



U. S. Department of Justice

Office of the Associate Attorney General

Washington, D.C. 20530

April 13, 2016

MEMORANDUM FOR: HEADS OF CIVIL LITIGATING COMPONENTS
UNITED STATES ATTORNEYS

FROM: Stuart F. Delery 
Acting Associate Attorney General

SUBJECT: Statement of Principles for Selection of Corporate Monitors in
Civil Settlements and Resolutions

I. INTRODUCTION

The Department of Justice is committed to combatting and deterring corporate misconduct. In recent years, the Department has obtained significant civil resolutions with corporations and other entities. Certain of these negotiated agreements have included provisions pertaining to the appointment of an independent corporate monitor. The Department has a significant interest in ensuring that corporate monitors in its civil resolutions are independent, highly qualified, and free of conflicts of interest. The Department previously has issued guidance for the selection of monitors for criminal Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs). The purpose of this memorandum is to establish principles and procedures for civil settlements and resolutions in which the Department has occasion to select or recommend a monitor.¹

As used in this memorandum, the term “monitor” includes any third party whose job is to monitor the opposing party’s compliance with the terms of any civil settlement agreement or resolution, whether called a “monitor,” “trustee,” “auditor,” or other name. The memorandum

¹ Department guidance for the selection of monitors for DPAs and NPAs is contained in two memoranda, one issued in 2008 (the “Morford Memorandum”) and the other in 2009 (the “Breuer Memorandum”). See “Memorandum for Heads of Department Components and United States Attorneys” from Acting Deputy Attorney General Craig S. Morford, March 7, 2008 (attached hereto as Exhibit A); “Memorandum to All Criminal Division Personnel” from Assistant Attorney General Lanny A. Breuer, June 24, 2009 (attached hereto as Exhibit B). The Morford Memorandum set forth nine principles relating to the Department’s use of monitors in DPAs and NPAs, in the areas of selection of monitors, scope of monitor duties, and duration of monitorships. The Breuer Memorandum supplemented the Morford Memorandum and established policy and procedure for the selection of monitors in DPAs and NPAs being handled by Criminal Division attorneys. A third memorandum, issued in 2010 (the “Grindler Memorandum”), supplemented the Morford Memorandum but did not address the selection of monitors. See “Memorandum for Heads of Department Components and United States Attorneys” from Acting Deputy Attorney General Gary G. Grindler, May 25, 2010.

does not apply, however, to trustee or examiner appointments made by United States Trustees pursuant to the procedure established in 11 U.S.C. § 1104.

Component heads, including United States Attorneys,² are encouraged to prepare component-specific guidance – or to revise and/or supplement any such existing guidance – that enhances and implements this statement of principles in light of the component’s own needs and practices. Some components may have significant numbers of small cases that involve monitors; in such circumstances, component heads may seek appropriate exemptions from these principles from the Associate Attorney General.

This memorandum provides only internal Department of Justice 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. Nor are any limitations hereby placed on otherwise lawful litigation prerogatives of the Department of Justice.

II. PRINCIPLES OF MONITOR SELECTION FOR CIVIL SETTLEMENTS AND RESOLUTIONS

1. Goals of selection process.

The selection process for a monitor should be designed to (1) choose a highly qualified and respected person based on suitability for the assignment and all of the circumstances; (2) avoid potential and actual conflicts of interest; and (3) otherwise instill public confidence in the selection.

2. Identification of monitor candidates.

At the appropriate juncture, the Department’s litigation team, the opposing party (corporation, jurisdiction, etc.), and any other parties to the litigation should discuss what role the monitor will play and what qualities, expertise, and skills the monitor should have. In most cases, the component should allow the opposing party to propose a slate of monitor candidates. In appropriate cases (for example, where the litigation team identifies a person or persons who possess(es) skills, experience, or knowledge that make the person(s) uniquely qualified to serve as the monitor for a particular matter), the component may, at any point in the selection process, identify its own slate of candidates with the approval of the component head. The party proposing a slate of monitor candidates should, where practicable, identify three or more candidates.

The litigation team should provide the screening committee described below with the names of the candidates, along with resumes, biographical information, and any other relevant material concerning the candidates.

