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CORPORATE CRIME

Prosecutors Adhered to Guidance in Selecting Monitors for Deferred Prosecution and Non-Prosecution Agreements, but DOJ Could Better Communicate Its Role in Resolving Conflicts

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Homeland Security and Justice

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Highlights

Highlights of GAO-10-260T, a testimony to the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, House of Representatives

Why GAO Did This Study

Recent cases of corporate fraud and mismanagement heighten the Department of Justice's (DOJ) need to appropriately punish and deter corporate crime. Recently, DOJ has made more use of deferred prosecution and non-prosecution agreements (DPAs and NPAs), in which prosecutors may require company reform, among other things, in exchange for deferring prosecution, and may also require companies to hire an independent monitor to oversee compliance. This testimony addresses (1) the extent to which prosecutors adhered to DOJ's monitor selection guidelines, (2) the prior work experience of monitors and companies' opinions of this experience, and (3) the extent to which companies raised concerns about their monitors, and whether DOJ had defined its role in resolving these concerns. Among other steps, GAO reviewed DOJ guidance and examined the 152 agreements negotiated from 1993 (when the first 2 were signed) through September 2009. GAO also interviewed DOJ officials, obtained information on the prior work experience of monitors who had been selected, and interviewed representatives from 13 companies with agreements that required monitors. These results, while not generalizable, provide insights into monitor selection and oversight.

What GAO Recommends

GAO recommends that DOJ clearly communicate its role in resolving conflicts between companies and monitors. DOJ provided technical comments, which GAO incorporated.

View GAO-10-260T or key components.

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What GAO Found

Prosecutors adhered to DOJ guidance issued in March 2008 in selecting monitors required under agreements entered into since that time. Monitor selections in two cases have not yet been made due to challenges in identifying candidates with proper experience and resources and without potential conflicts of interests with the companies. DOJ issued guidance in March 2008 to help ensure that the monitor selection process is collaborative and based on merit; this guidance also requires prosecutors to obtain Deputy Attorney General approval for the monitor selection.

For DPAs and NPAs requiring independent monitors, companies hired a total of 42 different individuals to oversee the agreements; 23 of the 42 monitors had previous experience working for DOJ—which some companies valued in a monitor choice—and those without prior DOJ experience had worked in other federal, state, or local government agencies, the private sector, or academia. The length of time between the monitor's leaving DOJ and selection as a monitor ranged from 1 year to over 30 years, with an average of 13 years. While most of the companies we interviewed did not express concerns about monitors having prior DOJ experience, some companies raised general concerns about potential impediments to independence or impartiality if the monitor had previously worked for DOJ or had associations with DOJ officials.

Representatives for more than half of the 13 companies with whom GAO spoke raised concerns about the monitor's cost, scope, and amount of work completed—including the completion of compliance reports required in the DPA or NPA—and were unclear as to the extent DOJ could be involved in resolving such disputes, but DOJ has not clearly communicated to companies its role in resolving such concerns. Companies and DOJ have different perceptions about the extent to which DOJ can help to resolve monitor disputes. DOJ officials GAO interviewed said that companies should take responsibility for negotiating the monitor's contract and ensuring the monitor is performing its duties, but that DOJ is willing to become involved in monitor disputes. However, some company officials were unaware that they could raise monitor concerns to DOJ or were reluctant to do so. Internal control standards state that agency management should ensure there are adequate means of communicating with, and obtaining information from, external stakeholders that may have a significant impact on the agency achieving its goals. While one of the DOJ litigating divisions and one U.S. Attorney's Office have made efforts to articulate in the DPAs and NPAs what role they could play in resolving monitor issues, other DOJ litigation divisions and U.S. Attorney's Offices have not done so. Clearly communicating to companies the role DOJ will play in addressing companies' disputes with monitors would help increase awareness among companies and better position DOJ to be notified of potential issues related to monitor performance.

Mr. Chairman and Members of the Subcommittee

I appreciate the opportunity to participate in today's hearing to discuss the Department of Justice's (DOJ) selection and use of independent monitors in corporate deferred prosecution and non-prosecution agreements. According to the DOJ, one of its chief missions is to ensure the integrity of the nation's business organizations and protect the public from corporate corruption. In light of this goal, DOJ has prosecuted company executives and employees, as well as companies themselves, for crimes such as tax evasion, securities fraud, health care fraud, and bribery of foreign officials, among others. However, over the past decade, DOJ has recognized the potential harmful effects that criminally prosecuting a company can have on investors, employees, pensioners, and customers who were uninvolved in the company's criminal behavior. In particular, the failure of the accounting firm Arthur Andersen, and the associated loss of thousands of jobs following its indictment and conviction for obstruction of justice for destroying Enron-related records,[1] has been offered as a prime example of the potentially harmful effects of criminally prosecuting a company. To avoid serious harm to innocent third parties, and as an alternative to criminal prosecution or declination of prosecution, DOJ guidance allows prosecutors to negotiate agreements—referred to as deferred prosecution (DPA) and non-prosecution (NPA) agreements. These agreements may require companies to institute or reform corporate ethics and compliance programs,[2] pay restitution to victims, and cooperate with ongoing investigations of individuals in exchange for prosecutors deferring the decision to prosecute. As part of DPAs and NPAs, prosecutors may also require a company to hire, at its own expense, an independent monitor to oversee the company's compliance with the agreement. DOJ and companies have generally worked together to select monitors, but DOJ leaves it up to the company to enter into a contract with a monitor that specifies the monitor's fees, among other things.

