Memorandum

Subject: Selection of Monitors in Criminal Cases
Date: July 2019

To: Criminal Staff
From: Richard Powers
Antitrust Division
Deputy Assistant Attorney General
Antitrust Division

Selection of Monitors in Criminal Cases

The following establishes a policy and procedure for the selection of monitors in Antitrust Division criminal matters. In the event that the Division recommends or requires an external monitor in a particular case, staff should consult Department guidance, including the Criminal Resource Manual 163 and 166. 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) 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 (iii) 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.

Staff should defer to the selection procedures required by the court and/or Probation Office in any particular case. However, in cases where the Antitrust Division is responsible for selecting a monitor or recommending a candidate for selection to the court or Probation Office, the Antitrust Division should employ the following procedures:

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 provide, at a minimum, the following:

- 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 for a period of time, as specified in the agreement (typically one year 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 that he or she is not an employee or agent of the company and holds no interest in, and has no relationship with, the company, its subsidiaries, affiliates or related entities, or its employees, officers, or directors.

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, 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, and experience and expertise in applying the particular area(s) at issue in an organizational setting;
• 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 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 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;
• 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;
• a description of the countervailing considerations, if any, in selecting the candidate; 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.

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

In cases where the Antitrust Division is responsible for selecting a monitor or recommending a candidate to the court or Probation Office, 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.

Given that the facts and circumstances of each case, including the procedures required by the court and/or Probation Office, may differ, the monitor selection process must be practical and flexible. If the Antitrust Division attorneys handling the case at issue determine that a departure from the above-described process is warranted, that departure should be approved in writing by the Committee.

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.

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