October 17, 2018

DOJ Announces New Guidance for Imposing Compliance Monitors in Criminal Division Matters

On October 12, 2018,[1] Brian A. Benczkowski, the Assistant Attorney General for the Criminal Division, announced new guidance (the "Benczkowski Memorandum") setting forth a "pragmatic approach to monitorships," highlighting the factors that prosecutors should consider in determining whether to impose an independent compliance monitor to oversee corporate remediation efforts as part of a resolution with the Criminal Division.[2] Benczkowski also announced on the same day that the Criminal Division will no longer rely on a single compliance counsel attached to the Fraud Section for compliance expertise, and instead will develop a targeted training program for prosecutors in the Division and hire attorneys with experience developing and testing corporate compliance programs, in order to create "a workforce better steeped in compliance across the board."[3]

The Benczkowski Memorandum breaks limited new ground, but notably does elaborate specific factors to be weighed by the Criminal Division in assessing whether to appoint a monitor. In particular, the Benczkowski Memorandum underscores the possibility that a company's remediation efforts—including enhanced compliance policies and programs—may obviate the need to impose an independent monitor under certain circumstances. The new guidance also requires prosecutors to weigh the benefits of appointing a monitor against the potential costs. This includes considering the projected monetary costs to the business organization and whether the proposed scope of a monitor's role is appropriately tailored to avoid unnecessary burdens to the business's operations. The new guidance states plainly that 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.[4]

---

1 Brian A. Benczkowski, Assistant Attorney General of the Criminal Division of the United States Department of Justice, Assistant Attorney General Brian A. Benczkowski Delivers Remarks at NYU School of Law Program on Corporate Compliance and Enforcement Conference on Achieving Effective Compliance (hereinafter "Benczkowski Remarks") (Oct. 12, 2018), available here.

2 Memorandum from Brian A. Benczkowski, Assistant Attorney General, to All Criminal Division Personnel, Selection of Monitors in Criminal Division Matters (Oct. 11, 2018), available here.

3 Benczkowski Remarks.

4 Benczkowski Memorandum at 2.

As we explain below, this new guidance emphasizes the limited circumstances in which the appointment of a monitor is appropriate, and provides a framework for companies and their counsel to argue against the appointment of a compliance monitor in Criminal Division and potentially other DOJ cases.

Background

The Benczkowski Memorandum is the third iteration of the Division's guidance concerning the selection and use of monitors in DPAs and NPAs.[5] In 2008, then-Acting Deputy Attorney General ("DAG") Craig S. Morford announced a series of principles for drafting provisions pertaining to the use of monitors in resolution agreements with corporations (the "Morford Memorandum").[6] The Morford Memorandum contains comparatively little guidance concerning when it is appropriate to impose a monitor. Instead, it is primarily concerned with avoiding conflicts of interest in the appointment of monitors, which was at least partly a response to accusations at the time that monitor positions were being awarded through an unfair bidding process.[7] The Morford Memorandum explains, however, that a "monitor should only be used where appropriate given the facts and circumstances of a particular matter," and sets forth the two general considerations to 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."[8] The Morford Memorandum also makes clear that a monitor should never be imposed for punitive purposes.[9]

Further guidance, issued in 2009 by then-Assistant Attorney General ("AAG") Lanny Breuer (the "Breuer Memorandum"), provided for the creation of a standing committee on the selection of monitors and further details concerning the process for nominating monitors, but contained little further guidance concerning the circumstances in which the appointment of a monitor was appropriate.[10]

---

5 Whereas the Morford Memorandum applied only to DPAs and NPAs, the Benczkowski Memorandum applies the same principles to court-approved plea agreements that impose a monitor. Benczkowski Memorandum at 3.

6 Memorandum from Craig S. Morford, Acting Deputy Attorney General, to Heads of Dep't Components and U.S. Att'ys (Mar. 7, 2008), available here.

7 *See* Philip Shenon, "Ashcroft Deal Brings Scrutiny in Justice Dept.," *The New York Times* (Jan. 10 2008), available here.

8 Morford Memorandum at 2.

9 *Id.*

10 Memorandum from Lanny Breuer, Assistant Attorney General, to All Criminal Division Personnel, Selection of Monitors in Criminal Division Matters (June 24, 2009), available here.

The Benczkowski Memorandum supplements the Morford Memorandum, and supersedes the guidance contained in the 2009 Breuer Memorandum.[11]

The Benczkowski Memorandum

The stated goals of the Benczkowski Memorandum are to refine further the factors that go into DOJ's determination of whether to appoint a monitor, as well as to clarify and refine the monitor selection process.[12] According to AAG Benczkowski, the approach to the new policy began with the principle, derived from the Morford Memorandum, that the imposition of a corporate monitor should not be punitive and "should occur only as necessary to ensure compliance with the terms of a corporate resolution and to prevent future misconduct."[13] Accordingly, the new policy explicitly recognizes that, "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."[14]

Principles for Determining Whether a Monitor is Needed in Individual Cases

In keeping with the Morford Memorandum, Criminal Division attorneys deciding whether to impose a monitor must still weigh the "potential benefits that employing a monitor may have for the corporation and the public," and consider "the cost of a monitor and its impact on the operations of a corporation." In weighing the "potential benefits" of a monitor, prosecutors must now consider whether:

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

---

11 Benczkowski Memorandum at 1 and n.1; *see also* Benczkowski Remarks.

12 Benczkowski Remarks. The Benczkowski Remarks also provides guidance concerning the selection of monitors that is similar to the guidance contained in the Morford and Breuer Memoranda.

