POHLMANN & COMPANY

Compliance Monitorships
Kompetenz aus Erfahrung

- **Über uns**
- **Grundlagenmaterialien**
  - → Morford-Memorandum
  - → Benczkowski-Memorandum

Interdisziplinärer Ansatz & internationale Praxis

Pohlmann & Company ist die erste interdisziplinäre Rechtsanwaltskanzlei und Unternehmensberatung mit klarem Fokus auf Compliance & Corporate Governance.

Wir sind spezialisiert auf konkrete Lösungen und arbeiten weltweit in schlagkräftigen interdisziplinären Teams mit ehemaligen Führungskräften aus der Industrie, erstklassigen Anwälten und erfahrenen Unternehmensberatern.

Compliance Monitorships

Präventive Compliance-Beratung

Interne Untersuchungen

Organhaftung

Umwelt-Compliance

Unsere Erfolge

2019 **The LEGAL 500 Deutschland: Top Tier Compliance / Interne Untersuchungen**

„Die Boutique Pohlmann & Company ‚ist auf dem Spezialgebiet Compliance eine echte Größe'. Mandanten schätzen ‚die professionelle und gleichzeitig persönliche Zusammenarbeit' sowie die 'sehr guten Branchenkenntnisse'."

2018 **FOCUS-Spezial: Top-Wirtschaftskanzleien Deutschlands**

Auch 2018 gehört Pohlmann & Company wieder zu Deutschlands besten Kanzleien im Bereich Compliance, die das Marktforschungsinstitut Statista im Auftrag des Nachrichtenmagazins FOCUS recherchiert hat.

2017 **WirtschaftsWoche: TOP-Kanzlei 2017 Compliance**

Pohlmann & Company ist eine von 24 Topkanzleien, die es in das aktuelle Ranking des führenden Wirtschaftsmagazins geschafft hat. Das Handelsblatt Research Institut (HRI) hat dieses in einer Peer-Group-Befragung von 444 Compliance-Anwälten ermittelt.

2017 **JUVE Awards: Kanzlei des Jahres für Compliance-Untersuchungen**

„Der häufig empfohlenen Compliance-Boutique gelingt es müheloser als vielen international aufgestellten Wettbewerbern, den US-Markt für sich zu erschließen. [...] Mit ihrem multidisziplinären und globalen Ansatz trifft sie die Bedürfnisse der Mandanten ..."

„Wir begleiten Ihr Unternehmen in der Krise, damit Sie daraus gestärkt in die Zukunft gehen."

Kompetenz aus Erfahrung

Compliance Monitoring erfordert Erfahrung, Fachwissen und die Fähigkeit, das Vertrauen sowohl der betroffenen Unternehmen als auch der Aufsichtsbehörden zu gewinnen. Als unabhängige Compliance Monitore oder deren Berater sowie in oder an der Seite von Inhouse-Funktionen betroffener Unternehmen kennen wir die gesamte Bandbreite von Compliance Monitorships.

Die seitens der Strafverfolgungs- und Aufsichtsbehörden weltweit an Unternehmen gestellten Compliance-Anforderungen steigen ständig. Damit gewinnt die Rolle des unabhängigen Compliance Monitors zunehmend an Bedeutung. Immer mehr Unternehmen werden bei Compliance-Verstößen verpflichtet, neben den auferlegten Bußgeldern auch einen unabhängigen Compliance Monitor zu akzeptieren.

Hauptaufgabe eines Compliance Monitors ist es, das Unternehmen bei der Etablierung und Entwicklung eines effektiven Ethik- und Compliance-Programms zu überwachen und weiter voranzubringen. Ziel ist es, zukünftige Verstöße mit Hilfe eines wirksamen Compliance-Management-Systems zu verhindern.

Pohlmann & Company war bereits mehrfach als Compliance Monitor oder dessen Berater tätig und verfügt über langjährige internationale Praxis im Bereich der präventiven Compliance-Beratung. Mit dieser besonderen Expertise sind wir die ideale Besetzung als unabhängiges Bindeglied zwischen Behörden, wie z.B. Department of Justice (DoJ), U.S. Securities and Exchange Commission (SEC) oder Weltbank, und betroffenen Unternehmen.

