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To appoint or not appoint a corporate monitor: Navigating the new DOJ guidance

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NOVEMBER 20, 2018

In an expert analysis published Aug. 17,[1] the lead author of this article reviewed the Department of Justice's Foreign Corrupt Practices Act corporate enforcement policy[2] with respect to corporate monitorships and the lessons learned from two significant FCPA settlements in the preceding 12 months: the September 2017 global settlement involving telecommunications giant Telia Co. AB and its Uzbek subsidiary Coscom LLC and the April 2018 settlement involving Panasonic Aviation Corp., a subsidiary of electronics giant Panasonic Corp.

Specifically, the expert analysis reviewed the Telia and PAC settlements in order to explain how Telia managed to avoid the imposition of a monitor while PAC was unsuccessful in doing so — even though sophisticated foreign bribery schemes were pervasive at both companies and, more importantly, neither company self-reported the FCPA violations as contemplated by the policy.

A review and comparison of the language of the settlements in both cases demonstrated that Telia was able to avoid a monitor because (unlike PAC), by the time of settlement, it had:

- Completed an aggressive and proactive investigation.
- Aggressively terminated all individuals involved in the misconduct, including supervisors and board members who "failed to detect the corrupt conduct," without regard to rank or title.
- Fully implemented and tested an enhanced foreign anti-corruption compliance program designed to "prevent the reoccurrence of misconduct."

In comparison to PAC's actions and remedial measures — which the government acknowledged were strong in many ways — Telia's actions and remedial measures were deemed even stronger. Thus, Telia's actions convinced prosecutors that a monitor was not necessary even though the company did not self-report the misconduct.

On Oct. 11, Assistant Attorney General Brian A. Benczkowski issued a memorandum to all Department of Justice Criminal Division personnel titled "Selection of Monitors in Criminal Division Matters."

The Benczkowski memo provides new direction to DOJ prosecutors regarding the decision on when to require the appointment of a corporate monitor as part of a resolution between the federal government and a corporation (whether by plea agreement, or by deferred or nonprosecution agreement) and the process for selecting a corporate monitor.

The memo is the first major DOJ pronouncement regarding corporate monitors under the Trump administration and represents a significant shift from earlier guidelines.[3] It signals to both prosecutors and businesses the administration's view that monitorship appointments will not be taken lightly and will be required only when clearly warranted.

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In this article, we explore the implications of the Benczkowski memo for the appointment of monitors in cases of corporate misconduct, and whether the memo affects our recent expert analysis.

BASIS FOR SEEKING A MONITOR

The Benczkowski memo directs prosecutors to weigh two principal considerations first identified in a March 7, 2008, memorandum issued by then-acting Deputy Attorney General Craig S. Morford regarding whether to require a monitor: the potential benefits that employing a monitor may have for the corporation and the public, and the cost of a monitor and its impact on the operations of a corporation.

In deciding whether the corporation and the public potentially benefit from the imposition of a monitor on a corporation, the Benczkowski memo further directs prosecutors to evaluate whether:

(1) The underlying misconduct involved the manipulation of corporate books and records or the exploitation of an inadequate compliance program or internal control system.

(2) The misconduct at issue was pervasive across the business organization or approved or facilitated by senior management.

(3) The corporation has made significant investments in, and improvements to, its corporate compliance program and internal control systems.

(4) Remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future.

An affirmative answer to either or both of these first two Benczkowski factors would support the imposition of a monitor. On the flip side, a negative answer to either (or both) of the third and fourth factors would also support the imposition of a monitor.

The rigorous Benczkowski memo requirements are designed to signal that a monitor will be required only when clearly warranted.

Conversely, assuming an affirmative answer to either or both the first two factors, if the company can affirmatively demonstrate it has met the third and fourth factors then the imposition of a monitor would probably not be warranted.

