



U.S. Department of Justice

Tax Division

January 31, 2023

Selection of Monitors in Tax Division Matters

The purpose of this memorandum is to establish standards, policy, and procedures for the selection of independent compliance monitors as part of the corporate criminal resolution of matters being handled by Tax Division attorneys.¹ This memorandum supplements the guidance provided by the memorandum entitled “Further Revisions to Corporate Criminal Enforcement Policies Following Discussion with Corporate Crime Advisory Group” issued by Deputy Attorney General Lisa Monaco (hereinafter referred to as the “Monaco Memorandum” or “Memorandum”). The standards, policy, and procedures contained in this memorandum shall apply to all Tax Division determinations regarding whether a monitor is appropriate in specific cases, and to any deferred prosecution agreement (“DPA”), non-prosecution agreement (“NPA”), or plea agreement between the Tax Division and a business organization (hereinafter referred to as the “Company”) that requires the retention of a monitor.

A. Principles for Determining Whether a Monitor is Needed in Individual Cases

The Monaco Memorandum recognizes that “independent compliance monitors can be an effective means of reducing the risk of further corporate misconduct and rectifying compliance lapses identified during a corporate criminal investigation.” Monitors can also reduce the risk of recurring misconduct and compliance lapses that gave rise to the underlying corporate criminal resolution.

Despite these benefits, the imposition of a monitor will not be necessary in many corporate criminal resolutions, and the scope of any monitorship should be appropriately tailored to address the specific issues and concerns that created the need for the monitor. According to the Memorandum, “the need for a monitor and the scope of any monitorship must depend on the facts and circumstances of the particular case.” A monitor should never be imposed for punitive purposes.

Tax Division attorneys should assess the need for and potential benefit of a monitor on a case-by-case basis, using the following illustrative and non-exhaustive list of factors:

1. Whether the Company voluntarily self-disclosed the underlying misconduct in a manner that satisfies the Division’s self-disclosure policy;

¹ The contents of this memorandum provide internal guidance to Tax Division attorneys on legal issues. Nothing in it is intended to create any substantive or procedural rights, privileges, or benefits enforceable in any administrative, civil, or criminal matter by prospective or actual witnesses or parties.

2. Whether, at the time of the resolution and after a thorough risk assessment, the Company has implemented an effective compliance program and sufficient internal controls to detect and prevent similar misconduct in the future;
3. Whether, at the time of the resolution, the Company has adequately tested its compliance program and internal controls to demonstrate that they would likely detect and prevent similar misconduct in the future;
4. Whether the underlying criminal conduct was long-lasting or pervasive across the Company or was approved, facilitated, or ignored by senior management, executives, or directors (including by means of a corporate culture that tolerated risky behavior or misconduct, or did not encourage open discussion and reporting possible risks and concerns);
5. Whether the underlying criminal conduct involved the exploitation of an inadequate compliance program or system of internal controls;
6. Whether the underlying criminal conduct involved active participation of compliance personnel or the failure of compliance personnel to appropriately escalate or respond to red flags;
7. Whether the Company took adequate investigative or remedial measures to address the underlying criminal conduct, including, where appropriate, the termination of business relationships and practices that contributed to the criminal conduct, and discipline or termination of personnel involved, including with respect to those with supervisory, management, or oversight responsibilities for the misconduct;
8. Whether, at the time of the resolution, the Company's risk profile has substantially changed, such that the risk of recurrence of the misconduct is minimal or nonexistent;
9. Whether the Company faces any unique risks or compliance challenges, including with respect to the particular region or business sector in which the corporation operates and the nature of the corporation's customers; and
10. Whether and to what extent the Company is subject to oversight from industry regulators, or a monitor imposed by another domestic or foreign enforcement authority or regulator.

Where the Company's compliance program and controls are untested, ineffective, inadequately resourced, or not fully implemented at the time of a resolution, prosecutors should consider imposing a monitorship. This is particularly true if the investigation reveals that a compliance program is deficient or inadequate in numerous or significant respects. Conversely, where the Company's compliance program and controls are demonstrated to be tested, effective, adequately resourced, and fully implemented at the time of a resolution, a monitor may not be necessary.

