



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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## 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

#### 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.