

White Collar Practice Alert

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*DOJ Issues Memorandum Governing Selection And Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements**by Robert R. Stauffer & Anwar T. Shatat*

Increasing use by the Department of Justice (DOJ) of Deferred Prosecution Agreements (DPAs) and issues associated with the selection of compliance monitors have led to significant scrutiny of the DOJ's practices with respect to DPAs. DPAs typically require companies to hire an independent monitor to assess and monitor a corporation's compliance with the terms of a DPA. Recently, the selection of monitors has come under scrutiny with critics alleging that selection is based more on favoritism than experience and ability. A DPA entered into between the DOJ and Zimmer Inc., in which former Attorney General John Ashcroft was appointed as the federal monitor and stands to receive fees of up to \$52 million, led to increased concerns about the manner in which monitors are selected and compensated.

On January 22, 2008, Rep. Frank Pallone, Jr. (D-N.J.) introduced legislation (H.R. 5086) that would impose a number of requirements to be followed in connection with the entry and implementation of DPAs and the selection of monitors. Specifically, the bill would

require the DOJ to issue guidelines delineating when U.S. attorneys should enter into DPAs and require examination of specific factors in determining whether to enter into DPAs. Those factors would include potential harm to employees and shareholders, degree of cooperation by the corporation, remedial action by the corporation, availability of criminal charges against specific employees, and availability of alternative punishments or remedial actions. The bill would also require that DPAs be approved by a U.S. district court judge or magistrate judge, who shall ensure that the agreement comports with the public interest and applicable law; require that the judge appoint a federal monitor from a pool of pre-qualified firms or individuals, who shall be paid according to a pre-determined fee schedule; and require that, upon request by the U.S. attorney, the presiding judge determine whether the DPA has been breached.

On March 11, 2008, the Subcommittee on Commercial and Administrative Law held a hearing on DPAs. During the hearing, Hon.

John Conyors, Jr. expressed a desire for judicial oversight of corporate settlement agreements to provide uniformity and transparency and prevent abuses, and Mr. Ashcroft defended himself against accusations of a conflict of interest and of excessive compensation.

On March 7, 2008, in advance of the hearing, the DOJ released a Memorandum by Acting Deputy Attorney General Craig S. Morford on Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations ("the Memorandum"). Procedurally, the Memorandum requires prosecutors, before executing an agreement that includes a corporate monitor, to notify the appropriate U.S. Attorney or Department Component Head, who in turn shall provide a copy of the agreement to the Assistant Attorney General for the Criminal Division, who shall maintain a record of all such agreements. The Memorandum also sets forth nine internal guidance principles for drafting provisions in DPAs and non-prosecution agreements

pertaining to the use of monitors. The key points from those principles are as follows:

1. Before beginning the process of selecting a monitor, the corporation and the government should discuss the necessary qualifications for a monitor based on the facts and circumstances of the case, and the Office of the Deputy Attorney General must approve the monitor. The monitor must be selected on the merits, and the principle includes guidelines to prevent conflicts of interest.
2. A monitor is an independent third-party, not an employee or agent of the corporation or government.
3. The monitor's primary responsibility is to assess and monitor a corporation's compliance with the terms of the DPA.
4. Although the monitor will often need to understand the full scope of the corporation's misconduct covered by the agreement, its responsibilities should not be broader than necessary to reduce risk of recurrence of the corporation's misconduct.
5. The monitor may make periodic written reports to both the government and the corporation depending on the facts and circumstances of each case.
6. If the corporation chooses not to adopt recommendations made by the monitor within a reasonable time, either the monitor or the corporation, or both, should report that fact to the government, along with the corporation's reasons, and the government may consider this conduct in evaluating whether the corporation has fulfilled its obligations under the agreement.
7. The agreement should identify any types of previously undisclosed or new misconduct that the monitor will be required to report directly to the government. The monitor will have the discretion to report other types of misconduct to the government or the corporation or both.
8. The duration of the agreement should be tailored to the problems that have been found to exist and the types of remedial measures needed for the monitor to satisfy his or her mandate.
9. In most cases, a DPA should provide for an extension of the monitor provision(s) at the discretion of the government in the event that the corporation has not successfully satisfied its obligations under the DPA and, conversely, in most cases, the DPA should provide for early termination if the corporation can demonstrate changed circumstances eliminating the need for a monitor.

The Memorandum does not address some of the concerns that prompted HR 5086, and concerns were raised during the hearing that the Memorandum does not go far enough; for instance, Rep. Conyers stated that the guidance fails to ensure uniformity in agreements. The memo is merely an internal guidance; corporations have no ability to enforce the statements in the memo, and there may be no remedy if the government fails to abide by its internal guidelines. The government also continues to retain the choice of the monitor and oversight over the agreement, unlike HR 5086, under which a judge would choose the monitor from a pool of pre-qualified firms or individuals and would oversee significant aspects of the agreement.

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