ALERT MEMORANDUM

New DOJ Guidance on the Imposition and Selection of Corporate Monitors

October 16, 2018

On Friday, October 12, 2018, during remarks at the NYU School of Law Program on Corporate Compliance and Enforcement Conference on Achieving Effective Compliance,[1] Assistant Attorney General Brian A. Benczkowski of the Department of Justice ("DOJ") announced new guidance, issued on October 11, relating to the imposition and selection of corporate compliance monitors in Criminal Division matters.[2] Acknowledging the significant burden that monitors place on corporations, Benczkowski announced that the new guidance is intended to ensure the Criminal Division is acting in a consistent and responsible manner when it imposes a compliance monitor and is designed to "further refine the factors that go into the determination of whether a monitor is needed, as well as to clarify and refine the monitor selection process."[3]

The new guidance, and the factors it sets forth, provides a helpful framework for companies to consider not only when they are in discussions with the DOJ concerning whether a monitor is appropriately imposed as part of any corporate resolution, but, significantly, as they are considering what remediation work to undertake.

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[1] Brian A. Benczkowski, Assistant Attorney Gen., DOJ, Criminal Div., Remarks at NYU School of Law Program on Corporate Compliance and Enforcement Conference on Achieving Effective Compliance (Oct. 12, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-nyu-school-law-program.
[2] Memorandum from Brian A. Benczkowski to All Criminal Division Personnel (Oct. 11, 2018), https://www.justice.gov/opa/speech/file/1100531/download.
[3] The new guidance will supplement (but not replace) the 2008 Morford Memorandum, which provides guidelines on the imposition and selection of corporate monitors, and will supersede the 2009 Breuer Memorandum, which previously outlined the selection process for corporate monitors.

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Imposition of a Corporate Monitor

In describing the purpose a corporate monitor serves, Benczkowski made clear that "imposing [a] corporate monitor[] [is] the exception, not the rule." He also noted that "the imposition of a monitor is never meant to be punitive. It should occur only as necessary to ensure compliance with the terms of a corporate resolution and to prevent further misconduct." The basic framework for the DOJ's consideration of whether a monitor is appropriate previously was set out in the 2008 Morford Memorandum, which states that "[i]n negotiating agreements with corporations, prosecutors should be mindful of both: (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 new guidance builds on this basic cost-benefit analysis by delineating certain specific factors that the DOJ should consider before imposing a corporate monitor:

- Whether the underlying misconduct involved a "books and records" or internal controls violation, such as the exploitation of an inadequate compliance program or internal controls systems;
- Whether the misconduct was pervasive across the company or involved senior management;
- Whether the company has taken appropriate remedial measures to address the misconduct, including by terminating business relationships and practices;
- Whether the misconduct occurred under prior leadership or in a prior compliance environment that no longer exists;
- Whether the changes in corporate culture and/or leadership are adequate to safeguard against a recurrence of misconduct;
- Whether the company has made a significant investment in, and improvements to, its compliance program and internal control systems; and
- The extent to which any enhancements to the corporation's compliance program and internal controls systems have been tested to demonstrate that they would prevent or detect similar misconduct in the future.

The new guidance further provides that the DOJ 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." According to the new guidance, the DOJ should consider the cost of a monitor and its impact on the operations of a corporation and, if a monitor is imposed, should ensure that the scope of the monitor's role is "appropriately tailored to avoid unnecessary burdens to the business's operations."

While the guidance contained in the 2008 Morford Memorandum and the 2009 Breuer Memorandum applied only to non-prosecution agreements ("NPA") and deferred prosecution agreements ("DPA"), the new guidance also applies to instances in which a company pleads guilty to a federal offense pursuant to a plea agreement.

Selection of a Corporate Monitor

Once the DOJ decides to impose a monitor, the new guidance governs the selection and review process. Benczkowski noted that the DOJ "want[s] to ensure that businesses and the public are confident in the selection process, avoiding

any suggestion that monitors are chosen for inappropriate reasons, including personal relationships or past employment in the Department." The new guidance thus provides procedures that the Criminal Division must follow in selecting a monitor, absent specific authorization to deviate from the procedures.

In particular, under the new guidance, the DOJ will describe in the DPA, NPA or plea agreement the specific scope of the monitorship, the selection process, and the monitor's responsibilities. The new guidance, like the now superseded 2009 Breuer Memorandum, establishes a Standing Committee on the Selection of Monitors (the "Standing Committee"), which is composed of various senior officers from the Criminal Division, including an ethics official. The Standing Committee is convened when necessary to evaluate monitorship applications. Companies required to appoint a monitor must recommend three qualified monitor candidates to the DOJ, and must identify a first choice. The DOJ attorneys handling the matter review the applications, and provide a formal monitor recommendation memorandum to the Standing Committee. The Standing Committee can either accept the recommendation or reject that candidate. If the candidate is rejected, the DOJ attorneys can recommend an alternate candidate from the pool of candidates the company recommended, or, if those are rejected, the DOJ attorneys can obtain additional options from the company. Ultimately, all monitor candidates must be approved by the Office of the Deputy Attorney General.

Continued Focus on Compliance

Finally, in his speech at NYU, Benczkowski reiterated the DOJ's focus on effective corporate compliance programs. Benczkowski announced that the DOJ will not hire a replacement for its previous full-time compliance counsel, Hui Chen, and will instead build upon prior compliance training and knowledge "across every section in the Division . . . through diverse hiring and the development of targeted training programs." When hiring, Benczkowski said that the Criminal Division will "focus on building a team of attorneys who offer diverse skillsets. That means not just attorneys with experience as prosecutors and in the courtroom, but also those who bring compliance experience to the table." Benczkowski indicated that the Criminal Division will increase compliance training for all of its prosecutors, starting with the Fraud Section and the Money Laundering and Asset Recovery Section, where the bulk of corporate enforcement activity occurs, and expand to other divisions. According to Benczkowski, such training is necessary to "ensure that [Criminal Division] attorneys can successfully navigate the difficult compliance and other issues that arise . . . including whether the facts and circumstances of a particular case warrant the imposition of a corporate monitor."

Implications

As noted, the new guidance provides a pragmatic approach and additional transparency to the issues the DOJ will consider in determining whether to require a company to retain a compliance monitor in connection with any corporate resolution. As in any situation where a regulator or authority such as the DOJ is applying a series of factors to make a decision, the new guidance provides the DOJ with significant flexibility in weighing each individual factor. The new guidance also incentivizes companies to remediate their compliance programs by creating a presumption that "[w]here 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."

Accordingly, companies seeking to avoid the imposition of a corporate monitor should keep each of these factors in mind as they develop and test improvements to their compliance programs following the identification of any misconduct, and they should be prepared to demonstrate the potential costs and burdens a monitor would have on the company's business organization and operations. Importantly, the new guidance provides companies facing the possibility of a monitorship with a significant opportunity for advocacy by arguing how those factors may apply to the company, its conduct, and its remediation efforts, and how the balance weighs against the imposition of a monitor as part of any settlement.[4]

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[4] This Alert Memorandum was prepared with the assistance of Kylie M. Huff.