DOJ views DPAs and NPAs as appropriate tools to use in cases where the goals of punishing and deterring criminal behavior, providing restitution to

[1] The conviction was ultimately overturned by the Supreme Court. *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005). In a unanimous decision, the Court held that the jury instructions used to convict Arthur Andersen were impermissibly flawed. *Id.* at 705-07.

[2] The U.S. Sentencing Guidelines define a compliance and ethics program as "a program designed to prevent and detect criminal conduct." U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 cmt. n.1.

victims, and reforming otherwise law-abiding companies can be achieved without criminal prosecution. The use of these agreements and the associated monitors, however, is not without debate. Some commentators have acknowledged monitors' value in ensuring company compliance with the terms of DPAs and NPAs and in instituting corporate reform, but have also pointed to challenges associated with monitorships, such as concerns regarding potential favoritism in the monitor selection process and questions about monitor accountability, oversight, and costs.

In June 2009, we testified before this subcommittee regarding our ongoing work on DOJ's use and oversight of DPAs and NPAs.[3] With regard to the selection and use of monitors, we reported that DOJ used independent monitors as one mechanism to ensure that companies were complying with the agreements, where monitors were typically required to file written reports with prosecutors on the companies' progress. Also, we reported in our testimony that DOJ generally took the lead in selecting monitors and varied in the extent to which it involved companies in monitor selection decisions. In cases where DOJ officials identified monitor candidates, they generally did so based on their personal knowledge of individuals whose reputations suggested that they would be effective monitors, or through recommendations from colleagues or professional associates who were familiar with the requirements of a monitorship. We reported that DOJ had acknowledged concerns about the cost to companies of hiring a monitor and perceived favoritism in the selection of monitors, and thus issued guidance in March 2008 to help ensure that its monitor selection process is collaborative and merit-based. Lastly, we reported that companies we spoke with identified concerns about the amount and scope of the monitors' work, but believed that they had little leverage to resolve these issues, and therefore would like DOJ to assist them in doing so.

My testimony today includes additional findings since our June 2009 testimony on aspects relating to the selection and use of independent monitors in DPAs and NPAs, including: (1) the extent to which prosecutors adhered to DOJ guidelines regarding selecting monitors for

[3] GAO, *Corporate Crime: Preliminary Observations on DOJ's Use and Oversight of Deferred Prosecution Agreements and Non-Prosecution Agreements,* GAO-09-636T (Washington, D.C.: June 25, 2009). This statement provided preliminary observations on factors DOJ considered when entering into and setting the terms of the agreements, methods DOJ used to oversee companies' compliance, the monitor selection process, and companies' perspectives regarding the costs and role of the monitor.

DPAs and NPAs, (2) what previous professional experience monitors had and what were company perspectives on monitors' experience, and (3) to what extent, if at all, companies raised concerns about their monitors, and whether DOJ has defined its role in resolving any concerns. My comments are based on our ongoing review of DPAs and NPAs requested by you as well as the Chairman of the Senate Judiciary Committee, Patrick Leahy; the Chairman of the House Judiciary Committee, John Conyers; Congressman Frank Pallone, Jr.; Congressman Bill Pascrell, Jr.; and Congresswoman Linda T. Sanchez. The final results of this review will be issued later this year.

To address all 3 objectives, we identified 152 DPAs and NPAs that DOJ prosecutors had negotiated from 1993 (when the first two were signed) through September 2009 (which was the end of our review period), and reviewed copies of all but one of the agreements.[4] Of the 152 agreements, 48 required the appointment of an independent monitor. We interviewed prosecutors from DOJ's Criminal Division and 12 U.S. Attorneys Offices (USAO) that had negotiated most (119) of the 152 agreements. We selected the Criminal Division because it had negotiated the vast majority of agreements entered into by prosecutors at DOJ headquarters, and we selected 12 specific USAOs because they were the only ones that had negotiated at least 2 agreements, of which at least 1 had been completed as of September 30, 2008. During our interviews, we discussed 57 agreements. Of these 57, 25 were completed agreements that required companies to institute an ethics or compliance program. In addition, DOJ required 15 of the 25 companies to hire an independent monitor; we interviewed or obtained written responses from legal representatives or compliance officials from 13 of these 15 companies.[5] Since we determined which DOJ officials and company representatives to interview based on a nonprobability sample, the information we obtained is not generalizable to all DOJ litigating components, U.S. Attorneys Offices, and companies

[4] This agreement was sealed by order of the court. We obtained a DOJ press release describing the key terms in the agreement.