„Eine der wenigen deutschen Kanzleien mit einem **exzellenten** Zugang zum US-Markt …"

JUVE

Compliance ist unsere Mission.
Exzellenz ist unser Anspruch.
Lösungen sind unsere Leidenschaft .

Im Überblick

Mit erfahrenen Beratern sind wir auch ein verlässlicher Partner für Unternehmen, die sich vorausschauend auf ein Monitorship vorbereiten wollen – von der Auswahl eines passenden Monitors über die Etablierung des erforderlichen Kommunikations- und Prozessmanagements bis hin zur proaktiven Verbesserung des Compliance-Management-Systems.

Unter Umständen kann es für Unternehmen auch von Interesse sein, ein „freiwilliges Monitorship" zu initiieren, um den Reifegrad und die Effektivität des Compliance-Programms und internen Kontroll-Systems zu überprüfen. Wir kennen die relevanten Mindestanforderungen und Best-Practice-Standards, auch im internationalen Umfeld. Deshalb verlassen sich Mandanten auf uns, wenn es darum geht, ihre Prozesse zu optimieren oder den Grad ihrer Aufarbeitung von Compliance-Verstößen (Remediation) von unabhängiger Seite testen zu lassen.

Compliance Monitor

- Tätigkeit als unabhängiger **Compliance Monitor**, z.B. für das U.S. Justizministerium (Department of Justice), die U.S. Börsenaufsicht (U.S. Securities and Exchange Commission) oder die Weltbank

Counsel/Support to the Monitor

- Unterstützung von Compliance Monitoren als Berater oder als Experte / Teammitglied im Sinne eines „**Counsel/Support to the Monitor**"

Counsel to the Company

- Strategische Beratung und praktische Unterstützung in Vorbereitung auf und während eines Compliance Monitorships, inklusive der Etablierung/Verbesserung von Compliance-Programmen und internen Kontrollsystemen („**Counsel to the Company**")

Freiwilliges Compliance Monitorship

- „**Freiwilliges Compliance Monitorship**" zwecks unabhängiger Zertifizierung eines effektiven Compliance-Programms und/oder internen Kontrollsystems nach relevanten Mindestanforderungen und internationalen Best-Practice-Standards

Internationale Mandate und weltweites Auftreten

Von unseren drei Büros in Frankfurt, München und Montréal aus betreuen wir internationale Mandanten und Mandate. Aktuell sind wir in mehr als 30 Ländern unterwegs, um direkt vor Ort Compliance-Risiken zu bewerten und bedarfsgerechte Lösungen zu entwickeln.

POHLMANN & COMPANY

Dr. Andreas Pohlmann

Partner

Andreas Pohlmann ist ein führender Praktiker und international anerkannter Berater in Fragen der Compliance und Corporate Governance, insbesondere bei Monitorships. Zu seiner Expertise gehört zudem die Beratung zu Pflichten und Obliegenheiten von Gesellschaftsorganen und Organmitgliedern. Seine Mandanten sind häufig Mitglieder von Geschäftsführung bzw. Vorstand wie auch von Aufsichtsräten. Andreas Pohlmann berät und unterstützt Compliance Officer und Leiter der Rechtsfunktionen bei der Konzeption und Implementierung effektiver und effizienter Compliance-Management-Systeme.

Kontakt

+49 69 260 117 141

apohlmann@pohlmann-company.com

Frankfurt

Thomas Lüthi

Partner

Thomas Lüthi berät bei der Konzeption, beim Aufbau und bei der Umsetzung von Compliance-Management-Systemen und Compliance-Organisationen, insbesondere auch bei Monitorships. Er ist ein anerkannter Praktiker, welcher im Rahmen seiner früheren Führungspositionen unter anderem die weltweite Implementierung von geschäftsbezogenen, risikobasierten Compliance-Prozessen und -Tools verantwortete. Über besondere Erfahrung verfügt Thomas Lüthi auf dem Gebiet der organisatorischen und funktionalen Ausgestaltung effektiver Rechts- und Compliance-Organisationen.

