

What DOJ Gov't Monitoring Guidance Can Teach Companies

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President Joe Biden's U.S. Department of Justice recently unveiled the results of its months-long review of monitors tasked with overseeing civil settlement agreements and consent decrees involving state and local governmental entities, including those consent decrees aimed at police reform.[1]

At first glance, the DOJ's new guidance for monitors — proposed by Associate Attorney General Vanita Gupta — might seem relevant only to federal efforts to rein in unconstitutional policing. But many of the core principles underlying this plan apply with equal force to corporations selecting and working with monitors, as well as to organizations conducting internal investigations and compliance assessments.

Just like the independent overseers at the heart of the Gupta memo, nongovernmental entities, when thinking about their own internal investigations and compliance assessments — and monitorships, if imposed — should aim to:

- Define the term "stakeholder" expansively;
- Seek and incorporate input from stakeholders on a continuing basis;
- Creatively and meaningfully engage with those stakeholders; and
- Communicate with stakeholders in a manner that has true staying power.[2]

The prospects of a civil settlement and accompanying monitorship are not remote, particularly in heavily regulated industries and particularly as law enforcement priorities shift with a new administration. And as sophisticated in-house counsel and compliance officers recognize, these same law enforcement priorities drive the need for internal investigations and compliance assessments.

As a result, counsel and executives responsible for ensuring law-abiding and ethical organizations can use these principles from the Gupta memo, not as a formula to be rigidly followed, but as principles to help both pressure test the strength of ongoing monitorships, internal investigation programs, and compliance assessments and to guide future efforts at compliance.



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Expansively Defining "Stakeholder"

The Gupta memo demonstrates the need for organizations to think broadly about who is invested in the outcome of a monitorship, internal investigation or compliance assessment. In crafting the memo, the DOJ did more than speak with current and former monitors. Its 50-plus listening sessions also included state and local officials, police chiefs, and national law enforcement organizations, civil rights advocates, community leaders and academics.

Nongovernmental entities also need to take a similarly expansive view of their stakeholders. It is of course insufficient for corporations to be concerned only with how their board of directors or C-suite executives will respond to a brewing controversy. Just as monitors in police misconduct cases may want to consult with a variety of community leaders, internal investigations and compliance program assessments will want to cast a broad net within the organizations in evaluating corporate culture and identifying opportunities for change.

A corporation or organization's stakeholders also includes its shareholders, creditors, customers, business partners, and, in cases involving nonprofits, donors and funding sources. Local communities and the public generally can also be significant stakeholders. Armed with tweets and calls for boycotts, activists can damage both the reputation and the bottom line of institutions viewed as sufficiently unresponsive to issues related to the environment, unfair labor and consumer practices, and workplace harassment and employment discrimination.

Understanding just how big the stakeholder tent can be is an organization's first step toward the successful execution of a monitorship, internal investigation or compliance assessment.

Ongoing Stakeholder Input

The Gupta memo also stresses the need for public input throughout the monitorship process. It calls for public input in the monitor selection process and for the selection of monitors who will prioritize stakeholder input.^[3] And it requires that monitors, once selected, seek local feedback on a consistent basis, including by using community liaisons charged with making sure that the monitoring team regularly hears from "a diverse set of community voices."^[4]

Organizations operating under a monitorship or conducting sensitive internal investigations and compliance assessments should similarly prioritize the need for collecting stakeholder input on an ongoing basis. Interviewing of employees is only the starting point of such input.

The organization may share draft sets of recommendations or preliminary compliance plans and training programs with multiple internal stakeholders representing a variety of corporate and business functions. That initial feedback can be incorporated into future drafts and those later versions circulated as well for further refinement.

This iterative process — rooted in and influenced by the observations and ideas of key stakeholders — will help ensure the success of the monitorship, investigation or assessment. It will help get to the heart of the problem and result in recommendations with the best success of stakeholder buy-in across the board.

Creative and Meaningful Engagement With Stakeholders

The Gupta memo also encourages monitors to be creative in how they communicate with stakeholders. For instance, in addition to organizing traditional town halls where members of the community can provide feedback, Gupta recommended that monitors "go to the place where impacted communities actually live and work" and "use modern tools of communication, such as social media." [5]

These approaches, she explained, will help ensure that monitors are reaching a broader swath of people, including "community members whose voices are not as regularly heard." [6]

This principle is equally relevant to corporate monitorships and organizations facing internal investigations and compliance assessments. Resourceful investigators should consider multiple creative ways of reaching stakeholders and gathering their input.

An ethics hotline, especially one not staffed after-hours or by operators speaking the relevant language, is unlikely to be used or trusted by employees, particularly younger ones who may be far more comfortable firing off a text than dialing a number. A hotline's ability to solicit engagement and to gather meaningful data may therefore be limited.

Another way to engage internal stakeholders would be through focus groups or internal surveys — mechanisms that can help evaluate overall corporate culture, the tone at the top and the mood in the middle. Investigators could also follow the lead of media organizations, like the Washington Post, which walks whistleblowers step-by-step through the process of sending encrypted communications through emails, apps and the web. [7]

Monitorships and investigative teams that represent diverse perspectives and populations are more likely to engage stakeholders whose voices might not otherwise penetrate. Although the Gupta memo did not squarely address this issue, others have written compellingly about the increased need for diversity in monitorship selection. [8]

By meaningfully increasing diversity among monitorships and investigative teams, corporations and organizations can create better opportunities for more honest, open and meaningful dialogue.

