



## **United States Attorneys' Offices Monitor Selection for Corporate Criminal Enforcement**

### **INTRODUCTION**

The Deputy Attorney General's September 15, 2022 memorandum, "Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group," instructed that each component involved in corporate criminal resolutions that does not currently have a public monitor selection process must adopt an already existing Department process, or develop and publish its own process.

The Attorney General's Advisory Committee (AGAC) requested that the White Collar Fraud Subcommittee of the AGAC, under the leadership of U.S. Attorney for the Eastern District of New York Breon Peace (Chair), recommend relevant policies and procedures for consideration. The below policy was prepared by a Corporate Criminal Enforcement Policy Working Group comprised of U.S. Attorneys from geographically diverse districts, including U.S. Attorney Peace, as well as U.S. Attorney for the Northern District of California Stephanie Hinds, U.S. Attorney for the District of Connecticut Vanessa Avery, U.S. Attorney for the District of Hawaii Clare Connors, U.S. Attorney for the District of New Jersey Philip Sellinger, U.S. Attorney for the Eastern District of North Carolina Michael F. Easley, Jr., U.S. Attorney for the Eastern District of Virginia Jessica Aber, and U.S. Attorney for the Western District of Virginia Christopher Kavanaugh. Assistant U.S. Attorney Mandy Riedel, White Collar Crimes Coordinator for the Executive Office for U.S. Attorneys, also participated in the development of this policy.

The Office of the Deputy Attorney General has reviewed and approved this policy. The policy shall apply to all United States Attorney's Offices and is effective as of March 1, 2023.

### **POLICY**

The purpose of this memorandum is to establish standards, policy, and procedures for the selection of monitors in criminal matters being handled by United States Attorney's Offices ("USAOs," and each a "USAO").<sup>1</sup> This memorandum sets forth the public monitor selection process for all USAOs, the adoption of which was directed by the Memorandum from Deputy Attorney General Lisa O. Monaco, "Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group," dated September 15, 2022 ("Monaco Memo 2022"), and incorporates guidance from both Monaco Memo 2022 and the Memorandum from Deputy Attorney General Lisa O. Monaco, "Corporate Crime Advisory Group and Initial Revisions

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<sup>1</sup> The contents of this memorandum provide internal guidance to prosecutors 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 does not apply to cases involving court-appointed monitors, where prosecutors must give due regard to the appropriate role and procedures of the court.

to Corporate Criminal Enforcement Policies,” dated October 28, 2021 (“Monaco Memo 2021”).<sup>2</sup> The standards, policy, and procedures contained in this memorandum shall apply to all determinations regarding whether a monitor is appropriate in specific criminal cases and to any deferred prosecution agreement (“DPA”), non-prosecution agreement (“NPA”), or plea agreement between the USAO and a company which requires the retention of a monitor.

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

Independent corporate monitors can be an effective resource in assessing a company’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 repeat misconduct and compliance lapses identified during a corporate criminal investigation.

Prosecutors should analyze and carefully assess the need for the imposition of a monitor on a case-by-case basis, using the following non-exhaustive list of factors when evaluating the necessity and potential benefits of a monitor:

1. Whether the company voluntarily self-disclosed the underlying misconduct in a manner that satisfies the USAO’s self-disclosure policy;
2. Whether, at the time of the resolution and after a thorough risk assessment, the company 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 company 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 company 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;

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<sup>2</sup> The two Monaco memos incorporate and are consonant with prior memoranda on monitor selection that were applicable to the USAOs, including the Memorandum from Acting Deputy Attorney General Craig S. Morford, dated March 7, 2008.

7. Whether the company 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 company's risk profile has substantially changed, such that the risk of recurrence of the misconduct is minimal or nonexistent;
9. Whether the company 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 to what extent the company is subject to oversight from industry regulators, or a monitor imposed by another domestic or foreign enforcement authority or regulator.

The factors listed above are intended to be illustrative of those that should be evaluated and are not an exhaustive list of potentially relevant considerations. Prosecutors should determine whether a monitor is required based on the facts and circumstances presented in each case.<sup>3</sup>

In general, a USAO 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 company's compliance program and controls are untested, ineffective, inadequately resourced, or not fully implemented at the time of a resolution, prosecutors 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 company'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.

## **II. Approval Requirement for Monitorship Agreements**

Before agreeing to the imposition of a monitor in any case, the prosecutors handling the matter must first receive approval from their supervisors, and the United States Attorney ("USA").

## **III. Terms of USAO Monitorship Agreements**

As a preliminary matter, any DPA, NPA, or plea agreement between the USAO and a company 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;

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<sup>3</sup> Monitors should not be imposed to further punitive goals.

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 monitorship.

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

Each USAO shall create a Standing Committee on the Selection of Monitors (the "Standing Committee").