Kontakt

+49 89 217 5841 77

tluethi@pohlmann-company.com

München

Nicole Willms

Partnerin

Nicole Willms ist seit vielen Jahren für deutsche und internationale Mandanten in den Bereichen Compliance, Corporate Governance, Gesellschaftsrecht und Mergers & Acquisitions tätig. Sie berät laufend zu Compliance- und Governance-Fragen und verfügt über besondere Erfahrung hinsichtlich der Entwicklung, Umsetzung und Prüfung von Compliance-Management-Systemen, insbesondere auch im Rahmen von Compliance Monitorships. Überdies begleitet Nicole Willms Mandanten bei M&A-Transaktionen, inklusive der Durchführung von Compliance Due Diligences, und berät in sonstigen gesellschaftsrechtlichen Angelegenheiten, insbesondere auch im Bereich der Organpflichten/-haftung (D&O).

Kontakt

+49 69 260 1171 46

nwillms@pohlmann-company.com

Frankfurt

https://www.justice.gov/sites/default/files/dag/legacy/2008/03/20/morford-useofmonitorsmemo-03072008.pdf

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

March 7, 2008

MEMORANDUM FOR HEADS OF DEPARTMENT COMPONENTS
UNITED STATES ATTORNEYS

FROM: Craig S. Morford
Acting Deputy Attorney General

SUBJECT: Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations[1]

I. INTRODUCTION

The Department of Justice's commitment to deterring and preventing corporate crime remains a high priority. The Principles of Federal Prosecution of Business Organizations set forth guidance to federal prosecutors regarding charges against corporations. A careful consideration of those principles and the facts in a given case may result in a decision to negotiate an agreement to resolve a criminal case against a corporation without a formal conviction – either a deferred prosecution agreement or a non-prosecution agreement.[2] As part of some negotiated corporate agreements, there have been provisions pertaining to an independent corporate monitor.[3] The corporation benefits from expertise in the area of corporate compliance

[1] As used in these Principles, the terms "corporate" and "corporation" refer to all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations.

[2] The terms "deferred prosecution agreement" and "non-prosecution agreement" have often been used loosely by prosecutors, defense counsel, courts and commentators. As the terms are used in these Principles, a deferred prosecution agreement is typically predicated upon the filing of a formal charging document by the government, and the agreement is filed with the appropriate court. In the non-prosecution agreement context, formal charges are not filed and the agreement is maintained by the parties rather than being filed with a court. Clear and consistent use of these terms will enable the Department to more effectively identify and share best practices and to track the use of such agreements. These Principles do not apply to plea agreements, which involve the formal conviction of a corporation in a court proceeding.

[3] Agreements use a variety of terms to describe the role referred to herein as "monitor," including consultants, experts, and others.

from an independent third party. The corporation, its shareholders, employees and the public at large then benefit from reduced recidivism of corporate crime and the protection of the integrity of the marketplace.

The purpose of this memorandum is to present a series of principles for drafting provisions pertaining to the use of monitors in connection with deferred prosecution and non-prosecution agreements (hereafter referred to collectively as "agreements") with corporations.[4] Given the varying facts and circumstances of each case – where different industries, corporate size and structure, and other considerations may be at issue – any guidance regarding monitors must be practical and flexible. This guidance is limited to monitors, and does not apply to third parties, whatever their titles, retained to act as receivers, trustees, or perform other functions.

A monitor's primary responsibility is to assess and monitor a corporation's compliance with the terms of the agreement specifically designed to address and reduce the risk of recurrence of the corporation's misconduct, and not to further punitive goals. A monitor should only be used where appropriate given the facts and circumstances of a particular matter. For example, it may be appropriate to use a monitor where a company does not have an effective internal compliance program, or where it needs to establish necessary internal controls. Conversely, in a situation where a company has ceased operations in the area where the criminal misconduct occurred, a monitor may not be necessary.

