

October 22, 2018

DOJ Releases New Memorandum on Standards and Policies for Retention of Corporate Compliance Monitors

The New Memorandum Emphasizes the Need for a Careful Weighing of Costs and Benefits by Prosecutors Before Seeking the Imposition of a Monitorship in Connection with a Corporate Criminal Settlement

SUMMARY

On October 12, 2018, the U.S. Department of Justice (“DOJ”) Criminal Division released a memorandum (dated the previous day) on standards, policy, and procedures for the selection and appointment of corporate compliance monitors in connection with deferred prosecution agreements, non-prosecution agreements, and plea agreements with corporations entering into resolutions with the Criminal Division.¹ The memorandum, signed by Assistant Attorney General Brian Benczkowski, is the first significant published guidance relating to the retention of compliance monitors from the DOJ in eight years and is the product of the DOJ’s recent review of the monitor program. Although the Benczkowski memorandum largely incorporates and restates prior guidance relating to specific procedures for the selection and retention of monitors, the “principles” articulated at the outset of the memorandum appear to reflect a renewed focus by the DOJ on the costs and burdens associated with, and the process for, the appointment of a monitor (including both monetary costs and disruption to company operations). The memorandum indicates that the DOJ will opt for a monitor only in the exceptional cases in which the DOJ determines that the company has deficient compliance procedures and controls and that the benefits of a monitor’s appointment outweigh the associated costs and burdens.

BACKGROUND AND DISCUSSION

From 2008-2010, the DOJ issued three memoranda relating to the appointment of corporate monitors (each referred to by the name of the DOJ official who authored the memo). The “Morford memorandum,” issued in 2008, described nine principles governing the selection of corporate compliance monitors and the scope and limits of monitors’ duties and responsibilities, and stated that the determination of whether to impose a monitor in connection with a corporate settlement should involve a weighing of the costs of the monitorship against its benefits to both the company and the public.² The “Breuer memorandum,” published in 2009, set out specific policies and procedures for the selection and appointment of monitors in the Criminal Division, including establishing a Standing Committee on the selection of monitors to make recommendations on monitor candidates based on criteria set out in the memorandum.³ The 2010 “Grindler memorandum” supplemented the Morford memorandum with a tenth “principle” relating to the resolution of disputes between the monitor and the corporation.⁴

The Benczkowski memorandum is styled as a supplement to the Morford memorandum, intended to elaborate on the considerations relevant to the Morford memorandum’s instruction to prosecutors to weigh the benefits of a monitorship against its costs. Specifically, in the first section of the memorandum, entitled “Principles for Determining Whether a Monitor is Needed in Individual Cases,” the memorandum sets out the following factors that federal prosecutors are to consider when evaluating the potential imposition of a monitor:

- 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.”⁵

The memorandum directs DOJ attorneys to consider, when deciding whether to require a monitor in connection with a settlement, whether the need for a monitor has been obviated by the corporation’s (i) appointment of new corporate leadership; (ii) implementation of a new compliance environment; or (iii) undertaking of remedial measures prior to settlement, including by ending relationships with problematic agents or employees.⁶ The memorandum also instructs prosecutors to consider “the unique risks and compliance challenges the company faces” (including those resulting from their industry or geographic location) in evaluating whether the company’s compliance program and remedial efforts are sufficient to avoid appointment of a monitor.⁷ Additionally, the memorandum notes that the potential “costs” of a monitorship that prosecutors should consider include not only monetary costs to the company but also

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disruptions to the company's operations, and that a monitor should be imposed only when there is a demonstrable benefit to be derived from doing so.⁸ The memorandum states at the conclusion of the "Principles" section that "a monitor likely will not be necessary" when a company has an effective compliance program in place at the time of resolution.⁹

The remainder of the Benczkowski memorandum describes specific procedures for the selection and appointment of monitors. Although the memorandum states that it supersedes the Breuer memorandum, the procedures set forth largely adopt and restate with minor revisions the procedures set out in the Breuer memorandum. Those changes include modifications to the composition of the Standing Committee charged with evaluating monitor candidates and the requirement that the DOJ attorneys recommending the selection of a particular monitor to the Standing Committee provide the basis for their recommendation and a description of the other candidates nominated by the company.¹⁰ The memorandum also notes that when the DOJ deem appropriate based on the unique facts and circumstances of a particular case, the DOJ may deviate from the processes described in the memorandum.¹¹

