



WHITE COLLAR COMPLIANCE & DEFENSE PRACTICE

ALERT

DEPARTMENT OF JUSTICE RELEASES GUIDANCE ON CORPORATE MONITOR DISPUTES AND FEDERAL SENTENCING DECISIONS

By Eric E. Reed

The U.S. Department of Justice (Department) recently issued statements that clarify and revise existing Department policy on two significant issues: (1) the Department's role in resolving disputes with corporate monitors; and (2) prosecutorial discretion in charging and sentencing decisions. The following offers a brief synopsis of both releases.

New Guidance Clarifying DOJ Role in Resolving Disputes With Corporate Monitors

Prompted by a critical report from the U.S. Government Accountability Office (GAO), on May 25, 2010, the Department issued additional guidance on the use of monitors in deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) with business organizations under criminal investigation. Building on past guidance, the recent release adds that a DPA or NPA "should explain what role the Department could play in resolving disputes that may arise between the monitor and the corporation, given the facts and circumstances of the case."

When a business organization facing federal criminal liability convinces the government to resolve the liability without a formal conviction through a DPA or NPA, the negotiated agreement may call for the use of a corporate monitor to ensure compliance with the provisions of the DPA or NPA. The monitors receive compensation from the business organizations they oversee, recommend changes for the business organization to adopt and may report their findings (and the business organization's performance) to the Department.

In November 2009, the GAO reported that, of the 13 business organizations under DPAs or NPAs with whom GAO spoke, more than half expressed concerns about their corporate monitor's cost, scope of work and amount of work completed. However, the business organizations also expressed uncertainty about whether and to what extent the Department was to be involved in resolving such concerns. The GAO concluded that "Clearly communicating to companies the role DOJ will play in addressing companies' disputes with monitors would help increase awareness among companies and better position DOJ to be notified of potential issues related to monitor performance."

The Department's recent additional guidance follows the GAO's recommendation and directs that DPAs and NPAs define the Department's role in resolving disputes between business organizations and corporate monitors. The Department clarifies that, while it will not arbitrate contractual disputes between the monitor and the business organization, it will address disputes over whether the business organization has complied with the applicable DPA or NPA. For example, the Department's guidance suggests it may be appropriate for a DPA or NPA to provide that the business organization may approach the Department with proposed alternative action if it considers a monitor's recommendation to be unduly burdensome or expensive, or impractical. The Department's guidance also suggests that DPAs and NPAs provide for at least annual meetings between the business organization and the Department to review the scope and cost of the monitorship.

The guidance should provide some assurance to business organizations that legitimate concerns about the costs and performance of corporate monitors will not fall on deaf ears at the Department.

DOJ Memo Grants Federal Prosecutors Greater Charging and Sentencing Discretion

In other recent developments, on May 19, 2010, Attorney General Eric J. Holder, Jr. issued a memorandum addressing "Department Policy on Charging and Sentencing." The memorandum recognizes the advisory nature of the United States Sentencing Guidelines (Guidelines), emphasizes that charging and sentencing decisions must be made individually "on the merits of each case" rather than beginning and ending with the Guidelines and extends to Department prosecutors greater discretion to make charging and sentencing decisions.

The Holder memorandum supersedes the prior Department position on charging and sentencing, including the January 28, 2005, memorandum of then-Deputy Attorney General James Comey titled, "Department Policies and Procedures Concerning Sentencing." In that document, Comey directed that Department prosecutors "charge and pursue the most serious readily provable offenses," i.e., the charges that would generate the most substantial sentence, in all cases. The prior policy also required Department prosecutors oppose any sentence below the Guidelines range.

Under the new guidance, the prior policy that Department prosecutors "must" charge the most serious provable offense and seek sentences within the Guidelines is made more permissive and discretionary. Charges "should ordinarily" be brought if "there is probable cause to believe that a person has committed a federal offense and there is sufficient admissible evidence to obtain and sustain a conviction, unless 'no substantial federal interest' would be served, the person is

subject to 'effective prosecution' elsewhere, or there is 'an adequate non-criminal alternative to prosecution.'" The most serious provable offense "should ordinarily" be charged, but the decision "must always be made in the context of 'an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purpose of the Federal criminal code and maximize the impact of Federal resources on crime.'"

The new guidance also affects plea agreements, as Department prosecutors "should" seek a plea "to the most serious offense that is consistent with the nature of the defendant's conduct and likely to result in a sustainable conviction, informed by an individualized assessment of the specific facts and circumstances of each particular case." Likewise, sentences sought by Department prosecutors "should ... reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford deterrence, protect the public, and offer defendants an opportunity for effective rehabilitation ..." but sentencing advocacy is no longer limited by the Guidelines. While the Guidelines "remain important in furthering the goal of national uniformity throughout the federal system, ... advocacy at sentencing-like charging decisions and plea agreements--must also follow from an individualized assessment of the facts and circumstances of each particular case."

While the Guidelines have been advisory since 2005, the Holder memorandum recognizes the Guidelines should no longer bind the Department's charging and sentencing practices. As a result of this new approach, Department prosecutors should be more open to defense advocacy in seeking charge avoidance or reduced sentences in appropriate cases.

For more information, please contact Eric Reed at 215.299.2741 or ereed@foxrothschild.com, or any member of Fox Rothschild's White Collar Compliance and Defense Practice.



Fox Rothschild LLP
ATTORNEYS AT LAW

Attorney Advertisement

© 2010 Fox Rothschild LLP. All rights reserved. This publication is intended for general information purposes only. It does not constitute legal advice. The reader should consult with knowledgeable legal counsel to determine how applicable laws apply to specific facts and situations. This publication is based on the most current information at the time it was written. Since it is possible that the laws or other circumstances may have changed since publication, please call us to discuss any action you may be considering as a result of reading this publication.