BART M. SCHWARTZ
COUNSELOR AT LAW

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Office of Public Affairs
U.S. Sentencing Commission
One Columbus Circle, N.E.
Washington, DC. 20002-8002

Re: Proposed Amendments to the Organizational Guidelines

I appreciate this opportunity to comment on the proposed amendments to the sentencing guidelines as they relate to organizations. In particular, I will comment on the concept of Monitors and Monitorships.

I have extensive experience as a Monitor and have held Monitorship or similar positions since the mid-1980's. I currently serve as a Monitor in a number of matters: BP, formerly British Petroleum, the law firm Milberg Weiss, the international freight company DHL and the government of the United Arab Emirates in a matter relating to four MOUs with Bangladesh, Pakistan, Mauritania and the Sudan. More detail about this work is in the attached bio and list. In the 1970's and then again in the 1980's, I served in the United States Attorney's office for the Southern District of New York, including as Chief of the Criminal Division under United States Attorney Rudolph W. Giuliani.

I do not support Monitorships because they are an important part of my professional life; I made them an important part of my professional life because I believe in their value. A Monitorship imposed under the sentencing guidelines inevitably will be linked to the concept of punishment. It is understandable that most commentators and others view a Monitorship as a punishment because they usually result from a criminal or regulatory process. But in fact, an effective Monitor is one who is independent of the prosecutors and regulators and the organization being monitored. The purpose of the Monitorship should be to achieve specific goals and to attain best practices in compliance and ethics programs. I always begin a Monitorship with separate meetings with the government representatives and the organizational representatives to understand what each believes are the problems and the areas that require attention immediately and long term.

1185 AVENUE OF THE AMERICAS
SUITE 1750
NEW YORK, NEW YORK 10036-2603
212.205.4190 (V)
212.205.4199 (F)
bschwartz@bartmschwartz.com
www.bartmschwartz.com

If an organization is recalcitrant and is not truly making an effort, a Monitor is much more likely than anyone else to lead structural and cultural changes to achieve best practices and permanently change the institution. If an organization is genuine in its intent to reach these goals, the Monitor's methods may be different, but the goals are the same and the likelihood of success is greater. If any organization needs the guidance and control of a Monitor it is precisely the one that needs to be pushed in the right direction. It should not be left to its own devices to take corrective actions.

There are many benefits that inure to the public, the government and to organizations from a Monitorship.

1. A Monitorship may be the only way the organization in question can continue to conduct business successfully, thereby protecting innocent investors, shareholders, employees and those who rely on the organization's products and services.
2. Elevating the standards of one company in an industry will influence the entire industry, thus enabling the government to have an impact far beyond a single company or case.
3. Monitors identify issues in a company and an industry which need to be addressed. The government learns of this and the Monitor serves as a kind of early warning system for regulators and prosecutors.
4. When a problem occurs during the probation or Monitorship period, the government has an independent person it can rely on to ascertain the seriousness of the issue, its causes, potential consequences and possible appropriate remedies, if any. This is a valuable service to the organization as well.
5. Organizations that create an ethical and law abiding culture can and do use those achievements to recruit new employees and to retain employees. In highly regulated industries it is a relief for employees to know that their company wants them on the right side of the line and they will not be pressured to cross it.
6. The government is not geared or prepared to provide Monitor-type oversight. Its resources should be focused on what it knows how to do. A Monitorship conducted by someone from the private sector frees up government resources and provides expertise not otherwise available.
7. The Monitor typically has a broad brief and is not limited to the narrow issues which resulted in the regulatory or criminal action. Best practices are not limited to the one deficiency that caused the problem, but address the entire operation and culture of a company.
8. A Monitor gets attention from the powers that be at a company and it gets resources for the changes that need to be made. The "half-life" of focused punishment can

be short. The "half-life" of continued oversight, assistance, audit, review and evaluation is much longer. A Monitor's influences and accomplishments should outlive the Monitorship.

Recommendations

1. As part of the Probation process, the Monitor should be required to meet with all interested parties early on in the process.
2. Within 60 days of appointment, the Monitor should be required to generate a work plan for the initial six months of the Monitorship and new work plans for each subsequent six-month period for the duration of the Monitorship.
3. The Monitor should be required to file written reports to the company and the Probation Department and have the authority to file ex parte reports to Probation.
4. The Monitor should be required to identify those matters, which if not successfully achieved by the organization, would in and of themselves, or in combination with other open items, result in a finding that the organization has failed to meet its obligations.
5. The New York City Department of Investigation (DOI) has had extensive experience with the use of Monitors. One of the procedures DOI has instituted requires the Monitor to submit detailed bills to the DOI for approval and, upon approval, a bill is sent to the organization under Monitorship without the detail. This allows for a bill reviewing process, but protects the Monitor's work from being known to the organization should there be work which needs to be kept from the company.
6. Monitors should be encouraged to utilize resources that are within the company or at least there should be no prohibition against such use. I do not mean to suggest that the Monitor's team should be comprised of organizational people, but in most circumstances there are untainted resources in the company. For example, I have found the independent audit function to be a valuable resource and have often included independent auditor employees on my audit teams to provide expertise about the company itself. I have requested the independent audit function to conduct some audits on their own so that I might judge their competence. This approach produces additional expertise for the Monitor, may result in a reduction in cost to the company since existing employees are utilized and, perhaps most importantly, provides the opportunity for the Monitor to train employees who will remain in the company after the Monitor leaves.

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Offer of Assistance

I have limited my comments in this letter to highlights. If it would be helpful to the Commission I am available to meet with you or your representatives to further discuss Monitorships and how they function.

Very truly yours,

Bart M. Schwartz