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"This is an outstanding article by U.S. Attorney Geoffrey Berman on Monitorships."

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U.S. Attorney Geoffrey Berman Keynote Speech on Monitorships by Geoffrey S. Berman

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Thank you very much for that introduction, Jennifer, and thanks to the entire PCCE staff for organizing this great event. It is always wonderful to be at NYU and especially to appear before such a distinguished audience.

Let me first share with you some general principles we follow with respect to monitors, and then discuss some specific issues, including:

- How we determine whether to seek appointment of a monitor;
- The factors we consider in selecting a monitor;
- How an entity might avoid the appointment of a monitor; and
- What, in our experience, makes a monitorship successful?

I. Overview of Approach to Monitorships

As for general principles, we adhere to guidance from the Deputy Attorney General concerning the selection and use of monitors. The DOJ guidance is set forth in the 2008 Morford Memorandum, as modified by the 2010 Grindler Memorandum, and just recently supplemented by the Benczkowski Memorandum.

Second, as those memoranda reflect, a monitor's primary responsibility is to assess and monitor the entity's compliance with the terms of the agreement that resolved the case. The specific goal is to reduce the risk of recurrence; in other words, a monitor's role is remedial, not punitive.

Now there is an exception to this as it pertains to monitors imposed in civil cases involving union corruption or, most recently, with NYCHA addressing the deplorable conditions of NYC public housing. These are consent decrees in the civil context and the role of the monitors there are generally much more proactive and far reaching than in the Deferred Prosecution Agreement ("DPA") context.

It's worth noting that one thing the Southern District generally does not do, in either the criminal or civil context, is utilize pre-settlement, investigative monitors as some state regulatory agencies do.

Getting back to the context of a traditional DPA monitor, we expect that the monitor will report any new or additional misconduct it identified in the course of performing its remedial function, but my point is that the investigation of wrongdoing is not a monitor's primary function in the DPA context.

It is not SDNY's default position that a monitor is presumptively appropriate as part of every DPA or Non-Prosecution Agreement ("NPA"), and then put the burden on an entity to prove why a monitor is unnecessary. Monitors are the exception, not the rule. We are not eager to displace corporate management in the execution of its fiduciary duties to address and remediate the wrongdoing that brought them to our attention in the first place. We are mindful of the government's proper role in these situations, and the expense and operational disruption that can occur in monitor situations.

That said, we recognize the great value that monitors can provide to ensure that misconduct will be both

remediated and not repeated, and thus we will not hesitate to use them in the appropriate circumstances.

II. Track Record in Appointing Monitors

Adherence to these principles has resulted in my Office's imposing relatively few monitors over the years. Leaving aside (1) the numerous monitorships in the late 1980's and 1990's involving labor union corruption cases; (2) victim compensation administrators or others whose function is specialized and something short of a full-blown monitor; and (3) situations where our state law enforcement partners have been primarily responsible for the imposition of a monitor in parallel proceedings with the SDNY, the SDNY, alone or in conjunction with its DOJ colleagues, has imposed monitors in approximately nine cases since 2001. Roughly nine SDNY monitorships over approximately 17 years – that makes clear that we are careful and prudent in our approach to monitors, and that we recognize that there must be a manifest need for a monitor before we take that significant step.

At the same time, the serious nature of the violations in cases where we chose to impose a monitor, and the shortcomings of the companies and entities involved in these situations, demonstrate that prudence in the decision to impose a monitor does not reflect an unwillingness to do so. We will seek a monitor in the appropriate circumstances.

I will have more to say about such circumstances in a moment, when I talk about our experience with Toyota and GM.

In this sense, the SDNY approach is already aligned with the new guidance announced today by my friend, Assistant Attorney General Brian Benczkowski, which both indicates the value of monitors, but at the same time confirms that they should be imposed where there is clear benefit and demonstrated need.

So, let us turn to the factors we consider in determining whether a monitorship is necessary as part of a corporate resolution.

III. Factors Considered in Determining Whether a Monitorship is Necessary

The factors we consider in determining whether a monitor is appropriate overlap to a considerable degree with the Principles of Federal Prosecution of Business Organizations – the so-called Filip Factors.

And this makes perfect sense. The Filip Factors, which include the nature of the misconduct, the circumstances and conditions that allowed that misconduct to occur, and the company's response to the misconduct, collectively speak to the corporate conditions that permitted the misconduct to occur, and whether the company can be trusted to prevent its recurrence. And, as I have said, those are considerations core to the question of whether a monitor is necessary.

So, specifically, monitors are best suited to cases in which the criminal activity was the product, at least in part, of organization-level failures.

