



U.S. Department of Justice

National Security Division

Office of the Assistant Attorney General

Washington, D.C. 20530

February 28, 2023

TO: All National Security Division Personnel

FROM: Matthew G. Olsen *MGOlsen 2/28/23*  
Assistant Attorney General for National Security

SUBJECT: Standards, Policies, and Procedures for the Selection of Corporate Monitors in National Security Division Matters

As required by Section III.B of the memorandum entitled “Further Revisions to Corporate Criminal Enforcement Policies Following Discussion with Corporate Crime Advisory Group,” issued to Department components by Deputy Attorney General Lisa O. Monaco on September 15, 2022, (hereinafter, the “September 15, 2022 Memorandum”), this memorandum details the National Security Division’s process for selecting corporate monitors in National Security Division matters. The standards, policies, and procedures contained in this memorandum<sup>1</sup> shall apply to all National Security Division determinations regarding whether a monitor is appropriate in specific criminal cases and to any deferred prosecution agreement (“DPA”), non-prosecution agreement (“NPA”), or plea agreement between the National Security Division and a business organization in which the retention of a monitor is required.<sup>2</sup> The guidance in this memorandum does not apply to foreign investment security reviews. In the event of any inconsistency, conflict, or ambiguity between the guidance contained in this memorandum and any guidance issued to Department components by the Attorney General or Deputy Attorney General on topics addressed in this memorandum, such guidance issued by the Attorney General or Deputy Attorney General shall control, supplement, and supersede the guidance contained in this memorandum.

<sup>1</sup> This memorandum incorporates and supplements the guidance regarding monitors contained in the September 15, 2022 Memorandum, the memorandum entitled “Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies,” issued to Department components by Deputy Attorney General Lisa O. Monaco on October 28, 2021, and 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 on March 7, 2008, as amended and supplemented by successor guidance to Department components.

<sup>2</sup> This memorandum provides internal guidance to National Security Division attorneys. Nothing in this memorandum is intended to or shall create any substantive or procedural rights, privileges, or benefits enforceable in any administrative, civil, or criminal matter or other proceeding. As required by the September 15, 2022 Memorandum, this memorandum shall be published and made available to the public, and a copy shall be provided to the Assistant Attorney General for the Criminal Division.

**A. Approval, Consultation, and Concurrence Requirement for Monitorship Agreements**

Before agreeing to the imposition of a monitor in any case, the National Security Division attorneys handling the matter must first receive approval from their supervisors, including the Chief of the relevant Section, as well as the concurrence of the Assistant Attorney General for National Security (“AAG”) or his/her designee, who in most cases will be the Principal Deputy Assistant Attorney General for National Security (“PDAAG”) or the Deputy Assistant Attorney General (“DAAG”) with supervisory responsibility for the relevant Section.

**B. Terms of National Security Division Monitorship Agreements**

As a preliminary matter, any DPA, NPA, or plea agreement between the National Security 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 the monitor’s required qualifications;
2. A description of the monitor selection process;
3. A description of the process for replacing the monitor during the term of the monitorship, should it be necessary;
4. A description of the role that the National Security Division will play in resolving disputes that may arise between the monitor and the business organization that is the subject of the Agreement (hereinafter referred to as the “Company”);
5. A statement that the parties will endeavor to complete the monitor selection process within sixty (60) days of the execution of the underlying agreement;
6. An explanation of the responsibilities of the monitor and the monitorship’s scope; and
7. The length of the monitorship.

**C. Committee on the Selection of Monitors**

As needed, the National Security Division shall convene a Committee on the Selection of Monitors (the “Committee”).

1. Composition of the Committee:

The Committee shall consist of: (1) the DAAG with supervisory responsibility for the matter in which the monitor is proposed, or his/her designee;<sup>3</sup> (2) the Chief of the Section with

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<sup>3</sup> Should the DAAG be recused from a particular case, the AAG will appoint a representative to fill the DAAG’s position on the Committee.

supervisory responsibility for the matter in which the monitor is proposed, or his/her designee;<sup>4</sup> and (3) the Deputy Designated Agency Ethics Official for the National Security Division.<sup>5</sup> Should further replacements not contemplated by this paragraph be necessary for a particular case, the AAG will appoint a temporary, additional member of the Committee for the particular case.

