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Compliance Remains A Key DOJ Priority

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(October 29, 2018, 2:42 PM EDT)


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For many companies considering the resolution of a criminal matter, the imposition of a corporate monitor can be one of the most significant and enduring aspects of the ordeal. It therefore comes as no surprise that the issuance of a new policy ("Selection of Monitors in Criminal Division Matters") and Assistant Attorney General Brian Benczkowski's accompanying speech have received widespread attention, with commentators hailing the Benczkowski memo as signaling a softening in the U.S. Department of Justice's use of corporate monitors.

As an initial matter, it is worth noting what the Benczkowski memo does not change. Although it supersedes a 2009 department memorandum on the selection of monitors, the Criminal Division's process for the selection of monitors appears to remain more or less the same. The new policy also expressly retains a 2008 memorandum that outlines general — and salutary — principles for the selection and conduct of a corporate monitor.

This latest guidance applies only to Criminal Division personnel and does not extend to the U.S. attorneys' offices nationwide, which, subject to the criteria outlined in the 2008 memo, remain free to impose monitors as they see fit. Other federal enforcement agencies such as the U.S. Securities and Exchange Commission and the U.S. Environmental Protection Agency, multilateral bodies such as the World Bank, and state enforcement agencies are free to impose monitors pursuant to their own guidelines. Finally, the Benczkowski memo, like its predecessor memos, does not curtail the ability of prosecutors to seek to impose an independent consultant as part of any resolution. While not typically as onerous as a full-blown monitor, imposing a consultant upon a company can still generate many of the same burdens including cost and disruption to normal business activity.

In articulating how the Criminal Division will consider whether to require monitors going forward, the memo makes clear that a monitor should not be imposed when costs (to the corporate defendant) outweigh the benefits. In making this determination, the Benczkowski memo directs Criminal Division attorneys to assess:

- Whether the underlying misconduct was the result of an inadequate compliance or internal controls system;

- The pervasiveness of the misconduct with the organization and/or the involvement of senior management;

- Improvements made since the underlying misconduct to the company's compliance program; and

- Th likelihood that any remedial efforts would prevent future occurrences of the underlying misconduct.

Importantly, from the corporate perspective at least, the Benczkowski memo directs Criminal Division attorneys to ensure that the scope of any monitorship is "appropriately tailored to avoid any unnecessary burdens to the business's operations." Whereas earlier policy memos had only applied to monitors imposed as part of deferred prosecution agreements and non-prosecution agreements, the Benczkowski memo expressly applies to cases resolved by guilty pleas as well. As guilty pleas necessarily involve court filings and appearances, and require acceptance and a sentencing by a federal court, this may engender renewed debate about the proper oversight role of judges in evaluating the scope of monitorships and overseeing monitors' work.

While both the Second Circuit in United States v. HSBC Bank USA NA[1] and the D.C. Circuit in U.S. v. Fokker Services BV[2] made clear that courts have almost no role in overseeing monitors imposed in connection with deferred prosecution agreements, the Benczkowski memo may inject a new element of uncertainty for companies that opt to resolve their issues by pleading guilty. But mostly, the Benczkowski memo reflects a responsiveness to corporate complaints about the costs and other burdens associated with monitorships while generally keeping the process for the selection and imposition of monitors intact.

One key aspect of Benczkowski's speech that has received less attention is the decision not to renew the compliance counsel position. In 2015, the Criminal Division hired a full-time compliance attorney to sit within the Fraud Section on a two-year contractual basis. The attorney chosen was a former assistant U.S. attorney who had later served in high-level compliance positions in various industries. After her departure in 2017, the DOJ initially advertised an opening for her replacement. However, in his Oct. 11 speech, Benczkowski announced that the Criminal Division would no longer seek to fill this position. Instead, the division apparently will hire multiple compliance professionals who will work alongside prosecutors on individual investigations.

Benczkowski gave several reasons why the division would hire multiple compliance experts. He noted that "[e]ven when fully briefed on a matter, a single compliance professional … is not likely to have the same depth of factual knowledge as the attorneys who make up the case team." While that is true, it is not necessary for an individual assessing a company's compliance program to have the same depth of knowledge about the minutiae of an investigation as the prosecuting attorneys. To the contrary, sometimes a fresh perspective, unencumbered from entrenched viewpoints that may form over the course of a long investigation, can be beneficial in evaluating the merits of a matter, whether it be a case or a compliance program. This is true from the perspectives of both the corporation — which likely would consider a trained compliance professional a less partisan evaluator than prosecutors focused on building a criminal case against it — and the Criminal Division, which would benefit from a strong message that its evaluation of compliance programs is fair and consistent.

Benczkowski also said in his speech that "[n]or can any one person be a true compliance expert in every industry we encounter." Again, that raises the question of whether the government should be deploying scant resources to hire multiple compliance experts to serve as add-ons to particular matters, rather than trial attorneys focused on the core mission of investigating and prosecuting cases. It seems unlikely that an official assessing the relative merits of a corporate compliance program truly needs to be an expert in that specific regulated industry. Rather, the hallmarks of a strong compliance program — robust oversight of high-risk areas, appropriate monitoring and reporting mechanisms, and effective investigatory capabilities, accountability, etc. — are more or less common across industries. This is why it is not uncommon for compliance professionals, including the department's former compliance counsel, to move between industries in the private sector.

Regardless of the particular approach taken, there is no doubt that the assessment of a company's compliance program will remain a key priority for the Criminal Division — both in assessing whether criminal charges are warranted under the Principles of Federal Prosecution of Business Organizations and in assessing whether a monitor is appropriate under the Benczkowski memorandum.

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[1] United States v. HSBC Bank USA, N.A, 16-308(L) (2d Cir. July 12, 2017)

[2] U.S. v. Fokker Servs. B.V., 818 F.3d 733 (D.C. Cir. 2016).