# New DOJ Corporate Crime Policy Brings Extraterritorial Risks

By **Matthew Lafferman, Kristian Garibay and Stephen Hill** (December 16, 2021)

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Much ink has been spilled over the last several weeks regarding the significant changes to the U.S. Department of Justice's corporate enforcement policies, announced by Deputy U.S. Attorney General Lisa Monaco on Oct. 28.[1]

Monaco's announcement, as well as the accompanying memorandum, came during her speech at the American Bar Association's 36th National Institute on White Collar Crime.[2]

One underscrutinized aspect of these changes, however, has been their extraterritorial implications and their impact on cross-border investigations. This article discusses some of these implications and proposes actions that corporations can take to mitigate the resulting risks.

**Disclosure requirements appear to apply globally.**

One of the major changes Monaco announced was to the DOJ's consideration of a company's historical misconduct.

The Justice Manual previously stated that prosecutors should consider the corporation's history of similar misconduct in determining how to resolve a matter. Monaco announced, however, that the DOJ is substantially broadening the requirement to include all of a company's past misconduct.

Notably, this change appears to apply expansively to capture extraterritorial misconduct. The Monaco memo specifically directs prosecutors to consider

> all misconduct by the corporation discovered during any prior domestic or foreign criminal, civil, or regulatory enforcement actions against it, including any such actions against the target company's parent, divisions, affiliates, subsidiaries, and other entities within the corporate family.

This language not only extends to cover misconduct discovered during foreign enforcement actions, but also encompasses actions against entities within the company's corporate family, without any identified limitations for time period, industry or geography.

For multinational companies with operations in many different countries, this new disclosure requirement poses significant challenges. Misconduct identified in the resolution of enforcement actions with foreign authorities now is subject to disclosure to the DOJ. Companies in industries in which frequent encounters with regulatory authorities are the norm may find this change particularly burdensome.

And without identified limitations on time, industry and product, greater pressure will be placed on companies, and even on entities across their corporate structure, no matter their location, to collect compliance data for significant periods of time

**Global monitorships are likely to become more prevalent but appear to still be**

**subject to geographical carveouts.**

Monaco also announced new guidance that is likely to lead to the imposition of more monitorships and, by extension, more global monitorships.

In 2018, then-Assistant Attorney General Brian Benczkowski issued guidance on the appointment of monitors. In his guidance, Benczkowski recognized that "the imposition of a monitor will not be necessary in many corporate criminal resolutions."[3]

Monaco, however, stated that to the extent prior DOJ guidance "suggested that monitorships are disfavored or are the exception," she was "rescinding" such guidance,[4] indicating that this portion of Benczkowski's guidance is now inapplicable.

However, the Monaco memo left an important part of the Benczkowski guidance intact. Benczkowski's guidance also stated that "the scope of any monitorship should be appropriately tailored to address the specific issues and concerns that created the need for the monitor."[5]

The Monaco memo recited this guidance — noting that "at a minimum, the scope of any monitorship should be appropriately tailored to address the specific issues and concerns that created the need for the monitor."[6]

This language is significant because it has previously been relied on by defense counsel to carve out geographical regions or operations from prior global monitorships. So, while defense counsel can expect the DOJ to take a more friendly posture toward global monitorships, the parameters of such monitorships may still be subject to some limitations.

**The department will continue to explore new technologies that enhance their global investigative capabilities.**

A less publicized portion of Monaco's announced changes was the DOJ's emphasis on new technologies. Monaco announced the creation of a Corporate Crime Advisory Group within the department that would be tasked with reviewing its approach to prosecuting white collar criminal conduct. The Monaco memo specified that this advisory group will examine the DOJ's investment in new technologies like artificial intelligence to help process data.[7]

This seemingly passing remark is actually quite significant. It signals that the DOJ will continue to become increasingly focused on the use of new technologies that will improve their investigative capacity and ability. Such technologies are being increasingly used in the department's investigations, signaled by Monaco speaking to the "larger and larger role" data analytics now play in corporate criminal investigations.

Combined with the department's increasing focus and attempt to expand its powers extraterritorially, companies can expect the DOJ to steadily improve its global investigative capabilities as these new technologies are adopted.

