



U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General

Washington, D.C. 20530

March 1, 2023

TO: All Criminal Division Personnel

FROM: Kenneth A. Polite, Jr.  
Assistant Attorney General, Criminal Division

SUBJECT: Revised Memorandum on Selection of Monitors in Criminal Division Matters

The Criminal Division has a longstanding commitment to transparent and just corporate criminal enforcement policies, including with respect to monitor selection criteria and procedures. The substance and purpose of this memorandum is much the same as that of the memorandum that preceded it, issued by then-Assistant Attorney General Brian Benczkowski: its aim is to make clear to the public, our prosecutors, defense counsel, and corporations the standards, policy, and procedures for the selection of monitors in matters being handled by Criminal Division attorneys.<sup>1</sup> When first issued, this memorandum supplemented 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”). In addition to the Morford Memorandum, this revised memorandum also supplements Department-wide guidance issued by our current Deputy Attorney General and edits to the Department’s Justice Manual concerning monitors.<sup>2</sup> The standards, policy, and procedures contained in this memorandum shall continue to apply to all Criminal Division determinations regarding whether a monitor is appropriate in specific cases and to any deferred prosecution agreement (“DPA”), non-prosecution agreement (“NPA”), or plea agreement<sup>3</sup> between the Criminal Division and a business organization which requires the retention of a monitor.

<sup>1</sup> 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. This memorandum slightly revises and supersedes the October 11, 2018 Criminal Division memorandum on monitor selection.

<sup>2</sup> The Morford Memorandum required 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 required that the Committee include an ethics advisor, the Section Chief of the involved Department component, and one other experienced prosecutor. The Criminal Division has utilized such a Standing Committee for years, and Assistant Attorney General Benczkowski’s October 11, 2018 Memorandum on Selection of Monitors in Criminal Division Matters set forth our policies and procedures, and the composition of the Standing Committee, in writing. Two memoranda issued by Deputy Attorney General Lisa Monaco, respectively issued on October 28, 2021, and September 15, 2022, further clarified Department-wide criteria for monitor selection, as described herein.

<sup>3</sup> Although the Morford Memorandum applies only to DPAs and NPAs, this memorandum makes clear that the Criminal Division shall apply the same principles to plea agreements that impose a monitor so long as the court approves the agreement.

The updates included herein clarify four things: (1) consistent with Department-wide policy, prosecutors should not apply presumptions for or against monitors, and should consider ten non-exhaustive factors when assessing the need for, and potential benefits of, a monitor; (2) consistent with the Criminal Division's practice since at least 2018, many of the requirements for monitors apply to monitor teams, in addition to the titular monitors; (3) monitor selections are and will be made in keeping with the Department's commitment to diversity, equity, and inclusion; and (4) the cooling off period for monitors is now not less than three years, rather than two years, from the date of the termination of the monitorship.

#### **A. Principles for Determining Whether a Monitor is Needed in Individual Cases**

Independent corporate monitors can be a helpful resource and beneficial means of assessing a business organization's compliance with the terms of a corporate criminal resolution, whether a DPA, NPA, or plea agreement. Monitors can also be an effective means of reducing the risk of recurrence of the misconduct and compliance lapses that gave rise to the underlying corporate criminal resolution.

The Morford Memorandum set forth the two broad considerations that should guide prosecutors when assessing the need and propriety of a monitor: "(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." The Memorandum also made clear that a monitor should never be imposed for punitive purposes.

As clarified in two Memoranda issued by Deputy Attorney General Lisa Monaco, dated October 28, 2021, and September 15, 2022, respectively, "Department prosecutors will not apply any general presumption against requiring an independent compliance monitor [...], nor will they apply any presumption in favor of imposing one. Rather, the need for a monitor and the scope of any monitorship must depend on the facts and circumstances of the particular case."

Consistent with Department-wide policy and the Justice Manual, *see* JM 9-28.1700, *et seq.*, Criminal Division prosecutors should consider the following ten non-exhaustive factors when assessing the necessity and potential benefits of a monitor:

1. Whether the corporation voluntarily self-disclosed the underlying misconduct in a manner that satisfies the particular DOJ component's voluntary self-disclosure policy;
2. Whether, at the time of the resolution and after a thorough risk assessment, the corporation has implemented an effective compliance program and sufficient internal controls to detect and prevent similar misconduct in the future;
3. Whether, at the time of the resolution, the corporation has adequately tested its compliance program and internal controls to demonstrate that they would likely detect and prevent similar misconduct in the future;
4. Whether the underlying criminal conduct was long-lasting or pervasive across the business organization or was approved, facilitated, or ignored by senior management, executives, or directors (including by means of a corporate

