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Regulatory Oversight Podcast – What is a Monitorship? A Conversation with Affiliated Monitors President, Vin DiCianni

Ashley Taylor:

Welcome to another episode of Regulatory Oversight. This is a podcast by Troutman Pepper's regulatory group that focuses on recent trends in government and regulatory enforcement and covers topics of interest to clients who may be facing regulatory scrutiny or litigation. I'm Ashley Taylor, one of the hosts of the podcasts and a partner at Troutman Pepper. Before we get started today, I wanted to remind all of our listeners to visit and subscribe to our blog at [regulatoryoversight.com](http://regulatoryoversight.com) so you can stay up to date on developments and changes in the regulatory landscape. Now, I am please introduce our guest today, Vin DiCianni. Vin is the president and founder of Affiliated Monitors, which serves as an independent monitor in federal state and private enforcement actions, tracking compliance with government regulations and industry practices in a variety of fields. Vin, welcome and thank you for joining us today.

Vin DiCianni:

Thank you, Ashley. Great to be here, excited to talk about your practice and the regulatory work that you do. And then to let you know about Affiliated Monitors and what we do.

Ashley Taylor:

Great. Let's start with a brief introduction about our practice here at Troutman Pepper. And we have had this practice now almost 20 years. We're one of only three firms recognized nationally by chambers in the government relations state attorney general's category. And our team includes a number of experienced practitioners, including two former state solicitor generals, four former deputy attorney generals, former assistant, deputy AGs, former deputy solicitor generals, and at least four former assistant attorney general. Our attorneys are diligent about staying abreast of regulatory and enforcement issues and trends so we can respond accordingly. And our team provides ongoing insightful analysis and commentary not only through this podcast, but also on our Regulatory Oversight blog and through our state attorney's general monitor newsletter, but enough about the practice. We're here today to learn more about Affiliated Monitors. Vin, how did Affiliated Monitors come about?

Vin DiCianni:

So, I am a former assistant attorney general in Massachusetts. I was there for about six years and tried a lot of different cases then I went... As they say to the dark side, representing clients before AGs offices. And in my practice, I had a number of matters on the regulatory side of things, where on occasion, the punishment did not fit the crime. Best way I can describe it is, the client did something inappropriate, but the sanction they were receiving because the alternatives on sanctions were so limited were very draconian, a suspended license for not crossing T's and dotting I's always seemed to be a little too severe. So, as I thought about things, I came up with this notion of creating an alternative sanction of independent monitoring and making it available to government agencies, including AGs offices, as we'll talk about, it's more of a probationary type of sanction where the practitioner or the business that can stay in business and not lose their license or credentials and be monitored for a period of time and fix things.

So, that was the whole notion of starting it. And we started it in 2004. So, we were way ahead of the curve in establishing an entity that provided independent monitoring. It has really

taken off and it's taken off in many different ways. One is more government agencies are using independent monitoring as a resource for this alternative sanction and that's been great. The work that we do includes work with federal agencies. So, we've monitored for DOJ, in the criminal division, the fraud section, we're monitoring a matter right now for the antitrust division at DOJ, we do work on the suspension and de department side with the Department of Defense, EPA, transportation, and other federal agencies, but more and more we've been doing work with AGs offices. And that's why I thought it would be great to chat with you because of the great work that you and your team does at Troutman.

Ashley Taylor:

So, then let me ask you a question because your story reminded me and we hadn't talked about this in our prep session, but it reminded me that when I was in law school, I interned with the General Services Administration, the Suspension and Debarment Division. And now that you mention it, I remember the issue of monitoring being one, even back then some... Almost 30 years ago now, a concept that the federal government was very comfortable with implementing and now that you mention it, when I served in the Virginia Attorney General's Office, I don't remember that being the type of tool that was regularly discussed. So, maybe talk about the migration of monitoring as a concept from the federal government to the state government. Because I see that as being a significant turning point in this area of practice.

Vin DiCianni:

I agree with you and it raises a number of different issues. So, on the one hand, DOJ has been using it now for some period of time, right? And they use it on the criminal side with deferred prosecution or non-prosecution agreements to resolve a criminal matter. But over the course of time, it has expanded into civil at DOJ so you can resolve a matter civilly. The agency side of things like the GSA side of things, or the DOD side of things really comes about because of the federal acquisition racks the fall. There is the provision that these agencies really are to determine whether or not contractors are and the term I'm putting in quotes in my fingers, as you can see, presently responsible. So, is a contractor, a presently responsible contractor so that it can continue to get business and do business with government agencies.