The parties may identify and evaluate monitor candidates with information from a variety of sources. For example, they may employ a public application process. Components of course

² As used in this memorandum, the term “component” includes individual United States Attorney’s Offices, and “component heads” includes individual United States Attorneys.

may solicit input and recommendations on monitor candidates from their client agencies (particularly where the client agency possesses relevant technical expertise).

The appropriate timing of submission of monitor candidates to the screening committee may be determined by each component, as long as the selection process set forth herein is employed prior to the Department's selecting a monitor or recommending one to a court.

3. Screening committee.

The relevant Department component shall create a screening committee within the component to approve one or more monitor candidates from the slate provided. A committee may be created as a standing committee or on a case-by-case basis as occasions for selecting or recommending a monitor arise. Because a monitor's role may vary based on the facts of each case and the opposing party involved, a component does not necessarily need to use the same committee structure in every case, as long as the structure used is designed to result in the selection of an independent, highly qualified monitor free from actual or apparent conflicts of interest.

The committee should be comprised of career Department employees, or a combination of career and non-career Department employees, preferably those with relevant experience in the subject matter involved.

4. Conflict of interest clearance.

The component's Deputy Designated Agency Ethics Official should ensure that no member of the screening committee has a conflict of interest in serving on the committee; U.S. Attorney's Offices may designate an appropriate person within the office to perform this conflict clearance function.

In addition, components should use an appropriate conflict clearance process to ensure that each monitor candidate is free of actual or apparent conflicts of interest, or that any such conflict has been waived by all appropriate parties, including by the component head on behalf of the Department. It may be appropriate to require ethics clearance by the Director of the Departmental Ethics Office. The screening committee should also receive an assurance from each candidate that she/he has no conflict of interest that would prevent her/him from accepting the monitorship.

5. Approval and selection of the monitor.

Once each monitor candidate is cleared by the component and provides the conflict of interest assurance, the committee should decide whether to approve one or more of the candidates. The committee may conduct interviews and other research at its discretion in order to determine whether each candidate is independent, highly qualified, and free of conflicts of interest.

The litigation team should select a monitor from among the candidates approved by the committee, and submit the name along with a recommendation memo to the component head. All monitor candidates must be approved by the component head.

Once a monitor candidate has been approved through the Department's process, the litigation team should communicate the decision to the opposing party, or recommend the monitor to the court.

6. Procedure if no candidate is approved.

If no monitor candidate is approved by the screening committee, the party that submitted the initial slate should propose a new slate, ideally numbering three or more candidates, and the litigation team should provide the committee with resumes, biographical information, and any other relevant material concerning the candidates. This process should be repeated until a monitor is approved.

7. Post-monitorship bar.

The employment or retention of the monitor by the opposing party after the termination of the monitorship may raise concerns about both the appearance of a conflict of interest and the effectiveness of the monitor during the monitorship. Consequently, the Department component should obtain a written assurance from the opposing party that it will not employ, retain or otherwise be affiliated with the monitor, or professionals retained by the monitor during the monitorship, for a period of at least one year from the date of the termination of the monitorship. Components may, with component head approval, waive this requirement in a particular case.

8. Monitor vacancy.

In the event that a monitor, once selected, is unable or unwilling to fulfill her/his duties in connection with ensuring the opposing party's compliance with the settlement agreement, the process outlined above should be used to select a new monitor or propose a new monitor to the court.

9. Departure from procedure.

Given the wide variety of civil settlements the Department enters into, and the varying facts and circumstances of each case, any process for monitor selection must be practical and flexible. When the litigation team concludes that the monitor selection process should be different from the process set out in this memorandum, the team may request a departure from the procedure from the component head. The component head may request additional information and/or a written request for a departure.

III. CONCLUSION

Ensuring that the monitors tasked with enforcing compliance with the Department's civil settlement agreements are independent, highly qualified, and free of conflicts of interest is an important priority for the Department. These principles for monitor selection for civil settlements and resolutions, when utilized in an appropriate case, will help ensure a consistent approach to monitor selection that will enhance the Department's law enforcement efforts.

