

Succeeding Across a Monitor's Audiences

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It is a unique model: an independent third party that is neither an employee nor an agent of the organisation or government, appointed and overseen by the government, though paid for by the organisation, is tasked with reducing the risk of recurrence of an organisation's misconduct. Although the monitorship is imposed at the same time as the entity is being punished for its prior misconduct, the US Department of Justice (DOJ) makes clear that the role of the monitor is not to further punitive goals but, rather, to assess and recommend improvements to the organisation's compliance programme.^[2] Yet, despite the government's view that monitorships are not punitive, most would agree that it seems unlikely that the organisation will view the imposition of a monitor as anything other than punishment.

One of the most common challenges faced in monitorships comes from the need for the monitor to fulfil its responsibilities at a time when hostilities may be elevated and trust is lacking among all parties. By their very nature, monitorships are imposed when the government does not trust the organisation to address or reduce the risk of future misconduct without direct oversight, after what was likely years of costly, protracted investigations or litigation, or both, and the organisation has almost certainly spent years frustrated by the distraction from its core business. To add to this general feeling of mistrust, frustration and exhaustion, the organisation is reminded that this government-appointed monitor is independent, no privilege will attach to its work, the organisation's cooperation must be full and forthcoming, and the multi-year costs associated with the monitor's oversight must be borne by the organisation.

It is with this backdrop that the monitor must begin its task.

The goals in this challenging context are multifaceted. They include guiding the organisation to improve its compliance programme, assisting the organisation's development, reinforcement of practical solutions and practices that reduce future risks, and ensuring that the organisation's compliance measures meet government expectations. Ultimately, we gauge success by whether the organisation, on completion of the monitorship, is in a better position to understand and control its own unique compliance risks and be a better corporate citizen, while also having avoided undue financial burdens and disruptions to operations.

This chapter provides insights regarding navigating the complex and delicate nature of the sensitive relationships among the parties to a monitorship and the steps that can be taken to minimise and overcome the related challenges to increase the likelihood of a successful monitorship – one that will achieve the stated monitorship goals to each party’s satisfaction.

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