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DOJ Announces Updated Policy on Corporate Monitors,
Elimination of the Compliance Counsel Position

Corporate clients facing complex criminal investigations frequently ask us whether they will be given appropriate “credit” for embarking upon vigorous cooperation and remediation efforts as well as maintaining and improving robust compliance programs. For years, we have counseled that, despite the uncertainties, such efforts are generally well worth the effort. But we have also urged DOJ (and other enforcement actors) to provide greater clarity and predictability so companies will know that expensive and time-intensive efforts will be rewarded in appropriate cases. (See our prior memo here.) In a speech on Friday, Assistant Attorney General Brian Benczkowski of DOJ’s Criminal Division announced a newly updated policy to guide the Division’s decision-making on whether to require a monitor as part of a corporate criminal resolution.

The updated policy codifies the principle that imposing a corporate monitor should be “the exception, not the rule.” Specifically, the policy requires a cost-benefit analysis, directing that a corporate monitor be imposed only where there is “a demonstrated need for, and clear benefit to be derived from,” a monitor when compared to the costs and burdens to the corporation. A monitor “will likely not be necessary” if a corporation’s compliance program is “demonstrated to be effective and appropriately resourced at the time of resolution.”

The new policy also mandates that, where a monitorship is imposed, its scope should be “appropriately tailored to address the specific issues and concerns that created the need for the monitor.” To ensure suitable tailoring, Criminal Division agreements must now include an explanation of the monitorship’s scope, along with a description of the process for replacing a monitor, if necessary. And AAG Benczkowski emphasized that Criminal Division prosecutors have an ongoing obligation to ensure that monitors are acting properly and effectively by “operating within the appropriate scope of their mandate.”

In the same speech, AAG Benczkowski announced that the Criminal Division will eliminate the position of compliance counsel – a role created to some fanfare in the last administration – citing the institutional limitations of relying on a single person as the repository of compliance expertise. But AAG Benczkowski
hastened to emphasize that assessment of the compliance function will continue to
be a key consideration in every corporate enforcement matter. Rather than hiring a
new compliance counsel, the Criminal Division will institute a hiring and training
program to cultivate “a workforce better steeped in compliance issues across the
board.” Accordingly, this change does not signal a shift in DOJ’s approach to
corporate enforcement nor does it diminish the importance of maintaining an
effective compliance program.

Viewed alongside the incremental expansion of its FCPA Enforcement
Policy that we have previously reported on in March, July, and earlier this October,
Friday’s announcement marks a continuation of DOJ’s efforts to promote
predictability and transparency in its approach to corporate enforcement. The
result is a stronger and clearer message that when companies invest in robust
compliance programs and actively remediate identified misconduct, those efforts
will be recognized and rewarded by DOJ.

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