If prosecutors determine that a monitorship is appropriate in a specific case, the term of the monitorship should be carefully calibrated to achieve its goals. A shorter monitorship may be appropriate for companies that exhibit some of the following characteristics, among others: (1) the Company has implemented a robust compliance program designed to mitigate the risks presented by its operations, geographic profile, and regulatory environment but it has not been adequately tested; (2) the Company is not a large, multi-national enterprise; (3) the geographic scope of the monitor's work is fairly narrow; (4) the Company has an effective governance system in place with a compliance function that has adequate independence, autonomy, stature, and access to senior leadership and the Board of Directors; and (5) the Company effectively remediated the underlying conduct. Under some circumstances, prosecutors may consider selecting a monitorship term that is shorter than the term of the agreement with the possibility of an extension (or a longer term with the possibility of a reduction) to incentivize more rapid implementation of an effective compliance program.

In weighing the benefit of a contemplated monitorship against the potential costs, Tax Division attorneys should consider not only the projected monetary costs to the Company, but also whether the proposed scope of a monitor's role is appropriately tailored to avoid unnecessary burdens to the Company's operations.

In general, the Tax Division should favor the imposition of a 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. If the Company's compliance program and controls are demonstrated to be effective and appropriately resourced and tested at the time of resolution, a monitor will likely not be necessary.

B. Approval, Consultation, and Concurrence Requirement for Monitorship Agreements

Before agreeing to the imposition of a monitor in any case, the Tax 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 ("AAG") for the Tax Division or their designee, who in most cases will be the Deputy Assistant Attorney General for Criminal Matters ("DAAG").

C. Terms of Tax Division Monitorship Agreements

As a preliminary matter, any DPA, NPA, or plea agreement between the Tax Division and a Company that requires the retention of a monitor (hereinafter referred to as the "Agreement"), should contain the following:

1. The reasoning for requiring a monitor;
2. A description of the monitor's required qualifications;
3. A description of the monitor selection process;

4. A description of the process for replacing the monitor during the term of the monitorship, should it be necessary;
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, to include assessing and monitoring *inter alia* (a) the Company's compliance with the terms of the underlying agreement, (b) any existing corporate compliance program to specifically address and reduce the risk of a recurrence of the Company's misconduct, and (c) the Board of Directors' and senior management's commitment to, and effective implementation of, the corporate compliance program;
7. The length of the monitorship; and
8. The Company's obligations under the monitorship, to include, *inter alia*: (a) facilitating the monitor's access to relevant Company data and resources, (b) providing the monitor with guidance on applicable local law, (c) providing the monitor with access to all information, documents, records, facilities, and employees reasonably requested by the monitor, except as necessary to protect attorney-client privilege or the attorney work product doctrine, and (d) using best efforts to provide the monitor with access to the Company's former employees and third-party vendors, agents, and consultants.

D. Standing Committee on the Selection of Monitors

The Tax Division shall create a Standing Committee on the Selection of Monitors (the "Standing Committee").

1. Composition of the Standing Committee

The Standing Committee shall comprise: (1) the DAAG for Criminal Matters or their designee;² (2) the Chief of the relevant Section, or their designee;³ and (3) the Deputy Designated Agency Ethics Official for the Tax Division.⁴ Should further replacements not contemplated by this paragraph be necessary for a particular case, the DAAG will appoint any temporary, additional member of the Standing Committee for the particular case.

The DAAG shall be the Chair of the Standing Committee and shall be responsible for ensuring that the Standing Committee discharges its responsibilities.

² Should the DAAG be recused from a particular case, the AAG for the Tax Division will appoint a representative to fill the DAAG's position on the Standing Committee.

³ Should the Chief of the Section be recused from a particular case, they will be replaced by the Assistant Chief with supervisory responsibility over the matter.

⁴ Should the Deputy Designated Agency Ethics Official for the Tax Division be recused from a particular case, they will be replaced by the Alternate Deputy Designated Agency Ethics Official for the Tax Division or their designee.

All Tax Division employees involved in the selection process, including Standing 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 Officer for the Tax Division as soon as practicable, but no later than the time the Monitor Recommendation Memorandum is submitted to the AAG for the Tax Division.