The DAAG, or his/her designee, shall be the Chair of the Committee, and shall be responsible for ensuring that the Committee discharges its responsibilities.

All National Security Division employees involved in the selection process, including 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), and shall provide written certification of such compliance to the Deputy Designated Agency Ethics Official for the National Security Division as soon as practicable, but no later than the time of the submission of the Monitor Recommendation Memorandum to the AAG.

## 2. Convening the Committee:

The Chief of the relevant Section proposing to enter into the Agreement should notify the Chair of the Committee as soon as practicable that the Committee will need to convene. Notice should be provided as soon as an agreement in principle has been reached between the government and the Company, but not later than the date the Agreement is executed. The Chair will arrange to convene the Committee meeting as soon as practicable after receiving the Monitor Recommendation Memorandum described below, will identify the Committee participants for the case, and will confirm with the Deputy Designated Agency Ethics Official for the National Security Division, or his/her designee, that no conflicts exist among the Committee Members.

## **D. The Selection Process**

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 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 these objectives, the National Security Division shall employ the following procedures in selecting a monitor, absent authorization from the Committee to deviate from this process pursuant to the procedures described in Section H below. The selection process outlined herein applies to the selection of a monitor at the initiation of a monitorship and to the selection of a replacement monitor, when

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<sup>4</sup> Should the relevant Section Chief be recused from a particular case, the AAG will appoint a representative to fill Section Chief's position on the Committee.

<sup>5</sup> Should the Deputy Designated Agency Ethics Official for the National Security Division be recused from a particular case, the AAG will appoint the General Counsel of the National Security Division or another National Security Division attorney with experience in ethics matters to fill the Deputy Designated Agency Ethics Official's position on the Committee.

and where necessary. As discussed in the September 15, 2022 Memorandum, the monitor selection process shall be conducted in a manner in keeping with the Department's commitment to diversity, equity, inclusion, and accessibility, including as to the monitor and the team supporting the monitor.

1. Nomination of Monitor Candidates:

At the outset of the monitor selection process, counsel for the Company should be advised by the National Security Division attorneys handling the matter to recommend a pool of three qualified monitor candidates. 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 (and those of their team, as applicable);
- b. a written certification by the Company that it will not employ or be affiliated with the monitor, the monitor's firm, or other professionals who are part of the monitorship team, for a period of not less than two years from the date of the termination of the monitorship;
- c. a written certification by each of the candidates that he/she (and the members of the candidate's team, where applicable) is not a current or recent (*i.e.*, within the prior two years) employee, agent, or representative of the Company and holds no interest in, and has no relationship with, the Company, its subsidiaries, affiliates or related entities, or its employees, officers, or directors;
- d. a written certification by each of the candidates that he/she has notified any clients that the candidate represents in a matter involving the National Security Division or any other Department component, including any United States Attorney's Office, of his/her candidacy, and that the candidate has either obtained a waiver from those clients or has withdrawn as counsel in the other matter(s); and,
- e. A statement identifying the monitor candidate that is the Company's first choice to serve as the monitor.

2. Initial Review of Monitor Candidates:

The National Security Division attorneys handling the matter, along with supervisors from their Section, should promptly interview each monitor candidate to assess his/her qualifications, credentials, and suitability (and those of the monitor's team, where applicable) for the assignment and, in conducting such 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 and expertise with the particular area(s) at issue in the case under consideration, and with the particular area(s) 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 and availability to discharge the monitor's responsibilities; and
- e. any other factor determined by the National Security Division attorneys, based on the circumstances, to relate to the qualifications, competency, and independence of each monitor candidate as may relate to the tasks required by the monitor agreement and nature of the business organization to be monitored.

### 3. Requests for Additional Candidates:

If the attorneys handling the matter and their supervisors decide that any or all of the three candidates recommended by the Company lack the requisite qualifications, they should notify the counsel for the Company and request that counsel for the Company propose another candidate or candidates within twenty (20) business days. At the discretion of the National Security Division attorneys handling a matter, the Company may be granted a reasonable extension of time to propose an additional candidate or candidates if circumstances warrant such an extension. The attorneys handling the matter should advise the Committee of any extension granted to the Company.