In negotiating agreements with corporations, prosecutors should be mindful of both: (1) the potential benefits that employing a monitor may have for the corporation and the public, and (2) the cost of a monitor and its impact on the operations of a corporation. Prosecutors shall, at a minimum, notify the appropriate United States Attorney or Department Component Head prior to the execution of an agreement that includes a corporate monitor. The appropriate United States Attorney or Department Component Head shall, in turn, provide a copy of the agreement to the Assistant Attorney General for the Criminal Division at a reasonable time after it has been executed. The Assistant Attorney General for the Criminal Division shall maintain a record of all such agreements.

This memorandum does not address all provisions concerning monitors that have been included or could appropriately be included in agreements. Rather this memorandum sets forth nine basic principles in the areas of selection, scope of duties, and duration.

This memorandum provides only internal Department of Justice guidance. In addition, this memorandum applies only to criminal matters and does not apply to agencies other than the

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[4] In the case of deferred prosecution agreements filed with a court, these Principles must be applied with due regard for the appropriate role of the court and/or the probation office.

Department of Justice. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

II. SELECTION

1. Principle: Before beginning the process of selecting a monitor in connection with deferred prosecution agreements and non-prosecution agreements, the corporation and the Government should discuss the necessary qualifications for a monitor based on the facts and circumstances of the case. The monitor must be selected based on the merits. The selection process must, at a minimum, be designed to: (1) select a highly qualified and respected person or entity based on suitability for the assignment and all of the circumstances; (2) avoid potential and actual conflicts of interests, and (3) otherwise instill public confidence by implementing the steps set forth in this Principle.

To avoid a conflict, first, Government attorneys who participate in the process of selecting a monitor shall be mindful of their obligation to comply with the conflict-of-interest guidelines set forth in 18 U.S.C. § 208 and 5 C.F.R. Part 2635. Second, the Government shall create a standing or *ad hoc* committee in the Department component or office where the case originated to consider monitor candidates. United States Attorneys and Assistant Attorneys General may not make, accept, or veto the selection of monitor candidates unilaterally. Third, the Office of the Deputy Attorney General must approve the monitor. Fourth, the Government should decline to accept a monitor if he or she has an interest in, or relationship with, the corporation or its employees, officers or directors that would cause a reasonable person to question the monitor's impartiality. Finally, the Government should obtain a commitment from the corporation that it will not employ or be affiliated with the monitor for a period of not less than one year from the date the monitorship is terminated.

Comment: Because a monitor's role may vary based on the facts of each case and the entity involved, there is no one method of selection that should necessarily be used in every instance. For example, the corporation may select a monitor candidate, with the Government reserving the right to veto the proposed choice if the monitor is unacceptable. In other cases, the facts may require the Government to play a greater role in selecting the monitor. Whatever method is used, the Government should determine what selection process is most effective as early in the negotiations as possible, and endeavor to ensure that the process is designed to produce a high-quality and conflict-free monitor and to instill public confidence. If the Government determines that participation in the selection process by any Government personnel creates, or appears to create, a potential or actual conflict in violation of 18 U.S.C. § 208 and 5

C.F.R. Part 2635, the Government must proceed as in other matters where recusal issues arise. In all cases, the Government must submit the proposed monitor to the Office of the Deputy Attorney General for review and approval before the monitorship is established.

Ordinarily, the Government and the corporation should discuss what role the monitor will play and what qualities, expertise, and skills the monitor should have. While attorneys, including but not limited to former Government attorneys, may have certain skills that qualify them to function effectively as a monitor, other individuals, such as accountants, technical or scientific experts, and compliance experts, may have skills that are more appropriate to the tasks contemplated in a given agreement.

Subsequent employment or retention of the monitor by the corporation after the monitorship period concludes may raise concerns about both the appearance of a conflict of interest and the effectiveness of the monitor during the monitorship, particularly with regard to the disclosure of possible new misconduct. Such employment includes both direct and indirect, or subcontracted, relationships.

Each United States Attorney's Office and Department component shall create a standing or *ad hoc* committee ("Committee") of prosecutors to consider the selection or veto, as appropriate, of monitor candidates. The Committee should, at a minimum, include the office ethics advisor, the Criminal Chief of the United States Attorney's Office or relevant Section Chief of the Department component, and at least one other experienced prosecutor.

