

CLIENT ALERT

New Department of Justice Policy for the Selection of Independent Corporate Monitors in Criminal Division Matters

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On October 11, 2018, Assistant Attorney General Brian A. Benczkowski disseminated a memorandum setting forth a new policy for the selection of independent corporate monitors in Department of Justice Criminal Division matters (the “Benczkowski Memorandum”). The Benczkowski Memorandum addresses standards, policy, and procedures for determining whether appointment of a monitor is appropriate in specific cases, and to any deferred prosecution agreement, non-prosecution agreement, or plea agreement between the Criminal Division and a business organization.

In recent years, the Department of Justice has pushed for the use of an independent monitor with some frequency as an element of corporate criminal resolutions. In remarks presented at NYU Law School on October 12, 2018, Benczkowski noted that “over the past five years or so,” approximately one in three corporate resolutions by the Department of Justice’s Fraud Section involved the imposition of a corporate monitor. Indeed, Benczkowski stated that “the issue of whether a monitor will be required is one of the most significant aspects of any corporate resolution.”

The Benczkowski Memorandum introduces a more business-friendly policy with regard to corporate monitors, one that takes into significant consideration the financial costs to a company of a monitorship, the unnecessary burdens to a business’s operations, and the company’s independent remedial efforts.

The Benczkowski Memorandum notes that independent corporate monitors can be helpful and beneficial in assessing a business’s compliance with the terms of a corporate criminal resolution, and in reducing the risk of future misconduct or compliance lapses. The Benczkowski Memorandum also notes, however, that the imposition of a monitor is not necessary in many corporate criminal resolutions, and the scope of any monitorship should be tailored to address the specific issues and concerns raised in that case.

The Benczkowski Memorandum sets out factors that the Criminal Division should consider in evaluating the potential benefits of a monitor, including:

- Whether the misconduct involved the manipulation of corporate books and records, or the exploitation of an inadequate compliance program or internal control systems;
- Whether the misconduct was pervasive across the business, or approved or facilitated by senior management;

- Whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal control systems; and
- 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.

The Benczkowski Memorandum highlights other issues that Criminal Division attorneys should take into consideration, including:

- Whether misconduct occurred under different corporate leadership or within a different compliance environment and, if so, whether the changes in corporate culture and/or leadership are adequate to safeguard against a recurrence of misconduct;
- Whether adequate remedial measures were taken to address problem behavior by employees or management, including, where appropriate, the termination of business relationships and practices that contributed to the misconduct; and
- The unique risks and compliance challenges the company may face, including the particular region and industry in which the company operates and the nature of the company's clientele.

Significantly, the Benczkowski Memorandum further states that in weighing the benefits of a monitorship against potential costs, the Criminal Division should consider the projected monetary costs to the business, and whether the scope of the monitor's role is tailored to avoid unnecessary burdens to the business's operations. Benczkowski stated in his October 12 remarks that "the imposition of a corporate monitor is never meant to be punitive," and should occur "only as necessary to ensure compliance with the terms of a corporate resolution and to prevent future misconduct."

The Benczkowski Memorandum also addresses the procedure for selection of a monitor. In a case where a monitor is to be employed, counsel for a company would submit a written proposal identifying candidates. The Criminal Division attorneys handling the case would then interview the candidates, and a written recommendation would be sent to a newly-created Standing Committee on the Selection of Monitors. The Standing Committee, which includes the Deputy Assistant Attorney General with supervisory responsibility for the Fraud Section, the Chief of the Fraud Section or other relevant Section, and a designated Ethics Official for the Criminal Division, would review the recommendation and vote on whether or not to accept it. As a final step, any selected monitor candidate would have to be approved by the Office of the Deputy Attorney General. Benczkowski stated in his October 12 remarks that the goal of this procedure is to "ensure that the process is fair, ensure[] the selection of the best candidate, and avoid[] even the perception of any conflicts of interest."

The Benczkowski Memorandum is significant for companies considering entering a resolution with the Criminal Division. It provides a detailed roadmap for businesses seeking to avoid the burden of a monitor, by suggesting the types of remedial measures that can be implemented before a resolution is finalized. It also provides a set of defined points for a business to cite in arguing against the need for a monitor. Finally, it formalizes the need for the Criminal Division to weigh the financial cost of a monitor, and the burden on a business's operations, before imposing a monitor as part of a corporate criminal resolution.

The Benczkowski Memorandum is available [here](#).

Brian A. Benczkowski's October 12, 2018 remarks at NYU Law School are available [here](#).

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