Once the attorneys handling the matter conclude that the Company has provided a slate of three qualified candidates, they should conduct a review of those candidates and confer with their supervisors to determine which of the monitor candidates should be recommended for selection to the Committee. If the National Security Division attorneys handling the matter, along with their supervisors, determine that the Company has not proposed and appears unwilling or unable to propose qualified candidates, consistent with the guidance provided herein, or that the Company's delay in proposing candidates is negatively impacting the Agreement or the prospective monitorship, then the attorneys may evaluate alternative candidates that they identify in consultation with the Committee and provide a list of such candidates to the Company for comment and consideration.

#### 4. Preparation of a Monitor Recommendation Memorandum:

Once the attorneys handling the matter and their supervisors recommend a candidate, the selection process should be referred to the Committee. The attorneys handling the matter should prepare a written memorandum to the Committee, in the format requested by the Chair of the Committee. 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 it was determined that a monitor is required in the case, based on the considerations set forth in this memorandum;
- 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 selected candidate's qualifications (and those of their team, if applicable), and why the selected candidate is being recommended;
- g. a description of countervailing considerations, if any, in selecting the candidate;
- h. a description of the other candidates put forward for consideration by the Company; and
- i. a signed certification, on the form provided by the Deputy Designated Agency Ethics Official for the National Security Division or his/her designee, by each of the National Security Division attorneys involved in the monitor selection process that he/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 Recommendation Memorandum and provided to the Committee.

#### 5. Committee Review of a Monitor Candidate:

The Committee shall review the recommendation set forth in the Monitor Recommendation Memorandum and vote whether or not to accept the recommendation. In the course of making its decision, the Committee may, in its discretion, interview one or more of the candidates put forward for consideration by the Company.

If the Committee accepts the recommended candidate, it should note its acceptance of the recommendation in writing on the Monitor Recommendation Memorandum and forward the memorandum to the AAG for ultimate submission to the Office of the Deputy Attorney General ("ODAG"). In addition to noting its acceptance of the recommendation, the Committee may also, where appropriate, revise the Memorandum. The Committee's recommendation should also include a written certification by the Deputy Designated Agency Ethics Official for the National Security Division, or his/her designee, that the recommended candidate meets the ethical requirements for selection as a monitor, that the selection process utilized in approving the candidate was proper, that no conflicts of interest exist among members of the Committee, and that the attorneys involved in the process, including members of the Committee, 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 Committee rejects the recommended candidate, it should so inform the National Security Division attorneys handling the matter and their supervisors of the rejection decision. In such an instance, the National Security Division attorneys handling the matter, along with their supervisors, may either recommend an alternate candidate from the two remaining candidates proposed by the Company, or, if necessary, obtain from the Company the names of additional qualified monitor candidates, as provided by Section D above. If the Committee rejects the recommended candidate, or the pool of remaining candidates, the National Security Division attorneys and their supervisors should notify the Company. The Committee also should return the Monitor Recommendation Memorandum and all attachments to the attorneys handling the matter.

If the Committee is unable to reach a majority decision regarding the proposed monitor candidate, the Committee should so indicate on the Monitor Recommendation Memorandum and forward the Memorandum and all attachments to the AAG for his or her decision.

6. Review by the Assistant Attorney General for National Security:

Consistent with long-standing Department policy, the AAG may not unilaterally make, accept, or veto the selection of a monitor candidate. Rather, the AAG must review and consider the recommendation of the Committee set forth in the Monitor Recommendation Memorandum. In the course of doing so, the AAG may, in his/her discretion, request additional information from the Committee and/or the National Security Division attorneys handling the matter and their supervisors. Additionally, the AAG may, in his/her discretion interview the candidate recommended by the Committee. The AAG should note his/her concurrence or disagreement with the proposed candidate on the Monitor Recommendation Memorandum, or revise the memorandum to reflect his/her position, and forward the Monitor Recommendation Memorandum to the ODAG.