Where practicable, the corporation, the Government, or both parties, depending on the selection process being used, should consider a pool of at least three qualified monitor candidates. Where the selection process calls for the corporation to choose the monitor at the outset, the corporation should submit its choice from among the pool of candidates to the Government. Where the selection process calls for the Government to play a greater role in selecting the monitor, the Government should, where practicable, identify at least three acceptable monitors from the pool of candidates, and the corporation shall choose from that list.

III. SCOPE OF DUTIES

A. INDEPENDENCE

2. Principle: A monitor is an independent third-party, not an employee or agent of the corporation or of the Government.

Comment: A monitor by definition is distinct and independent from the directors, officers, employees, and other representatives of the corporation. The monitor is not the

corporation's attorney. Accordingly, the corporation may not seek to obtain or obtain legal advice from the monitor. Conversely, a monitor also is not an agent or employee of the Government.

While a monitor is independent both from the corporation and the Government, there should be open dialogue among the corporation, the Government and the monitor throughout the duration of the agreement.

B. MONITORING COMPLIANCE WITH THE AGREEMENT

3. Principle: A monitor's primary responsibility should be to assess and monitor a corporation's compliance with those terms of the agreement that are specifically designed to address and reduce the risk of recurrence of the corporation's misconduct, including, in most cases, evaluating (and where appropriate proposing) internal controls and corporate ethics and compliance programs.

Comment: At the corporate level, there may be a variety of causes of criminal misconduct, including but not limited to the failure of internal controls or ethics and compliance programs to prevent, detect, and respond to such misconduct. A monitor's primary role is to evaluate whether a corporation has both adopted and effectively implemented ethics and compliance programs to address and reduce the risk of recurrence of the corporation's misconduct. A well-designed ethics and compliance program that is not effectively implemented will fail to lower the risk of recidivism.

A monitor is not responsible to the corporation's shareholders. Therefore, from a corporate governance standpoint, responsibility for designing an ethics and compliance program that will prevent misconduct should remain with the corporation, subject to the monitor's input, evaluation and recommendations.

4. Principle: In carrying out his or her duties, a monitor will often need to understand the full scope of the corporation's misconduct covered by the agreement, but the monitor's responsibilities should be no broader than necessary to address and reduce the risk of recurrence of the corporation's misconduct.

Comment: The scope of a monitor's duties should be tailored to the facts of each case to address and reduce the risk of recurrence of the corporation's misconduct. Among other things, focusing the monitor's duties on these tasks may serve to calibrate the expense of the monitorship to the failure that gave rise to the misconduct the agreement covers.

Neither the corporation nor the public benefits from employing a monitor whose role is too narrowly defined (and, therefore, prevents the monitor from effectively evaluating the

reforms intended by the parties) or too broadly defined (and, therefore, results in the monitor engaging in activities that fail to facilitate the corporation's implementation of the reforms intended by the parties).

The monitor's mandate is not to investigate historical misconduct. Nevertheless, in appropriate circumstances, an understanding of historical misconduct may inform a monitor's evaluation of the effectiveness of the corporation's compliance with the agreement.

C. COMMUNICATIONS AND RECOMMENDATIONS BY THE MONITOR

5. Principle: Communication among the Government, the corporation and the monitor is in the interest of all the parties. Depending on the facts and circumstances, it may be appropriate for the monitor to make periodic written reports to both the Government and the corporation.

Comment: A monitor generally works closely with a corporation and communicates with a corporation on a regular basis in the course of his or her duties. The monitor must also have the discretion to communicate with the Government as he or she deems appropriate. For example, a monitor should be free to discuss with the Government the progress of, as well as issues arising from, the drafting and implementation of an ethics and compliance program. Depending on the facts and circumstances, it may be appropriate for the monitor to make periodic written reports to both the Government and the corporation regarding, among other things: (1) the monitor's activities; (2) whether the corporation is complying with the terms of the agreement; and (3) any changes that are necessary to foster the corporation's compliance with the terms of the agreement.

