



## U.S. Department of Justice

Civil Division  
Consumer Protection Branch

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### **Monitor Selection Policy** *February 2023*

#### **1. Applicability**

The following policy applies to Consumer Protection Branch (“CPB”) criminal corporate resolutions involving the use of an independent compliance monitor such as deferred prosecution agreements (“DPAs”) and non-prosecution agreements (“NPAs”).<sup>1</sup> The policy also applies to plea agreements so long as the court approves the plea agreement requiring the government to select the monitor.<sup>2</sup> This policy does not apply to civil corporate resolutions.

The monitor selection process will be consistent with the Department’s commitment to diversity, equity, inclusion, and accessibility, including as to the monitor and the team supporting the monitor.

#### **2. Standing Committee on the Selection of Monitors**

The Standing Committee for monitor selection for the Consumer Protection Branch consists of the following: (1) the Deputy Assistant Attorney General of the Consumer Protection Branch (the “DAAG”); (2) the Director of the Consumer Protection Branch (the “Director”); and (3) the designated Ethics Official for the Civil Division (“Ethics Official”). If any of these individuals are recused in a particular case, that person’s usual designee will take his or her place on the Standing Committee.

The DAAG is the Chair of the Standing Committee and is responsible for ensuring that the Standing Committee discharges its responsibilities.

All Civil 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. § 208, 5 C.F.R. Part 2635 (financial interest), and 28 C.F.R. Part 45.2 (personal or political relationship).

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<sup>1</sup> This policy provides internal guidance to Consumer Protection Branch and other Civil 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.

<sup>2</sup> If, however, a plea agreement calls for the District Court to appoint the independent compliance monitor, then only Sections 2 and 3 of the policy apply.

### **3. Notice of Monitorship**

When a case team determines a monitor is appropriate for a particular case, they should first gain approval from the case reviewer. The team must then gain concurrence from the Director and notify CPB's Corporate Compliance and Policy Unit ("CCP Unit") of the decision.

In advance of the agreement's effective date, the case team will also notify the CCP Unit of the anticipated effective date. The CCP Unit will, in turn, notify the Chair of the Standing Committee, who will arrange to convene the Standing Committee meeting as soon as practicable after receiving the Monitor Recommendation Memorandum described below and will ensure that there are no conflicts among the Standing Committee Members.

When the agreement is effective, the case team will forward a copy of the agreement, as filed (where applicable) and including all attachments, to the CCP Unit. The case team will also direct the business organization that is the subject of the agreement (the "Company") to communicate directly with the CCP Unit going forward concerning monitor selection.

### **4. Nomination of Monitor Candidates**

Within the time period set forth in the relevant Agreement, the Company shall submit a written proposal identifying three monitor candidates, and, at a minimum, providing the following:

- a description of each candidate's qualifications and credentials in support of the evaluative considerations and factors listed below (and those of their team, where applicable);
- 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 not less than two years from the date of the termination of the monitorship;
- a written certification by each of the candidates that they are not a current or recent (i.e., within the prior two years) employee, agent, or representative of the Company and holds no interest in, and has no relationship with, the Company, its parent company, subsidiaries, affiliates or related entities, as applicable, or its employees, officers, directors, or outside counsel retained in the matter at issue in the monitorship;
- a written certification by each of the candidates that they have notified any clients that the candidate represents in a matter involving CPB (or any other Department of Justice component) handling the monitor selection process, and that the candidate has either obtained a waiver from those clients or has withdrawn as counsel in the other matter(s); and

- a statement identifying the monitor candidate that is the Company's first, second, and third choice to serve as the monitor.

## **5. Evaluation of Monitor Candidates**

Upon receipt of the candidates and related required documentation, attorneys in the CCP Unit will interview each monitor candidate to assess his or her (and those of their team, where applicable) qualifications, credentials, and suitability for the monitorship based on the following factors:

- The candidate's general background, education and training, professional experience, relevant subject-matter experience, professional commendations and honors, licensing, and reputation in the relevant professional community (and those of their team, where applicable);
- The candidate's past experience as the relevant monitor type, including his or her experience and expertise with the particular area(s) at issue in the case and, where relevant, with applying the particular area(s) at issue in an organizational setting (and that of their team, where applicable);
- The 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 the candidate's resources (and that of their team, where applicable) to discharge the monitor's responsibilities effectively; and
- Any other factor determined by the CCP Unit, based on circumstances and in consultation with the case team, to relate to the qualifications, competency, and independence of the candidate as they may relate to the tasks required by the respective agreement and the nature of the Company's business organization.

