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Monitoring The Monitors

Law360, New York (October 22, 2010) -- The scenario has become all too familiar over the past few years: a large, often multinational corporation agrees to enter into either a nonprosecution agreement (NPA) or a deferred prosecution agreement (DPA) with the U.S. Department of Justice or a local U.S. attorney's office. One of the terms of the agreement mandates the appointment of a corporate monitor for the duration of the NPA or the DPA. Then the question arises — Who will be selected as the monitor?

This question stirred debate three years ago when former Attorney General John Ashcroft was selected by then U.S. Attorney Chris Christie in the District of New Jersey (Christie is now the governor of New Jersey) for a monitorship involving a hip and knee replacement implant manufacturer.

Three other hip and knee implant manufacturers also entered into DPAs with Christie's office and a fifth manufacturer entered into an NPA with the office. All five companies were required to retain monitors as well. The Ashcroft appointment was said to be structured to generate fees between $28 million and $52 million for The Ashcroft Group LLC, the multidisciplinary group formed by the former attorney general after leaving the Bush administration.

Many took note of the level of fees which were to be paid over the 18-month term of the monitorship and the fact that the former attorney general was seen as having a close relationship with the U.S. attorney. A debate then began, both at the DOJ and on Capitol Hill, about placing some parameters around the use of monitors.

The most immediate and visible reaction to the New Jersey monitorships came in the form of a memorandum issued March 7, 2008, by acting Deputy Attorney General Craig S. Morford (the Morford Memo) which set guidelines for the selection and use of monitors in DPAs and NPAs with corporations.

The Morford Memo contained nine principles which were intended to provide internal

guidance to DOJ officials, both in U.S. attorneys' offices and in the Criminal Division of the DOJ, concerning a number of topics, including: 1) how to select monitors; 2) what the scope of duties should be for the monitors; 3) how monitors should carry out their duties of monitoring compliance with the DPA or NPA; 4) what communications and recommendations monitors should bring to the corporations they were monitoring and to the DOJ; 5) whether, and to what extent, monitors should report on previously undisclosed or new misconduct; and 6) the duration of monitor appointments.

The Morford Memo followed closely after the introduction of a proposed bill in the U.S. House of Representatives in January 2008, which would have mandated that the attorney general issue guidelines for use of DPAs, use of federal monitors and court review of DPAs. Apparently, as a result of the Morford Memo, H.R. 5086, the bill introduced by New Jersey congressman Frank Pallone Jr. did not proceed to passage in Congress.

However, the issue of monitors did not go away. In April 2009, Congressman Bill Pascrell, another New Jersey congressman, introduced H.R. 1947, to be known as the "Accountability in Deferred Prosecution Act of 2009." H.R. 1947 also mandated adoption of guidelines by the attorney general and addressed several of the issues set out in the Morford Memo, including the selection of monitors and judicial oversight and approval of DPAs.

The U.S. Government Accountability Office also got involved and began a review into the DOJ's use of DPAs and NPAs and its appointment of monitors as a part of that process. GAO officials testified before the House Judiciary Committee's Subcommittee on Commercial and Administrative Law in June 2009 and November 2009. See GAO-09-636T and GAO-10-260T.

Then in December 2009, the GAO issued an extensive report entitled, "Corporate Crime: DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-Prosecution Agreements, but Should Evaluate Effectiveness." See GAO-10-110 (the GAO Report).

Congressman Steve Cohen of Tennessee also entered the debate in December 2009 by filing a bill to be known as the "Transparency and Integrity in Corporate Monitoring Act of 2009."

Cohen's bill primarily prohibits former U.S. attorneys and former assistant U.S. attorneys from serving as monitors immediately after leaving government service and sets out a two-year exclusionary period for former U.S. attorneys and a one-year exclusionary period for former assistant U.S. attorneys, subjecting them to civil penalties if selected as corporate monitors during the exclusionary period.

At present, none of these legislative measures appears headed toward passage. Nevertheless, the DPA/NPA and monitor discussion continues.

One of the primary criticisms leveled against the DOJ in the GAO report issued in December 2009 is: "DOJ intends for these agreements [DPAs and NPAs] to promote corporate reform; however, DOJ does not have performance measures in place to assess whether this goal has been met." GAO Report at 20.

Consequently, the GAO concluded "the attorney general should develop performance measures to evaluate the contribution of DPAs and NPAs towards achieving this objective [of combating public and corporate corruption]." Id. at 29.

In regard to the use of monitors, the GAO report noted that: "[C]ompanies we spoke with identified concerns about the monitor's cost, scope and amount of work completed, and that DOJ had not clearly communicated to companies its role in addressing such concerns." Id. at 4.

Since the primary purpose for using an independent monitor is to assess corporations' compliance with the DPAs and NPAs entered into with the DOJ, the GAO report suggested that if the DOJ were to begin "clearly communicating to companies the role DOJ will play in addressing companies' disputes with monitors [this] would help increase awareness among companies and better position DOJ to be notified of potential issues related to monitor performance." Id. at 4.

That suggestion from the GAO apparently did not go unheeded: on May 25, 2010, acting Deputy Attorney General Gary G. Grindler issued a follow-up memorandum entitled "Additional Guidance on the Use of Monitors in Deferred Prosecution Agreement and Non-Prosecution Agreement with Corporations," (referred to here as "the Grindler Memo").

The Grindler Memo acknowledges that its purpose "is to supplement the guidance in the Morford Memorandum by adding a tenth basic principle to guide prosecutors in drafting agreements: namely, that an agreement should explain what role the department could play in resolving any disputes between the monitor and the corporation, given the facts and circumstances of the case."

In view of the suggestion in the GAO report, it is not surprising that the new principle set out in the Grindler Memo reads as follows: "An agreement 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."

In effect, this new principle makes clear that the DOJ — either through its Criminal Division or at the local level through the U.S. attorney's office — will be the final arbiter of any disputes between a company and its monitor concerning recommendations by the monitor and reports regarding the company's compliance with its DPA or NPA. The Grindler Memo also provides for at least annual meetings between representatives of the company and the DOJ to discuss a monitorship and any concerns about the scope or costs of the monitorship.

The future of federal monitors appears certain, and for obvious reasons. DOJ officials have neither the manpower nor the ready resources to conduct the kind of exacting review of corporate agreements and corporate conduct which a federal monitor can perform. In the context of U.S. attorneys' offices, those offices may also lack ready expertise in a given area such as the Foreign Corrupt Practices Act or even traditional health care issues like Stark or the Anti-Kickback Statute.

Moreover, even if they have such expertise, these offices cannot dedicate experienced prosecutors to the task of individual oversight of a company's compliance program and the company's adherence to a DPA or NPA over one to two years of a monitorship. Monitors offer the advantage of a full staff or team of professionals dedicated to the singular task of reviewing conduct and compliance with the DPA or NPA under which the monitor was appointed.

Indeed, many monitor teams are multidisciplinary groups involving attorneys with subject matter expertise in the particular field as well as former compliance officers and other experts who bring familiarity with the corporation and its business to the table.

Since the DOJ seems committed to continuing to look to such outside experts to conduct the role of monitoring a DPA or an NPA, law firms would do well to assemble appropriate teams to handle monitor assignments. Former prosecutors and former regulatory/compliance professionals are an excellent source of personnel to demonstrate to the DOJ the competence to handle a monitor appointment.

To be sure, while Congress and others have begun monitoring the monitors more closely, the fact remains that monitors will continue to have opportunities to serve both the public and private corporations and the DOJ in this unique and important role.

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