Attachments

Exhibit A



U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

March 7, 2008

MEMORANDUM FOR HEADS OF DEPARTMENT COMPONENTS
UNITED STATES ATTORNEYS

FROM: Craig S. Morford 
Acting Deputy Attorney General

SUBJECT: Selection and Use of Monitors in Deferred Prosecution Agreements
and Non-Prosecution Agreements with Corporations¹

I. INTRODUCTION

The Department of Justice's commitment to deterring and preventing corporate crime remains a high priority. The Principles of Federal Prosecution of Business Organizations set forth guidance to federal prosecutors regarding charges against corporations. A careful consideration of those principles and the facts in a given case may result in a decision to negotiate an agreement to resolve a criminal case against a corporation without a formal conviction -- either a deferred prosecution agreement or a non-prosecution agreement.² As part of some negotiated corporate agreements, there have been provisions pertaining to an independent corporate monitor.³ The corporation benefits from expertise in the area of corporate compliance

¹ As used in these Principles, the terms "corporate" and "corporation" refer to all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations.

² The terms "deferred prosecution agreement" and "non-prosecution agreement" have often been used loosely by prosecutors, defense counsel, courts and commentators. As the terms are used in these Principles, a deferred prosecution agreement is typically predicated upon the filing of a formal charging document by the government, and the agreement is filed with the appropriate court. In the non-prosecution agreement context, formal charges are not filed and the agreement is maintained by the parties rather than being filed with a court. Clear and consistent use of these terms will enable the Department to more effectively identify and share best practices and to track the use of such agreements. These Principles do not apply to plea agreements, which involve the formal conviction of a corporation in a court proceeding.

³ Agreements use a variety of terms to describe the role referred to herein as "monitor," including consultants, experts, and others.

from an independent third party. The corporation, its shareholders, employees and the public at large then benefit from reduced recidivism of corporate crime and the protection of the integrity of the marketplace.

The purpose of this memorandum is to present a series of principles for drafting provisions pertaining to the use of monitors in connection with deferred prosecution and non-prosecution agreements (hereafter referred to collectively as "agreements") with corporations.⁴ Given the varying facts and circumstances of each case – where different industries, corporate size and structure, and other considerations may be at issue – any guidance regarding monitors must be practical and flexible. This guidance is limited to monitors, and does not apply to third parties, whatever their titles, retained to act as receivers, trustees, or perform other functions.

A monitor's primary responsibility is to assess and monitor a corporation's compliance with the terms of the agreement specifically designed to address and reduce the risk of recurrence of the corporation's misconduct, and not to further punitive goals. A monitor should only be used where appropriate given the facts and circumstances of a particular matter. For example, it may be appropriate to use a monitor where a company does not have an effective internal compliance program, or where it needs to establish necessary internal controls. Conversely, in a situation where a company has ceased operations in the area where the criminal misconduct occurred, a monitor may not be necessary.

In negotiating agreements with corporations, prosecutors should be mindful of both: (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. Prosecutors shall, at a minimum, notify the appropriate United States Attorney or Department Component Head prior to the execution of an agreement that includes a corporate monitor. The appropriate United States Attorney or Department Component Head shall, in turn, provide a copy of the agreement to the Assistant Attorney General for the Criminal Division at a reasonable time after it has been executed. The Assistant Attorney General for the Criminal Division shall maintain a record of all such agreements.

This memorandum does not address all provisions concerning monitors that have been included or could appropriately be included in agreements. Rather this memorandum sets forth nine basic principles in the areas of selection, scope of duties, and duration.

This memorandum provides only internal Department of Justice guidance. In addition, this memorandum applies only to criminal matters and does not apply to agencies other than the

⁴ In the case of deferred prosecution agreements filed with a court, these Principles must be applied with due regard for the appropriate role of the court and/or the probation office.

Department of Justice. 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. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

II. SELECTION

1. Principle: Before beginning the process of selecting a monitor in connection with deferred prosecution agreements and non-prosecution agreements, the corporation and the Government should discuss the necessary qualifications for a monitor based on the facts and circumstances of the case. The monitor must be selected based on the merits. The selection process must, at a minimum, be designed to: (1) select a highly qualified and respected person or entity based on suitability for the assignment and all of the circumstances; (2) avoid potential and actual conflicts of interests, and (3) otherwise instill public confidence by implementing the steps set forth in this Principle.