The candidate evaluation process will continue according to the terms of the agreement until the CCP Unit concludes the company has provided a slate of qualified candidates. The CCP Unit, after consultation with the case team, will then select one candidate to recommend to the Standing Committee.

## **6. Monitor Recommendation Memorandum**

The CCP Unit will prepare a Monitor Recommendation Memorandum to refer the selected monitor candidate to the Standing Committee. The memorandum should contain the following information:

- A brief statement of the underlying case;

- A description of disposition of the case, including the charges filed (if any);
- An explanation as to why it was determined that a monitor is required in the case;
- 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 selected candidate's qualifications (and those of their team, if applicable), and why the selected candidate is being recommended; and
- A description of the other candidates put forward for consideration by the Company.

A copy of the related agreement and any other relevant documents reflecting the disposition of the matter (such as the Information) must accompany the memorandum.

## **7. Approval of Selected Candidate**

### **a. Standing Committee**

The Standing Committee will review the recommendation set forth in the Monitor Recommendation Memorandum and vote whether or not to accept the recommendation. As part of its review, the Standing Committee may request additional information from the CCP Unit or, in its discretion, conduct further due diligence of its own. If the Standing Committee accepts the recommended candidate, it will note its acceptance of the recommendation in writing on the Monitor Recommendation Memorandum and forward the memorandum to the Assistant Attorney General of the Civil Division ("AAG"). The Standing Committee also will notify the CCP Unit of its decision.

Prior to forwarding the memorandum to the AAG, the Ethics Official will request that the government attorneys involved in the selection process certify their 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. The Ethics Official will prepare a written certification that the recommended 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 selection 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, which will accompany the memorandum to the AAG.

If the Standing Committee rejects the recommended candidate, it will return the Monitor Recommendation Memorandum to the CCP Unit. The CCP Unit may recommend an alternate candidate from the remaining candidates proposed by the Company or, if necessary, request from the Company additional candidates according to the terms of the agreement. When the CCP Unit has selected a new candidate to recommend, it shall prepare a revised Monitor Selection Memorandum for submission to the Standing Committee.

If the Standing Committee is unable to reach a majority decision regarding the proposed monitor candidate, the Standing Committee will indicate so on the Monitor Recommendation Memorandum and forward the memorandum and all attachments, including the Ethics Official's certification, to the AAG for his or her decision.

b. Assistant Attorney General for the Civil Division

The AAG may not unilaterally make, accept, or veto the selection of a monitor candidate.<sup>3</sup> Rather, the AAG must review and consider the recommendation of the Standing Committee set forth in the Monitor Recommendation Memorandum. As part of this review, the AAG may request additional information from the Standing Committee or the CCP Unit or, in his or her discretion, conduct further due diligence of his or her own. The AAG will note his or her concurrence or disagreement with the proposed candidate on the Monitor Recommendation Memorandum and forward the memorandum to the Office of the Associate Attorney General ("OASG") for review prior to submitting the memorandum to the Office of the Deputy Attorney General ("ODAG").

c. Office of the Deputy Attorney General

The ODAG must approve all monitor candidates selected pursuant to DPAs, NPAs, and plea agreements (unless specifically established by court order). If the ODAG approves the proposed monitor, the CCP Unit will notify the Company, which will notify the candidates of the decision and execute the monitorship according to the terms of the agreement.

If the ODAG does not approve the proposed monitor, the CCP Unit will notify the Company and request that the Company propose additional candidates pursuant to the terms of the agreement.

## **8. Record Retention**

The CCP Unit will ensure that a copy of the Monitor Recommendation 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. The Chair of the Standing Committee should obtain and maintain an electronic copy of every agreement that provides for a monitor, and shall provide a copy of the monitorship 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.

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<sup>3</sup> See Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations, Craig S. Morford, Acting Deputy Attorney General at 3 (Mar. 7, 2008); Selection of Monitors in Criminal Division Matters, Brian A. Benczkowski, Assistant Attorney General at 7 (Oct. 11, 2018).

## **9. Departure from Policy and Procedures**

When the case team, in consultation with the CCP Unit, concludes that the monitor selection process should be different from this standard procedure, they must first discuss with and receive approval from the Standing Committee for the departure and then document that determination and the substitute process.<sup>4</sup> The Standing Committee can, at its discretion, request additional information and/or a written request for a departure.

Where appropriate, a court may also modify the monitor selection process.

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<sup>4</sup> 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 the memorandum entitled “Further Revisions to Corporate Criminal Enforcement Policies Following Discussion with Corporate Crime Advisory Group” issued by Deputy Attorney General Lisa O. Monaco.