IMPLICATIONS

The content and tone of the Benczkowski memorandum suggest that the DOJ is conscious of, and is taking steps to address, the concerns about monitorships that have been raised by courts, companies, the white-collar bar, and commentators in recent years. Most of those considerations focus on the significant financial burden imposed by monitorships on companies (and the corresponding financial windfall to the appointed monitor) and the relative lack of compensating benefit conferred by monitors. In a large case, the monetary costs to a corporation of a monitorship can run into the tens or even hundreds of millions of dollars, with potentially dozens of monitor employees working full-time on a case for years (and billing the company at substantial hourly rates). Other relevant burdens include indirect costs associated with disruption to the company, which typically must allocate significant employee time to complying with the monitor's requests for documents and other information. The Benczkowski memorandum does not break much new ground and still leaves the determination of whether to impose a monitor, including the balancing of associated costs and benefits, largely to the discretion of the prosecutors involved in investigating the company at issue. The memorandum reinforces that the decision of whether to appoint a monitor should depend primarily on the DOJ's views of the relative balance of the benefits and burdens of doing so. Thus, a company seeking to avoid appointment of a monitor should take affirmative steps to ensure that it has implemented a sufficiently effective and staffed compliance system and culture at the time of resolution to obviate the need for a monitor. Those measures might include, among other things, reviewing applicable

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policies and training programs to ensure that they are “state of the art,” staffing its compliance function with a sufficient number of qualified personnel, and auditing or otherwise testing its compliance system to ensure its effectiveness.

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ENDNOTES

- ¹ Memorandum from Brian A. Benczkowski, Assistant Attorney General, U.S. Department of Justice (Oct. 11, 2018).
- ² Memorandum from Craig S. Morford, Acting Deputy Attorney General, U.S. Department of Justice (Mar. 7, 2008).
- ³ Memorandum from Lanny A. Breuer, Assistant Attorney General, U.S. Department of Justice (June 24, 2009).
- ⁴ Memorandum from Gary G. Grindler, Acting Deputy Attorney General, U.S. Department of Justice (May 25, 2010).
- ⁵ Benczkowski memorandum at 2.
- ⁶ *Id.*
- ⁷ *Id.*
- ⁸ *Id.*
- ⁹ *Id.*
- ¹⁰ *Id.* at 2-8.
- ¹¹ *Id.* at 8.

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CONTACTS

New York

Nicolas Bourtin	+1-212-558-3920	bourtinn@sullcrom.com
Justin J. DeCamp	+1-212-558-1688	decampj@sullcrom.com
Theodore Edelman	+1-212-558-3436	edelmant@sullcrom.com
Nicole Friedlander	+1-212-558-4332	friedlandern@sullcrom.com
Sergio J. Galvis	+1-212-558-4740	galviss@sullcrom.com
Robert J. Giuffra, Jr.	+1-212-558-3121	giuffrar@sullcrom.com
John L. Hardiman	+1-212-558-4070	hardimanj@sullcrom.com
Ann-Elizabeth Ostrager	+1-212-558-7357	ostragerae@sullcrom.com
Matthew J. Porpora	+1-212-558-4028	porporam@sullcrom.com
Samuel W. Seymour	+1-212-558-3156	seymours@sullcrom.com
Alexander J. Willscher	+1-212-558-4104	willschera@sullcrom.com

Washington, D.C.

Daryl A. Libow	+1-202-956-7650	libowd@sullcrom.com
Aisling O'Shea	+1-202-956-7595	osheaa@sullcrom.com
Christopher Michael Viapiano	+1-202-956-6985	viapianoc@sullcrom.com

Palo Alto

Brendan P. Cullen	+1-650-461-5650	cullenb@sullcrom.com
Laura Kabler Oswell	+1-650-461-5679	oswell@sullcrom.com

London

Theodore Edelman	+44-20-7959-8450	edelmant@sullcrom.com
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