Written memoranda to file will confirm that no conflicts exist in the committee prior to commencement of the selection process and that the monitor is free of conflicts prior to beginning their work. Monitor selection processes will reflect the Department's commitment to diversity, equity, inclusion, and accessibility, including as to the monitor and the team supporting the monitor.

2. Convening the Standing Committee

The Chief of the relevant Section entering into the Agreement should notify the Chair of the Standing Committee as soon as practicable that the Standing Committee will need to convene. Notice should be provided as soon as an agreement in principle has been reached between the government and the business organization that is the subject of the Agreement but not later than the date the Agreement is executed. The Chair will arrange to convene the Standing Committee meeting as soon as practicable after receiving the Monitor Recommendation Memorandum described below, identify the Standing Committee participants for that case, and ensure that there are no conflicts among the Standing Committee Members.

E. The Selection Process

The selection process will be designed to promote consistency, predictability, and transparency. 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 those objectives, the Tax Division shall employ the following procedure⁵ in selecting a monitor, absent authorization from the Standing Committee to deviate from this process as described in Section F below:

1. Nomination of Monitor Candidates

At the outset of the monitor selection process, counsel for the Company should be advised by the Tax Division attorneys handling the matter to recommend a pool of three

⁵ The selection process outlined in this memorandum applies both to the selection of a monitor at the initiation of a monitorship and to the selection of a replacement monitor, where necessary.

qualified monitor candidates.⁶ 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 (and that of the candidate's team, where applicable) in support of the evaluative considerations and factors listed below;
- b. a written certification by the Company that it will not employ or be affiliated with the monitor or the monitor's firm, or other professionals who are part of the monitorship team during the term of the monitorship, 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 they (and their teams, where applicable) are not a current or recent (i.e., within the two prior years) employee, agent, or representative of the Company and hold no interest in, and have 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 they (and their teams, where applicable) have notified any clients that the candidate represents in a matter involving the Tax Division (or any other Department component) handling the monitor selection process, 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 Tax Division attorneys handling the matter, along with supervisors from the Section, should promptly interview each monitor candidate to assess their qualifications, credentials, and suitability for the assignment (and those of their teams, where applicable) and, in conducting a 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 experience and expertise with the particular area(s) at issue in an organizational setting;

⁶ Any submission or selection of a monitor candidate by either the Company or the Tax Division shall be made without unlawful discrimination against any person or class of persons.

- 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 to discharge the monitor's responsibilities effectively; and
- e. any other factor determined by the Tax Division attorneys, based on the circumstances, that concerns the qualifications, competency, and independence of each monitor candidate as they may affect the tasks required by the monitor agreement and nature of the business organization to be monitored.

If the attorneys handling the matter and their supervisors decide that any of the three candidates lack the requisite baseline qualifications, they should notify the Company and request that counsel for the Company propose another candidate or candidates, if necessary, within twenty (20) business days.⁷ 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 to the Standing Committee.⁸

Once the attorneys handling the matter and their supervisors recommend a candidate, the selection process should be referred to the Standing Committee. The attorneys handling the matter should prepare a written memorandum to the Standing Committee, in the format attached hereto. 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;

⁷ A Company may be granted a reasonable extension of time to propose an additional candidate or candidates if circumstances warrant an extension. The attorneys handling the matter should advise the Standing Committee of any such extension.

⁸ If the Tax Division attorneys handling the matter, along with their supervisors, determine that the Company has not proposed and appears unwilling or unable to propose acceptable candidates consistent with the guidance provided herein, and 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 Standing Committee and provide a list of such candidates to the Company for consideration.

- 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 attached hereto, by each of the Tax Division attorneys involved in the monitor selection process that they have 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 Standing Committee.

3. Standing Committee Review of a Monitor Candidate

The Standing Committee shall review the recommendation set forth in the Monitor Recommendation Memorandum and vote whether to accept the recommendation. The Standing Committee may, in its discretion, interview one or more of the candidates put forward for consideration by the Company.

If the Standing 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 Standing Committee may also, where appropriate, revise the Memorandum. The Standing Committee's recommendation should also include a written certification by the Deputy Designated Agency Ethics Official for the Tax Division that the recommended candidate meets the ethical requirements for selection as a monitor, that the selection process utilized in approving the candidate was proper, and that the Government attorneys involved in the process acted in compliance with the conflict-of-interest guidelines set forth in 18 U.S.C. Section 208, 5 C.F.R. 2635, and 28 C.F.R. Part 45.