Although the Benczkowski factors provide guidance to prosecutors and companies on what will be considered in determining if the corporation and the public would benefit from a monitor, it provides no concrete guidance on how to weigh such benefits against the costs and impact of a monitor on the operations of a company.[4]

Besides directing prosecutors to calculate the costs of a proposed monitorship and estimate its operational impact on a company on a case-by-case basis, the Benczkowski memo makes clear to the prosecutors making the assessment that they will have to follow a rigorous review and approval process within the DOJ before a monitor can be imposed. As described below, this review process may deter prosecutors from seeking a monitor except in the clearest of cases.

THE PROCESS FOR SEEKING A MONITOR

The Benczkowski memo lays out in painstaking detail the process that will be required of company counsel and DOJ prosecutors seeking to impose a corporate monitor pursuant to a DPA, NPA or plea agreement. The most significant change to the existing process, assuming the prosecutors get the initial go-ahead to seek a monitor,[5] is the creation of a "Standing Committee on the Selection of Monitors" that is responsible for approving the selection of a monitor.

The committee consists of the deputy assistant attorney general with supervisory responsibility for the fraud section or a designee, the chief of the fraud section or a designee, the deputy designated agency ethics official for the criminal division, and ad hoc members as determined by the deputy assistant attorney general, who shall chair the Standing Committee.[6]

Before the handling prosecutors can submit a monitor recommendation memorandum to the Standing Committee for review and approval, they and counsel for the company must complete a thorough and (most likely) time-consuming vetting and selection process.

Indeed, once the prosecutors and the company agree that a monitor will be required as part of any agreement between the parties, the Benczkowski memo directs company counsel to provide the prosecutors with a written proposal[7] with a "pool of three qualified monitor candidates" that includes, at a minimum:

(1) A description of each candidate's qualifications and credentials in support of the listed "evaluative considerations and factors."

(2) A written certification by the company that it will not employ or be affiliated with the monitor for at least two years from the date the monitorship is terminated

(3) A written certification from each monitor candidate that the candidate has not been employed by or affiliated with (or maintained a financial interest in) the company and any of its affiliated entities.

(4) A written certification from each candidate that the candidate has notified any client regarding any representation of the client by the candidate in a matter involving the DOJ criminal division section handling the monitor selection process, and has either obtained a waiver from those clients or has withdrawn as counsel; and,

(5) A statement identifying the company's first choice to serve as monitor.

The process then shifts to the handling prosecutors and their section supervisors to promptly interview each candidate, address the evaluative considerations and factors[8] supporting each candidate's qualifications and make a selection from the pool of three candidates; direct the company to submit another candidate or candidates within 20 days (or longer, if the requested by the company and the circumstances warrant an extension); or identify and evaluate alternative candidates on their own.[9]

Once the prosecutors and their supervisors have selected a candidate, they must prepare and submit a written monitor selection memorandum to the Standing Committee for its review and approval. The memorandum must include, among other things, an explanation as to why a monitor is required in the case, based on the four Benczkowski factors discussed earlier.[10]

The Standing Committee is then free to interview the recommended candidate, as well as the other candidates, and

must vote on whether to accept or reject the recommended candidate.

If the Standing Committee rejects the recommended candidate, the prosecution team may either recommend an alternative candidate from the remaining two candidates or seek additional qualified candidates from the company.

If the Standing Committee rejects the entire pool of candidates, it must return the monitor recommendation memorandum and all attachments to the handling prosecutors — essentially requiring the prosecutors and company counsel to begin the process anew.

If the Standing Committee accepts or does not reject the recommended candidate (by being unable to reach a majority decision on accepting or rejecting the candidate), it must so indicate on the memorandum and forward the memorandum and all attachments to the assistant attorney general.

Once the AAG has noted either concurrence or disagreement with the recommended candidate on the memorandum,[11] the AAG must forward the memorandum to the Office of the Deputy Attorney General.

Finally, it is the ODAG that must ultimately approve or reject the recommended monitor candidate. If it does not approve, the handling prosecutors are to ask the company to propose a new candidate or slate of candidates and begin the process anew.[12]

AN ANALYSIS OF RECENT SETTLEMENTS IN LIGHT OF THE BENCZKOWSKI MEMO

Notwithstanding the length and scope of the Benczkowski memo, prosecutors have been applying elements of the four Benczkowski factors in determining whether to seek a monitor for years, including in the Telia and PAC settlements.