[5] Two companies declined to participate in interviews.

involved in DPAs and NPAs.[6] However, the interviews provided insights into the selection and use of independent monitors in DPAs and NPAs.

To assess whether DOJ had selected monitors according to DOJ's March 2008 guidelines, we reviewed the six agreements that required companies to hire a monitor that had been entered into since the issuance of the guidelines. We also reviewed documentation maintained by the Office of the Deputy Attorney General (ODAG) on the procedures used to select the four monitors that had been selected as of October 2009, and discussed the status of the selection process for the other two agreements with DOJ. We compared the selection processes for the six agreements to the requirements of DOJ's March 2008 guidelines.

To assess the prior experience of DOJ-appointed monitors for the 46 agreements where monitor selections had been completed, we obtained the names of the monitors from DOJ or company representatives and reviewed publicly available biographies that detailed these monitors' prior work experience.[7] We also spoke with the 13 selected company legal representatives and compliance officials regarding companies' perspectives on monitors' prior experience.

To assess companies' concerns, if any, with their monitors, and DOJ's role in resolving conflicts between companies and monitors, we conducted a Web-based survey of legal representatives or compliance officials from the 23 companies with agreements that required monitors, where the agreement had been completed, to obtain company views on the monitoring process. We obtained responses from 13 of the 23 companies we surveyed. Since we surveyed company officials involved with agreements that had been completed, the information we obtained is not

[6] DOJ's litigating components and the U.S. Attorneys Offices, among other things, litigate on behalf of the U.S. government by enforcing the law and defending the interests of the United States according to the law. The litigating components include the Criminal Division, Antitrust Division, Civil Division, Civil Rights Division, Environment and Natural Resources Division, National Security Division, and Tax Division. Seven of these litigating components—excluding the U.S. Attorneys Offices—are based at DOJ headquarters in Washington, D.C. In addition, the Office of the Solicitor General conducts all litigation on behalf of the U.S. in the Supreme Court and supervises the handling of litigation in the federal appellate courts.

[7] We obtained the name of the monitor for one company from that company's required report to the Securities and Exchange Commission covering major events that shareholders should know about, and the name of a monitor for another company from the October 2007 edition of *Corporate Counsel.*

generalizable; however, the survey responses provided useful insights into company perspectives on monitor contracts and performance. We also spoke with companies' legal representatives and compliance officials regarding the types of issues that may arise between companies and monitors in negotiating the monitor contracts and carrying out the monitorship. We discussed with Senior Counsel to the ODAG what role, if any, DOJ should play in resolving any conflicts between companies and monitors. We compared our findings on DOJ's role in resolving conflicts between companies and monitors with criteria on internal control standards in the federal government.[8]

We conducted this performance audit from September 2008 to November 2009 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our objectives.

In summary, DOJ issued guidance in March 2008—known as the Morford Memo—to help ensure that the monitor selection process is collaborative and merit based. DOJ prosecutors adhered to the Morford Memo in selecting 4 of the 6 monitors required under agreements entered into since March 2008; DOJ has not yet selected the remaining 2 monitors. For all 48 DPAs and NPAs where DOJ required independent monitors, companies hired a total of 42 different individuals to oversee the agreements. Twenty-three of the 42 monitors had previous experience working for DOJ, and the 13 monitors who were not former DOJ employees had experience working in other federal, state, or local agencies, the private sector, the military, or academia.[9] Representatives from some of the companies we interviewed sought monitors with DOJ experience, whereas others raised general concerns about potential impediments to independence or impartiality if the monitor had previously worked for DOJ or had associations with DOJ officials. Representatives for more than half of the

[8] GAO, *Internal Control: Standards for Internal Control in the Federal Government*, GAO/AIMD-00-21.3.1 (Washington, D.C.: November 1999).

[9] Four monitors hired by companies as required by a DPA or NPA are consulting firms or firms with technical expertise, rather than individuals, and we were, therefore, unable to determine which individuals worked on the monitorship and whether any had previous DOJ experience. We were unable to obtain information on the previous experiences of two monitors.

