

Whose Work Is It? Building a Culture of Compliance By Operationalizing Laws and Regulations

A PRIMER ON THE WORK OF LEGAL COMPLIANCE PROFESSIONALS

By Suzanne E. Thoeni*

The purpose of this article is to acquaint the reader with the work of legal compliance professionals. It is intended to further the collaborative effort between the legal and the business communities, as they strive to address compliance with laws and regulations, and ensure that a business's operations are successful, as measured both by traditional business and legal compliance standards. This article, authored by a non-attorney, is the perspective of a legal compliance professional who may one day be your client, colleague, subordinate, or manager, or on whom, in some capacity, you may rely for success in your own professional endeavors.¹

Knowledge and Know-How

There is knowledge and there is know-how. The marriage of the two delivers results. The best results occur when sound knowledge is combined with skilled know-how. Knowledge alone is never enough, even in an academic setting, where knowledge is king but where the know-how for imparting and cultivating knowledge is what results in education and defines an educator. Knowledge without action is just information; without the requisite information, know-how cannot be appropriately employed and may be dangerous, as it may result in action without awareness of consequences.

In some situations, certain results must be continuously and consistently delivered by folks, with limited knowledge and limited know-how, in the course of performing their routine, daily tasks. Typically, procedures and task performance monitoring are established to ensure the quality of the output of such task performance. This is precisely what is required for businesses to ensure compliance with laws and regulations. That is, businesses must ensure that tasks are performed such that they reliably result in output which meets all specifications, including legal compliance. If businesses develop relevant tools and processes, then individuals will have the power to make decisions and act



on them, with consistent and compliant results, day after day. This seemingly simple end result is the objective. Determining how to get there, and realizing it, is the work of compliance professionals.

Managing the Globe

An idea, without execution, is just an idea. Execution without a supporting idea is just motion. If there are, in your organization, 10,000 people, all over the globe, who execute tasks every day that require certain considerations in order to be compliant with a certain law or regulation, what exactly is your challenge and how do you undertake it? You may possess exemplary knowledge of the applicable regulation, and have demonstrated your know-

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how in applying the regulation to specific situations. How do you address the situation where the scope of application is well beyond your ability, or desire, to directly manage it? Is it possible to “manage through others” when those others do not possess your knowledge, or even some close approximation, which it appears is imperative to responsible action and to achieving desired results? Your job is to answer this question, in the affirmative, and make it happen. This is not the typical work of lawyers. But it is the lawyers who understand the underlying laws and regulations and most clearly see the implications of noncompliance. In that respect, attorneys seem best suited to the task.

Building a culture of compliance, where individuals are both motivated and able to comply with a specific law or regulation, requires a skill set that is unrelated to deep knowledge of the law or its application in a specific situation. The needed skills include: building the enabling infrastructure, embedding it in existing processes so that it becomes part of established routines, educating individuals as to its purpose and use, monitoring activities to confirm proper use, and making process improvements to further compliance. The endeavor is more than advising executives of the organization as to the existence of a law and the importance of compliance. It is more than creating a policy which becomes, effectively, a mandate. It is more than communicating the importance of complying. The endeavor is based on reaching the indi-

viduals who perform the tasks in a way that may be, or may not be, in compliance with law. It is building the specific tools and processes that enable individuals to perform their daily activities within the bounds of the law or regulation, to identify exceptions which require special consideration, and to know how and when to direct such considerations to others for further handling. The imperatives include conceptualizing, constructing, and implementing the structure which serves as the enabler; in gaining acceptance among those whose task performance you seek to influence; in embedding processes and tools so thoroughly

throughout an organization that individuals internalize the processes and requirements that ensure compliance.

To a compliance professional, nothing is more satisfying or a better reflection of success in cultivating a culture of compliance than when someone, on a different continent, who you don't know and who doesn't know you, informs you that he or she cannot accommodate your request until he or she has performed a certain compliance-supporting task, and it is a task which you conceptualized, built, communicated, and implemented. It is at that moment that you know that you have succeeded, as the compliance consideration has become fully integrated into everyday routines. When you walk by the office of an employee, he or she has a process map on a white board that includes the step that you built into an existing process, and the employee has no idea



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Fire Prevention and Fire Fighting

If your organization is found noncompliant by means of an internal audit, a whistle-blower, an investigation, or an otherwise routine government inquiry, who owns the task of responding? Most likely, you, the attorney, own the work. At this point, noncompliance has become an issue or event. It needs legal disposition. It is a fire to be contained and extinguished. It may be expensive, time-consuming, worthy of executive management's attention, press-worthy, and potentially career-building; that is, of course, unless your charter was to ensure compliance, not merely manage noncompliance which becomes apparent. The question is, is your role to fight fires, or also to prevent them? The inherent challenge in the latter is the lack of show, and the requirement for a process, not point, solution. The challenge calls for a certain skill set which varies from that employed for point-solutions. In the absence of a fire, it is difficult to assess to what extent good preventative measures have been a contributing factor. With a fire, it is apparent who the firefighter heroes are. With prevention, it is far less clear. In the face of adversity, the level of investment — or lack thereof — in preventative measures becomes apparent. The compliance professional's obligation is to manage the organization's fires and fire prevention programs, relative to compliance to laws and regulations. However, the role is primarily focused on prevention as the key to both effective compliance with law and efficient business operations. Every compliance professional appreciates and is driven to avoid the disruptive nature of fire fighting

Managing Risk

The charter to manage compliance with law is a risk management mission. If it is done well, there is no quantifiable return on investment ("ROI"). In fact, there is most likely a negative ROI, due to the expense associated with putting compliance measures in place. Noncompliance may result in an array of costly events, from direct fines and penalties and legal fees, to indirect costs such as loss of brand equity, flight of customers, shareholders and employees, and higher cost of capital. Compliance is like an insurance policy, the value of which one hopes he or she can never fully appreciate. Risk cannot be entirely eliminated, and it is impractical to try to do so. The challenge is finding the right balance among accepting risk, reducing risk,

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keeping the risk source while selling the risk (e.g., insurance), and removing the risk source. Compliance endeavors to reach acceptable levels of risk when the risk source is present. This challenge involves both fire prevention and fire fighting.

