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Living Under Monitorship: Strategies for Success

By Randy Cook

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Monitorships, consent agreements, special masters, independent review organizations, compliance “expert” organizations, and similar independent integrity oversight arrangements are a constant feature of the modern compliance and enforcement environment. Check out recent headlines concerning Uber, McKesson, and ZTE for just a few examples.

Lean performance culture, increasingly complex organizations, overstretched regulators, questing media, and a skeptical public add up to frequent, recurring use of independent third party oversight to assure organizational compliance performance following revelation of significant violations or in order to avoid and/or mitigate an identified policy risk.

Like it or (more likely) not, if you work in complex organizations long enough, you will almost certainly encounter a monitorship or other independent oversight arrangement.

No one wants to be under a monitorship or a corporate integrity agreement. Once you are in that boat though, the process of restoring the organization's credibility and full autonomy is dependent on successful monitorship and oversight. A botched or awkward process will only intensify and prolong the pain and the cost. This article describes certain key best practices to ensure that your organization successfully navigates a monitorship or a corporate integrity agreement.

Organizational Buy-In Is Foundational

A monitorship or independent review organization (“IRO”) requirement is fundamentally about restoring an organization's credibility and it is impossible to be credible if your organization, especially executive leadership, is hostile to the monitorship's or IRO's purposes and process.

Leadership needs to go “all-in” by embracing the monitorship as an organizational priority and commitment. One effective technique to achieve this is to designate a senior executive to champion the monitorship in the board room, at the budget table, and on the operating floor.

The executive should drive a project-based initiative to build the monitorship/IRO program into your organization's culture, processes and systems, and integrate the monitorship's/IRO's key commitments into each affected employee's evaluated performance criteria.

Achieving the objectives of the monitorship/IRO needs to be "everyone's business" and your organizational culture needs to reflect this priority.

Get the Right Monitor/IRO

A good monitor/IRO can be an organizational mentor, external champion, and a success enabler. Conversely, a bad monitor/IRO can be a constant nay-sayer, aloof or indifferent to the health of the business, and quickly turn the monitorship into an adversarial cat and mouse game.

Monitors/IROs are chosen in different ways, depending on the issue context but in most cases, the organization has some influence in the selection process. It is vital to get a monitor/IRO who will facilitate your success. Critical criteria in selecting a monitor/IRO include:

- A collaborative, pragmatic approach to working with your organization to build a monitorship program;
- Perspective working with and within organizations to conduct monitoring and compliance oversight;
- Competence to programmatically monitor and effectively report organizational performance and progress;
- Expertise with your industry and the applicable issue set;
- Credibility with the applicable regulators and in your industry.

Cooperation and Transparency Is Usually the Best Approach

Organizations entering into corporate integrity agreements or monitorship situations sometimes have an adversarial or litigious relationship with the applicable regulator. But that approach sends the wrong message and impairs the objectives of the monitorship, namely rebuilding your credibility and regulators' trust in your organization.

Clearly, some regulators (and monitors) are more zealous and difficult than others, and your organization has to maintain its ability to operate effectively, independently, and reasonably. But an ounce of honey will often achieve what gallons of vinegar cannot.

Actively Identify, Investigate, Analyze Root Causes, and Disclose Regulatory Violations

One tangible way to demonstrate transparency is to implement an active process to identify and credibly address regulatory violations. An effective corporate compliance program is the typical approach to proactively monitor any organizations.

Organizations are understandably reluctant to voluntarily disclose violations based on concern over attracting unwelcome scrutiny and of being placed at a disadvantage in the event of civil or criminal litigation.

Once a monitorship or corporate integrity agreement is in place, these concerns are substantially outweighed by the credibility-enhancing advantages of active transparency.

You should implement an employee issue reporting system, integrate key stakeholders and continuous improvement capabilities into the investigation process, leverage the investigations as an opportunity to both improve your program quality and demonstrate your commitment to the monitor and regulator.

Set Realistic Expectations About the Budget

It is hard to reallocate scarce dollars from profit-generating activity to compliance and overhead but restoring your organization's credibility requires investment.

Your organization's business and financial leadership need to be engaged in an honest, data-based conversation about the resourcing needs of a monitorship compliance program.

As with any organizational priority, the budget for monitorship success needs to be accountable, performance-oriented and realistic, accounting for both the response to the initial crisis that accompanies the initiation of a monitorship and long-term sustainment.

Recognize that early investments in key systems and capabilities often enable efficiencies later in the program cycle.

One should also ensure that your organization appreciates and retains high value internal resources. Competent compliance professionals look like expensive overhead, but are vital to building your organization's competence and credibly engaging with the monitor and regulators.

Design a Program That Addresses All Three Time Dimensions

It is helpful to conceptualize a monitorship in three time dimensions when thinking about its objectives and your organization's corresponding compliance program capabilities.

- Past: The monitorship must address the unsatisfactory historical conditions, acts, and omissions that led to initiation of the monitorship. This requires identification of the deep root causes; clearing the decks on past violation conduct; addressing any residual personnel, systemic or resourcing issues; and demonstrating organizational accountability.

- Present: The monitorship must ensure that sufficient processes and resources (interim or otherwise) are in place in order for the organization to operate compliantly in the present. It is no good to clear your organization's conscience of past problems and build the Rolls Royce program of the future if you are unable to execute compliantly now.

- Future: The monitorship needs to ensure that the organization enhances the performance and persistence of its compliance program through proactive monitoring and training as well as iterative process and system enhancements. For this dimension, it is helpful for the organization to execute project-based initiatives with completion calendars, performance measures, and gated reviews.

Integrate the Monitorship's/IRO's Objectives Into Your Organization's Systems and Processes

Rather than treat the monitorship as a foreign organism or a completely new function, a better strategy is to focus on integrating its purposes into your organization's existing systems, processes, and cultural commitments.

The objective is to splice compliance into your organization's DNA by leveraging quality, continuous improvement, change management, and program capabilities.

This will both reduce some of the friction from the changes associated with the monitorship and enhance the consequent program's sustainability and persistence.

Measure and Report Risk, Performance, and Success

Leverage your existing company systems to collect data about your organization's risk profile and compliance program performance.

For any new systems you implement, ensure that you integrate a data component. Track and report metrics over time. Optimally, build dashboards tailored to the priorities and responsibilities of key stakeholders. Develop Key Performance Indicators around the monitorship's priorities and build them into performance reporting and accountability. Utilize these measures to assess, improve, and report performance success in your program over time.

In conclusion, monitorships and IROs are quite costly and painful. But once you are subject to one, a positive/supportive tone at the top and effective execution is a necessary crucible to restore your organization's autonomy, credibility, and reputation.

Adopting the strategies described above will reduce monitorship/IRO friction and facilitate your success. And the good news is that most organizations subject to corporate integrity agreements and monitorships find out that their focus on process results in more effective and efficient operations. There is some light at the end of the dark tunnel.