To avoid a conflict, first, Government attorneys who participate in the process of selecting a monitor shall be mindful of their obligation to comply with the conflict-of-interest guidelines set forth in 18 U.S.C. § 208 and 5 C.F.R. Part 2635. Second, the Government shall create a standing or *ad hoc* committee in the Department component or office where the case originated to consider monitor candidates. United States Attorneys and Assistant Attorneys General may not make, accept, or veto the selection of monitor candidates unilaterally. Third, the Office of the Deputy Attorney General must approve the monitor. Fourth, the Government should decline to accept a monitor if he or she has an interest in, or relationship with, the corporation or its employees, officers or directors that would cause a reasonable person to question the monitor's impartiality. Finally, the Government should obtain a commitment from the corporation that it will not employ or be affiliated with the monitor for a period of not less than one year from the date the monitorship is terminated.

Comment: Because a monitor's role may vary based on the facts of each case and the entity involved, there is no one method of selection that should necessarily be used in every instance. For example, the corporation may select a monitor candidate, with the Government reserving the right to veto the proposed choice if the monitor is unacceptable. In other cases, the facts may require the Government to play a greater role in selecting the monitor. Whatever method is used, the Government should determine what selection process is most effective as early in the negotiations as possible, and endeavor to ensure that the process is designed to produce a high-quality and conflict-free monitor and to instill public confidence. If the Government determines that participation in the selection process by any Government personnel creates, or appears to create, a potential or actual conflict in violation of 18 U.S.C. § 208 and 5

C.F.R. Part 2635, the Government must proceed as in other matters where recusal issues arise. In all cases, the Government must submit the proposed monitor to the Office of the Deputy Attorney General for review and approval before the monitorship is established.

Ordinarily, the Government and the corporation should discuss what role the monitor will play and what qualities, expertise, and skills the monitor should have. While attorneys, including but not limited to former Government attorneys, may have certain skills that qualify them to function effectively as a monitor, other individuals, such as accountants, technical or scientific experts, and compliance experts, may have skills that are more appropriate to the tasks contemplated in a given agreement.

Subsequent employment or retention of the monitor by the corporation after the monitorship period concludes may raise concerns about both the appearance of a conflict of interest and the effectiveness of the monitor during the monitorship, particularly with regard to the disclosure of possible new misconduct. Such employment includes both direct and indirect, or subcontracted, relationships.

Each United States Attorney's Office and Department component shall create a standing or *ad hoc* committee ("Committee") of prosecutors to consider the selection or veto, as appropriate, of monitor candidates. The Committee should, at a minimum, include the office ethics advisor, the Criminal Chief of the United States Attorney's Office or relevant Section Chief of the Department component, and at least one other experienced prosecutor.

Where practicable, the corporation, the Government, or both parties, depending on the selection process being used, should consider a pool of at least three qualified monitor candidates. Where the selection process calls for the corporation to choose the monitor at the outset, the corporation should submit its choice from among the pool of candidates to the Government. Where the selection process calls for the Government to play a greater role in selecting the monitor, the Government should, where practicable, identify at least three acceptable monitors from the pool of candidates, and the corporation shall choose from that list.

III. SCOPE OF DUTIES

A. INDEPENDENCE

2. Principle: A monitor is an independent third-party, not an employee or agent of the corporation or of the Government.

Comment: A monitor by definition is distinct and independent from the directors, officers, employees, and other representatives of the corporation. The monitor is not the

corporation's attorney. Accordingly, the corporation may not seek to obtain or obtain legal advice from the monitor. Conversely, a monitor also is not an agent or employee of the Government.

While a monitor is independent both from the corporation and the Government, there should be open dialogue among the corporation, the Government and the monitor throughout the duration of the agreement.

B. MONITORING COMPLIANCE WITH THE AGREEMENT

3. **Principle:** A monitor's primary responsibility should be to assess and monitor a corporation's compliance with those terms of the agreement that are specifically designed to address and reduce the risk of recurrence of the corporation's misconduct, including, in most cases, evaluating (and where appropriate proposing) internal controls and corporate ethics and compliance programs.

