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DOJ publishes list of compliance monitors, improving transparency and accountability

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Vinson & Elkins' Fry Wernick, Palmina Fava and Ron Tenpas

Vinson & Elkins' Ephraim Wernick, Palmina Fava, Ronald Tenpas, Conrad Bolston and Peter Thomas say the criminal fraud section's decision to release the names of active monitors is a welcome development. But they argue that more transparency is needed.

On Tuesday, for the first time, the Department of Justice (DOJ) published a list identifying all corporate monitors actively engaged by companies as a part of criminal resolutions with the Criminal Division's fraud section. The DOJ's monitor list names the companies and their monitors, noting the year when each monitorship began and the specific Fraud Section unit overseeing each case. The move continues the DOJ's trend toward increased transparency into corporate criminal enforcement while also signalling that corporate monitorships are now a mainstay of the DOJ's corporate enforcement policy. While the decision to publish the information is a welcome development and may help identify trends in the criminal fraud section's use of corporate monitors, the DOJ should consider expanding the publication to other components within the Criminal Division and to other divisions within the department that prosecute corporate cases. Additional information, including historical data on the cost of monitorships and the success rates for companies to receive certifications, would also be helpful in enhancing transparency

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and evaluating the effectiveness of the corporate monitor programme and identifying areas of improvement.

Background

Independent compliance monitors have been a part of the DOJ's criminal enforcement arsenal for over two decades. The concept of a corporate monitor may have its roots in a deferred prosecution agreement (DPA) entered into between the US Attorney's Office for the Southern District of New York and Prudential Securities in 1994. In *Prudential*, the government required the company to appoint an independent ombudsman to sit on the company's board and compliance committee, accept anonymous complaints, and produce quarterly compliance progress reports that included allegations of "criminal conduct and material improprieties" to the government and the company's board and audit committees during the duration of the DPA. Since that time, the role of the independent monitor has morphed significantly into a much larger and more intrusive presence on company operations, and the DOJ has imposed monitors on companies with increased frequency as part of corporate plea deals, DPAs and non-prosecution agreements (NPAs). Due to a lack of guidance in the early years, companies seeking to resolve criminal investigations faced uncertainty as to when the government would require a compliance monitor as part of its corporate resolution and what the monitor process would entail. It was not until 2008 that the DOJ set forth its first guiding principles for prosecutors considering the appointment of corporate monitors in what is known as the Morford Memo. DOJ supplemented this guidance multiple times since, with the publication of the Breuer Memo in 2009, the Grindler Memo in 2010, and the Benczkowski Memo in 2018.

Monitorships can be an effective tool for remediating corporate misconduct and preventing recidivism. Agreeing to a monitorship can also be a helpful way for a company to close a corporate plea negotiation and avoid more onerous alternative terms. However, once in operation, they also present the potential to be exorbitantly expensive and unnecessarily intrusive on a company's business operations. DOJ guidance recognises the need to strike the right balance because neither the company nor the public benefit from monitorships whose scopes are overbroad; the guidance specifically reminds prosecutors to be mindful of "the cost of a monitor and its impact on the operations of a corporation".

The most recent DOJ guidance suggested that monitors should be used sparingly and only in the most egregious circumstances. Specifically, the 2018 Benczkowski Memo states that the DOJ should consider imposing a corporate monitor "only where there is a demonstrated need for, and clear benefit to be derived from, a monitorship relative to the projected costs and burdens" the monitorship will impose on the company. However, almost half of the criminal fraud section's corporate Foreign Corrupt Practices Act (FCPA) resolutions since the Benczkowski Memo involve compliance monitors.

Recent DOJ guidance also indicates that the quality and efficacy of a company's compliance programme are the most critical factors for prosecutors to consider when determining whether a monitor is necessary. In 2019, one senior DOJ official even went so far as to describe compliance as a "super mitigator" that should affect prosecutorial discretion when evaluating how to treat a company under investigation.

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There is a general understanding that monitorships should not be imposed as a punitive measure, and they should only be used when there is a perceived need to improve a corporate compliance programme. Moreover, the DOJ wants to incentivise companies to remediate and invest in their compliance functions, even while under investigation, and companies are more likely to do so if they understand more concretely the steps necessary to avoid the imposition of a corporate monitor.

