

163. SELECTION AND USE OF MONITORS IN DEFERRED PROSECUTION AGREEMENTS AND NON-PROSECUTION AGREEMENTS WITH CORPORATIONS

Note. This Memorandum was modified in 2010 by Criminal Resource Manual 166 (the "Grindler Memorandum").

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MEMORANDUM FOR HEADS OF DEPARTMENT COMPONENTS
UNITED STATES ATTORNEYS

FROM: Craig S. Morford
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SUBJECT: Selection and Use of Monitors in Deferred Prosecution Agreements
and Non-Prosecution Agreements with Corporations[FN1]

INTRODUCTION

The Department of Justice's commitment to deterring and preventing corporate crime remains a high priority. The Principles of Federal Prosecution of Business Organizations set forth guidance to federal prosecutors regarding charges against corporations. A careful consideration of those principles and the facts in a given case may result in a decision to negotiate an agreement to resolve a criminal case against a corporation without a formal conviction—either a deferred prosecution agreement or a non-prosecution agreement.[FN2] As part of some negotiated corporate agreements, there have been provisions pertaining to an independent corporate monitor.[FN3] The corporation benefits from expertise in the area of corporate compliance from an independent third party. The corporation, its shareholders, employees and the public at large then benefit from reduced recidivism of corporate crime and the protection of the integrity of the marketplace.

The purpose of this memorandum is to present a series of principles for drafting provisions pertaining to the use of monitors in connection with deferred prosecution and non-prosecution agreements (hereafter referred to collectively as "agreements") with corporations.[FN4] Given the varying facts and circumstances of each case—where different industries, corporate size and structure, and other considerations may be at issue—any guidance regarding monitors must be practical and flexible. This guidance is limited to monitors, and does not apply to third parties, whatever their titles, retained to act as receivers, trustees, or perform other functions.

A monitor's primary responsibility is to assess and monitor a corporation's compliance with the terms of the agreement specifically designed to address and reduce the risk of recurrence of the corporation's misconduct, and not to further punitive goals. A monitor should only be used where appropriate given the facts and circumstances of a particular matter. For example, it may be appropriate to use a monitor where a company does not have an effective internal compliance program, or where it needs to establish necessary internal controls. Conversely, in a situation where a company has ceased operations in the area where the criminal misconduct occurred, a monitor may not be necessary.

In negotiating agreements with corporations, prosecutors should be mindful of both: (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. Prosecutors shall, at a minimum, notify the appropriate United States Attorney or Department Component Head prior to the execution of an agreement that includes a corporate monitor. The appropriate United States Attorney or Department Component Head shall, in turn, provide a copy of the agreement to the Assistant Attorney General for the Criminal Division at a reasonable time after it has been executed. The Assistant Attorney General for the Criminal Division shall maintain a record of all such agreements.

This memorandum does not address all provisions concerning monitors that have been included or could appropriately be included in agreements. Rather this memorandum sets forth nine basic principles in the areas of selection, scope of duties, and duration.

This memorandum provides only internal Department of Justice guidance. In addition, this memorandum applies only to criminal matters and does not apply to agencies other than the Department of Justice. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

SELECTION

1. Principle: Before beginning the process of selecting a monitor in connection with deferred prosecution agreements and non-prosecution agreements, the corporation and the Government should discuss the necessary qualifications for a monitor based on the facts and circumstances of the case. The monitor must be selected based on the merits. The selection process must, at a minimum, be designed to: (1) select a highly qualified and respected person or entity based on suitability for the assignment and all of the circumstances; (2) avoid potential and actual conflicts of interests, and (3) otherwise instill public confidence by implementing the steps set forth in this Principle.

To avoid a conflict, first, Government attorneys who participate in the process of selecting a monitor shall be mindful of their obligation to comply with the conflict-of-interest guidelines set forth in 18 U.S.C. § 208 and 5 C.F.R. Part 2635. Second, the Government shall create a standing or *ad hoc* committee in the Department component or office where the case originated to consider monitor candidates. United States Attorneys and Assistant Attorneys General may not make, accept, or veto the selection of monitor candidates unilaterally. Third, the Office of the Deputy Attorney General must approve the monitor. Fourth, the Government should decline to accept a monitor if he or she has an interest in, or relationship with, the corporation or its employees, officers or directors that would cause a reasonable person to question the monitor's impartiality. Finally, the Government should obtain a commitment from the corporation that it will not employ or be affiliated with the monitor for a period of not less than one year from the date the monitorship is terminated.

Comment: Because a monitor's role may vary based on the facts of each case and the entity involved, there is no one method of selection that should necessarily be used in every instance. For example, the corporation may select a monitor candidate, with the Government reserving the right to veto the proposed choice if the monitor is unacceptable. In other cases, the facts may require the Government to play a greater role in selecting the monitor. Whatever method is used, the Government should determine what selection process is most effective as early in the negotiations as possible, and endeavor to ensure that the process is designed to produce a high-quality and conflict-free monitor and to instill public confidence. If the Government determines that participation in the selection process by any Government personnel creates, or appears to create, a potential or actual conflict in violation of 18 U.S.C. § 208 and 5 C.F.R. Part 2635, the

Government must proceed as in other matters where recusal issues arise. In all cases, the Government must submit the proposed monitor to the Office of the Deputy Attorney General for review and approval before the monitorship is established.