Comment: At the corporate level, there may be a variety of causes of criminal misconduct, including but not limited to the failure of internal controls or ethics and compliance programs to prevent, detect, and respond to such misconduct. A monitor's primary role is to evaluate whether a corporation has both adopted and effectively implemented ethics and compliance programs to address and reduce the risk of recurrence of the corporation's misconduct. A well-designed ethics and compliance program that is not effectively implemented will fail to lower the risk of recidivism.

A monitor is not responsible to the corporation's shareholders. Therefore, from a corporate governance standpoint, responsibility for designing an ethics and compliance program that will prevent misconduct should remain with the corporation, subject to the monitor's input, evaluation and recommendations.

4. **Principle:** In carrying out his or her duties, a monitor will often need to understand the full scope of the corporation's misconduct covered by the agreement, but the monitor's responsibilities should be no broader than necessary to address and reduce the risk of recurrence of the corporation's misconduct.

Comment: The scope of a monitor's duties should be tailored to the facts of each case to address and reduce the risk of recurrence of the corporation's misconduct. Among other things, focusing the monitor's duties on these tasks may serve to calibrate the expense of the monitorship to the failure that gave rise to the misconduct the agreement covers.

Neither the corporation nor the public benefits from employing a monitor whose role is too narrowly defined (and, therefore, prevents the monitor from effectively evaluating the

reforms intended by the parties) or too broadly defined (and, therefore, results in the monitor engaging in activities that fail to facilitate the corporation's implementation of the reforms intended by the parties).

The monitor's mandate is not to investigate historical misconduct. Nevertheless, in appropriate circumstances, an understanding of historical misconduct may inform a monitor's evaluation of the effectiveness of the corporation's compliance with the agreement.

C. COMMUNICATIONS AND RECOMMENDATIONS BY THE MONITOR

5. **Principle:** Communication among the Government, the corporation and the monitor is in the interest of all the parties. Depending on the facts and circumstances, it may be appropriate for the monitor to make periodic written reports to both the Government and the corporation.

Comment: A monitor generally works closely with a corporation and communicates with a corporation on a regular basis in the course of his or her duties. The monitor must also have the discretion to communicate with the Government as he or she deems appropriate. For example, a monitor should be free to discuss with the Government the progress of, as well as issues arising from, the drafting and implementation of an ethics and compliance program. Depending on the facts and circumstances, it may be appropriate for the monitor to make periodic written reports to both the Government and the corporation regarding, among other things: (1) the monitor's activities; (2) whether the corporation is complying with the terms of the agreement; and (3) any changes that are necessary to foster the corporation's compliance with the terms of the agreement.

6. **Principle:** 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. The Government may consider this conduct when evaluating whether the corporation has fulfilled its obligations under the agreement.

Comment: The corporation and its officers and directors are ultimately responsible for the ethical and legal operations of the corporation. Therefore, the corporation should evaluate whether to adopt recommendations made by the monitor. If the corporation declines to adopt a recommendation by the monitor, the Government should consider both the monitor's recommendation and the corporation's reasons in determining whether the corporation is complying with the agreement. A flexible timetable should be established to ensure that both a monitor's recommendations and the corporation's decision to adopt or reject them are made well before the expiration of the agreement.

**D. REPORTING OF PREVIOUSLY UNDISCLOSED
OR NEW MISCONDUCT**

7. Principle: The agreement should clearly identify any types of previously undisclosed or new misconduct that the monitor will be required to report directly to the Government. The agreement should also provide that as to evidence of other such misconduct, the monitor will have the discretion to report this misconduct to the Government or the corporation or both.

Comment: As a general rule, timely and open communication between and among the corporation, the Government and the monitor regarding allegations of misconduct will facilitate the review of the misconduct and formulation of an appropriate response to it. The agreement may set forth certain types of previously undisclosed or new misconduct that the monitor will be required to report directly to the Government. Additionally, in some instances, the monitor should immediately report other such misconduct directly to the Government and not to the corporation. The presence of any of the following factors militates in favor of reporting such misconduct directly to the Government and not to the corporation, namely, where the misconduct: (1) poses a risk to public health or safety or the environment; (2) involves senior management of the corporation; (3) involves obstruction of justice; (4) involves criminal activity which the Government has the opportunity to investigate proactively and/or covertly; or (5) otherwise poses a substantial risk of harm. On the other hand, in instances where the allegations of such misconduct are not credible or involve actions of individuals outside the scope of the corporation's business, the monitor may decide, in the exercise of his or her discretion, that the allegations need not be reported directly to the Government.