6. Principle: If the corporation chooses not to adopt recommendations made by the monitor within a reasonable time, either the monitor or the corporation, or both, should report that fact to the Government, along with the corporation's reasons. The Government may consider this conduct when evaluating whether the corporation has fulfilled its obligations under the agreement.

Comment: The corporation and its officers and directors are ultimately responsible for the ethical and legal operations of the corporation. Therefore, the corporation should evaluate whether to adopt recommendations made by the monitor. If the corporation declines to adopt a recommendation by the monitor, the Government should consider both the monitor's recommendation and the corporation's reasons in determining whether the corporation is complying with the agreement. A flexible timetable should be established to ensure that both a monitor's recommendations and the corporation's decision to adopt or reject them are made well before the expiration of the agreement.

D. REPORTING OF PREVIOUSLY UNDISCLOSED OR NEW MISCONDUCT

7. Principle: The agreement should clearly identify any types of previously undisclosed or new misconduct that the monitor will be required to report directly to the Government. The agreement should also provide that as to evidence of other such misconduct, the monitor will have the discretion to report this misconduct to the Government or the corporation or both.

Comment: As a general rule, timely and open communication between and among the corporation, the Government and the monitor regarding allegations of misconduct will facilitate the review of the misconduct and formulation of an appropriate response to it. The agreement may set forth certain types of previously undisclosed or new misconduct that the monitor will be required to report directly to the Government. Additionally, in some instances, the monitor should immediately report other such misconduct directly to the Government and not to the corporation. The presence of any of the following factors militates in favor of reporting such misconduct directly to the Government and not to the corporation, namely, where the misconduct: (1) poses a risk to public health or safety or the environment; (2) involves senior management of the corporation; (3) involves obstruction of justice; (4) involves criminal activity which the Government has the opportunity to investigate proactively and/or covertly; or (5) otherwise poses a substantial risk of harm. On the other hand, in instances where the allegations of such misconduct are not credible or involve actions of individuals outside the scope of the corporation's business, the monitor may decide, in the exercise of his or her discretion, that the allegations need not be reported directly to the Government.

IV. DURATION

8. Principle: The duration of the agreement should be tailored to the problems that have been found to exist and the types of remedial measures needed for the monitor to satisfy his or her mandate.

Comment: The following criteria should be considered when negotiating duration of the agreement (not necessarily in this order): (1) the nature and seriousness of the underlying misconduct; (2) the pervasiveness and duration of misconduct within the corporation, including the complicity or involvement of senior management; (3) the corporation's history of similar misconduct; (4) the nature of the corporate culture; (5) the scale and complexity of any remedial measures contemplated by the agreement, including the size of the entity or business unit at issue; and (6) the stage of design and implementation of remedial measures when the monitorship commences. It is reasonable to forecast that completing an assessment of more extensive and/or complex remedial measures will require a longer period of time than completing

an assessment of less extensive and/or less complex ones. Similarly, it is reasonable to forecast that a monitor who is assigned responsibility to assess a compliance program that has not been designed or implemented may take longer to complete that assignment than one who is assigned responsibility to assess a compliance program that has already been designed and implemented.

9. **Principle: In most cases, an agreement should provide for an extension of the monitor provision(s) at the discretion of the Government in the event that the corporation has not successfully satisfied its obligations under the agreement. Conversely, in most cases, an agreement should provide for early termination if the corporation can demonstrate to the Government that there exists a change in circumstances sufficient to eliminate the need for a monitor.**

Comment: If the corporation has not satisfied its obligations under the terms of the agreement at the time the monitorship ends, the corresponding risk of recidivism will not have been reduced and an extension of the monitor provision(s) may be appropriate. On the other hand, there are a number of changes in circumstances that could justify early termination of an agreement. For example, if a corporation ceased operations in the area that was the subject of the agreement, a monitor may no longer be necessary. Similarly, if a corporation is purchased by or merges with another entity that has an effective ethics and compliance program, it may be prudent to terminate a monitorship.

https://www.justice.gov/opa/speech/file/1100531/download

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

October 11, 2018

TO: All Criminal Division Personnel

FROM: Brian A. Benczkowski
Assistant Attorney General

SUBJECT: Selection of Monitors in Criminal Division Matters

The purpose of this memorandum is to establish standards, policy, and procedures for the selection of monitors in matters being handled by Criminal Division attorneys.[1] This memorandum supplements the guidance provided by 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 (hereinafter referred to as the "Morford Memorandum" or "Memorandum").[2] The standards, policy, and procedures contained in this memorandum shall apply to all Criminal 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[3] between the Criminal Division and a business organization which requires the retention of a monitor.

