CONGRESS AND THE MEDIA CRITICIZE ROLE OF MONITORS IN CORPORATE INVESTIGATIONS AND PROSECUTIONS

Over the past few weeks, the use, and potential abuse, of monitors in connection with corporate investigations and prosecutions has emerged as a controversial issue before the United States Congress and in the major U.S. media. In particular, there has been strong criticism of the unilateral power of Department of Justice ("DOJ") prosecutors to require the appointment of specific law firms or consultants as compliance monitors. Some members of Congress have called for DOJ and judicial oversight and approval of monitors and the terms under which they would be selected and retained, and have introduced legislation to require such oversight. The Government Accountability Office ("GAO") has launched an investigation of the monitor issue. Additional hearings before Congress are likely. The DOJ is now considering issuing internal guidance to blunt the criticisms of current practices of U.S. Attorneys. The precise outcome of this scrutiny is not yet clear, but it should afford affected entities additional leverage in negotiations with enforcement authorities as to whether a monitor may be required, how it would be chosen, what government approvals would be required, and under what terms and fee structures it would operate.

On December 17, 2007, Rep. Bill Pascrell (D-NJ) wrote to the House Judiciary Committee and to the Attorney General, expressing concerns regarding the use of monitors under deferred prosecution agreements ("DPAs"). Pascrell highlighted as key issues the unilateral authority of U.S. Attorneys to require defendants to appoint certain firms as monitors, the fees charged by those monitors, and secrecy of the monitor arrangements. In other public statements, Pascrell indicated that his concerns were based on monitors put in place in cases handled by the U.S. Attorney for New Jersey involving companies and educational institutions in the healthcare sector. Pascrell particularly criticized the appointment, at the suggestion or direction of the U.S. Attorney, of a number of former Republican officials as monitors, and fee arrangements involving millions of dollars.

Other Democratic members of Congress followed with similar criticisms. In January, the House Judiciary Committee said it would review the monitor issues, and the Senate Judiciary Committee requested information from the DOJ regarding the appointment and conduct of monitors. Attorney General Mukasey is scheduled to appear at a Senate Judiciary Committee oversight hearing on DOJ operations on January 30, when it is expected that he will be questioned about alleged conflicts and abuses involving monitors.

Major media, including *The Wall Street Journal*, *The Washington Post*, and *The New York Times*, have published articles alleging or implying favoritism in the choice of monitors, excessive fees, and unfettered monitor interference in corporate issues, including recommending the firing of top-level executives. Public interest "watchdog" groups have also raised conflict-of-interest and favoritism concerns regarding monitors. There have been reports, which the DOJ denies, that the DOJ is investigating the actions of the U.S. Attorney in New Jersey. The DOJ has, however, confirmed that it is reviewing practices surrounding monitors and may issue policy guidance on the selection of monitors and the scope of their responsibilities.

In his letters, Rep. Pascrell did not call for legislation to prohibit or even restrict DPA monitors. Instead, he asked that the DOJ consider implementing "guidelines" that would provide for judicial oversight of DPAs; DOJ selection of federal monitors from a registry of entities that would be certified as meeting established qualification requirements; fee limits; and mandatory disclosure of the terms of appointment and powers of monitors. On January 22, Rep. Frank Pallone (D-NJ) introduced legislation that would require the DOJ to implement the substance of Rep. Pascrell's recommendations.

It seems clear at this point that the criticism and continuing congressional scrutiny of monitor issues are going to result in some initiatives that will change the current practices regarding monitors. This could take the form of legislation, unless action by the DOJ makes such legislation unnecessary. At a minimum, U.S. Attorneys may no longer have unilateral power to direct the appointment of particular monitors, and monitors will be subject to significant DOJ oversight and regulation. Other possible restrictions, including judicial review of monitors, are more uncertain.

This very public controversy will almost certainly cause federal prosecutors to approach negotiations and administration in connection with monitors more cautiously. Entities already being monitored or facing the possibility being asked to retain a monitor should be sensitive to this situation, since, potentially, it may provide an opportunity to obtain relief from existing problems, to have a greater say in the selection of a monitor, to restrict the role of a monitor, or to avoid altogether being required to appoint a monitor.

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If you have any questions concerning the foregoing or would like additional information, please contact Martin Weinstein (202-303-1122, mweinstein@willkie.com), Robert Meyer (202-303-1123, rmeyer@willkie.com), Jeffrey Clark (202-303-1139, jdclark@willkie.com), Russell Smith (202-303-1116, rsmith@willkie.com), or the attorney with whom you regularly work.

Willkie Farr & Gallagher LLP is headquartered at 787 Seventh Avenue, New York, NY 10019-6099 and has an office located at 1875 K Street, NW, Washington, DC 20006-1238. Our New York telephone number is (212) 728-8000 and our facsimile number is (212) 728-8111. Our Washington, DC telephone number is (202) 303-1000 and our facsimile number is (202) 303-2000. Our website is located at www.willkie.com.

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