13 companies with whom we spoke or from whom we obtained written responses raised concerns about the monitor's cost, scope, and amount of work completed and were unclear as to whether DOJ could be involved in resolving such disputes s. However, given that DOJ is not a party to the contract between the company and monitor, DOJ and companies have different perceptions about the extent to which DOJ can help to resolve conflicts between companies and monitors. Internal control standards state that agency management should ensure there are adequate means of communicating with, and obtaining information from, external stakeholders that may have a significant impact on the agency achieving its goals. Clearly communicating to companies the role DOJ will play in addressing companies' disputes with monitors would help better position DOJ to be notified of potential issues related to monitor performance.

To provide clarity regarding DOJ's role in resolving disputes between companies and monitors, we recommend that the Attorney General direct all litigating components and U.S. Attorneys Offices to explain in each corporate DPA or NPA what role DOJ could play in resolving such disputes, given the facts and circumstances of the case. We requested comments on a draft of this statement from DOJ. DOJ did not provide official written comments to include in the statement. However, in an email sent to us on November 17, 2009, DOJ provided technical comments, which we incorporated into the statement, as appropriate.

Prosecutors Have Selected Monitors in Accordance with DOJ Guidelines, but Have Experienced Delays in Selecting Some Monitors

In March 2008, then Deputy Attorney General Craig Morford issued a memorandum—also known as the "Morford Memo"—to help ensure that the monitor selection process is collaborative, results in the selection of a highly-qualified monitor suitable for the assignment, avoids potential conflicts of interest, and is carried out in a manner that instills public confidence. [10] The Morford Memo requires USAOs and other DOJ litigation divisions to establish ad hoc or standing committees consisting of the office's ethics advisor, criminal or section chief, and at least one other experienced prosecutor to consider the candidates—which may be proposed by either prosecutors, companies, or both—for each monitorship. DOJ components are also reminded to follow specified federal conflict of interest guidelines and to check monitor candidates for

[10] Deputy Attorney General Craig Morford, DOJ, *Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations* (Mar. 7, 2008).

potential conflicts of interest relationships with the company.[11] In addition, the names of all selected monitors for DPAs and NPAs must be submitted to ODAG for final approval.

Following issuance of the Morford Memo, DOJ entered into 35 DPAs and NPAs, 6 of which required the company to hire an individual to oversee the company's compliance with the terms of the DPA. As of November 2009, DOJ had selected monitors for 4 of the 6 agreements.[12] Based on our discussions with prosecutors and documentation from DOJ, we determined that for these 4 agreements, DOJ made the selections in accordance with Morford Memo guidelines. Further, while the Morford Memo does not specify a selection process that must be used in all cases, it suggests that in some cases it may be appropriate for the company to select the monitor or propose a pool of qualified candidates from which DOJ will select the monitor. In all 4 of these cases, the company either selected the monitor, subject to DOJ's approval, or provided DOJ with proposed monitor candidates from among which DOJ selected the monitor. However, while we were able to determine that the prosecutors complied with the Morford Memo based on information obtained through our interviews, DOJ did not fully document the selection and approval process for 2 of the 4 monitor selections. The lack of such documentation will make it difficult for DOJ to validate to an independent third-party reviewer, as well as to Congress and the public, that prosecutors across DOJ offices followed Morford Memo guidelines and that monitors were selected in a way that was fair and merit based. For example, for 1 of these 2 agreements, DOJ did not document who in the U.S. Attorney's Office was

[11] *See* 18 U.S.C. § 208 and 5 C.F.R. pt. 2635.

[12] For one additional DPA, the company was required to retain an external auditor. According to one of the prosecutors for this case, the external auditor was responsible for fulfilling and accelerating the duties outlined in another agreement between the company and the Internal Revenue Service. Given that the Internal Revenue Service would be primarily responsible for oversight of the company, and given the limited mandate of the external auditor, the prosecutors determined that the external auditor would not be considered a monitor as described in the Morford Memo, and therefore, would not be subject to DOJ's monitor selection guidelines. The prosecutor also noted that the external auditor was responsible for ensuring that the company fully ceased to operate an area of the company's business where the criminal misconduct occurred; the Morford Memo identifies the situation in which a company has ceased operations in the area where the criminal misconduct occurred as one where a monitor may not be necessary. ODAG concurred with the prosecutor's assessment, noting that the external auditor would not be undertaking a vast array of activities that monitors have typically undertaken related to internal controls, such as setting up an audit committee within the company, reviewing corporate decisions, or monitoring the entire company to detect misconduct.

involved in reviewing the monitor candidates, which is important because the Morford Memo requires that certain individuals in the office be part of the committee to consider the selection or veto of monitor candidates in order to ensure monitors are not selected unilaterally. For the second agreement, the Deputy Attorney General's approval of the selected monitor was relayed via telephone and not documented. As a result, in order to respond to our inquiries, DOJ officials had to reach out to individuals who were involved in the telephone call, one of whom was no longer a DOJ employee, to obtain information regarding the monitor's approval.