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

Independent corporate monitors can be a helpful resource and beneficial means of assessing a business organization's compliance with the terms of a corporate criminal resolution, whether a DPA, NPA, or plea agreement. Monitors can also be an effective means of reducing the risk of a recurrence of the misconduct and compliance lapses that gave rise to the underlying corporate criminal resolution.

[1] The contents of this memorandum provide internal guidance to Criminal 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. This memorandum supersedes the June 24, 2009 Criminal Division memorandum on monitor selection.

[2] The Morford Memorandum requires each Department component to "create a standing or ad hoc committee…of prosecutors to consider the selection or veto, as appropriate, of monitor candidates." The memorandum also requires that the Committee include an ethics advisor, the Section Chief of the involved Department component, and one other experienced prosecutor.

[3] Although the Morford Memorandum applies only to DPAs and NPAs, this memorandum makes clear that the Criminal Division shall apply the same principles to plea agreements that impose a monitor so long as the court approves the agreement.

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. The Morford Memorandum explained that, "[a] monitor should only be used where appropriate given the facts and circumstances of a particular matter[,]" and set forth the two broad considerations that should guide prosecutors when assessing the need and propriety of a monitor: "(1) the potential benefits that employing a monitor may have for the corporation and the public, and (2) the cost of a monitor and its impact on the operations of a corporation." The Memorandum also made clear that a monitor should never be imposed for punitive purposes.

This memorandum elaborates on those considerations. In evaluating the "potential benefits" of a monitor, Criminal Division attorneys should consider, among other factors: (a) whether the underlying misconduct involved the manipulation of corporate books and records or the exploitation of an inadequate compliance program or internal control systems; (b) whether the misconduct at issue was pervasive across the business organization or approved or facilitated by senior management; (c) whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal control systems; and (d) whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future.

Where misconduct occurred under different corporate leadership or within a compliance environment that no longer exists within a company, Criminal Division attorneys should consider whether the changes in corporate culture and/or leadership are adequate to safeguard against a recurrence of misconduct. Criminal Division attorneys should also consider whether adequate remedial measures were taken to address problem behavior by employees, management, or third-party agents, including, where appropriate, the termination of business relationships and practices that contributed to the misconduct. In assessing the adequacy of a business organization's remediation efforts and the effectiveness and resources of its compliance program, Criminal Division attorneys should consider the unique risks and compliance challenges the company faces, including the particular region(s) and industry in which the company operates and the nature of the company's clientele.

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

In general, the Criminal 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. Where a corporation's compliance program and controls are demonstrated to be effective and appropriately resourced 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 Criminal 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 Criminal Division or his/her designee, who in most cases will be the Deputy Assistant Attorney General ("DAAG") with supervisory responsibility for the relevant Section.

C. Terms of Criminal Division Monitorship Agreements

As a preliminary matter, any DPA, NPA, or plea agreement between the Criminal 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 statement that the parties will endeavor to complete the monitor selection process within sixty (60) days of the execution of the underlying agreement;
5. An explanation of the responsibilities of the monitor and the monitorship's scope; and
6. The length of the monitorship.

D. Standing Committee on the Selection of Monitors

The Criminal 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 with supervisory responsibility for the Fraud Section, or his/her designee;[4] (2) the Chief of the Fraud Section (or other relevant Section, if not the Fraud Section), or his/her designee;[5] and (3) the Deputy Designated Agency Ethics Official for the Criminal Division.[6] Should further replacements not contemplated by this paragraph be necessary for a particular case, the DAAG with supervisory responsibility for the Fraud Section will appoint any temporary, additional member of the Standing Committee for the particular case.

