Department of Justice Announces New Corporate Monitor Guidance

By Scott B. McBride and Eric R. Suggs

On October 11, 2018, Brian A. Benczkowski, Assistant Attorney General for the Criminal Division, issued a memorandum (the "Benczkowski Memorandum" or "Memo") modifying the factors that should be considered when evaluating whether a company must retain a corporate monitor. The Benczkowski Memorandum implements a more business-friendly approach that places emphasis on the costs to the company and the company's independent remedial efforts in effect at the time of resolution.

Corporate Monitors

The Department of Justice ("DOJ") defines a corporate monitor as "an independent third party who assesses and monitors a company's adherence to the compliance requirements of an agreement that was designed to reduce the risk of recurrence of the company's misconduct."[1] Corporate monitors are frequently assigned to companies as a condition of deferred prosecution agreements or non-prosecution agreements, with the purpose of "cleaning up" the company's wrongdoing, or ensuring the effectiveness of the company's remedial efforts, in a way that fulfills the government's demands.

DOJ's Elaboration on Corporate Monitor Policy

Prior to the Benczkowski Memorandum, DOJ provided only a limited amount of guidance on the criteria used to determine whether a corporate monitor should be assigned to a company. On March 7, 2008, Craig S. Morford, former acting Deputy Attorney General, issued a memorandum providing the following two factors to evaluate whether appointing a corporate monitor is appropriate: "(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."[2] The Benczkowski Memorandum elaborates on these factors.

The Benczkowski Memorandum begins by recognizing the benefits of corporate monitors, but quickly notes that they should not be utilized in all circumstances. The Memo states 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."[3]

The Benczkowski Memorandum also provides guidance to prosecutors instructing them to consider a number of factors when considering whether to appoint a monitor, including (1) the form of misconduct, i.e., whether it concerned the manipulation of books and records or the exploitation of inadequate internal controls and compliance programs; (2) the pervasiveness of the misconduct and whether senior management was involved; (3) the investments and improvements made to the company's compliance program and internal control systems; and (4) whether remedial measures

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[1] DOJ and SEC, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* at 71 (Nov. 14, 2012).

[2] Craig S. Morford, Former Acting Deputy Attorney General, *Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations* at 2 (Mar. 7, 2008).

[3] Brian A. Benczkowski, Assistant Attorney General of the United States, *Selection of Monitors in Criminal Division Matters* at 2 (Oct. 11, 2018).

have been tested to show their effectiveness in preventing and detecting similar misconduct in the future.[4] Additionally, prosecutors are now instructed to consider whether the misconduct took place under different corporate leadership or within an inadequate compliance environment that no longer exists.[5]

The Benczkowski Memorandum provides more autonomy to corporations, allowing them to self-correct their wrongdoing prior to resolution of the matter under investigation. Whereas before, a monitor may have been required regardless of a corporation's remedial efforts, the Memo "favor[s] 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."[6] If a corporation has demonstrated that its controls and compliance system are effective at the time of resolution, then a monitor most likely will not be necessary. Thus, corporations seeking to avoid the imposition of a monitor should retain experienced counsel to guide them through the remedial process and to demonstrate to DOJ that effective corrective efforts have been put in place.

Conclusion

The Benczkowski Memorandum is likely to have a significant impact in reducing the frequency with which corporate monitors are imposed on companies. To reap this benefit, however, companies will be required to proactively remedy and improve their existing compliance program and controls prior to resolution of the matter under investigation.

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[4] *Id.*
[5] *Id.*
[6] *Id.*

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