Documenting the reasons for selecting a particular monitor helps avoid the appearance of favoritism and verifies that Morford Memo processes and practices—which are intended to instill public confidence in the monitor selection process—were followed. Therefore, in our June 25, 2009, testimony, we recommended that the Deputy Attorney General adopt internal procedures to document both the process used and reasons for monitor selection decisions.[13] DOJ agreed with our recommendation and, in August 2009, instituted such procedures. Specifically, DOJ requires ODAG to complete a checklist confirming receipt of the monitor selection submission—including the process used and reasons for selecting the monitor—from the DOJ component; ODAG's review, recommendation, and decision to either approve or reject the proposed monitor; the DOJ component's notification of ODAG's decision; and ODAG's documentation of these steps. For the two monitors selected during or after August 2009, DOJ provided us with completed checklists to confirm that ODAG had followed the new procedures.

While DOJ selected monitors in accordance with the Morford Memo, monitor selections have been delayed for three agreements entered into after the Morford Memo was issued. The selection of one monitor took 15 months from the time the agreement was signed and selection of two monitors, as discussed above, has been delayed for more than 17 months from the time the agreement was signed. According to DOJ, the delays in selecting these three monitors have been due to challenges in identifying candidates with proper experience and resources who also do not have potential conflicts of interest with the company. Further, DOJ's selection of monitors in these three cases took more time than its selection of monitors both prior to and since the issuance of the Morford Memo—

[13] GAO-09-636T.

which on average was about 2 months from the time the NPA or DPA was signed or filed.[14]

According to the Senior Counsel to the Assistant Attorney General for the Criminal Division, for these three agreements, the prosecutors overseeing the cases have communicated with the companies to ensure that they are complying with the agreements. Further, DOJ reported that the prosecutors are working with each of the companies to extend the duration of the DPAs to ensure that the duties and goals of each monitorship are fulfilled and, as of October 2009, an agreement to extend the monitorship had been signed for one of the DPAs. Such action by DOJ will better position it to ensure that the companies are in compliance with the agreements while awaiting the selections of the monitors.[15]

[14] For nine agreements, the monitor was selected prior to the agreement's execution. DOJ was unable to provide data on the timing of the monitors' selection in three cases. We recognize that the Morford Memo requires additional steps in the monitor selection process—including the establishment of a committee to consider candidates and the approval of the Deputy Attorney General—which were not required prior to the memo's issuance. However, according to the Senior Counsel to the Assistant Attorney General for the Criminal Division, monitor selections do not take longer as a result of the Morford Memo requirements.

[15] Because the agreements for which monitor selections have been delayed are ongoing, we did not interview representatives from the companies that entered into these agreements to obtain their perspectives on what impact, if any, delayed monitor selection might have on the company.

More Than Half of the Monitors Had Prior DOJ Experience; Some Companies Said Such Experience Was Valuable While Others Noted That It Might Impede Monitors' Independence or Impartiality

For the 48 DPAs and NPAs where DOJ required independent monitors, companies have hired a total of 42 different monitors, more than half of whom were former DOJ employees.[16] Specifically, of these 42 monitors, 23 previously worked at DOJ, while 13 did not.[17] The 23 monitors held various DOJ positions, including Assistant U.S. Attorney, Section Chief or Division Chief in a litigating component, U.S. Attorney, Assistant Attorney General, and Attorney General. The length of time between the monitor's separation from DOJ and selection as monitor ranged from 1 year to more than 30 years, with an average of 13 years. Five individuals were selected to serve as monitors within 3 years or less of being employed at DOJ. In addition, 8 of these 23 monitors had previously worked in the USAO or DOJ litigating component that oversaw the DPA or NPA for which they were the monitor. In these 8 cases, the length of time between the monitor's separation from DOJ and selection as monitor ranged from 3 years to 34 years, with an average of almost15 years.

Of the remaining 13 monitors with no previous DOJ experience, 6 had previous experience at a state or local government agency, for example, as a prosecutor in a district attorney's office; 3 had worked in federal agencies other than DOJ, including the Securities and Exchange Commission and the Office of Management and Budget; 2 were former judges; 2 were attorneys in the military; 3 had worked solely in private practice in a law firm; and 1 had worked as a full-time professor.[18]

[16] As of October 2009, a total of 48 companies were required to hire monitors to oversee their compliance with a DPA or NPA. Monitors have not been selected in 2 cases. Four companies required to hire monitors hired 2 individuals to serve as monitor. Also, in 2 cases, a parent company and its subsidiary companies entered into agreements at the same time and used the same monitor—in 1 case, the parent company and 1 subsidiary did so, while in the other case the parent company and 2 subsidiaries did so. In addition, 5 companies that were required to hire monitors hired monitors who had previously served as a monitor for a different company—in 1 case, 1 individual served as monitor for a total of 3 companies, while 3 additional individuals served as monitors for a total of 2 companies.