[4] Should the DAAG be recused from a particular case, the Assistant Attorney General will appoint a representative to fill the DAAG's position on the Standing Committee.
[5] Should the Chief of the Section be recused from a particular case, he/she will be replaced by the Principal Deputy Chief or Deputy Chief with supervisory responsibility over the matter.
[6] Should the Deputy Designated Agency Ethics Official for the Criminal Division be recused from a particular case, he/she will be replaced by the Alternate Deputy Designated Agency Ethics Official for the Criminal Division or his/her designee.

The DAAG with supervisory authority over the Fraud Section, or his/her designee, shall be the Chair of the Standing Committee, and shall be responsible for ensuring that the Standing Committee discharges its responsibilities.

All Criminal 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 Official for the Criminal Division as soon as practicable, but no later than the time of the submission of the Monitor Recommendation Memorandum to the Assistant Attorney General for the Criminal Division ("the AAG").

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 (hereinafter referred to as the "Company"), 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

As set forth in the Morford Memorandum, 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 Criminal Division shall employ the following procedure[7] 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 Criminal Division attorneys handling the matter to recommend a pool of three qualified monitor candidates.[8] 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:

[7] 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.

[8] Any submission or selection of a monitor candidate by either the Company or the Criminal Division should be made without unlawful discrimination against any person or class of persons.

a. a description of each candidate's qualifications and credentials 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 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 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 Criminal Division Section (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 Criminal Division attorneys handling the matter, along with supervisors from the Section, should promptly interview each monitor candidate to assess his/her qualifications, credentials and suitability for the assignment 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 in applying the particular area(s) at issue 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 to discharge the monitor's responsibilities effectively; and

e. any other factor determined by the Criminal Division attorneys, based on the circumstances, to relate to the qualifications and competency of each monitor candidate as they may relate to 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 or all of the three candidates lack the requisite qualifications, they should notify the Company and request that counsel for the Company propose another candidate or candidates within twenty (20) business days.[9] 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.[10]

3. 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 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 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 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 Criminal 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.

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[9] 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.

[10] If the Criminal 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.

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.

4. Standing Committee Review of a Monitor Candidate:

The Standing 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 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 Criminal 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. Part 2635, and 28 C.F.R. Part 45.

If the Standing Committee rejects the recommended candidate, it should so inform the Criminal Division attorneys handling the matter and their supervisors of the rejection decision. In this instance, the Criminal 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 paragraph C above. If the Standing Committee rejects the recommended candidate, or the pool of remaining candidates, the Criminal 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 Assistant Attorney General for the Criminal Division.

5. Review by the Assistant Attorney General:

Consistent with the terms of the Morford Memo, 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 Standing 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 Standing Committee and/or the Criminal Division attorneys handling the matter and their supervisors. Additionally, the AAG may, in his/her discretion interview the candidate recommended by the Standing 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 this position, and forward the Monitor Recommendation Memorandum to the Office of the Deputy Attorney General ("ODAG").

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

All monitor candidates selected 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 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.

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 Criminal Division attorneys handling the case at issue conclude that the monitor selection process should be different from the process described herein, including when the Criminal Division attorneys propose using the process of a U.S. Attorney's Office with which the Criminal Division is working on the case, the departure should be discussed and approved by the Standing Committee. The Standing Committee can request additional information and/or a written request for a departure.[11]

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

POHLMANN & COMPANY

Kontakt

Frankfurt/Main

Pohlmann & Company
Guiollettstraße 48
60325 Frankfurt/Main
Deutschland

T +49 69 260 1171 40
F +49 69 260 1171 67

München

Pohlmann & Company
Nymphenburger Straße 4
80335 München
Deutschland

T +49 89 217 5841 70
F +49 89 217 5841 71

Montreal

Pohlmann & Company
1000 Rue de la Gauchètiere West, 24th floor
Montreal, QC H3B 4W5
Kanada

T +1 514 448 7487
M +1 438 494 3514