This may include, for example, information silos, lack of effective compliance program, or a corporate culture that favors cover-ups over transparency. Senior

management may have been involved in the wrongdoing, but whether or not that factor is present, the Government will be inclined to seek a monitor essentially because it lacks confidence that the organization has the infrastructure and/or commitment to avoid like problems in the future.

As we evaluate these considerations, here are some of the questions we ask ourselves:

- Is this a case of one or two bad apples who deliberately circumvented organizational controls, such as compliance controls or safety programs? Is the entity is being held responsible simply because the bad actors are significantly senior in the company? Or is it instead a case of entity-wide failures?
- What did the entity do when it discovered the conduct at issue? Did it immediately self-report and begin the process of remediating the harm, or did it try to conceal the issue from regulators?
- What did the entity do in reaction to the Government's investigation? Did it adopt a posture of acknowledgement and cooperation, or did it slow-play its responses to document and witness interview requests?

Also critical to the assessment is how the entity approached remediation. We would be looking at the measures the organization took to remedy the issues going forward, and how quickly those actions were taken. We would be interested in whether internal controls have been assessed and strengthened and whether the compliance function had been improved to reflect lessons learned. We also focus on whether the entity has taken adverse employment action against bad

actors or those who put in place the practices that facilitated the violations of law.

Ultimately, the question is whether a monitor will help or hinder the entity in improving its controls to prevent recurrence of the problematic—sometimes even dangerous—conduct.

The more confidence the Government has in an entity's ability to self-correct, the less likely a monitor will be needed. That said, monitorships may be warranted for even the most well-intentioned, proactive, and cooperative entities—if the conduct at issue was the product of company-wide failures and presented a significant danger to the public.

One final point on this topic. This overlap between the Filip Factors and the criteria for the imposition of monitors explains in part why our Office has imposed relatively few monitors over the past years.

Specifically, companies that wish to avoid charges, whether a guilty plea or a DPA, will vigorously address the various Filip Factors, which includes self-reporting, remediation, discipline of wrongdoing employees, and improved controls, compliance and processes.

In doing so, these companies are also reducing the need for a monitor, as they are showing that they take the misconduct seriously, and are committed to preventing its recurrence. That, in turn, gives our Office the comfort that an outside monitor is not needed to achieve those same goals.

Commentators have debated whether monitors are effective in getting a company to fully remediate and

adopt an effective system of compliance. Some have pointed out that if the government adequately incentivizes a company through imposition of stiff financial penalties, this will be enough to cause the company to adopt an effective compliance program. They have also noted that if a board needs guidance it can hire a compliance consultant.

I am not going to disagree with any of that. It is certainly not our view that a monitor is the only way that a company can get to the right compliance culture and it is far preferable that the company find its own way to making the needed changes. We have been quite judicious in seeking monitors and we reserve the remedy to situations where the conduct itself and the company's response to the conduct warrant the imposition of a monitor. We consider all the facts and circumstances and no one fact or factor drives our decision.

IV. How to Avoid Appointment of a Monitor

Let me now suggest the steps an entity should consider taking if it wanted to improve its chances of avoiding the appointment of a monitor.

First and foremost, self-reporting is important. A self-report can only get full credit if the entity itself provides the government with the very first notice of the existence of the problem. If the press reports the issue first, if a whistleblower makes a complaint or if the misconduct is discovered by a regulatory review, the entity loses the opportunity to take the credit for self-reporting. Obviously, the decision to self- report quickly is a hard call because lawyers prefer to take their time and do a full review before recommending self-

reporting, but as time goes by the chance to self-report may disappear.

Next step would be to make an early assessment of the root cause of the problem and immediately take initial, sensible remedial steps, whether that means taking some action regarding bad actors or fixing compliance or other processes on a provisional basis. The key is to assure that the bad conduct has ceased, and to demonstrate that future bad conduct will not be tolerated. These kinds of early remedial steps should be undertaken with urgency.

After these initial steps have been taken, the entity should immediately begin the process of instituting longer term and deeper changes in compliance, culture, systems and, if appropriate, personnel. This may need to go beyond immediate bad actors to those with oversight responsibility.

These are the very things that the Government will be looking to assess and that a monitor would be installed to address. If the entity has successfully embarked on this process long before the conclusion of the government's investigation, there will be a strong record from which to argue that the company is capable of full remediation on its own and a monitor is unnecessary.

V. Factors the Government Considers in Selecting a Monitor

In selecting a monitor, we are looking for persons qualified for the particular task at hand, a clear understanding of that goal and a commitment to getting that job done thoroughly and appropriately, but also in an efficient and timely manner.

As set forth in DOJ guidance, the monitor must be an independent third party, not an employee or agent of the entity. Nor can the monitor be an agent of the government or a government employee. While independent of both the entity and the government, it is expected that the monitor will have open dialogue with both throughout the monitorship.