- culture that tolerated risky behavior or misconduct, or did not encourage open discussion and reporting of possible risks and concerns);
5. Whether the underlying criminal conduct involved the exploitation of an inadequate compliance program or system of internal controls;
  6. Whether the underlying criminal conduct involved active participation of compliance personnel or the failure of compliance personnel to appropriately escalate or respond to red flags;
  7. Whether the corporation took adequate investigative or remedial measures to address the underlying criminal conduct, including, where appropriate, the termination of business relationships and practices that contributed to the criminal conduct, and discipline or termination of personnel involved, including with respect to those with supervisory, management, or oversight responsibilities for the misconduct;
  8. Whether, at the time of the resolution, the corporation's risk profile has substantially changed, such that the risk of recurrence of the misconduct is minimal or nonexistent;
  9. Whether the corporation faces any unique risks or compliance challenges, including with respect to the particular region or business sector in which the corporation operates or the nature of the corporation's customers; and
  10. Whether and the extent to which the corporation is subject to oversight from industry regulators or is receiving a monitor from another domestic or foreign enforcement authority or regulator.

As these factors make clear, our considerations will continue to include whether misconduct occurred under different corporate leadership or within a compliance environment that no longer exists within a company. In such circumstances, Criminal Division attorneys should consider whether the changes in corporate culture and/or leadership are adequate to safeguard against a recurrence of misconduct. Criminal Division attorneys should also consider whether adequate remedial measures were taken to address problem behavior by employees, management, or third-party agents, including, where appropriate, the termination of business relationships and practices that contributed to the misconduct. In assessing the adequacy of a business organization's remediation efforts and the effectiveness and resources of its compliance program, Criminal Division attorneys should consider the unique risks and compliance challenges the company faces, including the particular region(s) and industry in which the company operates and the nature of the company's clientele. *See also* Criminal Division Evaluation of Corporate Compliance Programs (revised March 2023).

As stated by Deputy Attorney General Monaco, in general, the Department should favor the imposition of a monitor where there is a demonstrated need for, and clear benefit to be derived from, a monitorship. Where a corporation's compliance program and controls are untested, ineffective, inadequately resourced, or not fully implemented at the time of a resolution, Department attorneys should consider imposing a monitorship. This is particularly true if the investigation reveals that a compliance program is deficient or inadequate in numerous or significant respects. Conversely, where a corporation's compliance program and controls are demonstrated to be tested, effective, adequately resourced, and fully implemented at the time of a resolution, a monitor may not be necessary.

Finally, at a minimum, the scope of any monitorship should be appropriately tailored to address the specific issues and concerns that created the need for the monitor.

## **B. Approval, Consultation, and Concurrence Requirement for Monitorship Agreements**

Before agreeing to the imposition of a monitor<sup>4</sup> in any case, the Criminal Division attorneys handling the matter must first receive approval from their supervisors, including the Chief of the relevant Section, as well as the concurrence of the Assistant Attorney General (“AAG”) for the Criminal Division or his/her designee, who in most cases will be the Deputy Assistant Attorney General (“DAAG”) with supervisory responsibility for the relevant Section.

## **C. Terms of Criminal Division Monitorship Agreements**

As a preliminary matter, any DPA, NPA, or plea agreement 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 the monitor’s required qualifications;
2. A description of the monitor selection process;
3. A description of the process for replacing the monitor during the term of the monitorship, should it be necessary;
4. A statement that the parties will endeavor to complete the monitor selection process within sixty (60) days of the execution of the underlying agreement;
5. An explanation of the responsibilities of the monitor and the monitorship’s scope; and
6. The length of the term of the monitorship.

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

In reviewing and approving the selection of monitors, the Criminal Division shall continue to employ its Standing Committee on the Selection of Monitors (the “Standing Committee”).

### **1. Composition of the Standing Committee:**

The Standing Committee shall comprise: (1) the DAAG with supervisory responsibility for the Fraud Section, or his/her designee<sup>5</sup>; (2) the Chief of the Fraud Section (or other relevant Section, if not the Fraud Section), or his/her designee<sup>6</sup>; and (3) the Deputy Designated Agency Ethics Official for the Criminal Division<sup>7</sup>. Should further replacements not contemplated by this

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<sup>4</sup> As used herein, the term monitor signifies both the leader of the monitorship team and the entire team.