##### **A. Composition of the Standing Committee**

The Standing Committee shall be comprised of 3 to 5 senior prosecutors and must include the following individuals: (1) the USAO's Criminal Division Chief; (2) the Chief of the section or unit entering into the Agreement; and (3) the USAO's Ethics Advisor.<sup>4</sup>

The Criminal Division Chief shall serve as the Chair of the Standing Committee and shall be responsible for ensuring that the Standing Committee discharges its responsibilities. All USAO 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 Criminal Division Ethics Advisor as soon as practicable, but no later than the time of the submission of the Monitor Recommendation Memorandum to the USA.

##### **B. Convening the Standing Committee**

The Chief of the relevant section or unit handling the case 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 company 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

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<sup>4</sup> Should any of these three individuals be recused from a particular case, the USA will appoint another senior prosecutor to fill that individual's position on the Standing Committee. If the Ethics Advisor is recused, that position must be filled with another senior prosecutor with similar responsibilities, such as another or alternate Ethics Advisor, or a Professional Responsibility Advisor.

Recommendation Memorandum described below, identify the Standing Committee participants for that case, and ensure that there are no conflicts among the Standing Committee Members.

## **V. The Selection Process**

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; (ii) reflect the Department's commitment to diversity, equity, inclusion, and accessibility;<sup>5</sup> and (iii) 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.<sup>6</sup> To meet those objectives, the USAO shall employ the following procedure<sup>7</sup> in selecting a monitor, absent authorization from the Standing Committee to deviate from this process as described in Section VII below.

### **A. Nomination of Monitor Candidates**

At the outset of the monitor selection process, counsel for the Company should be advised by the prosecutors handling the matter to recommend a pool of three qualified monitor candidates. Within at least (20) business days after the execution of the Agreement, the Company should submit a written proposal identifying the monitor candidates, providing the following:

1. 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);
2. 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, for a period of not less than three years from the date of the termination of the monitorship;<sup>8</sup>
3. a written certification by each of the candidates that they have no conflict of interest that would prevent them from accepting the monitorship and is 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 subsidiaries, affiliates or related entities, or its employees, officers, directors, or outside counsel retained in the matter at issue in the monitorship;

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<sup>5</sup> This includes with respect to the monitor, as well as the team supporting the monitor.

<sup>6</sup> Any submission or selection of a monitor candidate by either the Company or the USAO shall be made without unlawful discrimination against any person or class of persons.

<sup>7</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.

<sup>8</sup> A USA, with the agreement of the Ethics Advisor, may waive this requirement as to the monitor's firm or professionals who are part of the monitorship team during the term of the monitorship; such a waiver decision ought to be accompanied by written justification stating the reasons as to why such a waiver is necessary.

4. a written certification by each of the candidates that they have notified any clients that the candidate represents in a matter involving the USAO, and that the candidate has either obtained a waiver from those clients or has withdrawn as counsel in the other matter(s); and
5. a statement identifying the monitor candidate that is the Company's first choice to serve as the monitor.

#### **B. Initial Review of Monitor Candidates**

The prosecutors handling the matter, along with supervisors, should promptly interview each monitor candidate to assess their independence, qualifications, credentials and suitability for the assignment (and those of their team, where applicable) and, in conducting a review, should consider the following factors:

1. 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;
2. 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;
3. each monitor candidate's degree of objectivity and independence from the Company to ensure effective and impartial performance of the monitor's duties;
4. the adequacy and sufficiency of each monitor candidate's resources to discharge the monitor's responsibilities effectively; and
5. any other factor determined by the prosecutors, based on the circumstances, to relate to the qualifications, competency, and independence of each monitor candidate as they may relate to the tasks required by the monitor agreement and nature of the business organization to be monitored.

If the prosecutors handling the matter and their supervisors decide that any or all of the three candidates lack the requisite qualifications, they should notify the Company and request that counsel for the Company propose another candidate or candidates within twenty (20) business days.<sup>9</sup> Once the prosecutors handling the matter conclude that the Company has provided a slate of three qualified

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<sup>9</sup> A Company may be granted a reasonable extension of time to propose an additional candidate or candidates if circumstances warrant an extension. The prosecutors handling the matter should advise the Standing Committee of any such extension.

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>10</sup>

### **C. Preparation of a Monitor Recommendation Memorandum**

Once the prosecutors handling the matter and their supervisors recommend a candidate, the selection process should be referred to the Standing Committee. The prosecutors handling the matter should prepare a written memorandum to the Standing Committee, in the format attached hereto. The memorandum should contain the following information:

1. a brief statement of the underlying case;
2. a description of the proposed disposition of the case, including the charges filed (if any);
3. an explanation as to why it was determined that a monitor is required in the case, based on the considerations set forth in this memorandum;
4. a summary of the responsibilities of the monitor, and their term;
5. a description of the process used to select the candidate;
6. a description of the selected candidate's qualifications (and those of their team, if applicable), and why the selected candidate is being recommended;
7. a description of countervailing considerations, if any, in selecting the candidate;
8. a description of the other candidates put forward for consideration by the Company; and
9. a signed certification, on the form attached hereto, by each of the prosecutors 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.

