

SUPPLEMENTAL APPENDIX 3



U.S. Department of Justice


Criminal Division

Office of the Assistant Attorney General

Washington, D.C. 20530

June 24, 2009

TO: All Criminal Division Personnel

FROM: Lanny A. Breuer 
Assistant Attorney General

SUBJECT: Selection of Monitors in Criminal Division Matters

The purpose of this memorandum is to establish policy and procedure for the selection of monitors in matters being handled by Criminal Division attorneys. This memorandum supplements the guidance provided by the memorandum entitled, "Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations," issued by then-Acting Deputy Attorney General, Craig S. Morford (hereinafter referred to as the "Morford Memorandum" or "Memorandum").¹ The policy and procedure contained in this memorandum shall apply to any deferred prosecution agreement ("DPA") and/or non-prosecution agreement ("NPA") between the Criminal Division and a business organization which requires the retention of a monitor.²

A. Terms of the Agreement: As a preliminary matter, any DPA or NPA between the Criminal Division and a business organization which requires the retention of a monitor (hereinafter referred to as the "Agreement"), should contain the following:

1. A description of what the monitor's qualifications should be;
2. A statement that the parties will endeavor to complete the monitor selection process within sixty (60) days of the execution of the underlying agreement; and
3. An explanation of the responsibilities of the monitor; and
4. The term of the monitorship.

¹ The Morford Memorandum requires each Department component to "create a standing or ad hoc committee...of prosecutors to consider the selection or veto, as appropriate, of monitor candidates." The Memorandum also requires that the Committee include an ethics advisor, the Section Chief of the involved Department component and one other experienced prosecutor.

² The contents of this memorandum provide internal guidance to Criminal Division attorneys on legal issues. 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.

B. Standing Committee on the Selection of Monitors: The Criminal Division shall create a Standing Committee on the Selection of Monitors (the “Standing Committee”).

1. Composition of the Standing Committee: The Standing Committee shall comprise: (1) the Deputy Assistant Attorney General (“DAAG”) with supervisory responsibility for the Fraud Section, or his or her designee;³ (2) the Chief of the Fraud Section, or his or her designee; (3) the Chief of the relevant Section entering into the Agreement;⁴ and (4) the Deputy Designated Agency Ethics Official for the Criminal Division.⁵ Should further replacements not contemplated by this paragraph be necessary for a particular case, the DAAG with supervisory responsibility for the Fraud Section will appoint any temporary, additional member of the Standing Committee for the particular case.

The DAAG with supervisory authority over the Fraud Section, or his or her designee, shall be the Chair of the Standing Committee, and shall be responsible for ensuring that the Standing Committee discharges its responsibilities.

All Criminal Division employees involved in the selection process, including Standing Committee Members, should be mindful of their obligations to comply with the conflict-of-interest guidelines set forth in 18 U.S.C. Section 208, 5 C.F.R. Part 2635 (financial interest), and 28 C.F.R. Part 45.2 (personal or political relationship).

2. Convening the Standing Committee: The Chief of the relevant Section entering into the Agreement should notify the Chair of the Standing Committee as soon as practicable that the Standing Committee will need to convene. Notice should be provided as soon as an agreement in principle has been reached between the government and the business organization that is the subject of the Agreement (hereinafter referred to as the “Company”), but not later than the date the Agreement is executed. The Chair will arrange to convene the Standing Committee meeting as early as practicable, identify the Standing Committee participants for that case, and ensure that there are no conflicts among the Standing Committee Members.

C. The Selection Process: As set forth in the Morford Memorandum, a monitor must be selected based on the unique facts and circumstances of each matter and the merits of the individual candidate. Accordingly, the selection process should: (i) instill public confidence in the process and (ii) result in the selection of a highly qualified person or entity, free of the any actual or potential conflict of interest or appearance of a potential or actual conflict of interest, and suitable for the assignment at hand. To meet those objectives, the Criminal Division should employ the following procedure in selecting a monitor:

³ Should the DAAG be recused from a particular case, the Assistant Attorney General will appoint a representative to fill the DAAG’s position on the Standing Committee.