<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> 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/her designee.

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/her designee, shall be the Chair of the Standing Committee, and shall be responsible for ensuring that the Standing Committee discharges its responsibilities. In cases brought in partnership between the Criminal Division and other offices or components, the Chair may, as warranted, invite leaders from the partner offices or components to participate in the selection by the Standing Committee.

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), and shall provide written certification of such compliance to the Deputy Designated Agency Ethics Official for the Criminal Division as soon as practicable, but no later than the time of the submission of the Monitor Recommendation Memorandum to the Assistant Attorney General for the Criminal Division (“the AAG”).

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 soon as practicable after receiving the Monitor Recommendation Memorandum described below, identify the Standing Committee participants for that case, and ensure that there are no conflicts among the Standing Committee Members.

**E. 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 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 shall employ the following procedure<sup>8</sup> in selecting a monitor, absent authorization from the Standing Committee to deviate from this process as described in Section F below:

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<sup>8</sup> The selection process outlined in this Memorandum applies both to the selection of a monitor at the initiation of a monitorship and to the selection of a replacement monitor, where necessary.

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. Consistent with the Criminal Division’s approach for the past several years, as well as recent Department-wide guidance, any submission or selection of a monitor candidate by either the Company or the Criminal Division should be made in keeping with the Department’s commitment to diversity, equity, and inclusion, and without unlawful discrimination against any person or class of persons. Corporate defendants should also expect that corporate resolution agreements themselves—whether guilty pleas, deferred prosecution agreements, or non-prosecution agreements that contemplate selection and imposition of a monitor team—specify this requirement and commitment. *See, e.g., United States v. Panasonic Avionics Corp.*, No. 18-CR-00118-RBW, Dkt. 2-1 at 12 (D.D.C. Apr. 30, 2018) (“Monitor selections shall be made in keeping with the Department’s commitment to diversity and inclusion”), *available at* <https://www.justice.gov/opa/press-release/file/1058466/download>; Non-Prosecution Agreement with Fresenius Medical Care AG & Co. KGaA at 5 (2019) (same), *available at* <https://www.justice.gov/opa/press-release/file/1148951/download>; *United States v. Balfour Beatty Communities*, No. 1:21-cr-00742-EGS, Dkt. 5 at 18 (D.D.C. Dec. 22, 2021) (same), *available at* <https://www.justice.gov/criminal-fraud/file/1461571/download>; *United States v. Glencore Ltd.*, No. 22-CR-71, Dkt. 18 at 23-24 (D. Conn. May 24, 2022) (same), *available at* <https://www.justice.gov/criminal-fraud/file/1508931/download>.

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, the monitor’s firm, or any of the personnel or entities assisting in the monitorship for a period of not less than three years from the date of the termination of the monitorship;
- c. a written certification by each of the candidates that neither he/she, nor his/her firm, nor any of the personnel or entities who will assist him/her in the monitorship of the Company, will, without prior written consent of the Assistant Attorney General, Criminal Division, United States Department of Justice, discuss or enter into any employment, consultant, agency, attorney-client, auditing, or other professional relationship with the Company, or any of its subsidiaries, present or former affiliates, successors, directors, officers, employees, or agents acting in their capacity as such for the period of the monitorship and for a period of three years from the date of the termination of the monitorship;

- d. a written certification by each of the candidates that he/she, his/her firm, or any of the personnel or entities assisting him/her in the monitorship of the Company, are not current or former employees, agents, or representatives 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<sup>9</sup>;
  - e. a written certification by each of the candidates that he/she and any other personnel assisting in the monitorship have notified any clients that the candidate or other personnel represent in a matter involving the Criminal Division Section (or any other Department component) handling the monitor selection process, and that the candidate any other personnel have either obtained a waiver from those clients or have withdrawn his/her representation in the other matter(s); and
  - f. a statement identifying the monitor candidate that is the Company's first choice to serve as the monitor.
2. Initial Review of Monitor Candidates:

The Criminal Division attorneys handling the matter, along with supervisors from the Section, 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 and expertise with the particular area(s) at issue in the case under consideration, and experience and expertise 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, based on the circumstances, to relate to the qualifications and competency of each monitor

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<sup>9</sup> Should a current or former relationship exist, the monitor candidate will disclose it and provide any additional information requested in order to assess disqualifying conflicts.

candidate as they may relate to the tasks required by the monitor agreement and nature of the business organization to be monitored.