Indeed, in both the Telia and PAC settlements, the government noted the weaknesses in the companies' compliance programs and internal controls and the pervasiveness of the bribery schemes across the organizations.

The government also recognized that both companies had cooperated with the government and had significantly enhanced their compliance programs and internal controls. However, as we discussed our earlier expert analysis, Telia was more aggressive than PAC in its top-to-bottom purging of all company personnel with responsibility for the bribery scheme.

By the time of its settlement with the government, the company had fully implemented and tested its enhanced internal controls and demonstrated (to the government's satisfaction) that the enhancements would prevent the reoccurrence of misconduct.

In short, the application of the four Benczkowski factors to Telia and PAC explain that a monitor was required in PAC because (unlike Telia) the company had failed to meet the fourth factor.

If Telia was able to avoid a monitor prior to the Benczkowski memo, there is little doubt it would have been able to do the same under it. The more interesting question is whether, despite "failing" the fourth factor, PAC would have been able to dissuade the handling prosecutors from seeking a monitor by relying on the Benczkowski memo requirement that prosecutors weigh the benefits of a monitor against the costs and operational impact of the monitorship on the company.

In addition to the costs and operational impact that PAC (or a similarly situated company) might argue in opposing a monitor, prosecutors would also most likely carefully consider the Benczkowski memo's rigorous monitor review and selection approval process in its decision to seek a monitor.

In other words, although the memo provides no concrete guidance to prosecutors on how to assess costs and operational impact of a proposed monitorship on a company, it provides prosecutors (and company counsel) with plenty of guidance on the costs — in terms of time and human resources — that it will take for a monitor to be approved at the highest levels of the DOJ.

And though it might be tempting to assume that the Standing Committee will defer to the judgment of the handling prosecutors and their supervisors — and that ODAG will defer to the judgment of the AAG, Standing Committee and prosecution team — the very fact that the Benczkowski memo provides two levels of de novo review of the decision to seek a monitor will almost certainly give prosecutors pause before moving forward.

Indeed, in our view, the rigorous Benczkowski memo requirements are designed to do just that and to signal both DOJ personnel at every level and the business community at large that (going forward) a monitor will be required only when clearly warranted.

While it is not clear whether PAC would have been able to dissuade the handling prosecutors from seeking a monitor had the Benczkowski memo been in place at the time of its DPA and settlement with the government, it is reasonable to assume that the prosecutors would most likely have carefully evaluated the following:

(1) PAC's "significant, although in some respects untimely" remedial measures;

(2) the company's enhancements to its compliance program, even though they had not been "fully implemented or tested" at the time of resolution; and

(3) whether the company's shortcomings in enhancements and controls (whatever they were) were serious enough to require a monitor, knowing that they would have to justify and subject their decision to multiple levels of review within DOJ.

Although we will never know for sure if the government would have required a monitor in PAC had the Benczkowski memo been in place at the time of settlement, future settlements involving companies with less than perfect compliance program enhancements and controls may provide a reasonable guess.

CONCLUSION

The Benczkowski memo redirects prosecutors considering a monitorship to thoroughly analyze the necessity of a monitor and seek to impose one only when absolutely necessary — balancing the potential benefits to the company and the public of a monitor against the costs and operational burden to the company.

The rigorous Benczkowski memo requirements are designed to signal that a monitor will be required only when clearly warranted.

The memo makes it clear that even if the handling prosecutors determine that a monitor is necessary, they will be required to go through a rigorous monitor selection and approval process involving de novo review at the highest levels of the DOJ.

While the memo might suggest that a monitor will be imposed only in the most necessary of circumstances, it would be folly for a company in the throes of an investigation to assume that half-hearted enhancements to internal controls and compliance will stave off a monitor.