### **D. Standing Committee Review of a Monitor Candidate**

The Standing Committee shall review the recommendation set forth in the Monitor Recommendation Memorandum and vote whether 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.

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<sup>10</sup> If the prosecutors 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 prosecutors 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.

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 USA for approval and 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 USAO’s Ethics Advisor 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 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 prosecutors handling the matter and their supervisors of the rejection decision. In this instance, the prosecutors 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 Section V.C. above. If the Standing Committee rejects the recommended candidate, or the pool of remaining candidates, the prosecutors and their supervisors should notify the Company. The Standing Committee also should return the Monitor Recommendation Memorandum and all attachments to the prosecutors 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 USA for his or her decision.

#### **E. Approval by the USA**

The USA must review and consider the recommendation of the Standing Committee set forth in the Monitor Recommendation Memorandum. In the course of doing so, the USA may request additional information from the Standing Committee or the prosecutors handling the matter and their supervisors. The USA may also elect to interview the candidate recommended by the Standing Committee.

Once a proposed candidate is approved by the USA, the USA should forward the Monitor Recommendation Memorandum to ODAG.

If the USA rejects the recommended candidate, they should so inform the Standing Committee, as well as the prosecutors handling the matter and their supervisors of the rejection decision in writing explaining the reasons behind the USA’s rejection. In this instance, the prosecutors 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 Section V.C. above. If the USA rejects the recommended candidate, or the pool of remaining candidates, the prosecutors and their supervisors should notify the Company.



## **F. Approval of ODAG**

All monitor candidates selected pursuant to DPAs, NPAs, and plea agreements must be approved by ODAG. If ODAG does not approve the proposed monitor, the prosecutors handling the matter should notify the Company and request that the Company propose a new candidate or slate of candidates as provided by Section V.C. above. If ODAG approves the proposed monitor, the prosecutors 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.

## **VI. Retention of Records Regarding Monitor Selection**

It should be the responsibility of the prosecutors 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. The USA should also provide a copy of each agreement to the Assistant Attorney General for the Criminal Division at a reasonable time after it has been executed.

## **VII. Departure from Policy and Procedure**

Given that each case presents unique facts and circumstances, the monitor selection process must be practical and flexible. When the prosecutors handling the case at issue conclude that the monitor selection process should be different from the process described herein, the departure should be discussed, approved, and documented by the Standing Committee.<sup>11</sup> The Standing Committee can request additional information or a written request for a departure.<sup>12</sup>

## **VIII. Continued Review of Monitorship**

In matters where an independent corporate monitor is imposed pursuant to a resolution with the USAO, prosecutors should ensure that the monitor's responsibilities and scope of authority are well-defined and recorded in writing, and that a clear workplan is agreed upon between the monitor and the company – all to ensure agreement among the company, monitor, and USAO as to the proper scope of review.

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<sup>11</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 Monaco Memo 2022.

<sup>12</sup> In cases where the company is being jointly prosecuted by a USAO and another Department component, the USAO and the Department component shall jointly determine whether to apply the monitor selection process of the USAO, the Department component, or an alternative selection process that combines elements of their respective policies and procedures, including, but not limited to, with respect to the composition of the Standing Committee.

For the term of the monitorship, prosecutors must remain apprised of the ongoing work conducted by the monitor.<sup>13</sup> Continued review of the monitorship requires ongoing communication with both the monitor and the company.<sup>14</sup>

Prosecutors should receive regular updates from the monitor about the status of the monitorship and any issues presented. Monitors should promptly alert prosecutors if they are being denied access to information, resources, or corporate employees or agents necessary to execute their charge. Prosecutors should also regularly receive information about the work the monitor is doing to ensure that it remains tailored to the workplan and scope of the monitorship. In reviewing information relating to the monitor's work, prosecutors should consider the reasonableness of the monitor's review, including, where appropriate, issues relating to the cost of the monitor's work. In certain cases, prosecutors may determine that the initial term of the monitorship is longer than necessary to address the concerns that created the need for the monitor, or that the scope of the monitorship is broader than necessary to accomplish the goals of the monitorship. For example, a company may demonstrate significant and faster-than-anticipated improvements to its compliance program, and this could reduce the need for continued monitoring. Conversely, prosecutors may determine that newly identified concerns require lengthening the term or amending the scope of the monitorship.

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<sup>13</sup> In cases of court-appointed monitors, the court may elect to oversee this inquiry.

<sup>14</sup> Any agreement requiring a monitor should also explain what role the USAO could play in resolving disputes that may arise between the monitor and the company, given the facts and circumstances of the case.