[17] Four monitors hired by companies as required by a DPA or NPA are consulting firms or firms with technical expertise, rather than individuals, and we were, therefore, unable to determine which individuals worked on the monitorship and whether any had previous DOJ experience. We were unable to obtain information on the previous experiences of two monitors.

[18] Four of the monitors had experience in more than one of these categories, therefore these numbers do not add to 13.

Of the 13 company representatives with whom we spoke who were required to hire independent monitors,[19] in providing perspectives on monitors' previous experience, representatives from 5 of these companies stated that prior employment at DOJ or an association with a DOJ employee could impede the monitor's independence and impartiality, whereas representatives from the other 8 companies disagreed. Specific concerns raised by the 5 companies—2 of which had monitors with prior DOJ experience—included the possibility that the monitor would favor DOJ and have a negative predisposition toward the company or, if the monitor recently left DOJ, the monitor may not be considered independent; however, none of the companies identified specific instances with their monitors where this had occurred. Of the remaining 8 company representatives who did not identify concerns, 6 of them worked with monitors who were former DOJ employees, and some of these officials commented on their monitors' fairness and breadth of experience. In addition 5 company representatives we spoke with who were involved in the monitor selection process said that they were specifically looking for monitors with DOJ experience and knowledge of the specific area of law that the company violated.

Companies Have Raised Concerns about the Scope and Cost of Monitors' Duties, and DOJ Has Not Communicated Its Role in Resolving Such Concerns

Officials from 8 of the 13 companies with whom we spoke raised concerns about their monitors, which were either related to how monitors were carrying out their responsibilities or issues regarding the overall cost of the monitorship. However, these companies said that it was unclear to what extent DOJ could help to address these concerns. Seven of the 13 companies identified concerns about the scope of the monitor's responsibilities or the amount of work the monitor completed.[20] For example, 1 company said that the monitor had a large number of staff assisting him on the engagement, and he and his staff attended more meetings than the company felt was necessary, some of which were unrelated to the monitor responsibilities delineated in the agreement, such as a community service organization meeting held at the company when

[19] We spoke with representatives of one additional company that was required to hire a monitor, but, with DOJ's approval, the company was allowed to hire a monitor who was not independent. Specifically, the monitor who was selected had represented the company during a previous compliance investigation. Therefore, we did not discuss with these company representatives how, if at all, prior DOJ experience could affect a monitor's independence and impartiality.

[20] Two of the 13 companies did not provide information about the scope of the monitor's responsibilities or the amount of work completed by the monitor.

the DPA was related to securities fraud. As a result, the company believes that the overall cost of the monitorship—with 20 to 30 lawyers billing the company each day—was higher than necessary.[21]

Another company stated that its monitor did not complete the work required in the agreement in the first phase of the monitorship—including failing to submit semi-annual reports on the company's compliance with the agreement to DOJ during the first 2 years of the monitorship—resulting in the monitor having to complete more work than the company anticipated in the final phase of the monitorship. According to the company, this led to unexpectedly high costs in proportion to the company's revenue in the final phase, which was significant because the company is small. Further, according to a company official, the monitor's first report contained numerous errors that the company did not have sufficient time to correct before the report was submitted to DOJ and, thus, DOJ received a report containing errors.[22]

While 6 of the 13 companies we interviewed did not express concerns about the monitor's rates, 3 companies expressed concern that the monitor's rate (which ranged from $290 per hour to a rate of $695 to $895 per hour among the companies that responded to our survey)[23] was high.[24] Further, while 9 of the 13 companies that responded to our survey believed that the total compensation received by the monitor or monitoring firm was reasonable for the type and amount of work performed (which, according to the companies that responded to our

[21] We were unable to obtain the monitor's perspective regarding the company's concerns because the monitor declined our request for an interview.

[22] We identified 24 agreements that required monitors to submit periodic reports to DOJ—and in some instances the company—describing the company's progress in meeting the terms of the agreement. Of the total 129 reports that were required as a result of these 24 agreements, DOJ provided us with 117. DOJ reported that it could not produce the remaining 12 of the 129 required reports from 7 different monitors because they were either not submitted by the monitor, were misplaced by DOJ, the reporting was completed orally but DOJ was unable to provide documentation confirming the completion of the oral reports, or—in the case of two agreements entered into in 1996 and 2000—DOJ was not able to obtain them from the federal records center.

[23] The hourly rates presented are those associated with the highest compensated individuals at the monitoring firm. Seven of the 13 companies that responded to the survey provided the monitors' hourly rates, while the remaining 6 did not.

