

# Monaco Memorandum: The Impact of the New DOJ's Enforcement Approach for Business Organizations' Enforcement Risk in the US and Across The Globe

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**Moderator**



**Stephen L. Hill, Jr.**  
Kansas City, Partner  
stephen.hill@dentons.com  
D +1 816 550 0438

**Speakers**



**Kristian B. Garibay**  
Phoenix, Associate  
kristian.garibay@dentons.com  
D +1 602 508 3909



**Matthew A. Lafferman**  
Washington DC, Senior Managing  
Associate  
matthew.lafferman@dentons.com  
D +1 202 496 7303

## What We Will Cover Today

1. Background on memorandum and what it entails
2. What is the impact on all legal functions?
3. Immediate steps and potential strategies that should be considered in response

## Overview

- On October 28th, Deputy Attorney General Lisa Monaco announced a new, more stringent enforcement approach to “invigorate” the US Department of Justice’s corporate criminal enforcement efforts.
- The changes signal a return to the more aggressive corporate criminal enforcement policies put in place under the Obama administration.
- Monaco described three new actions the Department will immediately implement to strengthen the way it responds to corporate crime and additional considered actions.



### JUSTICE NEWS

Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime

Washington, DC - Thursday, October 28, 2021

## Rolling Back Guidance to Obama-Era Yates Memo

- Pursuant to the Section 9-28 of the Justice Manual, companies seeking cooperation credit must disclose “all relevant facts relating to that misconduct.”
- Back in 2015, the Yates memo announced that this policy would require companies to “identify all individuals involved in or responsible for the misconduct.”
- The Trump administration modified this guidance in 2018 to only require disclosures of “all individuals substantially involved in or responsible for the misconduct at issue.”
- Monaco directed the Department to “reinstate” the guidance in the Yates memo, and companies will again be required to disclose “all nonprivileged information relevant to all individuals involved in the misconduct,” regardless of their position, status or seniority.

## **Broadened Requirement to Disclose Historical Conduct**

- Monaco announced that prosecutors must now consider “all prior misconduct” when assessing a proper resolution to corporate misconduct.
- The Justice Manual previously limited consideration of the corporation’s “history of similar misconduct.”
- Now, prosecutors are directed to consider “all misconduct by the corporation discovered during any prior domestic or foreign criminal, civil, or regulatory enforcement actions against it,” including other entities in the corporate family.
- Monaco reasoned that such historical records provides insights into a “company’s overall commitment to compliance programs and the appropriate culture to disincentivize criminal activity.”