To ensure that we meet all of these standards, and that we select a qualified, conflict-free monitor, we follow an internal monitor selection process within SDNY that involves senior and experienced personnel from my Office.

As a practice tip to applicants seeking to serve as monitors, I would say that while it seems basic, applicants should carefully read the relevant papers—the DPA and statement of facts in particular—and prepare a pitch that's targeted at the particular case. Too often, the pitches we hear are generic and ill-informed. Likewise, make sure the members of the team you have selected for the pitch are ones suited to this particular project.

Applicants should have an outline of how they would execute this particular monitorship if selected. We want to ensure that applicants have the staff, expertise, and resources necessary to dive deep into the company and really understand how it can be improved. A successful monitor applicant can be a partner at a small law firm, but the Government needs to know that he or she has access to the necessary support—for example, through partnership with an investigative firm. It is generally a significant plus to have someone on the team with hands-on regulatory and/or significant industry

expertise in the area in which the entity operates, be it automotive, financial services or other industry.

VI. What Makes a Monitorship Successful?

The most successful monitors are those who gain the trust of the entity, but are still able to maintain a critical eye throughout the term of the monitorship. A successful monitorship is one that leaves a lasting, positive imprint on the company.

To accomplish that goal there has to be integration with the company. A monitor who is brought into the fold is more likely to understand how the entity operates, and to help the entity develop controls that will actually be effective and not superficial. The monitor also has to have the confidence and experience to insist upon changes within the entity, and have the entity heed his or her advice.

Any successful monitorship will need to include a program for auditing the new controls that are put in place. That is the only way to know whether the controls are working. Since the monitorship is intended to assess compliance with the terms of the DPA or other agreement with the government, the monitor's reports should focus on how the aims of the DPA are being accomplished.

VII. Examples of SDNY Monitors

It might be helpful for me to give you a sense of recent SDNY monitorships – Toyota and GM.

With respect to Toyota, the case bore many of the features I have identified as warranting imposition of a

monitor. The case involved affirmative concealment of safety issues from the public and a regulator: specifically, design flaws that caused unintended acceleration and, in some cases, out-of-control vehicles. The concealment and the fraud upon consumers was driven by a company-wide desire to defend Toyota's brand image. Moreover, the concealment was directed by employees and executives at high levels within the company. The clear direction from top safety executives within the company was to resist acknowledging any safety issues.

The point is illustrated by an episode recounted in the Statement of Facts. Early on in the charged scheme, Toyota's engineering quality control group in Japan ordered a supplier to cancel a fix for a safety issue called "sticky pedal," and directed that the cancellation be done without a paper trail—all to prevent the U.S. regulator from learning of the underlying safety issue.

Meanwhile, Toyota employees and executives in the United States tasked with communicating with the U.S. regulator were making false and misleading statements, assuring everyone that unintended acceleration in Toyota vehicles had been remedied.

This case was a painful illustration of the dangers of information silos within large organizations. The focus of the monitorship imposed was to try to remedy those silos and prevent recurrence of the fraud on the consuming public.

GM was another case that cried out for imposition of a monitor. GM was highly cooperative throughout the criminal investigation. Nevertheless, the conduct posed a deadly risk to the public, was the product of company-

wide failures, and resulted in false and misleading statements to the public and regulators. These failures were caused at least in part by information silos within the company.

GM involved a safety defect in an ignition switch. A product engineer within the company had signed off on a switch for some cars that lacked adequate torque. The switch could easily move out of the "run" position, and that would prevent the airbags from deploying. So, for example, if a driver got into an accident and his knee hit the ignition switch, the switch would move out of run and disable the airbags. This defect was ultimately linked to a number of deaths.

When the GM personnel responsible for safety recalls became aware of the safety defect, they did not disclose the issue, but instead concealed it from the regulator through misleading presentations, and took far too long to announce a recall. Meanwhile, as in the Toyota matter, the company was giving the driving and consuming public false assurances about the safety of GM cars equipped with the defective switch. In particular, it was certifying as safe a whole host of pre-owned vehicles that were actually equipped with the defective switch.

As in the Toyota case, a big focus of the monitorship in GM was to help the company break down information silos and ensure the accuracy of its public statements. The monitor was also tasked with ensuring that GM complied with its own recall procedures, which had been systematically side-stepped during the ignition switch review.

Perhaps the greatest fear that hangs up entities deciding to accept a monitorship is that they will be trapped in that relationship for years, if not decades. So in a demonstration of good faith, I am going to conclude my remarks. Thank you again to Jennifer and NYU for giving me the opportunity to share our perspective on monitorships.

Geoffrey S. Berman is the U.S. Attorney for the Southern District of New York.