IV. DURATION

8. Principle: 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.

Comment: The following criteria should be considered when negotiating duration of the agreement (not necessarily in this order): (1) the nature and seriousness of the underlying misconduct; (2) the pervasiveness and duration of misconduct within the corporation, including the complicity or involvement of senior management; (3) the corporation's history of similar misconduct; (4) the nature of the corporate culture; (5) the scale and complexity of any remedial measures contemplated by the agreement, including the size of the entity or business unit at issue; and (6) the stage of design and implementation of remedial measures when the monitorship commences. It is reasonable to forecast that completing an assessment of more extensive and/or complex remedial measures will require a longer period of time than completing

an assessment of less extensive and/or less complex ones. Similarly, it is reasonable to forecast that a monitor who is assigned responsibility to assess a compliance program that has not been designed or implemented may take longer to complete that assignment than one who is assigned responsibility to assess a compliance program that has already been designed and implemented.

9. Principle: In most cases, an agreement 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 agreement. Conversely, in most cases, an agreement should provide for early termination if the corporation can demonstrate to the Government that there exists a change in circumstances sufficient to eliminate the need for a monitor.

Comment: If the corporation has not satisfied its obligations under the terms of the agreement at the time the monitorship ends, the corresponding risk of recidivism will not have been reduced and an extension of the monitor provision(s) may be appropriate. On the other hand, there are a number of changes in circumstances that could justify early termination of an agreement. For example, if a corporation ceased operations in the area that was the subject of the agreement, a monitor may no longer be necessary. Similarly, if a corporation is purchased by or merges with another entity that has an effective ethics and compliance program, it may be prudent to terminate a monitorship.

Exhibit B



U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General

Washington, D.C. 20530

June 24, 2009

TO: All Criminal Division Personnel

FROM: Lanny A. Breuer 
Assistant Attorney General

SUBJECT: Selection of Monitors in Criminal Division Matters

The purpose of this memorandum is to establish policy and procedure for the selection of monitors in matters being handled by Criminal Division attorneys. This memorandum supplements 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" or "Memorandum").¹ The policy and procedure contained in this memorandum shall apply to any deferred prosecution agreement ("DPA") and/or non-prosecution agreement ("NPA") between the Criminal Division and a business organization which requires the retention of a monitor.²

A. Terms of the Agreement: As a preliminary matter, any DPA or NPA 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 what the monitor's qualifications should be;
2. A statement that the parties will endeavor to complete the monitor selection process within sixty (60) days of the execution of the underlying agreement; and
3. An explanation of the responsibilities of the monitor; and
4. The term of the monitorship.

¹ The Morford Memorandum requires 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 requires that the Committee include an ethics advisor, the Section Chief of the involved Department component and one other experienced prosecutor.

² 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.

B. Standing Committee on the Selection of Monitors: The Criminal Division shall create a Standing Committee on the Selection of Monitors (the "Standing Committee").

1. Composition of the Standing Committee: The Standing Committee shall comprise: (1) the Deputy Assistant Attorney General ("DAAG") with supervisory responsibility for the Fraud Section, or his or her designee;³ (2) the Chief of the Fraud Section, or his or her designee; (3) the Chief of the relevant Section entering into the Agreement;⁴ and (4) the Deputy Designated Agency Ethics Official for the Criminal Division.⁵ Should further replacements not contemplated by this 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 or her designee, shall be the Chair of the Standing Committee, and shall be responsible for ensuring that the Standing Committee discharges its responsibilities.

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).

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 early as practicable, identify the Standing Committee participants for that case, and ensure that there are no conflicts among the Standing Committee Members.

C. 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 the 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 should employ the following procedure in selecting a monitor:

³ 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.

⁴ 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.

⁵ 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 or her designee.

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.⁶ 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 for a period of not less than one year from the date the termination of the monitorship; and
- c. a written certification by each of the candidates that he/she is not an employee or agent of the corporation and holds no interest in, and has no relationship with, the corporation, its subsidiaries, affiliates or related entities, or its employees, officers, or directors.