⁴ Should the Chief of the Section be recused from a particular case, he/she will be replaced by the Principal Deputy Chief or Deputy Chief with supervisory responsibility over the matter.

⁵ Should the Deputy Designated Agency Ethics Official for the Criminal Division be recused from a particular case, he/she will be replaced by the Alternate Deputy Designated Agency Ethics Official for the Criminal Division or his or her designee.

1. Nomination of Monitor Candidates: At the outset of the monitor selection process, counsel for the Company should be advised by the Criminal Division attorneys handling the matter to recommend a pool of three qualified monitor candidates.⁶ Within at least (20) business days after the execution of the Agreement, the Company should submit a written proposal identifying the monitor candidates, and, at a minimum, providing the following:

- a. a description of each candidate's qualifications and credentials in support of the evaluative considerations and factors listed below;
- b. a written certification by the Company that it will not employ or be affiliated with the monitor for a period of not less than one year from the date the termination of the monitorship; and
- c. a written certification by each of the candidates that he/she is not an employee or agent of the corporation and holds no interest in, and has no relationship with, the corporation, its subsidiaries, affiliates or related entities, or its employees, officers, or directors.

2. Initial Review of Monitor Candidates: The Criminal Division attorneys handling the matter should promptly interview each monitor candidate to assess his/her qualifications, credentials and suitability for the assignment and, in conducting a review, should consider the following factors:

- a. 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;
- b. each monitor candidate's experience with the particular area(s) at issue in the case under consideration, and experience in applying the particular area(s) at issue in an organizational setting;
- c. 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;
- d. the adequacy and sufficiency of each monitor candidate's resources to discharge the monitor's responsibilities effectively; and
- e. any other factor determined by the Criminal Division attorneys, and by the circumstances, to relate to the qualifications and competency 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 the attorneys handling the matter have completed the initial review of monitor candidates and conferred with their supervisors, they should decide whether one of the monitor

⁶ The Company may express a preference and/or identify the monitor candidate among the pool that is its first choice to serve as the monitor.

candidates is acceptable. If they decide to reject all three candidates, they should notify the Company and request that counsel for the Company propose another candidate or candidates within twenty (20) business days.⁷ This process should continue until the attorneys handling the matter have voted to accept and recommend a monitor candidate.

3. Preparation of a Monitor Selection Memorandum: Once the attorneys handling the matter and their supervisors accept and recommend a candidate, the selection process should be referred to the Standing Committee. The attorneys handling the matter should prepare a written memorandum to the Standing Committee, in the format attached hereto. The memorandum should contain the following information:

- a. a brief statement of the underlying case;
- b. a description of the proposed disposition of the case, including the charges filed (if any);
- c. an explanation as to why a monitor is required in the case;
- d. a summary of the responsibilities of the monitor, and his/her term;
- e. a description of the process used to select the candidate;
- f. a description of the candidate's qualifications;
- g. a description of countervailing considerations, if any, in selecting the candidate; and
- h. a signed certification, on the form attached hereto, by each of the Criminal Division attorneys involved in the monitor selection process that he or she has complied with the conflicts-of-interest guidelines set forth in 18 U.S.C. Section 208, 5 C.F.R. Part 2635, and 28 C.F.R. Part 45 in the selection of the candidate.

Copies of the Agreement and any other relevant documents reflecting the disposition of the matter must be attached to the Monitor Selection Memorandum and provided to the Standing Committee.

4. Standing Committee Review of a Monitor Candidate: The Standing Committee should review the recommendation set forth in the Monitor Selection Memorandum and vote whether or not to accept the recommendation. In the course of making its decision, the Standing Committee may, in its discretion, interview the candidate.

⁷ A Company may be granted a reasonable extension of time to propose an additional candidate or candidates if the attorneys handling the matter believe circumstances warrant an extension. The attorneys handling the matter should advise the Standing Committee of the extension. If the attorneys handling the matter determine that the Company has not proposed acceptable candidates, consistent with the guidance provided herein, then the attorneys may evaluate alternative candidates that they identify and provide a list of such candidates to the Company for consideration.

