommendation Memorandum to the Office of the Deputy Attorney General (“ODAG”).

6. Approval of the Office of the Deputy Attorney General:

All monitor candidates selected pursuant to DPAs, NPAs, and plea agreements must be approved by the ODAG.

If the ODAG does not approve the proposed monitor, the attorneys handling the matter should notify the Company and request that the Company propose a new candidate or slate of candidates as provided by Section E.1 above. If the ODAG approves the proposed monitor, the attorneys handling the matter should notify the Company, which shall notify the three candidates of the decision, and the monitorship shall be executed according to the terms of the Agreement.

F. Retention of Records Regarding Monitor Selection

It should be the responsibility of the attorneys handling the matter to ensure that a copy of the Monitor Recommendation Memorandum, including attachments and documents reflecting the approval or disapproval of a candidate, is retained in the case file for the matter and that a second copy is provided to the Chair of the Standing Committee.

The Chair of the Standing Committee should obtain and maintain an electronic copy of every Agreement which provides for a monitor.

G. Departure from Policy and Procedure

Given the fact that each case presents unique facts and circumstances, the monitor selection process must be practical and flexible. When the Criminal Division attorneys handling the case at issue conclude that the monitor selection process should be different from the process described herein, including when the Criminal Division attorneys propose using the process of a U.S. Attorney’s Office with which the Criminal Division is working on the case, the departure should be discussed and approved by the Standing Committee. The Standing Committee can request additional information and/or a written request for a departure.¹¹

¹¹ Where appropriate, a court may also modify the monitor selection process in cases where the Agreement is filed with the court.