Analysis of the list

Of the 13 companies with active monitorships published by the DOJ on 14 April 2020, eight are based outside the United States and five are US-based companies. The companies are spread across multiple industries, with three companies each from the healthcare and automotive sectors, two companies each from the aviation and financial services sectors, and the remaining companies operating in telecommunications, retail and construction. Of the 13 monitorships, 12 stem from prosecutions by the FCPA Unit (seven cases) and Market Integrity and Major Fraud Unit (five cases), with the Health Care Fraud Unit handling the remaining one.

Not surprisingly, the state of a company's compliance programme appears to have factored most heavily into the DOJ's decision whether to impose a monitor. In almost every case, the DOJ identified significant weaknesses with a company's compliance programme or remediation. For example, in the DPA with Russian telecom company Mobile Telesystems, DOJ stressed that the company had "inadequate anti-corruption controls and an inadequate program", and although the company had "committed to enhance its compliance program", it had "not yet fully implemented or tested" those enhancements. Similarly, the plea agreement with Brazilian construction company Odebrecht cited the company's lack of implementation and testing of internal controls. When it announced the Panasonic Avionics resolution, the DOJ also noted that it required a monitorship "[b]ecause many of the company's compliance enhancements were more recent, and therefore have not been tested."

The Fraud Section's decision to publish this list is consistent with the current Criminal Division leadership's commitment to transparency. Speaking in October 2019, Assistant Attorney General Brian Benczkowski explained that transparency ensures "consistency and predictability" in the prosecutorial process and allows defence attorneys to "base their advocacy on the very criteria that [DOJ] prosecutors find relevant to their decisions."

The publication will enable some additional analysis and should help in-house and external counsel to tailor their advocacy in light of past practices. However, more can be done to shed light on corporate monitorships so that both the government and the business can learn from past practice and improve the monitor programme.

One area in critical need of more transparency is cost. The government and the business community generally understand that monitorships are expensive, but there is a limited understanding as to just how expensive they are, and the lack of information makes it difficult for a company to know whether its monitor's fees are reasonable. Certain information may be gleaned from the select few companies that choose to include line items for monitor fees in their public disclosures, but there is no requirement to do so. DOJ is best-positioned to collect such data as part of its ongoing

commitment to improving the monitorship programme. The release of current and historical cost information would be useful in establishing baselines and determining whether certain monitor fees are reasonable and in line with the government's and company's expectations in a given case. Moreover, if DOJ were to publish such data, it would help companies and their compliance professionals make the business case for investing more money into their compliance programmes on the front-end to avoid costly monitorships later.

Costs tend to escalate as monitors expand the scope of the review and companies feel powerless to resist. Given that DOJ is imposing the monitors in the first instance, it could improve on this system by offering greater input to refine a monitor's role to specific testing areas and to empower companies to develop independently the internal framework necessary to fortify their compliance programmes. At the end of the monitorship, the company must stand on its own, and shareholders are better served by the company learning how to do that through the monitorship process, rather than the monitorship becoming an extension of the initial investigation.

It would also be helpful for the DOJ to publish data covering the certification success rates for companies under monitorships, including the number of times that companies were able to exit the monitorship on time or if extensions were needed. Such information would be a valuable analytical tool to help companies and compliance officials understand where companies succeeded and where they failed under previous monitorships.

Enhancements to the dispute resolution process would also assist companies dealing with creeping cost and scope. The 2010 Grindler Memo set forth new guidance so monitor agreements would "explain what role the Department could play in resolving disputes that may arise between the monitor and the corporation", and the Memo suggested language to require annual meetings to enable a company to raise issues, "including with respect to the scope or costs of the monitorship". However, the DOJ is not a party to the contract between a company and the monitor, and department prosecutors may feel limited in what they can do to resolve such disputes. The promulgation of additional guidance, including requiring monitors to submit and be expected to stick to budgets for their work, would be very helpful in cementing public confidence in the programme.