If the Standing 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 Criminal Division for ultimate submission to the Office of the Deputy Attorney General (“ODAG”). The Standing Committee’s recommendation should also include a written certification by the Deputy Designated Agency Ethics Official for the Criminal Division that the candidate meets the ethical requirements for selection as a monitor, that the selection process utilized in approving the candidate was proper, and that the Government attorneys involved in the process acted in compliance with the conflict-of-interest guidelines set forth in 18 U.S.C. Section 208, 5 C.F.R. Part 2635, and 28 C.F.R. Part 45.

If the Standing Committee rejects the candidate, it should so inform the Criminal Division attorneys handling the matter and their supervisors who, in turn, should notify the Company and request that the Company propose a new monitor candidate or candidates as provided by paragraph C above. The Standing Committee also should return the Monitor Selection Memorandum and all attachments to the attorneys handling the matter.

If the Standing Committee is unable to reach a majority decision (*i.e.* there is a tie) regarding the proposed monitor candidate, the Standing Committee should so indicate on the Monitor Selection Memorandum and forward the Memorandum and all attachments to the Assistant Attorney General for the Criminal Division.

5. Review by the Assistant Attorney General: The Assistant Attorney General for the Criminal Division (the “AAG”) may not unilaterally accept or reject a monitor candidate selected pursuant to a DPA or NPA. However, the AAG should review the recommendation of the Standing Committee set forth in the Monitor Selection Memorandum. In the course of doing so, the AAG may, in his/her discretion, request additional information from the Standing Committee and/or the Criminal Division attorneys handling the matter and their supervisors. 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 Office of the Deputy Attorney General (“ODAG”).

6. Approval of the Office of the Deputy Attorney General: All monitor candidates involving DPAs and NPAs must be approved by the ODAG.

Upon receipt of the decision of the ODAG regarding the proposed monitor, the Criminal 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 by paragraph C above. If the ODAG approves the proposed monitor, the attorneys handling the matter should notify the Company and the monitorship should be executed according to the terms of the Agreement.

D. Retention of Records Regarding Monitor Selection: It should be the responsibility of the attorneys handling the matter to ensure that a copy of the Monitor Selection

Memorandum, including attachments and documents reflecting the approval or disapproval of a candidate, is retained in the case file for the matter and that a second copy is provided to the Chair of the Standing Committee.⁸

The Chair of the Standing Committee should obtain and maintain an electronic copy of every Agreement which provides for a monitor.

E. Departure from Policy and Procedure: Given the fact that each case presents unique facts and circumstances, the monitor selection process must be practical and flexible. When the Criminal Division attorneys handling the case at issue conclude that the monitor selection process should be different from the process described herein, the departure should be discussed and approved by the Standing Committee. The Standing Committee can request additional information and/or a written request for a departure.⁹

⁸ Note that pursuant to the memorandum entitled "Retention of Corporate Deferred Prosecution Agreements and Non-Prosecution Agreements," (January 15, 2009) all DPAs and NPAs must also be electronically sent to CorporateAgreements@usdoj.gov.

⁹ A court may also modify the monitor selection process in cases where the Agreement is filed with a court.



U.S. Department of Justice
Criminal Division

CONFIDENTIAL

MEMORANDUM

To: Criminal Division Monitor Selection Standing Committee

From:

Date:

Re:

INTRODUCTION

- I. Brief Statement of the Underlying Case**
- II. Proposed Disposition of the Case**
- III. Necessity of a Monitor in this Case**
- IV. Summary of Responsibilities and Term of Monitor**
- V. Process Used to Select the Candidate**

E.g., Company X proposed three proposed monitor candidates. On __ dates, the trial attorneys interviewed the candidates. Based on the qualifications of ____, and the interview with ____, the trial attorneys/ Section recommend(s) him/ her as the monitor.

- VI. Description of the Candidate's Qualifications**

Can provide a brief description along with a resume or CV.