[24] The remaining four companies did not comment on the monitor's rates.

survey, ranged from $8,000 to $2.1 million per month),[25] 3 companies did not believe it was reasonable.[26]

When asked how they worked to resolve these issues with the monitor, companies reported that they were unaware of any mechanisms available to resolve the issues—including DOJ involvement—or if they were aware that DOJ could get involved they were reluctant to seek DOJ's assistance. Specifically, three of the eight companies that identified concerns with their monitor were not aware of any mechanism in place to raise these concerns with DOJ. Four companies were aware that they could raise these concerns with DOJ, but three of these companies said that they would be reluctant to raise these issues with DOJ in fear of repercussions. Another company did not believe that DOJ had the authority to address their concerns because they were related to staffing costs, which were delineated in the contract negotiated between the company and the monitor, not the DPA.

However, DOJ had a different perspective than the company officials on its involvement in resolving disputes between companies and monitors. According to the Senior Counsel to the ODAG, while DOJ has not established a mechanism through which companies can raise concerns with their monitors to DOJ and clearly communicated to companies how they should do so, companies are aware that they can raise monitor-related concerns to DOJ if needed. Further, it was the Senior Counsel's understanding that companies frequently raise issues regarding DPAs and NPAs to DOJ without concerns about retribution, although to his knowledge, no companies had ever raised monitor-related concerns to ODAG. The Senior Counsel acknowledged, however, that even if companies did raise concerns to DOJ regarding their monitors, the point in the DPA process at which they did so may determine the extent of DOJ's involvement. Specifically, according to this official, while he believed that DOJ may be able to help resolve a dispute after the company and monitor enter into a contract, he stated that, because DOJ is not a party to the contract, if a conflict were to arise over, for instance, the monitor's failure to complete periodic reports, DOJ could not compel the monitor to

[25] Eight companies we surveyed provided information on the reported overall costs of their monitorships. These reported costs were: $38.7 million; $12 million; $9.2 million; $5.7 million; $3.9 million; $3 million; $2.7 million; and $200,000.

[26] One company did not know if the total compensation received by the monitor was reasonable for the type and amount of work performed.

complete the reports, even if the requirement to submit periodic reports was established in the DPA or NPA.

In contrast, the Senior Counsel said that if the issues between monitors and companies arise prior to the two parties entering into a contract, such as during the fee negotiation phase, DOJ may be able to play a greater role in resolving the conflict. However, the mechanisms that DOJ could use to resolve such issues with the monitor are uncertain since while the monitor's role is delineated in the DPA, there is no contractual agreement between DOJ and the monitor. DOJ is not a party to the monitoring contract signed by the company and the monitor, and the monitor is not a party to the DPA signed by DOJ and the company. We are aware of at least one case in which the company sought DOJ's assistance in addressing a conflict with the monitor regarding fees, prior to the monitor and company signing their contract. Specifically, one company raised concerns about the monitor to the U.S. Attorney handling the case, stating that, among other things, the company believed the monitor's fee arrangement was unreasonably high and the monitor's proposed billing arrangements were not transparent. The U.S. Attorney declined to intervene in the dispute stating that it was still at a point at which the company and the monitor could resolve it. The U.S. Attorney instructed the company to quickly resolve the dispute directly with the monitor—noting that otherwise, the dispute might distract the company and the monitor from resolving the criminal matters that were the focus of the DPA. The U.S. Attorney also asked the company to provide an update on its progress in resolving the conflict the following week. A legal representative of the company stated that he did not believe he had any other avenue for addressing this dispute after the U.S. Attorney declined to intervene. As a result, although the company disagreed with the high fees, it signed the contract because it did not want to begin the monitorship with a poor relationship with the monitor resulting from a continued fee dispute.

The Senior Counsel to the ODAG stated that because the company is signatory to both the DPA or NPA and the contract with the monitor, it is the company's responsibility to ensure that the monitor is performing the duties described in the agreement. However, 5 of the 7 companies that had concerns about the scope of the monitor's responsibilities or the amount of work the monitor completed did not feel as if they could adequately address their issues by discussing them with the monitors. This is because two companies said that they lacked leverage to address issues with

