

Memorandum



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| Subject | Selection of Monitors in Antitrust Division Criminal Cases | Date | March 1, 2023 |
| To | Criminal Staff Antitrust Division | From | Emma M. Burnham Acting Director of Criminal Enforcement |

The following establishes a policy and procedure for the selection of monitors in Antitrust Division criminal matters.¹ This memorandum applies to cases in which the Antitrust Division is responsible for selecting a monitor or recommending a candidate for selection to the court or Probation Office.

In cases in which the Antitrust Division recommends or requires an external monitor, staff should consult Department guidance, including the [Criminal Resource Manual 163](#) and [166](#) and “Further Revisions to Corporate Criminal Enforcement Policies Following Discussion with Corporate Crime Advisory Group,” issued by Deputy Attorney General Lisa O. Monaco in September 2022.

A monitor should be selected based on the unique facts and circumstances of each matter. Monitors are to be chosen based on the merits of the individual candidate. The selection process should: (i) instill public confidence in the process; (ii) reflect the Department’s commitment to diversity, equity, inclusion, and accessibility; (iii) result in the selection of a highly qualified person or entity, free of any actual or potential conflict of interest or appearance of a potential or actual conflict of interest; and (iv) be suitable for the assignment at hand.

Each Antitrust Division attorney involved in the monitor selection process should be aware of and abide by the conflict of interest guidelines set forth in 18 U.S.C. § 208, 5 C.F.R. Part 2635, and 28 C.F.R. Part 45 in the selection of the candidate.

A. Nomination of Monitor Candidates

Candidates should be proposed to the Antitrust Division consistent with the agreement between the parties and/or as ordered by the court. The business organization that is the subject of the monitorship (“the company”) should propose three candidates and provide, at a minimum, the following:

¹ The contents of this memorandum provide internal guidance to Antitrust Division attorneys. Nothing in it is intended to create any substantive or procedural rights, privileges, or benefits enforceable in any administrative, civil, or criminal matter by prospective or actual witnesses or parties. This memorandum supersedes the July 2019 Antitrust Division memorandum on monitor selection.

- a description of each candidate's qualifications and credentials;
- a written certification by the company that it will not employ or be affiliated with the monitor, the monitor's firm, or other professionals who are part of the monitorship team during the term of the monitorship and for a period of time, as specified in the agreement (typically two years unless circumstances warrant a different time period) or as ordered by the court, from the date of termination of the monitorship; and
- a written certification by each of the candidates (and the candidates' teams, where applicable) that they have no conflict of interest that would prevent them from accepting the monitorship and that they are not an employee or agent of the company and hold no interest in, and have no relationship with, the company, its subsidiaries, affiliates or related entities, or its employees, officers, or directors or outside counsel retained in the matter at issue in the monitorship.

B. Initial Review of Monitor Candidates

Once the materials described above have been received, staff should promptly interview each monitor candidate to assess his or her qualifications, credentials, and suitability for the assignment (and those of their team, where applicable) and, in conducting a review, should consider the following factors:

- each monitor candidate's general background, education and training, professional experience, professional commendations and honors, licensing, reputation in the relevant professional community, and past experience as a monitor;
- each monitor candidate's experience and expertise with the particular area(s) at issue in the case under consideration;
- each monitor candidate's degree of objectivity and independence from the company so as to ensure effective and impartial performance of the monitor's duties;
- the adequacy and sufficiency of each monitor candidate's resources to discharge the monitor's responsibilities effectively; and
- any other factor determined by staff, and by the circumstances, to relate to the qualifications, competency, and independence of each monitor candidate as they may correlate to the tasks required by the monitor agreement and nature of the business organization to be monitored.

After staff has completed the initial review of monitor candidates, staff should decide whether one of the candidates is acceptable. If any or all of the candidates are not acceptable, staff should notify the company and request replacement candidate(s), consistent with the agreement between the parties and/or as ordered by the court.