- VII. Countervailing Considerations**

**Department of Justice Attorney Certification Concerning
Compliance with Conflict of Interest Guidelines
In Monitor Selection Matters**

Monitor Selection Name

18 U.S.C. § 208 is a criminal conflict of interest statute that prohibits me from participating personally and substantially in an official capacity in any particular matter in which I have a financial interest, or in which certain persons or organizations whose interests are imputed to me have a financial interest, if the particular matter will have a direct and predictable effect on that interest. This statute is in addition to any state bar professional conduct rules that may apply.

With regard to the selection of monitors in Criminal Division matters:

I understand that my involvement in the selection of the above-referenced monitor is *personal and substantial participation in a particular matter*.

I understand that *financial interest* is the potential for gain or loss as a result of governmental action and that such interests typically arise through ownership of stocks or sectored mutual funds, outside activities/employment, and spousal employment.

I understand that those *interests imputed to me* include those of my spouse, domestic partner, minor children, general partners, any organization in which I serve as officer, director, trustee, general partner or employee, and any person or organization with whom I am negotiating for or have any arrangement concerning prospective employment.

I understand that a direct and predictable effect occurs when there is a close causal relationship between the selection of the monitor and my financial interest or the financial interest held by someone whose interests are imputed to me. The effect maybe positive or negative. The magnitude of the gain or loss is immaterial.

I certify that, to the best of my knowledge, the selection of the above-named monitor, will not directly and predictably affect my financial interests or those interests imputed to me and my participation in this matter will not violate 18 U.S.C. Section 208.

5 C.F.R. § 2635.502, the impartiality rule, prohibits me from participating in a specific party matter that I know is likely to affect the *financial interests of a member of my household* or in which someone with whom I have a *covered relationship* is or represents a party.

I understand that I have a covered relationship with the following: anyone with whom I have or seek a business, contractual, or financial relationship; a relative with whom I have a close personal relationship; anyone for whom my spouse, domestic partner, parent, or dependent child serves or seeks to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee; anyone for whom I worked in the last year as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee; and an organization in which I am an active member.

I certify that, to the best of my knowledge, my involvement in the selection of the above-named monitor is not likely to affect the financial interest of a member of my household, and no one with whom I have a covered relationship is or represents a party in this matter. My participation will not violate 5 C.F.R. § 2635.502.

28 C.F.R. § 45.2 prohibits me, without written authorization, from participating in a criminal investigation or prosecution if I have a *personal or political relationship* with any person or organization substantially involved in the conduct that is the subject of the investigation or prosecution, or any person or organization which I know has a specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution.

I understand that I have a political relationship with any of the following with whom I have a close identification: an elected official, a candidate for elective public office, a political party, or a campaign organization, arising from service as a principal adviser thereto or a principal official thereof.

I understand that I have a personal relationship with anyone with whom I have a close and substantial connection of the type normally viewed as likely to induce partiality.

I have disclosed to the Deputy Designated Agency Ethics Official for the Criminal Division any relationship(s) I have or had with the monitor selected. To the extent any relationship(s) exist, I have attached a statement hereto either describing said relationship(s) or a statement that I have discussed the matter with the Deputy Designated Agency Ethics Official for the Criminal Division and it has been determined that my participation does not violate 28 C.F.R. § 45.2.

I certify that to the best of my knowledge, that I do not have, nor have I had a personal or political relationship with the above-named monitor, or that, in accordance with 28 C.F.R. § 45.2 (b), any relationship with the monitor selected has been disclosed to my appropriate

supervisor and the Deputy Designated Agency Ethics Official for the Criminal Division and it has been determined that my participation in the selection of the above-named monitor does not violate 28 C.F.R. § 45.2.

I understand, acknowledge, and certify the above. I acknowledge my ongoing responsibility to be aware of the potential for conflict or the appearance of a conflict, and my responsibility to disclose, as soon as it is known to me, any financial or personal interests described above.

_____ Date _____
(Signed)

(Printed Name)

Each attorney assigned to the monitor selection must execute a separate certification. Attach the completed certification to the monitor selection memorandum.