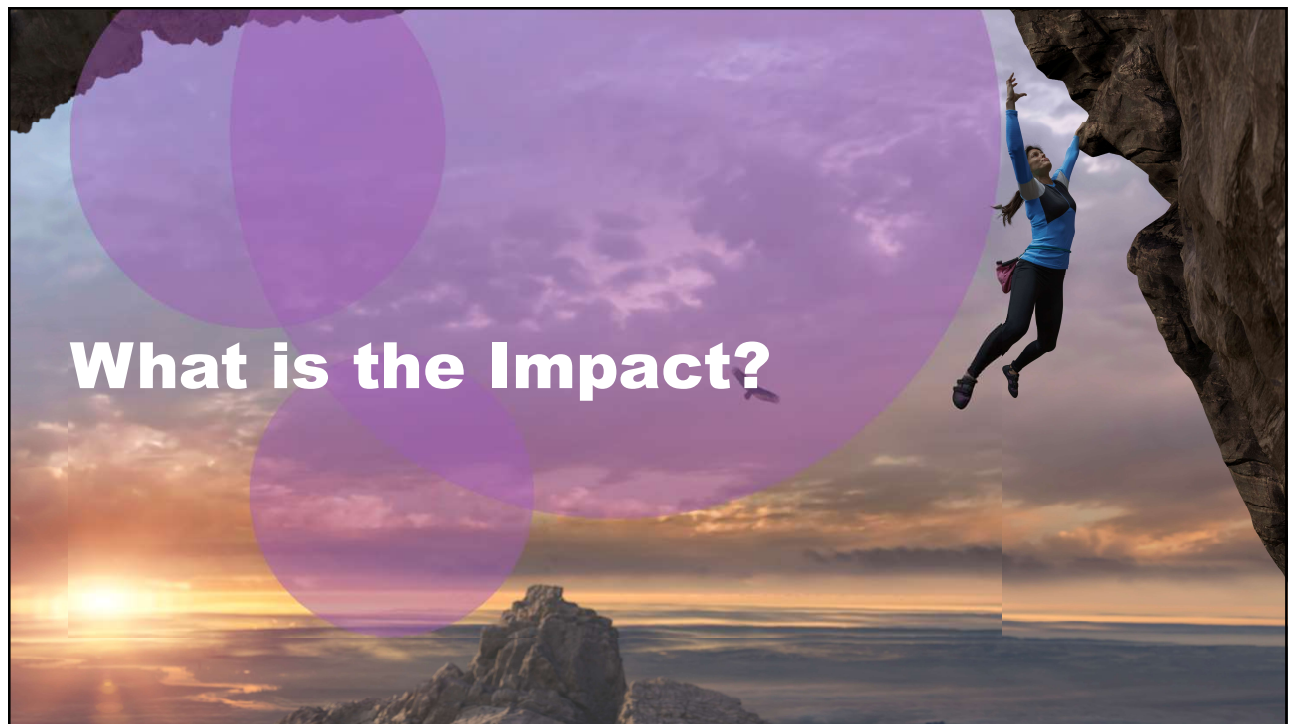
## Monitorships will be Issued More Frequently

- Monaco also announced new guidance on the imposition of monitors.
- In 2018, then-Assistant Attorney General Brian Benczkowski issued a memorandum detailing guidance on the appointment of monitors.
- In the memorandum, Benczkowski stated that “the imposition of a monitor will not be necessary in many corporate criminal resolutions.”
- Monaco stated that to the extent prior Department guidance “suggested that monitorships are disfavored or are the exception,” she was “rescinding” such guidance.
- Monaco instead noted that monitors were warranted wherever necessary to establish “that a company is living up to its compliance and disclosure obligations under the DPA or NPA.”
- The accompanying Memorandum provided more detail about the portion of Benczkowski’s guidance being modified.

## **New Actions Being Considered**

- In addition to these actions, Monaco mentioned other actions were being considered.
- Monaco announced the creation of a “Corporate Crime Advisory Group” within the Department that would be tasked with “reviewing [Department’s] approach to prosecuting criminal conduct by corporations and their executives, management and employees.”
- Specific topics that the Advisory Group will consider are as follows:
  - How to account for companies with a documented history of repeated wrongdoing; for example, whether pre-trial diversion (DPAs/NPAs) is appropriate for recidivist corporations.
  - How the Department selects corporate monitors.
  - How the Department can invest in new technologies.





## Question:

You get a call today about the Department opening an investigation into your client. What impact does this new guidance have?

## Question:

How does this guidance impact an ongoing matter? A settled matter?

## Question:

Does this guidance apply extraterritorially?  
If so, what actions can I take?

## Question:

What are some arguments that you can use to rebut aggressive interpretations/applications of this guidance by line prosecutors?

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## Question:

What should companies expect to result from the new actions being considered?

## Question:

Any other approaches you can use to mitigate the risk this guidance creates?



## **Immediate steps and potential strategies that should be considered in response**

- The best strategy to avoid the risk created by this guidance is a robust compliance program.
- A collaborative, global approach to investigations is necessary given these policies and the global enforcement environment.
- Consider these factors in when deciding when/where/if to voluntarily disclose:
- A global compliance program that properly employs data analytics is essential.
- Counsel in Department-led investigations need to come prepared to argue to limit the impact of guidance.

## Other Questions?



# Thank you

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