# DOJ Issues Guidance Emphasizing Importance of Remedial Action to Corporate Monitorship Decisions

*Under new Justice Department guidance, corporate defendants have a crucial, time-sensitive window to implement remedial changes independently to potentially avoid the imposition of a government-required monitor to oversee that process.*

## Introduction

On October 11, 2018, the U.S. Department of Justice (DOJ or government) announced major revisions to its policy concerning the selection and imposition of corporate monitors in criminal cases that emphasize that a company's *reaction* to discovery of corporate wrongdoing is often as important as the initial conduct. Most significantly for companies and their compliance officers, the new guidance makes clear the value of making compliance program improvements as soon as potential legal violations have been identified. In particular, under the new policy, companies may be able to avoid the imposition of a monitor where one might otherwise be imposed by taking early remedial action, after the discovery of legal compliance problems and before formal resolution of those issues with DOJ.

The new policy also sets a higher standard for the government's imposition of a monitor and increases the transparency of the monitor selection process. In addition, the new guidance expands the DOJ policy to include expressly plea agreements for the first time.

## Background on DOJ Guidance Concerning Monitorships

As a component of deferred or non-prosecution agreements negotiated between the government and a corporation to resolve criminal violations, the parties may agree, as a condition of the agreement and generally at the insistence of government prosecutors, to implement or enhance compliance programs to prevent future wrongdoing. Hiring of a government-approved independent monitor, at the corporation's expense, to assess the corporation's compliance weaknesses, make recommendations, and report on implementation of program enhancements may be an additional term of the agreement. Similarly, the government may seek and federal courts may require a monitor in connection with corporate guilty pleas.

Since 2008, DOJ has had formal guidance in place concerning the use of corporate monitors in deferred and non-prosecution agreements. The first memo, issued in 2008 by then-Acting Deputy Attorney General Craig Morford (the Morford Memo), set forth nine controlling principles guiding the terms of corporate monitorship agreements, the scope of the monitor's role, and the nature of the monitor's relationship with the government. In 2009, DOJ issued a memo from Assistant Attorney General Lanny Breuer (the Breuer Memo) creating a formalized procedure for the selection of monitors. In a 2010 memo from then-Acting Deputy Attorney General Gary Grindler, DOJ added a 10th substantive principle to the considerations for a monitorship agreement.

The guidance put in place over the past decade was focused on the terms of a monitorship and did not provide formal criteria for prosecutors to evaluate whether the *use* of a monitor was appropriate in a given case. The Morford Memo made the sole pronouncement concerning the evaluation of whether a monitorship *should be* imposed, simply instructing prosecutors to "be mindful" of "the potential benefits that employing a monitor may have for the corporation and the public" and "the cost of a monitor and its impact on the operations of a corporation."[1]

## Changes Imposed by Benczkowski Memo

Nicole H. Sprinzen
Vice Chair, White Collar Defense & Investigations
nsprinzen@cozen.com
Phone: (202) 471-3451
Fax: (202) 861-1905

Martin S. Bloor
Member
mbloor@cozen.com
Phone: (212) 883-4941
Fax: (212) 986-0604

Andrew D. Linz
Associate
alinz@cozen.com
Phone: (215) 665-4638
Fax: (215) 665-2013

### Related Practice Areas

- White Collar Defense & Investigations

## New Policy Emphasizes the Importance of Prompt Remediation

The latest changes to the DOJ's monitor policy were published in the October 11, 2018, memo from Assistant Attorney General Brian Benczkowski (the Benczkowski Memo), which supersedes the Breuer Memo (2009) and supplements the Morford Memo (2008). The guidance emphasizes the relevance of post-violation conduct by the company and its employees and establishes a starting presumption *against* the imposition of a monitor.

The memo states 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."[2] Thus, where a company is dealing with the investigation of legal violations but remediates the issues and makes compliance program enhancements to mitigate future violations between the discovery of the legal issues and their resolution with the government, the company may realize a significant and outcome determinative benefit with regard to the imposition of a monitor.

For company management and compliance personnel, assessing the root cause of compliance failings, identifying program procedures and internal controls improvements that can be made to prevent future deficiencies, and implementing those changes may result in the company avoiding the imposition of a monitor. The timing of making improvements is important, making it critical to identify and remediate deficiencies quickly.

