

166. ADDITIONAL GUIDANCE ON THE USE OF MONITORS IN DEFERRED PROSECUTION AGREEMENTS AND NON-PROSECUTION AGREEMENTS WITH CORPORATIONS

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SUBJECT: Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations

I. INTRODUCTION

On March 7, 2008, then-Acting Deputy Attorney General Craig S. Morford issued guidance relating to the use of independent corporate monitors in connection with deferred prosecution agreements and non-prosecution agreements (hereinafter referred to collectively as "agreements")^[FN1] with corporations. The Morford Memorandum set forth nine basic principles for drafting monitor-related provisions in agreements, but did not purport to address all provisions concerning monitors that could appropriately be included in agreements. The purpose of this memorandum is to supplement the guidance in the Morford Memorandum by adding a tenth basic principle to guide prosecutors in drafting agreements: namely, that an agreement should explain what role the Department could play in resolving any disputes between the monitor and the corporation, given the facts and circumstances of the case.

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.

II. ROLE OF THE DEPARTMENT IN RESOLVING DISPUTES

Principle: An agreement should explain what role the Department could play in resolving disputes that may arise between the monitor and the corporation, given the facts and circumstances of the case.

Comment: The adoption of this principle is based on the Department's experience with the use of corporate monitors over the last several years, including information developed during a United States Government Accountability Office ("GAO") audit of the Department's use of agreements.^[FN2] Clearly communicating to companies the role of the Department in addressing companies' disputes with monitors should better position the Department to be notified of potential issues relating to monitorships and monitor performance. Moreover, providing clarity as to the Department's role should help to instill public confidence in the Department's use of monitors, including the Department's mindfulness of the costs of a monitor and their impact on a corporation's operations, as well as the accountability of monitors in performing their duties.

In applying this principle, prosecutors should keep in mind the following considerations. First, the role that the Department plays in resolving particular types of disputes should be consistent with the fact that the Department is not a party to the contract between the company and the monitor. Accordingly, the dispute

resolution language should not imply that the Department will arbitrate contractual disputes between the company and the monitor. Second, the Department's role in resolving disputes generally should be limited to questions relating to whether the company has complied with the terms of the agreement.. Third, the Department's appropriate role in resolving disputes will depend on the public and law enforcement interests implicated by the dispute. For example, it generally would be more appropriate for the Department to be involved in resolving a dispute over whether a company should adopt a particular compliance program enhancement recommended by the monitor or whether the company or the monitor is fulfilling its responsibilities under the agreement than a dispute over an issue that has no corporate compliance or other law enforcement implications.

The specific provisions included in agreements will depend on the facts and circumstances of the case and the monitor's specific responsibilities. In certain cases, the Department has included provisions relating to dispute resolution with a corporate monitor. Prosecutors should make clear when including such language in an agreement or when communicating with a company about the Department's role in resolving disputes that such concerns should be raised in the first instance with the United States Attorney's Office or the Department Component that has been handling the case. In applying the principle set forth in this memorandum, prosecutors should consider whether language along the lines of the following provisions or similar language would appropriately be included in agreements:

- With respect to any Monitor recommendation that the company considers unduly burdensome, impracticable, an unduly expensive, or otherwise inadvisable, the company need not adopt the recommendation immediately; instead, the company may propose in writing an alternative policy, procedure, or system designed to achieve the same objective or purpose. As to any recommendation on which the company and the Monitor ultimately do not agree, the views of the company and the Monitor shall promptly be brought to the attention of the Department. The Department may consider the Monitor's recommendation and the company's reasons for not adopting the recommendation in determining whether the company has fully complied with its obligations under the Agreement.
- At least annually, and more frequently if appropriate, representatives of the company and the Department will meet together to discuss the monitorship and any suggestion, comments, or improvements the company may wish to discuss with or propose to the Department, including with respect to the scope or costs of the monitorship.

FN 1. Unless otherwise specified, the terms used herein have the same meaning as in the Morford Memorandum.

FN 2. See GAO report entitled, "Prosecutors Adhered to Guidance in Selecting Monitors for Deferred Prosecution and Non-Prosecution Agreements, but DOJ Could Better Communicate Its Role in Resolving Conflicts" (Nov. 19, 2009). The GAO report noted that most of the companies that had retained corporate monitors that it surveyed were unclear as to how the Department could help address their concerns over how the monitors were performing their responsibilities or the cost of the monitorships.

[added March 2008] [cited in Criminal Resource Manual 163]

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