

October 17, 2018

DOJ Signals Policy Shift on Corporate Monitors

The Assistant Attorney General for the Criminal Division of the United States Department of Justice, Brian Benczkowski, recently announced a new policy for the selection of corporate monitors in matters being handled by Criminal Division attorneys. The policy, issued in a memorandum on October 11, 2018, elaborates on certain principles for the use and selection of monitors set forth in a 2008 memorandum issued by then-Acting Deputy Attorney General Craig Morford, and supersedes a 2009 memorandum issued by then-Acting Assistant Attorney General Lanny Breuer. Consistent with past Criminal Division practice, the new policy establishes that monitorships may be imposed in cases resolved by plea agreements, as well as those resolved by deferred or non-prosecution agreements.

In what appears to be a further shift away from the frequent imposition of monitors in matters handled by the DOJ's Criminal Division, the new policy instructs that Criminal Division attorneys "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." In weighing the benefits of a potential monitorship against the costs, the Benczkowski Memo directs that Criminal Division attorneys 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." These considerations alone may, in practice, mitigate against the imposition of a monitor in many cases.

The Benczkowski Memo also sets out specific factors that Criminal Division attorneys should consider in evaluating the need for a corporate monitor:

1. whether the underlying misconduct involved the manipulation of corporate books and records or the exploitation of an inadequate compliance program or internal control systems;
2. whether the misconduct at issue was pervasive across the business organization or approved or facilitated by senior management;
3. whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal control systems; and

4. 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.

The Benczkowski Memo counsels that if the misconduct at issue occurred under prior corporate leadership or within a compliance environment that no longer exists within the company, Criminal Division attorneys should consider whether the corporate culture or leadership changes are adequate to “safeguard against a recurrence of misconduct.” Similarly, the Memo instructs Criminal Division attorneys to 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.” Importantly, the Memo notes that if a corporation’s compliance program is effective and appropriately resourced at the time of *resolution of the matter*, a monitor will likely not be necessary. This change mirrors the approach announced in the DOJ’s November 2017 FCPA Corporate Enforcement Policy, which appeared to signal a presumption against the imposition of monitors in FCPA matters.

Although the Benczkowski Memo expressly “supersedes” the Breuer Memo, the broad process for selecting a corporate monitor remains largely the same: counsel for the company must submit a written proposal to the Criminal Division attorneys identifying three qualified monitor candidates and indicating the company’s first choice among the candidates; the Criminal Division attorneys handling the matter, along with supervisors from the Section, then will interview each monitor candidate to assess his/her suitability for the assignment; finally, a Standing Committee on

the Selection of Monitors will review the recommended candidate and vote on whether to accept the recommendation, with the Assistant Attorney General noting his/her concurrence or disagreement. The Office of the Deputy Attorney General must ultimately approve or reject the proposed monitor.

Simultaneously with the announcement of the new monitor selection guidelines, the Criminal Division [announced](#) that it will not continue the position of Compliance Counsel Expert in the Criminal Division’s Fraud Section, vacated by Hui Chen in 2017. Instead, as was the practice before the creation of the position, the Criminal Division will rely on its attorneys to handle these aspects of their matters and will seek to enhance the overall level of experience and expertise in the Division by providing its attorneys with training on corporate compliance programs and hiring attorneys with compliance experience.

While the effect of this new policy remains to be seen, the combination of the Criminal Division’s decision to employ a new cost-benefit analysis when assessing the need for a monitor and to eliminate the Compliance Counsel Expert position, certainly suggest a shift away from the recent increase in the use of corporate monitors and a move toward allowing companies more discretion to manage their own compliance programs, provided they can demonstrate the effectiveness of their program.

The Benczkowski Memo is [available here](#).

White Collar Defense, Regulatory & Investigations is published by the Litigation Department of Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153, +1 212 310 8000, www.weil.com.

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