The concepts though are a little bit different, right? So, on the criminal side of things, when you're thinking about DOJ, it really is a form of punishment, right? And maybe it's not a severe form of punishment, but it's a form of punishment which is resolving a criminal matter where behavior led to this type of resolution. On the federal side, when you're talking about agencies, it is really more... Not so much about punishment, but as I said to establish whether or not the companies are doing things appropriately, so they have good code of conduct, they have controls in place. So, there's really two different concepts there that are now being married if you will. So, I think, what's happened now is government agencies are now looking at whether or not there's an appropriate type of sanction that's put in place.

So, the monitoring model, which is now becoming as we know, a lot more popular is one in which the company gets to stay in business, but is watched by an independent, almost like that notion of presently responsible because the company has to demonstrate, be it under a deferred prosecution agreement, a civil settlement, or an administrative settlement where a monitor's put in place, the company has to demonstrate that they've corrected the deficiencies that got them in trouble in the first place and have put to put in place appropriate compliance programs and controls regarding third parties and investigations, all of that kind of stuff. So, it's more of a blending which, I think, is the right thing in today's environment, right?

Ashley Taylor:

Well, that's interesting. Then in the context of something that we often have to explain to clients, because it's a difficult concept to grasp but that is in the state attorney general world, the notion that in Attorney General's Office has both enforcement authority and regulatory authority, right? Most folks don't understand that regulatory authority. So, the blending you've described from a public policy perspective, I could see how that would resonate with a state AG if they are in the posture of an inquiry to determine whether or not you are acting in compliance with a statute, and they find that you're coming close to the line, but you haven't gone so far that they necessarily want to engage in punitive enforcement action, but they nevertheless feel something should be done.

Vin DiCianni:

That's exactly right. And, with COVID and all of the struggles that companies have had staying in business, right? A lot of states really do not want to put companies out of business, the bad ones that are doing the intentional bad acts. That's something that's a little bit different here. We're talking about companies that have done things inappropriately, but they're fixable.

Ashley Taylor:

So then I know that you were recently invited to speak to the leaders of the consumer protection units for all of the state attorneys, general offices around the country. Talk to us about that meeting why you were invited and what did you share?

Vin DiCianni:

So, actually, we were attendees at the NAAG Consumer Protection Program in Raleigh, in June. And it's their annual meeting. We were not speakers on the panels, but we did get to speak at the program. And what we are finding is that for particularly for Consumer Protection Divisions at state AGs offices, there is... I think, a great use of independent monitoring to resolve consumer protection matters. We have done a couple now across the country involving different types of consumer matters, predatory sales people using subscription services and not letting people out of their subscriptions, or [inaudible 00:10:29] and that thing.

And when you think about it, what a great resource for government agencies to not just get a fine from a company, because it's violated some type of advertising or consumer protection statute or regulation, but to put some oversight in it. So, you have a fix for the problem. So, the AGs office doesn't continue to get consumer protection complaint because company X is being predatory in its sales approaches in its door to door sales, in its messaging and that kind of thing. So, the whole purpose of going to the NAAG conference really was to introduce this notion of independent monitoring as a resource for Consumer Protection Divisions.

Ashley Taylor:

Then it may be helpful for the audience to hear at the operational level, and maybe let's use a multistate as a hypothetical, since a monitoring as a concept. I think, is probably for this audience, something that they're more familiar with in the multistate context. And I know their discussions about using it in more of the single state single company inquiry, but to talk about the operational aspects. So, so our listeners can really visualize what it looks like in practice.

Vin DiCianni:

Sure. And, I think, you're right. I mean, I think, for the NAAG folks, particularly, those states that get involved in the multistate matters, they have used monitoring and are using monitoring in some other things. And monitoring really depends on what the four corners of the agreements look like. So, sometimes it could be looking at a particular control that the entity or entities have in place and whether or not it is effectively being executed, right? So operationally, do you have a compliance program for this, that, and the other thing, and is it effective and are you appropriately working it? Is it being monitored? Is it being tested? And bringing in an independent to do that validation, to make sure that those programs are up to speed, are effectively implemented and are being effectively executed.