As we noted in our earlier expert analysis, a company that has experienced a major compliance failure, such as the FCPA violations in Telia and PAC, would be wise to engage outside counsel whose experience extends beyond conducting thorough and proactive investigations.

Ideally, outside counsel will have former compliance officers and/or former independent monitors that can help the company improve its compliance program and design, implement and test enhanced internal controls (and do the work that a monitor would do) before settling with the government.

NOTES

[1] Jose P. Sierra, Avoiding a monitor under the FCPA corporate enforcement policy: Lessons from Telia and Panasonic, 32 WESTLAW J. WHITE COLLAR-CRIME 12 (Aug. 17, 2018).

[2] U.S. Department of Justice, U.S. Attorney's Manual 9-47.120 (2017).

[3] Those earlier guidelines include Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations, dated March 7, 2008 (Morford Memo); Selection of Monitors in Criminal Division Matters, dated June 24, 2009 (Breuer Memo); and Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations, dated May 25, 2010 (Grindler Memo).

[4] In fact, it is not clear how much weight prosecutors have given to monitorship costs and operational impact in the past, once they determined that a monitor was needed.

[5] The Benczkowski memo states that, in addition to first receiving approval from their supervisors (including the chief of the relevant section of the criminal division) and the assistant attorney general for the criminal division, the prosecutors must include in the DPA, NPA or plea agreement: (1) a description of the monitor's qualifications; (2) a description of the monitor selection process; (3) a description of the process for replacing the monitor during the monitorship term, if necessary; (4) a commitment from the parties to complete the monitor selection process within 60 days of the execution of the agreement; (5) an explanation of the monitor's responsibilities and the scope of the monitorship; and (6) the length of the monitorship.

[6] All members of the Standing Committee reviewing the monitor selection process must adhere to the conflict-of-interest guidelines set forth in 18 U.S.C.A. § 208, C.F.R. Part 2635 (financial interest) and 28 C.F.R. Part 45.2 (personal or political relationship).

[7] Because the Benczkowski memo states that the written proposal must be provided within 20 business days after the execution of the agreement, most of the vetting will necessarily be accomplished before the parties sign the agreement.

[8] The considerations and factors to be evaluated are: (1) each candidate's general background, education and training, professional experience, commendations, honors, licensing, reputation in the relevant professional community and prior experience as a monitor; (2) each candidate's experience and expertise in the area(s) at issue in the case under consideration, including applying such experience and expertise in an organizational setting; (3) each candidate's degree of objectivity and independence from the company; (4) the adequacy and sufficiency of each candidate's resources to discharge the monitor's responsibilities effectively; and (5) any other relevant factors as determined by the handling prosecutors.

[9] The decision to identify and evaluate alternative candidates not selected by the company should occur only if the prosecutors conclude that the company has failed to identify a suitable candidate for whatever reason and such failure is negatively impacting the agreement or prospective monitorship.

[10] In addition to justifying the request for a monitor using the four Benczkowski factors, the monitor selection memorandum must include (1) a brief statement of the underlying case; (2) a summary of the monitor's responsibilities and the proposed length of his/her term; (3) a description of the candidate selection process; (4) a description of the selected candidate's qualifications and an explanation of why the recommended candidate was chosen; (5) a description of any countervailing considerations, if any, in selecting the candidate; (6) a description of the other candidates submitted by the company; and (7) a signed certification from each prosecutor and supervisor attesting to compliance with the conflicts of interest guidelines. It is noteworthy that the Benczkowski memo requires prosecutors to provide "countervailing considerations" that the Standing Committee could then use to reject the prosecutor's recommended candidate.

[11] Consistent with the Morford Memo, the AAG cannot unilaterally make, accept or veto the selection of the recommended monitor candidate, but can request additional information or interview the recommended candidate.

[12] Because the monitor selection process in the Benczkowski memo contemplates that the agreement between the company and the government has already determined that a monitor is necessary, a rejection of the recommended monitor candidate at either the Standing Committee or ODAG levels necessarily requires that the parties restart the process from scratch.

This article was originally published on the Practitioner Insights Commentaries web page on November 20, 2018.

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