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A survivor's guide to monitorships

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Despite talk that monitorships are on the decline, this form of regulatory oversight continues to be relied upon by the U.S. Department of Justice, as well as by other federal, state, and municipal regulators and prosecutors.

Living with a monitor in your midst may test your firm in myriad ways. The monitor may be reasonable, but his or her team members may get carried away with their authority. At the same time, employees and executives in your firm may believe the monitorship is unwarranted, politically driven, overly burdensome, and costly. Despite these perceptions — whether grounded in reality or not — the fact remains that the monitor is simply a day-to-day reality for you and your firm. This article provides practical recommendations for corporate executives and in-house counsel tasked with navigating a multi-year government-imposed monitorship.

Cooperate, cooperate, cooperate

Pick your battles. Fighting the monitor on every request, large and small, not only may serve to prolong the monitorship, but may also drive up your internal costs as your staff engages in endless skirmishes with the monitorship team. Of course, some disagreements cannot be dismissed, but you are best served by choosing these issues wisely.

Likewise, be mindful of the potential need to rein in outside counsel. If your outside counsel represented you throughout the course of the regulator's investigation or settlement discussions, they may have spent months or possibly years viewing the regulator as an adversary while they advocated for your firm's interests. In the eyes of outside counsel, the monitor may be perceived as an extension of the regulator, and an unreasonable penalty to be tolerated. Whether accurate or not, members of your legal team may view the monitorship as an unpleasant reminder of a lost battle.

Whether addressing general ill will directed to the monitor by your employees or your outside counsel, you must exert control and adjust this attitude. Allowing your outside legal team or your employees to do battle with the monitor on a daily basis may be perceived by the regulator as a declaration of war by your firm. The regulator may then bring the hammer down even harder on your firm, siding with the monitor on all disputes and ultimately extending the duration of the monitorship. At the same time, continued skirmishes and adversity costs time and money, as your firm's legal bills will continue to tick upwards.

Reserve issues of great importance for the regulator's attention. If forced to pick sides, there is a high probability that the regulator will be more likely to side with the monitor rather than your firm. This is particularly true when the installation of the monitor is the outgrowth of litigation or a prolonged adversarial investigation by the regulator. Moreover, the regulator likely chose or approved the monitor, and therefore may be more prone to adopt the monitor's view of your firm's conduct in the course of the monitorship. In any case, before elevating disagreements to the regulator, strive to seek resolution and compromise.

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