So, operationally, it could be involved in a... As I said, in a particular line of business or in a particular control area that the companies are expected to have in place and be working it. On the multistate level, yes, it is something that's been used. Now, what you and I are talking about is bringing it out now to the AGs offices in the states for individual states to start thinking about as a concept and as an application, because it's different, right? And a couple things that I do want to mention as we're talking is... One thing that I think government agencies understand is that the monitoring is not paid for by the state. It is paid for by the entity that is being monitored. And that notion has been in place since monitoring started 20, 25, 30 years ago now.

So, it's not like this is going to be money out of the pocket of a government agency, number one. Number two, as you know, from your experience, government agencies like AGs offices, do not have the manpower to do the kind of monitoring oversight that we are talking about now, right? Going into a place and seeing if the controls are being appropriately implemented and tested, and then testing them independently. So, it almost enhances the AGs office's staff through the independence, right? And the professionalism of the monitors that are being put in place. So, there's great benefit there for the public to have some oversight over a company that has already been challenged through an AG action, like a consumer protection case or an antitrust case or fraud case. I think, it makes a big difference. And, I think, this podcast hopefully will be alerting AGs offices, and attorneys representing companies and companies that this is a viable and effective alternative.

Ashley Taylor:

So then, let's address a couple of the issues that I am sure, a company representative listening to this podcast is probably thinking this all sounds great, but would the monitoring create a document trail that would become public and therefore perhaps create fodder for a plaintiff's law firm is... Then how do you address that concern?

Vin DiCianni:

Yeah, a great question. And so typically, when we are monitoring for government agencies, we are doing it under some type of protection if it's a criminal matter or it's a civil matter that allows the monitor to be sort of frank in the discussion of the findings we're making. So, we have a couple of cases. Sometimes we're submitting a redacted report that will protect trade secrets, business, operational kind of things, or business development and that kind of thing. So, it's a redacted report that can be made public.

And then there's the more fuller report that is privileged or protected between the company and the state agency. So, that has worked very well in some of the matters that we're working on, but it's a concern. You have to remember that the monitor is not doing the deepest dive into the company, all aspects of the company, they are really looking at what has there been agreed to under the settlement agreement for the monitor to look at, right? And that's where, I

think, lawyering becomes very important in crafting the language of that settlement agreement, because the monitor is restricted to the four corners of that settlement.

Ashley Taylor:

Mm-hmm.

Vin DiCianni:

I hope that helps.

Ashley Taylor:

Yeah. That's important. Would you monitoring, for example, include potentially on site visits and spot inspections?

Vin DiCianni:

Certainly. And again, it depends on what has been agreed to, so we don't make it up, right? So, if monitoring element of a settlement agreement says, "We want you to go out and look and talk to the sales force and see if they are doing things appropriately, and they're not overselling, or they're not making commitments to things that are not real." Those kinds of things. Well, sometimes you have to look at that, but the way we posture that is, we're helping the company stay compliant, right? And there's a great value there for companies to think about that. Because obviously, if they're entering into a settlement with an AGs office, they've done something that the AGs office has found, and now we have to remediate it, right? And so, how best to remediate it, leave it up to the company to do it itself. And self-report, and really not understand what the issues are or have a third party come in that has been through the trenches in terms of working with companies on compliance.

Ashley Taylor:

Then your comment makes a nice segue into the final question. I think, I have trying to anticipate questions from the audience, particularly from companies. And that is, when do you enter the picture, right? And are you brought to the table by the government? Are you brought to the table by defense council? So, talk to us about that.

Vin DiCianni:

Sure. So, I think, it's really three different ways that we get brought in. So, the one we've been talking about is on the enforcement side, on the back end, right? So, the entity and the government have entered into an agreement and they have to have a monitor. So, at that point, it's usually defense attorneys reach out to us or companies and they need a monitor. And so, we will then be put up for consideration to be the monitor. So, that's one way we get involved, but what we're seeing more and more, and it's sort of the creative lawyering that I love as a former attorney. And that is bringing a monitor in earlier to maybe fix the problems that have been identified and then go back to the government said, "Look, we recognize, we had a problem and made mistakes, but here's the fixes we've put in place."