2. Initial Review of Monitor Candidates: The Criminal Division attorneys handling the matter 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 with the particular area(s) at issue in the case under consideration, and experience 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, 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 the attorneys handling the matter have completed the initial review of monitor candidates and conferred with their supervisors, they should decide whether one of the monitor

⁶ The Company may express a preference and/or identify the monitor candidate among the pool that is its first choice to serve as the monitor.

candidates is acceptable. If they decide to reject all three candidates, they should notify the Company and request that counsel for the Company propose another candidate or candidates within twenty (20) business days.⁷ This process should continue until the attorneys handling the matter have voted to accept and recommend a monitor candidate.

3. Preparation of a Monitor Selection Memorandum: Once the attorneys handling the matter and their supervisors accept and 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;
- 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 candidate's qualifications;
- g. a description of countervailing considerations, if any, in selecting the candidate; and
- h. a signed certification, on the form attached hereto, by each of the Criminal Division attorneys involved in the monitor selection process that he or 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 Selection Memorandum and provided to the Standing Committee.

4. Standing Committee Review of a Monitor Candidate: The Standing Committee should review the recommendation set forth in the Monitor Selection 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 the candidate.

⁷ A Company may be granted a reasonable extension of time to propose an additional candidate or candidates if the attorneys handling the matter believe circumstances warrant an extension. The attorneys handling the matter should advise the Standing Committee of the extension. If the attorneys handling the matter determine that the Company has not proposed acceptable candidates, consistent with the guidance provided herein, then the attorneys may evaluate alternative candidates that they identify and provide a list of such candidates to the Company for consideration.

If the Standing 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 Criminal Division for ultimate submission to the Office of the Deputy Attorney General ("ODAG"). The Standing Committee's recommendation should also include a written certification by the Deputy Designated Agency Ethics Official for the Criminal Division that the 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 candidate, it should so inform the Criminal Division attorneys handling the matter and their supervisors who, in turn, should notify the Company and request that the Company propose a new monitor candidate or candidates as provided by paragraph C above. The Standing Committee also should return the Monitor Selection Memorandum and all attachments to the attorneys handling the matter.

If the Standing Committee is unable to reach a majority decision (*i.e.* there is a tie) regarding the proposed monitor candidate, the Standing Committee should so indicate on the Monitor Selection Memorandum and forward the Memorandum and all attachments to the Assistant Attorney General for the Criminal Division.

5. Review by the Assistant Attorney General: The Assistant Attorney General for the Criminal Division (the "AAG") may not unilaterally accept or reject a monitor candidate selected pursuant to a DPA or NPA. However, the AAG should review the recommendation of the Standing Committee set forth in the Monitor Selection 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. 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 Office of the Deputy Attorney General ("ODAG").

6. Approval of the Office of the Deputy Attorney General: All monitor candidates involving DPAs and NPAs must be approved by the ODAG.

Upon receipt of the decision of the ODAG regarding the proposed monitor, the Criminal 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 by paragraph C above. If the ODAG approves the proposed monitor, the attorneys handling the matter should notify the Company and the monitorship should be executed according to the terms of the Agreement.

D. 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 Selection

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.⁸

The Chair of the Standing Committee should obtain and maintain an electronic copy of every Agreement which provides for a monitor.

E. 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, 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.⁹

⁸ Note that pursuant to the memorandum entitled "Retention of Corporate Deferred Prosecution Agreements and Non-Prosecution Agreements," (January 15, 2009) all DPAs and NPAs must also be electronically sent to CorporateAgreements@usdoj.gov.

⁹ A court may also modify the monitor selection process in cases where the Agreement is filed with a court.



U.S. Department of Justice
Criminal Division

CONFIDENTIAL

MEMORANDUM

To: Criminal Division Monitor Selection Standing Committee

From:

Date:

Re:

INTRODUCTION

- I. Brief Statement of the Underlying Case
- II. Proposed Disposition of the Case
- III. Necessity of a Monitor in this Case
- IV. Summary of Responsibilities and Term of Monitor
- V. Process Used to Select the Candidate

E.g., Company X proposed three proposed monitor candidates. On ___ dates, the trial attorneys interviewed the candidates. Based on the qualifications of ____, and the interview with ____, the trial attorneys/ Section recommend(s) him/ her as the monitor.