Communication With Staying Power

The Gupta memo calls on monitors to make their work easily accessible and publicly digestible. [9] As Gupta explained, their timelines, plans and assessments need to be public facing, written "not just for judges, but also for the public." [10] In other words, the Gupta memo recognizes that for a monitorship to have staying power, clear and accessible communication is key.

An organization's internal investigation or compliance assessment is no different. A final set of recommendations and compliance plans are less likely to get traction if written in dense, bullet-pointed legalese that only gets airtime inside a boardroom or the client's law department.

Rather, at the conclusion of an inquiry, an organization should consider providing multiple versions of a compliance plan — with one version directed to in-house counsel and other, more user-friendly versions directed to the general employee population.

Corporations may also host virtual sessions geared toward remote and more tech-savvy employees.

That way, those employees can also learn the work plan for a monitorship, or the lessons learned during and the action items that will be taken following an internal investigation.

It is also worth noting that this greater focus on communication and transparency does not have to implicate concerns related to attorney-client privilege. Corporations and organizations engaged in monitorships, internal investigations and compliance assessments can still be inclusive and forthcoming in their communications while not sharing protected information.

A Note on Cost-Efficiencies and Value

The Gupta memo recognizes just how costly monitorships can be for taxpayers. Indeed, several of the memo's principles seek to minimize monitorship costs.[11] But the emphasis on cost-reduction strategies is not at odds with the emphasis on stakeholder input in the monitorship process.

Stakeholder input can create cost-efficiencies and yield tremendous value for corporations and organizations engaged in monitorships, internal investigations and compliance assessments.

Engaging with stakeholders broadly, early and often makes it less likely that a monitor or investigator will spend precious time and resources pursuing dead ends or tangents. It increases the chances of securing earlier buy-in from key stakeholders on proposed changes and plans, thus speeding up the project or investigation timeline.

Communicating recommendations and implementation plans in a widely accessible manner can help reduce the need for costly and repetitive follow-on work.

In short, stakeholder input is critical to a monitorship, investigation and assessment done right, and a monitorship, investigation and assessment done right should always create long-term cost-efficiencies and deliver value.

Conclusion

The Gupta memo will no doubt go a long way toward reforming the role of monitors in matters such as police reform. But the principles underlying the DOJ's directives should influence how all organizations, not just those operating in the civil rights arena, approach monitorships, internal investigations and compliance assessments.

By taking these four principles into account, organizations operating under the oversight of monitors or the scrutiny of internal investigators can help ensure that the ultimate outcome of these painstaking efforts is a law-abiding and ethical institution — as viewed by stakeholders and government officials alike.

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[1] See Memorandum from Vanita Gupta, Associate Attorney General, for Attorney General Merrick B.

Garland, Review of the Use of Monitors in Civil Settlement Agreements and Consent Decrees Involving State and Local Governmental Entities (Aug. 13, 2021), <https://www.justice.gov/ag/page/file/1432236/download>.

[2] Since 2008, the DOJ has published a series of memoranda focused on the selection and use of corporate monitorships. See, e.g., Memorandum from Craig S. Morford, Deputy Att'y Gen., to All Component Heads and US Att'ys, Selection and Use of Monitors in Deferred Prosecution Agreements (Mar. 7, 2008), <https://www.justice.gov/archives/jm/criminal-resource-manual-163-selection-and-use-monitors>; Memorandum from Lanny A. Breuer, Assistant Attorney General, Selection of Monitors in Criminal Division Matters (June 24, 2009), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/response3-supp-appx-3.pdf>; Memorandum from Gary G. Grindler, Acting Deputy Att'y Gen., Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (May 25, 2010), <https://www.justice.gov/sites/default/files/dag/legacy/2010/06/01/dag-memo-guidance-monitors.pdf>; Memorandum from Brian A. Benczkowski, Assistant Att'y Gen., to All Criminal Division Personnel, Selection of Monitors in Criminal Division Matters (Oct. 11, 2018), <https://www.justice.gov/opa/speech/file/1100531/download>. In addition to these memos related to monitorships, the DOJ has also issued periodic guidance related to the investigation and prosecution of corporations and individuals employed by corporations. See, e.g., Memorandum from Sally Quillian Yates, Deputy Attorney General, Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), <https://www.justice.gov/archives/dag/file/769036/download>; Memorandum from Mark Filip, Deputy Attorney General, Principles of Federal Prosecution of Business Organizations (Aug. 28, 2008), <https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf>.

[3] Gupta memo at 5, 7.

[4] *Id.* at 7.

[5] *Id.*

[6] *Id.*

[7] See, e.g., <https://www.washingtonpost.com/anonymous-news-tips/>.

[8] See, e.g., Jones Day White Paper, Diversity in Monitorship Selection (Sept. 2021), <https://www.jonesday.com/en/insights/2021/09/diversity-in-monitorship-selection>.

[9] Gupta memo at 5.

[10] Gupta memo at 6.

[11] Gupta memo at 4-5.