Now, treat us fairly right and give us the resolution that would be appropriate. And so, we are seeing that as one way of resolving it and that's making the fixes and the other is proposing that as a fix. So, going into the government and saying, "Look, how's this for a terms of a settlement?" We will put a monitor in place and we'll agree that we'll fix these things and have the

monitor report to you. And what we're finding is there's really a great ear for that and AGs offices and federal agencies like that very much, because you are going in with fixes that they would have considered, right? And they were going to propose to you. You're taking the bull by the horns and doing it up front. Let me tell you one story Ashley, that, I think, is going to be particularly instructive for your clients and you and I talked about it offline.

And that is, we were brought in a matter about a year and a half ago involving a company that it's in the financial services arena and was brought... It was sued by a federal agency in the US district court in one of the states and the agency got a temporary restraining order and put a receiver in place against the company. And that was basically going to shut down that company. And the company provided services that were valuable to people that were purchasing them. So, the attorney called me and said, "Vin, give me some ideas if I can go in and put some type of remediation plan in place so that the company can get off the TRO and get back into business." So, we gave them some ideas as I'm describing to you on terms of oversight and in terms of helping them the company put a compliance program in place that was real and of higher and effective compliance officer.

And so, that attorney put together what he called a business plan, submitted it to the agency and the court and everyone signed off on it. And it was a phased in return for the business. So, the TRO was lifted, the preliminary injunction was denied, and the company was allowed to reopen with the monitor in place while the case was pending for trial, which is another whole story for another day. But what a great success story for that company, because it got back out of this death sentence into being operational and now they resolved the case entirely, and they don't have a monitor.

Ashley Taylor:

Well then, that is a great example of how monitoring can be used as a tool and can be used effectively. So, we always want to close our podcast by giving the audience some practical tips and takeaways. So then, do you have one or two tips or takeaways in this area for the audience?

Vin DiCianni:

Sure. So, I think one is that independent monitoring should not be seen in the negative light that sometimes it is, and it really should be seen as a resource for, number one governments, government agencies particularly consumer protection divisions and others, because it should be considered part of the resolution. So, instead of just getting the fine, as I mentioned, think about a fix. And so, you're fixing the problems with some oversight to make sure that the fix is real. And then, the other one is this creative lawyering. I think, by attorneys really should be considered a little bit more often sometimes... And you know this from your practice, sometimes you're presented with situations that look dire, right? And the company's facing a period of suspension or potentially loss of a big contract or what have you, and being creative and coming up with a solution that's going to give the government what it needs.

And at the same time help the company improve its business practices, its compliance pieces and those things really can be a great takeaway. Those are two takeaways. The other thing I wanted to mention actually is your practice because... And, I think, we are seeing AGs office becoming AGs office around the country becoming much more active in consumer cases, antitrust and what have you. And so, I think, it's great that Troutman Pepper has this AGs practice and which is growing. So, I think, it's a great thing.

Ashley Taylor:

Well, I will build on your takeaways and share two of my own and I'll start where you ended and that is the issue of creativity. So, my first takeaway would be an appreciation of what creativity means, particularly in the consumer protection context, but more specifically in the state attorney general arena. And that is an understanding that the legal issue arises against a political backdrop. And I don't mean political in the sense of party affiliation. I mean, political in the sense of offices, priorities, stated goals, areas of emphasis, et cetera, and understanding what that is as you think about the tools that you should use including monitoring to resolve issues is that area of creativity. I think that you should start a case with a true understanding of what's motivating the regulator. And the second takeaway, particularly as it pertains to monitoring is to understand what Vin said at the beginning.

There are two aspects to this. One is punishment, and one is ensuring that a company is operating within the proper guidelines. And you want to present monitoring in a way that resonates with the regulator, which means you need to understand and appreciate how the regulator is approaching the case. Is it a case of punishment, even in the civil context, do they feel like a company needs to be corrected or do they feel like they just need to monitor in a more traditional sense to ensure the company stays within the proper guidelines, but presenting this third party independent monitor in a way that addresses their specific concern to me is the second key takeaway I would take. This is an important tool, but if the problem calls for a wrench, you don't want to present a hammer. If the problem calls for a hammer, you don't want to present a wrench. You want to present the tool that fits the problem.

So, then that would be my second takeaway for the audience. Hope that makes sense to you. Well then, thank you for joining us today. I know our listeners enjoyed your valuable insights, and I want to thank our audience for tuning in today. And please make sure to subscribe to this podcast via Apple Podcast, Google Play, Stitcher or whichever platform you use. And we look forward to seeing you here next time. Thank you again, Vin.

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