

# Court-Appointed Monitor Selection Process in Environmental Crimes Section Cases August 2022

Environmental Crimes Section (ECS) prosecutors must at times determine whether or not to impose a monitorship as part of a corporate resolution. If, based on Division and Department guidance,<sup>1</sup> that question is answered in the affirmative, ECS attorneys are to select the monitor according to the following process.

## **Required Conditions for Monitorships in ECS Cases**

Because of the civil and regulatory enforcement alternatives for environmental offenses, ECS disfavors deferred prosecution and non-prosecution agreements for corporations, except in extraordinary circumstances. Accordingly, this guidance applies only to the selection of court-appointed corporate monitors in ECS cases resolved by plea agreement or conviction after trial. In such cases, ECS attorneys should ensure that the following conditions are met for any monitorship:

*First*, monitorships in environmental crimes cases must be incorporated as a condition of probation in a plea agreement or in the court’s judgment of conviction, and not as a condition in a side agreement between the government and the defendant.

*Second*, any plea agreement imposing a monitorship must describe the reasoning for requiring a monitor.<sup>2</sup>

*Third*, the plea agreement or judgment of conviction must clearly and specifically enumerate the responsibilities, duties, and obligations of the monitor, as well as the minimum qualifications and desired areas of expertise necessary to ensure selection of a

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<sup>1</sup> See Memorandum from Acting Deputy Attorney General Craig S. Morford, “Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations,” Mar. 7, 2008, and Memorandum from Acting Deputy Attorney General Gary C. Grindler, “Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations,” May 25, 2010 (guidance applicable to deferred and non-prosecution agreements); Memorandum of Assistant Attorney General Brian A. Benczkowski, “Selection of Monitors in Criminal Division Matters,” Oct. 11, 2018 (applicable only to Criminal Division matters); and Memorandum of Deputy Attorney General Lisa O. Monaco, “Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies,” Oct. 28, 2021 (Revising Part A of the Benczkowski Memorandum: “Principles for Determining Whether a Monitor is Needed in Individual Cases,” and making Part A applicable to all Department criminal matters).

<sup>2</sup> In circumstances in which the government seeks a monitorship as part of a sentence after a trial, the reasons for requiring a monitor will ordinarily be set forth in the government’s publicly-filed sentencing memorandum.

monitor capable of carrying out these responsibilities, duties, and obligations. This applies even if a monitor has been selected prior to sentencing, to inform the selection of a replacement monitor, if necessary.

*Fourth*, the plea agreement or judgment must prohibit the monitor from seeking, offering, accepting, or discussing additional work for the defendant during the period of probation and for at least two years thereafter.

All plea agreements and sentencing recommendations including a corporate monitor must be reviewed and approved by both the Assistant Section Chief supervising the case and/or the Section Chief or Deputy Section Chief. Notice of the imposition of a monitor must be given to the Assistant Attorney General (AAG) in charge of the Environment and Natural Resources (ENRD). The ECS prosecutor shall provide a copy of the monitorship agreement to the AAG for ENRD, who will in turn provide the agreement to the AAG for the Criminal Division at a reasonable time after it has been executed.

### **Selection Process**

The preferred method of monitor selection includes the following steps:

*First, nomination of at least three candidates.*

If the court is selecting the monitor, either (1) the defendant nominates at least three candidates over which the government has veto authority, or (2) the defendant and the government each nominate at least two candidates that the other party may comment on or object to by a specified deadline. All candidates must be subject to U.S. jurisdiction for purposes of compelling documents or appearances. ECS attorneys shall veto or object to any candidate with a conflict of interest or whose past, present, planned, or under-consideration business, financial, or close personal relationships with the defendant or the government create an appearance of favoritism or bias. ECS attorneys shall also veto or object to any candidate determined to have insufficient experience, expertise, or resources to discharge the responsibilities, duties, and obligations of the monitor. The defendant must replace any government-vetoed candidate with a new candidate within a specified amount of time.

If the government is selecting the monitor, the defendant must nominate at least three candidates. If any of the three nominees is found to have a conflict of interest or a relationship to the parties that creates the appearance of favoritism or bias, the government must reject that candidate and may ask the defendant to nominate a replacement candidate.

*Second, submission by candidates of written materials that include or address the following:*

- 1) A summary of the candidate's background qualifications.
- 2) A brief description of the other members of the candidate's proposed team, if any, and the roles any team members will play in the monitorship.

- 3) The candidate's (and candidate's team's) ability to access and deploy resources needed to discharge duties as the monitor, including subject matter, compliance, and linguistic expertise.
- 4) A description of any past, present, planned, or under-consideration business, financial, or close personal relationship that the candidate, the candidate's firm, and the candidate's team members had or has with the defendant (including all subsidiaries and affiliates) or the United States (except salary, if previously employed by the government).
- 5) Verification or certification that the candidate, the candidate's firm, and/or the candidate's team members have no conflicts of interest with regard to this matter or that any conflict has been waived.
- 6) Verification or certification that the candidate, the candidate's firm, and the candidate's team members agree not to be compensated in any way by the defendant for a minimum of two years after the conclusion of the term of the monitorship.
- 7) A description of relevant experience or expertise of the candidate and his or her team in the following subject areas, as appropriate:
  - a. The defendant's industry;
  - b. Environmental law and regulations, particularly those related to the statutes of conviction;
  - c. Other relevant statutes (e.g., anti-fraud) under federal, state, tribal, or foreign law;
  - d. Designing, implementing, overseeing, and reviewing corporate ethics and compliance programs;
  - e. Experience serving as a monitor or advising a company in responding to a monitor;
  - f. Experience with corporate governance of corporations similar to defendant in size and structure;
  - g. Information technology, including forensic analysis of electronic information;
  - h. Any other specialized technical knowledge; and
  - i. Any necessary foreign language.
- 8) An overview of the candidate's plan for the monitorship.

*Third, candidate interviews.*

If the government is selecting the monitor, ECS attorneys must conduct interviews of the candidates (and any support personnel and/or team members, where applicable), to inform its decision. Interviews may be conducted by the case team and at least one other experienced ECS attorney. The feedback from the interviews should be discussed with the Assistant Chief supervising the case prior to any selection. If the court is selecting the monitor, ECS attorneys should recommend that the court conduct interviews of the candidates.

*Fourth, selection of monitor.*

The monitor must be selected from the final group of three or more nominees. If the government selects the monitor prior to the entry and acceptance of a plea agreement, the name

of the monitor selected must be included in the plea agreement. If the government will be selecting a monitor after the court's acceptance of the plea agreement, the plea agreement must include deadlines for the defendant's nomination of candidates and the government's selection of a candidate, along with a procedure for notifying the court of the government's selection.

At all times, ECS attorneys involved in the selection process must follow the established guidance and procedures for addressing recusal issues and must engage the assistance of the ECS Professional Responsibility Officer or ENRD's Ethics Advisor in cases that raise any specter of conflict of interest or favoritism.

This memorandum provides only internal ECS guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.