Finally, while it is helpful for the Fraud Section to publish this data, the DOJ should consider expanding the initiative and publish monitor data from other components within the Criminal Division, as well as other DOJ divisions that enforce corporate cases, such as the antitrust, civil, and environment and natural resources divisions. Doing so would ensure consistency and greater transparency in how monitors are employed department-wide.

Takeaways

The DOJ's list is an important step in improving transparency in the department's use of corporate monitors, and there should be no doubt that monitorships are here to stay. Given the high costs and intrusive nature of a corporate compliance monitor, companies should strive to avoid the imposition of a monitor when resolving government investigations. The easiest and most effective way to do so is to invest on

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the front end by implementing an effective risk-based compliance programme that detects and prevents wrongdoing. Companies under investigation would be well served to continue investing in compliance, to impress on the government that they sufficiently remediated, implemented and enhanced an effective programme, negating the need for a monitor. If a company has no choice but to accept the imposition of a monitor, it should negotiate terms from the outset that set a clear scope tailored to the discreet issues that necessitated the monitor in the first place, providing a check against later scope-creep and expense increases during the monitorship. To this end, companies facing investigation should consider the following proactive measures to reduce the risk and cost of a monitorship.

Enhance the company's compliance programme

Consider engaging outside counsel to serve as compliance counsel and monitor the remediation of compliance programmes. Having a robust compliance programme is important to avoid misconduct, but it is equally important for companies who find themselves already under investigation. The DOJ will consider a company's compliance remediation efforts, including its degree of implementation and testing at the time of resolution, when deciding whether to impose a monitor and when scoping the monitor's responsibilities. Outside counsel with experience in government investigations, and of evaluating corporate compliance programmes, are well positioned to help companies design programmes that the DOJ will view more favourably. Engaging an outside expert can also give further credibility to the company's claims to seek genuine improvement, not mere improvements on paper. Companies who take the initiative to reform their compliance programmes to prevent recidivism are much better placed to show the DOJ that a monitorship is unnecessary when negotiating a resolution.

Make the most of the company's role in a monitor's selection

If the government insists on imposing a monitor, companies should be deliberate in the selection process to ensure that the counsel is experienced in evaluating and developing compliance programmes, while also identifying candidates with requisite experience in the substantive area of law and the company's industry. Any monitor candidate proposed by a company must pass muster with the government, but the company should not diminish its role in advocating for particular counsel familiar with the company's business. Companies should identify potential monitors who will respect the limited nature of a monitorship engagement, scoping the engagement to the problems to be monitored, and committing to an efficient and cost-effective budget and work plan. Finally, companies should properly document the selection process, especially any negotiations centred on cost and scope, as such discussions could prove useful in any later disputes that may arise.

Be proactive before the monitorship

There will be at least some time where a company knows that it will be required to retain a monitor and when the monitor is engaged and begins its review. That time should be spent tackling the low-hanging fruit: creating an internal plan to address obvious deficiencies in a company's compliance programme, and determining how best to structure a team that will interact with the monitor. Doing so could impress

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upon the monitor that the company is taking compliance seriously, limit the number of recommendations that the monitor is required to make and avoid unnecessary administrative burdens on the company. Such developments can be critical to the success of a monitorship and helpful in lowering cost.

Keep counsel engaged during the monitorship

Finally, companies should engage outside counsel even after a monitor is selected and begins its engagement. Engaging independent, post-resolution attorneys can ensure that the monitorship stays within the proper scope and costs are kept in check. Such counsel can often suggest practical solutions to problems confronted during the monitorship, provide informal feedback to the monitor to avoid issues and resolve problems before they escalate to the DOJ, and can anticipate the likely DOJ perspective and concerns on any issues that will be elevated or that are arising during the monitorship. This enables companies to avoid further increased costs and the risk of a breach or extension of a monitorship.

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Companies facing investigation should prioritise compliance and remediation to potentially avoid the imposition of a monitor when resolving government investigations. Companies who find themselves subject to a monitor, however, should take the above steps to best position themselves to satisfy the obligations of their monitorships as quickly and in the least intrusive manner as possible.

The analysis in this article is based only on publicly available information and not on any privileged or confidential information related to the authors' prior client engagements or Fry Wernick's tenure as assistant chief of the DOJ's criminal fraud section.

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