7. Approval of the Office of the Deputy Attorney General:

All monitors appointed pursuant to DPAs, NPAs, and plea agreements must be approved by the ODAG.

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 slate of candidates as provided by Section D above. If the ODAG approves the proposed monitor, the attorneys handling the matter should notify the Company, which shall notify the three candidates of the decision, and the monitorship shall be executed according to the terms of the Agreement.

#### **E. Retention of Records Regarding Monitor Selection**

It shall be the responsibility of the attorneys handling the matter to ensure that a copy of the Monitor Recommendation Memorandum, including attachments and documents reflecting the approval or disapproval of a monitor candidate, is retained in the case file for the matter and that a second copy is provided to the Chair of the Committee.

The Chair of the Committee should obtain and maintain an electronic copy of every Monitor Recommendation Memorandum and every Agreement which provides for a monitor. In all cases where a monitor is appointed, NSD shall provide a copy of the Agreement appointing the monitor to the Assistant Attorney General for the Criminal Division, who has been designated by the Deputy Attorney General to maintain a record of all such agreements.

#### **F. Cases Involving Court-Appointed Monitors**

In National Security Division cases in which a corporate monitor is appointed by the court, the Committee shall adopt *ad hoc* procedures as similar as practicable to the guidance described in this memorandum to evaluate candidates and provide input to the court regarding monitor selection when invited by the court to do so.

#### **G. Continued Review of Monitorship**

For the term of the monitorship, National Security Division attorneys handling the matter must remain apprised of the ongoing work conducted by the monitor. Continued review of the monitorship requires ongoing communication with both the monitor and the Company. To this end, National Security Division attorneys should ensure that the monitor's responsibilities and scope of authority are well-defined and recorded in writing, and that a clear workplan is agreed upon between the monitor and the Company – all to ensure agreement among the National Security Division, the Company, and the monitor as to the proper scope of review.

National Security Division attorneys should receive regular updates from the monitor about the status of the monitorship and any issues or concerns that arise. Monitors should promptly alert prosecutors if the monitor believes that he/she is being denied access to information, resources, or corporate employees or agents necessary to execute the monitor's charge. National Security Division attorneys should regularly receive information about the work the monitor is doing to ensure that it remains tailored to the workplan and scope of the monitorship. In reviewing information relating to the monitor's work, National Security Division attorneys should consider the reasonableness of the monitor's review, including, where appropriate, issues relating to the cost of the monitor's work.



In certain cases, National Security Division attorneys may determine that the initial term of the monitorship is longer than necessary to address the concerns that created the need for the monitor, or that the scope of the monitorship is broader than necessary to accomplish the goals of the monitorship. For example, the Company may demonstrate significant and faster-than-anticipated improvements to its compliance program, which might reduce the need for continued monitoring. Conversely, National Security Division attorneys may determine that newly identified concerns require lengthening the term or amending the scope of the monitorship.

## **H. Departure from Policy and Procedure**

As each criminal enforcement matter presents unique facts and circumstances, the monitor selection process must be practical and flexible. When the National Security Division attorneys handling a particular case conclude that the monitor selection process should diverge from the process described in this memorandum, including when the National Security Division attorneys propose using the monitor selection process of a United States Attorney's Office with which the National Security Division is working on a given matter, the proposal to depart from the policies and procedures described in this memorandum should be reviewed, approved, and documented by the Committee.<sup>6</sup> The Committee may request from the National Security Division attorneys working on the matter additional information to inform its decision-making and/or require that the National Security Division attorneys interested in departing from the policies and procedures set forth in this memorandum submit a written request for approval of the departure.<sup>7</sup> Requests to the Committee for a departure from the policies and procedures set forth in this memorandum must be approved by the Chief of the relevant Section requesting the departure prior to being submitted to the Committee.

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<sup>6</sup> Any substitute process that departs from the process set forth in this policy must incorporate and apply the same principles of transparency, predictability, and consistency, as set forth in the September 15, 2022 Memorandum.

<sup>7</sup> Where appropriate, a court may also modify the monitor selection process in cases where the Agreement is filed with the court.