CLIENT ALERT

DOJ Issues New Guidance on Monitors

October 30, 2018

New DOJ guidance will likely reduce the situations in which the Criminal Division imposes an independent monitor as a condition of a non-prosecution agreement, deferred-prosecution agreement, or plea agreement. The guidance will also change the process by which monitors are proposed and selected.

We follow these developments because our clients are, on occasion, faced with decisions to enter into monitorships, and we have an active practice as monitors ourselves. Nichols Liu is currently the independent monitor under an administrative agreement between Agility Public Warehousing Company and the Defense Logistics Agency. We also currently serve as monitors under resolutions with federal and state agencies: the Department of Transportation, NASA and the State of New York. Our extensive background in government contracts—especially in areas of investigations and compliance—make our firm particularly suited to these matters.

I. Background

On October 11, 2018, the Department of Justice issued a new memorandum on the selection of monitors in Criminal Division matters (hereinafter the "Beneczkowski memo"). That memo elaborates on the original, 2008 guidance (the "Morford memo") and supersedes intervening guidance from the Obama administration (the 2009 "Breuer memo"). Thus, the guidance going forward is the original Morford memo as elaborated upon by the Beneczkowski memo.

II. Substance

The principal addition by the Beneczkowski memo is a preamble addressing the principles by which the Criminal Division will decide whether a monitor is even needed. The thrust of the section is to revitalize the second of the original two considerations from the 2008 Morford memo: "(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." Toward that end, the Beneczkowski memo affirms basic tenets of monitor selection: that the Monitorship should be "appropriately tailored" to the issues that prompted it and "should never be imposed for punitive purposes."

Specifically, DOJ attorneys must now take stock of "changes in corporate culture and/or leadership," as well as other "remedial measures" that might "safeguard against a recurrence of misconduct." Prosecutors must also account for "unique risks" facing the company, including the region(s) and industry(ies) in which the firm operates. While prosecutors must consider the nature of the violation, including its pervasiveness and the seniority of the perpetrators, they must also balance that against subsequent investments in, and improvements to, the company's compliance program and internal controls—including whether they have been "tested to demonstrate that they would prevent or detect similar misconduct in the future.

These policy statements likely signal a policy shift *away* from using monitors where the previous administration may have imposed them.

II. Procedure

The Beneczkowski memo also makes discrete changes to the procedures by which monitors are selected and appointed. First and foremost, line prosecutors must now obtain approval from their supervisors, including the Chief of the relevant section, as well as the Assistant Attorney General ("AAG") for the Criminal Division or her designee, most likely the Deputy AAG with cognizance.[1] This procedural change would not, on its face, increase or decrease the number of monitors imposed. However, taken in conjunction with the policy statements above, the procedure portends fewer monitorships being imposed by the Criminal Division.

There are other, more minor changes to the monitor-selection procedure. Prosecutors must now include the monitor's scope in the terms of the agreement, as well as a procedure for replacing the monitor "should it be necessary." The "Standing Committee on the Selection of Monitors no longer includes the chief of the relevant section—probably because she is involved earlier in the process, as noted above.

The selection process still begins with "a pool of three qualified monitor candidates." A candidate may no longer, however, be a "recent" (within the prior two years) employee, agent, or "representative" (new term) of the company. Each candidate must now certify that she has notified applicable clients and sought waivers or withdrawn from other matters, as necessary. The company is also required to identify its first choice, which was optional under the Breuer memo. If *any* of the three candidates is deemed unqualified by DOJ, prosecutors must notify the company and request a replacement. Under the Breuer memo, DOJ only had to notify the company if *all three* candidates were deemed unqualified.

[1] As under the Breuer memo, final approval authority rests with the Deputy Attorney General.

When prosecutors prepare the memorandum for the Standing Committee, they must now address the factors set forth in the Beneczkowski memo and explain *why* they recommend the candidate they chose. They must also now include a description of the two candidates who were not selected.

Under the Breuer memo, the Standing Committee could interview the candidate recommended in the prosecutors' memorandum. Under the new guidance, the Standing Committee can interview any of the three candidates proposed by the company. If the Standing Committee rejects the prosecutors' recommendation, they now have the option of recommending one of the other two candidates proposed by the company—without going back to the company.

If the Standing Committee accepts a recommended candidate, that decision goes to the AAG for review. Although the AAG "may not unilaterally make, accept, or veto the selection of a monitor candidate," she may request additional information about the candidate and—under the new memo—interview said candidate.

Finally, as under the Breuer memo, prosecutors can ask to depart from this process when dealing with "unique facts and circumstances." Deviations from procedure now expressly include "when the Criminal Division attorneys propose using the process of a U.S. Attorney's Office with which the Criminal Division is working the case." This will reduce the number of deviations and, consequently, standardize DOJ's monitor-selection process.

III. Conclusion

The new guidance suggests a DOJ policy shift *away* from using monitors. But that is not necessarily good news for government contractors. Organizations' willingness to engage monitors has in the past been a compelling argument to persuade DOJ attorneys to decline prosecution or, at least, to enter into agreements in lieu of prosecution. So, the recent, more restrictive guidelines (and the new arguably cumbersome procedures) may have the unintended consequence of increasing prosecutions that would otherwise have been declined or deferred.

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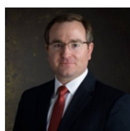

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