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DOJ Establishes Guidelines For Corporate Monitors; Congress Remains Skeptical

Over the last several years, the Department of Justice (“DOJ”) has increasingly relied on deferred prosecution agreements and non-prosecution agreements to resolve criminal investigations of corporations. In many such agreements, DOJ has imposed a corporate monitor to review and evaluate, among other things, the company’s internal controls and compliance policies. Corporate monitors can be a particularly intrusive element of these agreements, as monitors in essence put a government representative inside the corporation. Depending on the specific terms of the agreement, monitors are sometimes given broad mandates to review almost any aspect of the company’s activities and may attend high-level meetings, all without the protections of the attorney-client privilege. DOJ has often chosen the monitors with only limited input from the company. Moreover, such monitors can be extremely expensive, costing the company tens of millions of dollars over the term of the deferred prosecution agreement. Recently, DOJ’s largely unfettered discretion in this area attracted public attention and criticism when it was disclosed that former Attorney General John Ashcroft was retained as a corporate monitor and will receive as compensation from the corporation between \$28 and \$52 million under an eighteen-month agreement.

On March 10, 2008, apparently in response to such criticism, Acting Deputy Attorney General Craig S. Morford issued a memorandum setting forth nine principles that DOJ will now consider when negotiating and finalizing monitor provisions in connection with deferred prosecution arrangements (the “Morford Memo”). The Morford Memo addresses possible criteria for monitor selection, the independent nature of the monitor, the advisability of placing limits on scope of the monitor’s review, the need for regular communication among the monitor, DOJ and the corporation, procedures for resolving disputes over the monitor’s suggestions, the ability of the monitor to disclose previously undisclosed misconduct, and ways to determine the appropriate term of any monitorship.

On March 11, 2008, one day after DOJ issued this guidance, the House Subcommittee on Commercial and Administrative Law held a hearing entitled “Deferred Prosecution: Should Corporate Settlement Agreements be Without Guidelines?” A primary focus of the hearing was the role of corporate monitors. In his opening statement, Representative John Conyers noted that “despite the guidance the Department released just yesterday regarding use of corporate monitors in these agreements, this guidance still fails to ensure uniformity in the agreements themselves.” Conyers suggested that “there should be independent judicial oversight of corporate settlement agreements because currently there is no transparency and no requirement that they be made public.” Other witnesses echoed this view; one Congressman who testified at the hearing, Representative Frank Pallone, Jr., has introduced legislation that would, among other things, require that a third party, such as a district judge, select and approve corporate monitors and set their compensation according to a pre-determined fee schedule.

It remains to be seen whether the Morford Memo will alleviate concerns about DOJ’s use of deferred prosecution arrangements and its reliance on monitors. Notably, the

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Morford Memo is simply internal DOJ guidance; it confers no rights, and third parties have no ability to enforce any of the Morford Memo's provisions. However, the Morford Memo does, at a minimum, provide counsel with some new arguments when negotiating with prosecutors over whether or not such a monitorship is appropriate in a particular case, and, if so, how such monitors should be selected, supervised and compensated, and what the scope and term of their monitoring activities should be.

The principles set forth in the Morford Memo add yet another set of considerations to the already complex array of factors that a corporation must weigh in determining whether to resolve a criminal investigation by entering into a deferred prosecution agreement. Of course, corporations should not assume that having a monitor is a foregone conclusion. There are many cases where the corporation's own remedial actions and structural reforms are sufficient and a monitor is not appropriate.

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