If the attorneys handling the matter and their supervisors decide that any or all of the three candidates lack the requisite qualifications or if they are not satisfied with any or all of the candidates proposed, they should notify the Company and request that counsel for the Company propose another candidate or candidates within twenty (20) business days.<sup>10</sup> Once the attorneys handling the matter conclude that the Company has provided a slate of three qualified candidates, they should conduct a review of those candidates and confer with their supervisors to determine which of the monitor candidates should be recommended to the Standing Committee.<sup>11</sup>

3. Preparation of a Monitor Recommendation Memorandum:

Once the attorneys handling the matter and their supervisors 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, based on the considerations set forth in this memorandum;
- 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 selected candidate's qualifications, and why the selected candidate is being recommended;
- g. a description of countervailing considerations, if any, in selecting the candidate;
- h. a description of the other candidates put forward for consideration by the Company; and

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<sup>10</sup> A Company may be granted a reasonable extension of time to propose an additional candidate or candidates if circumstances warrant an extension. The attorneys handling the matter should advise the Standing Committee of any such extension.

<sup>11</sup> If the Criminal Division attorneys handling the matter, along with their supervisors, determine that the Company has not proposed and appears unwilling or unable to propose acceptable candidates, consistent with the guidance provided herein, and that the Company's delay in proposing candidates is negatively impacting the Agreement or the prospective monitorship, then the attorneys may evaluate alternative candidates that they identify in consultation with the Standing Committee and provide a list of such candidates to the Company for consideration.



- i. a signed certification, on the form attached hereto, by each of the Criminal Division attorneys involved in the monitor selection process that he/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 Recommendation Memorandum and provided to the Standing Committee.

4. Standing Committee Review of a Monitor Candidate:

The Standing Committee shall review the recommendation set forth in the Monitor Recommendation 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 one or more of the candidates put forward for consideration by the Company.

If the Standing Committee accepts the recommended candidate, it should note its acceptance of the recommendation in writing on the Monitor Recommendation Memorandum and forward the memorandum to the AAG for ultimate submission to the Office of the Deputy Attorney General (“ODAG”). In addition to noting its acceptance of the recommendation, the Standing Committee may also, where appropriate, revise the Memorandum. The Standing Committee’s recommendation should also include a written certification by the Deputy Designated Agency Ethics Official for the Criminal Division 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 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 recommended candidate, it should so inform the Criminal Division attorneys handling the matter and their supervisors of the rejection decision. In this instance, the Criminal Division attorneys handling the matter, along with their supervisors, may either recommend an alternate candidate from the two remaining candidates proposed by the Company or, if necessary, obtain from the Company the names of additional qualified monitor candidates, as provided by paragraph C above. If the Standing Committee rejects the recommended candidate, or the pool of remaining candidates, the Criminal Division attorneys and their supervisors should notify the Company. The Standing Committee also should return the Monitor Recommendation Memorandum and all attachments to the attorneys handling the matter.

If the Standing Committee is unable to reach a majority decision regarding the proposed monitor candidate, the Standing Committee should so indicate on the Monitor Recommendation Memorandum and forward the Memorandum and all attachments to the Assistant Attorney General for the Criminal Division.

5. Review by the Assistant Attorney General:

Consistent with the terms of the Morford Memo, the AAG may not unilaterally make, accept, or veto the selection of a monitor candidate. Rather, the AAG must review and consider the recommendation of the Standing Committee set forth in the Monitor Recommendation 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. Additionally, the AAG may, in his/her discretion interview the candidate recommended by the Standing Committee. The AAG should note his/her concurrence or disagreement with the proposed candidate on the Monitor Recommendation Memorandum, or revise the memorandum to reflect this position, and forward the Monitor Recommendation Memorandum to the Office of the Deputy Attorney General (“ODAG”).

6. Approval of the Office of the Deputy Attorney General:

All monitor candidates selected pursuant to DPAs, NPAs, and plea agreements must be approved by the ODAG.

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 slate of candidates as provided by Section E.1 above. If the ODAG approves the proposed monitor, the attorneys handling the matter should notify the Company, which shall notify the three candidates of the decision, and the monitorship shall be executed according to the terms of the Agreement.

**F. 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 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 which provides for a monitor.

## **G. 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, including when the Criminal Division attorneys propose using the process of a U.S. Attorney's Office with which the Criminal Division is working on the case, 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.<sup>12</sup>

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<sup>12</sup> Where appropriate, a court may also modify the monitor selection process in cases where the Agreement is filed with the court.