- VI. Description of the Candidate's Qualifications

Can provide a brief description along with a resume or CV.

- VII. Countervailing Considerations

Department of Justice Attorney Certification Concerning
Compliance with Conflict of Interest Guidelines
In Monitor Selection Matters

Monitor Selection Name

18 U.S.C. § 208 is a criminal conflict of interest statute that prohibits me from participating personally and substantially in an official capacity in any particular matter in which I have a financial interest, or in which certain persons or organizations whose interests are imputed to me have a financial interest, if the particular matter will have a direct and predictable effect on that interest. This statute is in addition to any state bar professional conduct rules that may apply.

With regard to the selection of monitors in Criminal Division matters:

I understand that my involvement in the selection of the above-referenced monitor is *personal and substantial participation* in a *particular matter*.

I understand that *financial interest* is the potential for gain or loss as a result of governmental action and that such interests typically arise through ownership of stocks or sectorized mutual funds, outside activities/employment, and spousal employment.

I understand that those *interests imputed to me* include those of my spouse, domestic partner, minor children, general partners, any organization in which I serve as officer, director, trustee, general partner or employee, and any person or organization with whom I am negotiating for or have any arrangement concerning prospective employment.

I understand that a direct and predictable effect occurs when there is a close causal relationship between the selection of the monitor and my financial interest or the financial interest held by someone whose interests are imputed to me. The effect maybe positive or negative. The magnitude of the gain or loss is immaterial.

I certify that, to the best of my knowledge, the selection of the above-named monitor, will not directly and predictably affect my financial interests or those interests imputed to me and my participation in this matter will not violate 18 U.S.C. Section 208.

5 C.F.R. § 2635.502, the impartiality rule, prohibits me from participating in a specific party matter that I know is likely to affect the *financial interests of a member of my household* or in which someone with whom I have a *covered relationship* is or represents a party.

I understand that I have a covered relationship with the following: anyone with whom I have or seek a business, contractual, or financial relationship; a relative with whom I have a close personal relationship; anyone for whom my spouse, domestic partner, parent, or dependent child serves or seeks to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee; anyone for whom I worked in the last year as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee; and an organization in which I am an active member.

I certify that, to the best of my knowledge, my involvement in the selection of the above-named monitor is not likely to affect the financial interest of a member of my household, and no one with whom I have a covered relationship is or represents a party in this matter. My participation will not violate 5 C.F.R. § 2635.502.

28 C.F.R. § 45.2 prohibits me, without written authorization, from participating in a criminal investigation or prosecution if I have a *personal or political relationship* with any person or organization substantially involved in the conduct that is the subject of the investigation or prosecution, or any person or organization which I know has a specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution.

I understand that I have a political relationship with any of the following with whom I have a close identification: an elected official, a candidate for elective public office, a political party, or a campaign organization, arising from service as a principal adviser thereto or a principal official thereof.

I understand that I have a personal relationship with anyone with whom I have a close and substantial connection of the type normally viewed as likely to induce partiality.

I have disclosed to the Deputy Designated Agency Ethics Official for the Criminal Division any relationship(s) I have or had with the monitor selected. To the extent any relationship(s) exist, I have attached a statement hereto either describing said relationship(s) or a statement that I have discussed the matter with the Deputy Designated Agency Ethics Official for the Criminal Division and it has been determined that my participation does not violate 28 C.F.R. § 45.2.

I certify that to the best of my knowledge, that I do not have, nor have I had a personal or political relationship with the above-named monitor, or that, in accordance with 28 C.F.R. § 45.2 (b), any relationship with the monitor selected has been disclosed to my appropriate

supervisor and the Deputy Designated Agency Ethics Official for the Criminal Division and it has been determined that my participation in the selection of the above-named monitor does not violate 28 C.F.R. § 45.2.

I understand, acknowledge, and certify the above. I acknowledge my ongoing responsibility to be aware of the potential for conflict or the appearance of a conflict, and my responsibility to disclose, as soon as it is known to me, any financial or personal interests described above.

_____ Date _____

(Signed)

_____ (Printed Name)

Each attorney assigned to the monitor selection must execute a separate certification. Attach the completed certification to the monitor selection memorandum.