C. Preparation of a Monitor Selection Memorandum

Once the attorneys handling the matter accept and recommend a candidate, the selection process should be referred to a committee comprised of (1) the Criminal DAAG, or his or her designee; (2) the chief of the relevant office where the case is pending, or his or her designee; and (3) the Antitrust Division's Ethics Officer ("the Committee"). The memorandum should contain, at a minimum, the following information:

- a brief statement of the underlying case, disposition, and charges filed;
- an explanation as to why it was determined that a monitor is required in the case, based on the considerations set forth in this memorandum;
- a summary of the responsibilities of the monitor and his or her term;
- a description of the process used to select the candidate;
- a description of the candidate's qualifications (and those of their team, if applicable), and why the selected candidate is being recommended;
- a description of the countervailing considerations, if any, in selecting the candidate;
- a description of the other candidates put forward for consideration by the Company; and
- a signed certification by each of the Antitrust Division attorneys involved in the monitor selection process certifying that he or she has complied with the conflict of interest guidelines set forth in 18 U.S.C. § 208, 5 C.F.R. Part 2635, and 28 C.F.R. Part 45 in the selection of the candidate.

If the Antitrust Division determines that a departure from the process described in this memorandum is warranted, the Committee should document and approve that departure in writing. Any substitute process that departs from the process set forth in this policy must incorporate and apply the same principles of transparency, predictability, and consistency, as set forth in "Further Revisions to Corporate Criminal Enforcement Policies Following Discussion with Corporate Crime Advisory Group."

D. Committee Review of a Monitor Candidate

The Committee should review the recommendation set forth in the Monitor Selection Memorandum and vote on whether or not to accept the recommendation. In the course of making its decision, the Committee may, in its discretion, interview the candidate. If the Committee accepts the candidate, it should note its recommendation in writing on the Monitor Selection Memorandum and forward the memorandum to the Assistant Attorney General for the Antitrust Division for ultimate submission to the Office of the Deputy Attorney General ("ODAG"). The Committee's recommendation should also include a written certification by the Antitrust Division's Ethics Officer that the candidate has submitted a written conflict of interest certification and meets the ethical requirements for selection as a monitor, that the selection process utilized in approving the candidate was proper, and that the Antitrust Division attorneys involved in the

process acted in compliance with the conflict of interest guidelines set forth in 18 U.S.C. § 208, 5 C.F.R. Part 2635, and 28 C.F.R. Part 45.

If the Committee rejects the candidate, it should so inform the Antitrust Division attorneys handling the matter who, in turn, should notify the company and request that the company propose a new monitor candidate or candidates as provided in the agreement and/or as ordered by the court.

E. Review by the Assistant Attorney General

The Assistant Attorney General for the Antitrust Division (the “AAG”) may not unilaterally accept or reject a monitor candidate. However, the AAG should review the recommendation of the Committee set forth in the Monitor Selection Memorandum. In the course of doing so, the AAG may, in his or her discretion, request additional information from the Committee and/or the staff handling the matter. The AAG should note his or her concurrence or disagreement with the proposed candidate on the Monitor Selection Memorandum and forward the Monitor Selection Memorandum to the ODAG.

F. Approval of the ODAG

The monitor candidate must be approved by the ODAG.

Upon receipt of the decision of the ODAG regarding the proposed monitor, the Antitrust Division attorneys handling the matter should communicate the decision to the company. If the ODAG does not approve the proposed monitor, the attorneys handling the matter should notify the company and request that the company propose a new candidate or candidates, as provided in the agreement and/or as ordered by the court. If the ODAG approves the proposed candidate, the attorneys handling the matter should notify the company, the Probation Office, and the court of the candidate’s selection or recommendation.

Staff handling the matter should retain a copy of the Monitor Selection Memorandum, including attachments and documents reflecting the approval or disapproval of a candidate, in the case file for the matter.