Ordinarily, the Government and the corporation should discuss what role the monitor will play and what qualities, expertise, and skills the monitor should have. While attorneys, including but not limited to former Government attorneys, may have certain skills that qualify them to function effectively as a monitor, other individuals, such as accountants, technical or scientific experts, and compliance experts, may have skills that are more appropriate to the tasks contemplated in a given agreement.

Subsequent employment or retention of the monitor by the corporation after the monitorship period concludes may raise concerns about both the appearance of a conflict of interest and the effectiveness of the monitor during the monitorship, particularly with regard to the disclosure of possible new misconduct. Such employment includes both direct and indirect, or subcontracted, relationships.

Each United States Attorney's Office and Department component shall create a standing or *ad hoc* committee ("Committee") of prosecutors to consider the selection or veto, as appropriate, of monitor candidates. The Committee should, at a minimum, include the office ethics advisor, the Criminal Chief of the United States Attorney's Office or relevant Section Chief of the Department component, and at least one other experienced prosecutor.

Where practicable, the corporation, the Government, or both parties, depending on the selection process being used, should consider a pool of at least three qualified monitor candidates. Where the selection process calls for the corporation to choose the monitor at the outset, the corporation should submit its choice from among the pool of candidates to the Government. Where the selection process calls for the Government to play a greater role in selecting the monitor, the Government should, where practicable, identify at least three acceptable monitors from the pool of candidates, and the corporation shall choose from that list.

SCOPE OF DUTIES

A. INDEPENDENCE

2. Principle: A monitor is an independent third-party, not an employee or agent of the corporation or of the Government.

Comment: A monitor by definition is distinct and independent from the directors, officers, employees, and other representatives of the corporation. The monitor is not the corporation's attorney. Accordingly, the corporation may not seek to obtain or obtain legal advice from the monitor. Conversely, a monitor also is not an agent or employee of the Government.

While a monitor is independent both from the corporation and the Government, there should be open dialogue among the corporation, the Government and the monitor throughout the duration of the agreement.

B. MONITORING COMPLIANCE WITH THE AGREEMENT

3. Principle: A monitor's primary responsibility should be to assess and monitor a corporation's compliance with those terms of the agreement that are specifically designed to address and reduce the risk of recurrence of the corporation's misconduct, including, in most cases, evaluating (and where appropriate proposing) internal controls and corporate ethics and compliance programs.

Comment: At the corporate level, there may be a variety of causes of criminal misconduct, including but not limited to the failure of internal controls or ethics and compliance programs to prevent, detect, and respond to such misconduct. A monitor's primary role is to evaluate whether a corporation has both adopted and effectively implemented ethics and compliance programs to address and reduce the risk of recurrence of the corporation's misconduct. A well-designed ethics and compliance program that is not effectively implemented will fail to lower the risk of recidivism.

A monitor is not responsible to the corporation's shareholders. Therefore, from a corporate governance standpoint, responsibility for designing an ethics and compliance program that will prevent misconduct should remain with the corporation, subject to the monitor's input, evaluation and recommendations.

4. Principle: In carrying out his or her duties, a monitor will often need to understand the full scope of the corporation's misconduct covered by the agreement, but the monitor's responsibilities should be no broader than necessary to address and reduce the risk of recurrence of the corporation's misconduct.

Comment: The scope of a monitor's duties should be tailored to the facts of each case to address and reduce the risk of recurrence of the corporation's misconduct. Among other things, focusing the monitor's duties on these tasks may serve to calibrate the expense of the monitorship to the failure that gave rise to the misconduct the agreement covers.

Neither the corporation nor the public benefits from employing a monitor whose role is too narrowly defined (and, therefore, prevents the monitor from effectively evaluating the reforms intended by the parties) or too broadly defined (and, therefore, results in the monitor engaging in activities that fail to facilitate the corporation's implementation of the reforms intended by the parties).

The monitor's mandate is not to investigate historical misconduct. Nevertheless, in appropriate circumstances, an understanding of historical misconduct may inform a monitor's evaluation of the effectiveness of the corporation's compliance with the agreement.

C. COMMUNICATIONS AND RECOMMENDATIONS BY THE MONITOR

5. Principle: Communication among the Government, the corporation and the monitor is in the interest of all the parties. Depending on the facts and circumstances, it may be appropriate for the monitor to make periodic written reports to both the Government and the corporation.

Comment: A monitor generally works closely with a corporation and communicates with a corporation on a regular basis in the course of his or her duties. The monitor must also have the discretion to communicate with the Government as he or she deems appropriate. For example, a monitor should be free to discuss with the Government the progress of, as well as issues arising from, the drafting and implementation of an ethics and compliance program. Depending on the facts and circumstances, it may be appropriate for the monitor to make periodic written reports to both the Government and the corporation regarding, among other things: (1) the monitor's activities; (2) whether the corporation is complying with the terms of the agreement; and (3) any changes that are necessary to foster the corporation's compliance with the terms of the agreement.