13 Benczkowski Remarks.

14 Benczkowski Memorandum at 2.

- 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.[15]

The new policy also considers whether the misconduct took place under different corporate leadership. In addition, prosecutors are directed to consider the adequacy of a company's remedial measures, as well as the effectiveness and resources of its compliance program, by examining 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.

With respect to the cost of a proposed monitor and its impact on the operations of a corporation, the memorandum directs prosecutors to consider not only the projected monetary costs to a company, but also whether the proposed scope of a monitor's role is appropriately tailored to avoid unnecessary burdens to the company's operations. The guidance further directs prosecutors to 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."[16]

Applicability to U.S. Attorney's Offices

Notably, the Benczkowski Memorandum also recognizes that there may be unique circumstances that require a departure from the procedures contained in the guidance, such as when the Criminal Division is prosecuting a case jointly with a U.S. Attorney's Office that may have different policies and procedures. Any departures from the guidance are subject to approvals by Criminal Division leadership.[17] It is noteworthy that the Benczkowski Memorandum applies to the Criminal Division only, but not the U.S Attorney's Offices, while the Morford Memorandum and a memorandum of then-Acting DAG Gary S. Grindler that expanded on it[18] applied to both the Criminal Division and the U.S. Attorney's Offices. This almost certainly explains why, despite current DAG Rod J. Rosenstein's previous statement that the DOJ would cease making policy by memorandum and would instead incorporate policies directly into the United States Attorneys' Manual (now renamed the "Justice Manual"),[19] which AAG Benczkowski referenced in his remarks announcing the new guidance,[20] the Benczkowski Memorandum does not appear to have been incorporated into the Justice Manual, which does not itself contain a section on monitorships in criminal

---

15 *Id.*

16 *Id.*

17 Benczkowski Remarks.

18 Criminal Resource Manual, CRM 1-166, available here.

19 Rod J. Rosenstein, U.S. Deputy Attorney General, Deputy Attorney General Rosenstein Delivers Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017), available here.

20 Benczkowski Remarks.

matters.[21] Companies negotiating the potential imposition of a monitorship with a U.S. Attorney's Office should be prepared to advocate for the application of the standards in the Benczkowski Memorandum as strongly persuasive authority, but should not consider the use of those standards to be automatic.

Expansion of Criminal Division Compliance Expertise

In remarks made in connection with his announcement of the new guidance on monitorships, AAG Benczkowski explained that the Criminal Division is also expanding its training for prosecutors relating to corporate compliance and it intends to hire some prosecutors who have compliance expertise.

In 2015, the Criminal Division engaged its first compliance expert to work full time with its Fraud Section. According to AAG Benczkowski, although this approach had its benefits, there were "inherent limitations in having the locus of our compliance expertise consolidated in a single person in a single litigating section."[22] Accordingly, the Criminal Division will, through hiring and the development of targeted training programs, expand its compliance capacity and knowledge across the Division, starting with the Fraud Section and the Money Laundering and Asset Recovery Section.

The revised training program is intended to encourage prosecutors considering the merits of a corporate matter to take into account the adequacy of a compliance program at the same time that they are considering a company's remedial actions or the timeliness of any voluntary self-disclosure rather than "outsource" a separate review of the compliance program.[23]

Conclusion

By stating explicitly the factors that Criminal Division prosecutors will consider when deciding whether to impose a compliance monitor, the new guidance, more so than past guidance, affords companies and their counsel specified grounds on which to argue that the appointment of a compliance monitor by the Criminal Division is not warranted. The new guidance also promises to help curtail the remit of monitors when they are appointed. Its success will largely depend on whether in practice the new guidance results in a greater receptiveness on the part of Criminal Division prosecutors to arguments against imposition of a compliance monitor based on the newly articulated criteria. In addition, whether the new approach to incorporating compliance expertise throughout the Criminal Division will in fact enhance its capacity in this area or dilute it remains to be seen. Even so, the Department's guidance underscores the need for companies to demonstrate not only the existence of a robust compliance program, but also its efficacy.

---

21 The DOJ's Criminal Resource Manual, which does address monitorships, currently links to the Morford and Grindler Memoranda, but not the Benczkowski Memorandum.

22 Benczkowski Remarks.

23 *Id.*

* * *

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Mark F. Mendelsohn
+1-202-223-7377
mmendelsohn@paulweiss.com

Alex Young K. Oh
+1-202-223-7334
aoh@paulweiss.com

Richard C. Tarlowe
+1-212-373-3035
rtarlowe@paulweiss.com

Farrah R. Berse
+1-212-373-3008
fberse@paulweiss.com

Peter Jaffe
+1-202-223-7326
pjaffe@paulweiss.com

Justin D. Lerer
+1-212-373-3766
jlerer@paulweiss.com

Associates James Hwang and Jonathan Silberstein-Loeb contributed to this client memorandum.