monitors and two companies feared repercussions if they raised issues with their monitors.[27] The Senior Counsel stated that one way the company could hold the monitor accountable is by incorporating the monitor requirements listed in the DPA into the monitoring contract and additionally include a provision in the contract that the monitor can be terminated for not meeting these requirements. However, the companies that responded to our survey did not generally include monitor termination provisions in their contracts. Specifically, 7 of the 13 companies that responded to our survey reported that their monitoring contract contained no provisions regarding termination of the monitor, and another 3 companies reported that their contract contained a clause that actually prohibited the company from terminating the monitor.[28] Only 1 company that responded to our survey reported that the contract allowed it to terminate the monitor with written notice at any time, once the company and DOJ agreed (and subject to the company's obligation to pay the monitor).[29] This contract also included a provision allowing for the use of arbitration to resolve disputes between the company and the monitor over, for instance, services rendered and fees. In order to more consistently include such termination clauses in the monitoring contracts, companies would need the monitor's consent. Given that DOJ makes the final decision regarding the selection of a particular monitor—and that DOJ allows for, but does not require, company involvement in the monitor selection process—it is uncertain how much leverage the company would have to negotiate that such termination or dispute resolution terms be included in the contract with the monitor.

Because monitors are one mechanism that DOJ uses to ensure that companies are reforming and meeting the goals of DPAs and NPAs, DOJ has an interest in monitors performing their duties properly. While over the course of our review, we discussed with DOJ officials various mechanisms by which conflicts between companies and monitors could be resolved, including when it would be appropriate for DOJ to be involved,

[27] GAO-09-636T. An official from the remaining company did not discuss whether the company had leverage to address issues with its monitor or feared repercussions from doing so.

[28] In addition, in our broader review of the 26 DPAs or NPAs that required companies to hire a monitor, none contained clauses that allowed the company to terminate the monitorship for any reason.

[29] Two companies did not know whether their monitoring contracts contained any provisions related to termination of the monitorship.

DOJ officials acknowledged that prosecutors may not be having similar discussions with companies about resolving conflict. This could lead to differing perspectives between DOJ and companies on how such issues should be addressed. Internal control standards state that agency management should ensure that there are adequate means of communicating with, and obtaining information from, external stakeholders that may have a significant impact on the agency achieving its goals. According to DOJ officials, the Criminal Division Fraud Section has made some efforts to clarify what role it will play in resolving disputes between the company and the monitor. For example, 11 of 17 DPAs or NPAs entered into by the Fraud Section that required monitors allowed companies to bring to DOJ's attention any disputes over implementing recommendations made by monitors during the course of their reviews of company compliance with DPAs and NPAs. In addition, 8 of these 11 agreements provide for DOJ to resolve disputes between the company and the monitor related to the work plan the monitor submitted to DOJ and the company before beginning its review of the company. Additionally, in 5 agreements entered into by one USAO, the agreement specified that the company could bring concerns about unreasonable costs of outside professionals—such as accountants or consultants—hired by the monitor to the USAO for dispute resolution. While the Criminal Division Fraud Section and one USAO have made efforts to articulate in the DPA or NPA the extent to which DOJ would be willing to be involved in resolving specific kinds of monitor issues for that particular case, other DOJ litigating divisions and USAOs that entered into DPAs and NPAs have not. Clearly communicating to companies and monitors in each DPA and NPA the role DOJ will play in addressing companies' disputes with monitors would help better position DOJ to be notified of potential issues companies have identified related to monitor performance.

Conclusions

According to DOJ, DPAs and NPAs can be invaluable tools for fighting corporate corruption and helping to rehabilitate a company, although use of these agreements has not been without controversy. DOJ has taken steps to address concerns that monitors are selected based on favoritism or bias by developing and subsequently adhering to the Morford Memo guidelines. However, once the monitors are selected and any issues—such as fee disputes or concerns with the amount of work the monitor is completing—arise between the monitor and the company, it is not always clear what role, if any, DOJ will play in helping to resolve these issues. Clearly communicating to companies and monitors the role DOJ will play in addressing companies' disputes with monitors would help better position DOJ to be made aware of issues companies have identified

related to monitor performance, which is of interest to DOJ since it relies on monitors to assess companies' compliance with DPAs and NPAs.

We are continuing to assess the potential need for additional guidance or other improvements in the use of DPAs and NPAs in our ongoing work.

Recommendations

To provide clarity regarding DOJ's role in resolving disputes between companies and monitors, the Attorney General should direct all litigating components and U.S. Attorneys Offices to explain in each corporate DPA or NPA what role DOJ could play in resolving such disputes, given the facts and circumstances of the case.

Agency Comments and Our Evaluation

We requested comments on a draft of this statement from DOJ. DOJ did not provide official written comments to include in the statement. However, in an email sent to us on November 17, 2009, DOJ provided technical comments, which we incorporated into the statement, as appropriate.

GAO Contact and Staff Acknowledgments

For questions about this statement, please contact Eileen R. Larence at (202) 512-8777 or larencee@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. Individuals making key contributions to this statement include Kristy N. Brown, Jill Evancho, Tom Jessor, Sarah Kaczmarek, Danielle Pakdaman, and Janet Temko, as well as Katherine Davis and Amanda Miller.

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