6. Principle: If the corporation chooses not to adopt recommendations made by the monitor within a reasonable time, either the monitor or the corporation, or both, should report that fact to the Government, along with the corporation's reasons. The Government may consider this conduct when evaluating whether the corporation has fulfilled its obligations under the agreement.

Comment: The corporation and its officers and directors are ultimately responsible for the ethical and legal operations of the corporation. Therefore, the corporation should evaluate whether to adopt recommendations made by the monitor. If the corporation declines to adopt a recommendation by the monitor, the Government should consider both the monitor's recommendation and the corporation's reasons in determining whether the corporation is complying with the agreement. A flexible timetable should be established to ensure that both a monitor's recommendations and the corporation's decision to adopt or reject them are made well before the expiration of the agreement.

D. REPORTING OF PREVIOUSLY UNDISCLOSED OR NEW MISCONDUCT

7. Principle: The agreement should clearly identify any types of previously undisclosed or new misconduct that the monitor will be required to report directly to the Government. The agreement should also provide that as to evidence of other such misconduct, the monitor will have the discretion to report this misconduct to the Government or the corporation or both.

Comment: As a general rule, timely and open communication between and among the corporation, the Government and the monitor regarding allegations of misconduct will facilitate the review of the misconduct and formulation of an appropriate response to it. The agreement may set forth certain types of previously undisclosed or new misconduct that the monitor will be required to report directly to the Government. Additionally, in some instances, the monitor should immediately report other such misconduct directly to the Government and not to the corporation. The presence of any of the following factors militates in favor of reporting such misconduct directly to the Government and not to the corporation, namely, where the misconduct: (1) poses a risk to public health or safety or the environment; (2) involves senior management of the corporation; (3) involves obstruction of justice; (4) involves criminal activity which the Government has the opportunity to investigate proactively and/or covertly; or (5) otherwise poses a substantial risk of harm. On the other hand, in instances where the allegations of such misconduct are not credible or involve actions of individuals outside the scope of the corporation's business, the monitor may decide, in the exercise of his or her discretion, that the allegations need not be reported directly to the Government.

DURATION

8. Principle: The duration of the agreement should be tailored to the problems that have been found to exist and the types of remedial measures needed for the monitor to satisfy his or her mandate.

Comment: The following criteria should be considered when negotiating duration of the agreement (not necessarily in this order): (1) the nature and seriousness of the underlying misconduct; (2) the pervasiveness and duration of misconduct within the corporation, including the complicity or involvement of senior management; (3) the corporation's history of similar misconduct; (4) the nature of the corporate culture; (5) the scale and complexity of any remedial measures contemplated by the agreement, including the size of the entity or business unit at issue; and (6) the stage of design and implementation of remedial measures when the monitorship commences. It is reasonable to forecast that completing an assessment of more extensive and/or complex remedial measures will require a longer period of time than completing an assessment of less extensive and/or less complex ones. Similarly, it is reasonable to forecast that a monitor who is assigned responsibility to assess a compliance program that has not been designed or implemented may take longer to complete that assignment than one who is assigned responsibility to assess a compliance program that has already been designed and implemented.

9. Principle: In most cases, an agreement should provide for an extension of the monitor provision (s) at the discretion of the Government in the event that the corporation has not successfully satisfied its obligations under the agreement. Conversely, in most cases, an agreement should

provide for early termination if the corporation can demonstrate to the Government that there exists a change in circumstances sufficient to eliminate the need for a monitor.

Comment: If the corporation has not satisfied its obligations under the terms of the agreement at the time the monitorship ends, the corresponding risk of recidivism will not have been reduced and an extension of the monitor provision(s) may be appropriate. On the other hand, there are a number of changes in circumstances that could justify early termination of an agreement. For example, if a corporation ceased operations in the area that was the subject of the agreement, a monitor may no longer be necessary. Similarly, if a corporation is purchased by or merges with another entity that has an effective ethics and compliance program, it may be prudent to terminate a monitorship.

FN 1. As used in these Principles, the terms "corporate" and "corporation" refer to all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations.

FN 2. The terms "deferred prosecution agreement" and "non-prosecution agreement" have often been used loosely by prosecutors, defense counsel, courts and commentators. As the terms are used in these Principles, a deferred prosecution agreement is typically predicated upon the filing of a formal charging document by the government, and the agreement is filed with the appropriate court. In the non-prosecution agreement context, formal charges are not filed and the agreement is maintained by the parties rather than being filed with a court. Clear and consistent use of these terms will enable the Department to more effectively identify and share best practices and to track the use of such agreements. These Principles do not apply to plea agreements, which involve the formal conviction of a corporation in a court proceeding.

FN 3. Agreements use a variety of terms to describe the role referred to herein as "monitor," including consultants, experts, and others.

FN 4. In the case of deferred prosecution agreements filed with a court, these Principles must be applied with due regard for the appropriate role of the court and/or the probation office.

[added March 2008] [cited in [Criminal Resource Manual 166](#)]

◀ [162. Dual Prosecution \(Petite Policy\)](#)

[up](#)

[164. Nolo Contendere Plea](#) ▶

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