## Addition of Criteria to Evaluate the Value of Imposing a Monitor

The Benczkowski Memo makes additional significant changes in DOJ monitorship policy. Where previous DOJ guidance had not significantly addressed the decision to use a monitor in individual cases, the Benczkowski Memo enumerates a number of factors that prosecutors are to weigh in making that decision, stating that "a monitor will not be necessary in many corporate criminal resolutions."[3]

Whereas the Morford Memo established that prosecutors should balance the potential benefits that a monitorship may have for the corporation and the public versus the cost of a monitor and its impact on the company's operations, prosecutors must now evaluate a number of specific factors.[4] The Benczkowski Memo emphasizes that a monitorship should be imposed, according to the guidance, "only where there is a demonstrated need for, and clear benefit to be derived from, a monitorship relative to the projected costs and burdens."[5]

Further to this analysis, the Benczkowski Memo requires that prosecutors provide a written explanation of why a monitor is required in light of these criteria during the monitor selection process.

## Increased Integrity in Monitor Selection Process

The Benczkowski Memo also implements procedures calculated to increase the integrity of the monitor selection process. Since the implementation of the Breuer Memo, the final selection of monitors has been made by a so-called "standing committee" of senior DOJ officials in consultation with the corporate defendant subject to the monitor from a pool of candidates provided by the defendant.

The Benczkowski Memo retains this requirement and further requires that the monitor selection process be included in every resolution agreement in which a monitorship is imposed. It adopts more expansive conflict of interest rules for potential monitors and prohibits monitors from being otherwise employed by the company for a longer period of time — now two years instead of one.

Prosecutors also must explain in writing the bases for their monitor recommendation to the standing committee. Finally, it gives the standing committee authority to interview candidates proposed by the corporate defendant that the prosecutors did not recommend.

## Extension of the Policy to Plea Agreements

The final major change in the new DOJ guidance is the expansion of the policy to plea agreements. Until now, monitorships imposed as part of a plea agreement were not subject to the procedures

that applied to monitors operating under agreements not to prosecute the corporation (non-prosecution agreements) or agreements to make a later determination about whether to prosecute the corporation (deferred prosecution agreements). The policy now applies to all voluntary resolution agreements.

## Takeaways

A monitorship is intended to bring independent and objective oversight to a company's compliance framework, and a successful monitorship can have that effect and assist a company with implementing effective program improvements. But even DOJ's guidance on the subject — first in the Morford Memo over a decade ago and most recently in the Benczkowski Memo — recognizes that a monitorship can affect a company's business operations and will have costs associated with it.

Given that the new guidance requires prosecutors to evaluate the costs and other impacts on a company from a monitorship, corporate defendants and counsel will be well-served by presenting to the government both the financial costs of a monitorship and any burdens it might entail for the company. Moreover, given the guidance's focus on swift, strategic remedial action in the wake of potentially criminal corporate wrongdoing, corporate defendants also have a crucial, time-sensitive window to assess and implement remedial changes independently to potentially avoid the imposition of a government-required monitor to oversee that process.

---

**Nicole H. Sprinzen and Martin S. Bloor are members in Cozen O'Connor's White Collar Defense & Investigations Practice. Nicole is a former federal prosecutor. Andrew Linz is an associate in Cozen O'Connor's White Collar Defense & Investigations Practice.**

---

[1] Craig S. Morford, March 7, 2008, *Memo re: Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations*, at 2.

[2] Brian A. Benczkowski, October 11, 2018, *Memo re: Selection of Monitors in Criminal Division Matters*, at 2 (emphasis added).

[3] *Id.*

[4] The factors that prosecutors must evaluate in determining whether a monitorship is appropriate are:

- severity of the misconduct, including, whether the underlying misconduct involved the manipulation of corporate books and records or involved an inadequate compliance program or internal controls, and the pervasiveness of the misconduct across the organization or involvement of senior management in the misconduct;
- whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal controls;
- changes in corporate leadership and/or culture since the misconduct;
- whether adequate remedial measures have been taken to address problem behavior by management, employees, or third-parties, including whether business relationships and practices that contributed to the misconduct have been terminated;
- extent to which remedial improvements to the compliance program and internal controls have been tested for prevention or detection of similar future misconduct; and
- costs of imposing a monitorship, and whether the proposed scope of the monitorship is appropriately tailored to avoid unnecessary burdens to the business's operations.

*Id.*

[5] *Id.*