If the Standing Committee rejects the recommended candidate, it should so inform the Tax Division attorneys handling the matter and their supervisors of the rejection decision. In this instance, the Tax 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 E.1 above. If the Standing Committee rejects the recommended candidate, or the pool of remaining candidates, the Tax Division attorneys and their supervisors should notify the company. The Standing Committee also should return the Monitor Recommendation Memorandum and all attachments to the attorneys handling the matter.

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

4. Review by the Assistant Attorney General

The AAG for the Tax Division may not unilaterally make, accept, or veto the selection of a monitor candidate. Rather, the AAG must review and consider the recommendation of the Standing Committee set forth in the Monitor Recommendation Memorandum. The AAG may, in their discretion, request additional information from the Standing Committee or the Tax Division attorneys handling the matter and their supervisors. Additionally, the AAG may, in their discretion, interview the candidate recommended by the Standing Committee. The AAG should note their concurrence or disagreement with the proposed candidate on the Monitor Recommendation Memorandum or revise the memorandum to reflect this position and forward the Monitor Recommendation Memorandum to the ODAG.

5. Approval of the Office of the Deputy Attorney General

All monitor candidates selected pursuant to DPAs, NPAs, and plea agreements that are not court-appointed 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 E.1 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.

F. Retention of Records Regarding Monitor Selection

It should 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 candidate, is retained in the case file for the matter and that a second copy is provided to the Chair of the Standing Committee.

The Chair of the Standing Committee should obtain and maintain an electronic copy of every Agreement which provides for a monitor.

The AAG for the Tax Division should provide a copy of the Agreement to the AAG for the Criminal Division within a reasonable amount of time after it has been executed.

G. Departure from Policy and Procedure

Given the fact that each case presents unique facts and circumstances, the monitor selection process must be practical and flexible. When the Tax Division attorneys handling the case at issue conclude that the monitor selection process should be different from the process

described herein, including when the Tax Division attorneys propose using the process of a U.S. Attorney's Office with which the Tax Division is working on the case, the departure should be discussed, approved, and documented by the Standing Committee.⁹ The Standing Committee can request additional information or a written request for a departure.¹⁰

H. Continued Review of Monitorships

Pursuant to the Monaco Memorandum, prosecutors should keep an ongoing dialogue with the monitor and the Company. The monitor should submit a written workplan identifying with reasonable specificity the activities they plan to undertake and provide regular status updates to prosecutors on a pre-determined schedule, revising the written workplan as required to fulfill their responsibilities. The monitor should notify prosecutors immediately if they are denied access to information, resources, or corporate employees or agents necessary to their task.

Continued review of the monitorship will enable prosecutors to ensure that the monitor's work continues to adhere to the workplan and scope of the monitorship. Such review should include assessing the reasonableness of the monitor's review, including, where appropriate, issues relating to the cost of the monitor's work. Continued review also will permit prosecutors to determine whether the initial term of the monitorship is adequate, but not longer than necessary, to address the concerns that created the need for the monitor.

The Division may determine, in its sole discretion, that the term of the monitorship agreed to by the parties is longer than necessary. For example, a corporation may demonstrate significant and better-than-anticipated improvements to its compliance program, negating the need for continued oversight from a monitor. Or the corporation may be acquired by another corporation with an established, robust compliance program that is provably extended to the acquired corporation. Conversely, the Division may determine in other cases that it will be necessary to extend a monitorship beyond the initial period agreed to by the parties—for example, where additional or more pervasive misconduct is identified subsequent to the resolution, whether by the monitor or through other means.

In cases where a corporation seeks to shorten or terminate the monitorship based on acquisition by another corporation, prosecutors should not presume that the underlying concerns that prompted the need for the monitor are automatically resolved. The acquirer must demonstrate that there have been meaningful, sustainable changes to the corporation's personnel, compliance programs, and culture that have been embedded in the corporate culture and framework and have resulted in demonstrable improvements that reduce the chances of future misconduct.

⁹ 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 Monaco memorandum.

¹⁰ Where appropriate, a court may also modify the monitor selection process in cases where the Agreement is filed with the court.