**Takeaways and Strategies to Consider**

In light of the extraterritorial impact of these policy changes, companies should bear in mind important lessons and consider implementing potential strategies to mitigate the additional risk the changes create.

***Consider the new risks in the decision to disclose.***

Companies must consider the risks created by this new approach when deciding to self-disclose. As some of us have previously written,[8] the decision to disclose is often the decision to disclose to the entire world. The possibility of parallel or follow-on prosecutions must be considered.

With the DOJ's announced changes, multinational companies can expect additional costs from an ongoing inquiry by the department that places additional burdens on its business operations. There is also an increasing likelihood that a global monitorship will be imposed, even if narrowing on geographical or operational lines is possible.

***Try to obtain early agreement on the parameters of disclosure.***

Once companies choose to self-disclose, counsel should seek early agreement with the DOJ to narrow the parameters for historical misconduct disclosure, if possible. Without any limitations for time, business line or industry, or geography, prosecutors may be open to parameters that will not burden the ongoing investigation, such as misconduct reported within the relevant statute of limitations.

Counsel should be prepared, however, to argue why the parameters align with the DOJ's underlying policy rationale for the broader disclosure requirement — that the operations sought to be excluded do not bear on the company's commitment to compliance or the effectiveness of its compliance program.

***A collaborative, global approach to cross-border investigations is more necessary than ever.***

Companies should consider adopting a collaborative, global approach to cross-border investigations. With this new guidance, there is additional risk that resolutions of even civil or regulatory enforcement actions with foreign authorities may be subject to disclosure to the DOJ.

Notably, the new policy does not define the meaning of "misconduct." Thus, counsel may be able to avoid implicating the disclosure requirement by negotiating resolutions of such inquiries that avoid any admission of fault or misconduct.

***A global compliance program employing data processes is essential.***

The extraterritorial impact of the policy changes underscores the importance of an effective global compliance program. Such a program can help avoid the risk resulting from these new policies by stopping misconduct before it arises.

But even if misconduct does occur, a compliance program that is, per the Monaco memo, "tested, effective, adequately resourced, and fully implemented at the time of a resolution" may help a target company avoid a monitorship.

Further, companies implementing such a compliance program must ensure that it has an effective means for collecting and employing data processes. In June 2020, the DOJ updated its guidance on the evaluation of corporate compliance programs to require that companies implement an analytical process for tracking lessons learned across industry and regions and that compliance personnel have proper access to data.[9]

To the extent that the compliance programs of global companies do not collect such data — notably resolutions with foreign authorities and lessons learned across different operations — it is ever more important to do so.

Not only will such functions allow companies to quickly identify the risk of disclosing misconduct in other regions and across corporate structure, but in the event of an inquiry by the DOJ, the company will be better positioned to argue that its robust compliance program renders a monitorship unnecessary.

Further, adopting and implementing more data-based compliance and control functions will help companies counterbalance the DOJ's own increasing use of such technologies.

In sum, the changes to the DOJ's corporate enforcement policies have created certain extraterritorial obligations that increase the already escalating risk of cross-border investigations. Multinational companies should prioritize adopting risk mitigation strategies before it's too late.

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[1] Deputy Attorney General Lisa O. Monaco, Gives Keynote Address at ABA's 36th National Institute on White Collar Crime (Oct. 28, 2021) ("Monaco Address").

[2] Memorandum from Lisa Monaco, Deputy Att'y Gen., US Dep't of Justice to All US Att'ys et al., Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies (Sept. 9, 2015).

[3] Memorandum from Brian A. Benczkowski, Assistant Att'y Gen., All Crim. Div. Personnel, Selection of Monitors in Criminal Division Matters at 2 (Sept. 9, 2015) ("Benczkowski Memo").

[4] Monaco Address, supra note 1.

[5] Benczkowski Memo at 2, supra note 3.

[6] Monaco Memo at 5, supra note 4.

[7] Id.

[8] Brian O'Bleness and Matthew A. Lafferman et al., "Cross-Border Investigations in a 'Flat' Investigation World," The Review of Securities & Commodities Regulation, October 2021.

[9] U.S. Dep't of Justice, Criminal Div., Evaluation of Corporate Compliance Programs at 4, 12 (June 2020), https://www.justice.gov/criminal-fraud/page/file/937501/download.