

DOJ Announces New Rules for Federal Monitors of Governmental Entities

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On September 13, 2021, Attorney General Merrick Garland announced a new set of principles and “implementation actions” governing monitors tasked with overseeing reforms required under settlement agreements between the United States and state and local governmental entities, and/or related consent decrees.¹ In making the announcement, Attorney General Garland noted that “[f]or decades, the Department of Justice has used consent decrees and settlement agreements <https://www.winston.com/en/thought-leadership/doj-announces-new-rules-for-federal-monitors-of-governmental-entities.html> with state and local governmental entities to remedy a wide variety of violations of federal law, including, for example, to ensure constitutional policing, improve access for people with disabilities, provide safe conditions of confinement, and protect the environment.”² Attorney General Garland further explained that “[t]he department has found that, while consent decrees and monitorships are important tools to increase transparency and accountability, the department can and should do more to improve their efficiency and efficacy.”³

The initiative to develop further guidance regarding the use of monitors in settlement agreements and consent decrees involving state and local governmental entities began about five months ago in April 2021. At that time, the Attorney General rescinded a November 2018 memo⁴ that had been issued by then Attorney General Sessions, which had made it more difficult for the Department of Justice to use consent decrees by adding in restrictions and additional requirements for approval, stating that the Department “will return to the traditional process” that allows the heads of litigating components to approve “most settlement agreements, consent decrees, and the use of monitors.”⁵ Recognizing that it is critical to ensure that the monitors are “independent, highly qualified, and free of conflicts of interest,” Attorney General Garland requested that Associate Attorney General Anita Gupta review the Department’s use of monitors and any associated guidance and provide recommendations on how to improve the use of monitorships going forward.⁶

As part of her review, Associate Attorney General Gupta convened more than 50 listening sessions with stakeholders, including current and former monitors, law enforcement officials, and civil rights advocates, and studied consent decrees used in past and ongoing cases. Upon completing her review, the Associate Attorney General issued a memorandum to the Attorney General concluding that “[i]n many cases involving consent decrees

and settlements with state and local governments, the use of monitors is essential to the successful implementation of the decree or agreement.”¹¹

She also provided recommendations for improving the use of monitors. Specifically, Associate Attorney General Gupta’s memo provided that monitorships of state and local governmental entities should meet the following five principles:

- Monitorships should be designed to minimize cost to jurisdictions and avoid any appearance of a conflict of interest.
- Monitors must be accountable to the court, the parties, and the public.
- Monitors should assess compliance consistently across jurisdictions.
- Sustained, meaningful engagement with the community is critical to the success of monitorships.
- Monitoring must be structured to efficiently move jurisdictions into compliance.

Attorney General Gupta also specified three to four recommendations to effectuate each of the five principles. Some of the more significant recommendations include that the consent decree should cap monitors’ fees and set term limits for the monitors. She also proposed public disclosure of the monitors’ bills and methodologies used to assess compliance. Further, she recommended requiring a hearing to assess the termination of the required monitorship no more than five years after the date of entry.

On September 13, 2021, Attorney General Garland accepted the Associate Attorney General’s set of principles and her recommended “implementation actions” and ordered them to be made effective immediately.¹² This is especially significant given the many Justice Department investigations of governmental entities that are ongoing, including those focused on police misconduct at the Phoenix, Louisville, and Minneapolis police departments.¹³ The selection, appointment, and work of any monitor charged with overseeing the implementation of required reforms stemming from settlement agreements or consent decrees arising out of these investigations will be expected to comply with the newly issued set of principles and implementation actions.

If you have additional questions or need further assistance, please reach out to **Suzanne Jaffe Bloom** (Co-chair, White Collar, Regulatory Defense, and Investigations) or your Winston & Strawn relationship attorney.

¹¹ Memorandum from the Attorney General, *Review of the Use of Monitors in Civil Settlement Agreements and Consent Decrees Involving State and Local Governmental Entities* (Sept. 13, 2021), <https://www.justice.gov/ag/page/file/1432236/download>.

¹² *Id.*

¹³ Melissa Quinn, *Justice Department Rolls Out New Rules for Federal Monitors of Police Departments*, CBS News (Sept. 13, 2021), <https://www.cbsnews.com/news/justice-department-federal-monitors-police-departments-consent-decrees/>.

¹⁴ Memorandum from the Attorney General, *Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Government Entities* (Nov. 7, 2018), <https://www.justice.gov/opa/press-release/file/1109681/download>.

¹⁵ Memorandum from the Attorney General, *Civil Settlement Agreements and Consent Decrees with State and Local Governmental Entities* (Apr. 16, 2021), <https://www.justice.gov/ag/page/file/1387481/download>.

¹⁶ Memorandum from the Attorney General, *Review of the Use of Monitors in Civil Settlement Agreements and Consent Decrees Involving State and Local Governmental Entities* (Sept. 13, 2021), <https://www.justice.gov/ag/page/file/1432236/download>.

¹⁷ Memorandum from the Associate Attorney General, *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>.

Memorandum from the Attorney General, *Review of the Use of Monitors in Civil Settlement Agreements and Consent Decrees Involving State and Local Governmental Entities* (Sept. 13, 2021), <https://www.justice.gov/ao/page/file/1432236/download>.

David Nakamura, *Justice Dept. Unveils New Rules on Federal Monitors Overseeing Local Police Reforms* (Sept. 13, 2021), https://www.washingtonpost.com/national-security/police-monitors-garland-new-rules/2021/09/12/d21fe6a0-1425-11ec-9589-31ac3173c2e5_story.html.

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