The compliance professional is dedicated to both, and realizes that a higher investment in the former is offset by a lesser need to invest in the latter. Conversely, continuous investment in fire fighting reduces the resources available to invest in fire prevention, which is the means by which one minimizes the need to engage in fire fighting.



The Export Example

An example that illustrates the complexity in execution is compliance with the Export Administration Regulations (EAR).² The EAR requires, among other things, that certain technology be authorized for export, in advance, by the Bureau of Industry and Security (BIS).³ Noncompliance may potentially result in fines and penalties and loss of the export privilege.⁴ For an exporting organization, the consequences of losing the export privilege can be devastating. Even a demonstration of compliance, in the face of an investigation or simply in response to a government inquiry, can be a costly endeavor, in terms of direct costs — e.g., legal fees and employee time — and potentially indirect costs — e.g., brand equity and stock value. A simple disclosure of noncompliance takes time and money to generate.

The more robust a compliance program is in its specificity, the greater the opportunity for noncompliance with the program.

Consider a simple export example. Assume that your organization has items with encryption technology, which requires the government's approval prior to export. How do you ensure compliance with this regulation? First, how do you know that the item's technology is controlled by the EAR?⁵ You train engineers as to what technology is controlled by the EAR, and they then identify what items contain this technology. You most likely set up an internal process for capturing this information. The engineers are in fourteen countries on four continents. You develop a great training program. You do not train the engineers on the EAR. You do not train them in what technology is controlled, although you may mention this as your reason for asking them to perform a task. You train them on how to classify your organization's items according to the numbering scheme in the EAR. This requires significant engineering expertise, knowledge of encryption technology, and the ability to identify the specific technology in the EAR's classification scheme. Into the system that already exists for recording your organization's items, you insert the requirement for an export classification. Clearly, you cannot introduce this requirement in advance of training the engineers, globally. And, you must align the persons who manage the item information system to ensure that a field for classifications is built into the system, and that a rule is built which does not allow a part to be established in the system

without an accompanying classification. Already, you are relying on the Chief Information Officer and Engineering and Research & Development organizations to contribute to your compliance program; you need their cooperation, time, attention, and resources. After the parts are classified, you need to know the intended end use (e.g., military or commercial), category of customer (e.g., government) and geographic markets in order to apply the regulations to the items with a certain classification. Now you are relying on the Marketing and Sales organizations

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to provide the understanding and information you need. To make the determination as to whether or not prior government authorization is needed in advance of exporting, you must consider the item's classification according to its technology, to whom the item will be exported, how the recipient intends to use it, and where the recipient is located. You are responsible for synthesizing the information in a way that is relevant to application of the EAR to the intended export. After these steps are taken, you need to engage the Supply Chain organization in controlling the shipping process and the Engineering and Information Technology organizations in controlling the electronic, intangible transfers of related software and technology. You may also develop a relationship with National Security Agency (NSA), which may have an interest in your organization's technology. You need to coordinate with the Human Resources organization to determine if certain employees need to be licensed by the government prior to working with certain technology. In a large organization, rules, processes to house rules, and routines requiring information to flow through the processes must be established, so that such identification can be made on a timely basis on a large scale. In any event, the processes must be orderly enough to provide advance notification of items expected to be exported that require prior government authorization.

After items requiring authorization are identified, you may need to complete a request to the government. As the EAR is extraterritorial, and is applicable wherever the item or technology is in the world, you need to make sure that the item manufactured in China and exported to Germany is captured in whatever process you develop. And, your process needs to include everything you considered for the EAR, for China's export regulations as well. And, if your facility in Germany will distribute to the Middle East, for example, then your process must consider the EAR, the export regulations of China, and Germany's export regulations.

Now, you realize that your training needs to cover multiple countries' classifications schemes, and your systems may need to house several countries' classifications for a single item. Realizing these requirements, and putting them into practice is the work of compliance professionals, who may be you — the attorney — your subordinates, your manager, your colleagues, or your clients.

Sustaining the Effort

After a compliance program has been built, the systems and processes developed and implemented, the training plan and materials finalized and deployed, resources assigned and committed, the risk profile periodically assessed and corresponding adjustments made to the compliance program, what has been accomplished? If working well, then a culture of compliance is being built. This does not mean that the risk of noncompliance has been erased. It means that the risk that remains is what the organization has knowingly decided to retain and manage. The intent is that the remaining risk is of limited consequence if something goes wrong, and/or the likelihood of noncompliance is limited; the compliance program furthers the organization's delivery against this intent.

In addition to managing risk and preventing noncompliance, if there is noncompliance that captures the attention of government agencies, a sound compliance program serves as a demonstration of reasonable care and may serve as a mitigating factor in the face of fines, penalties and other government actions. Conversely, a compliance program which is poorly implemented, ignored, or otherwise less than it was intended to be may be an aggravating factor. It may have the appearance of willful noncompliance, as it demonstrates knowledge, perhaps even know-how, and conscious disregard of the means to comply with the applicable law or regulation. The commitment to a compliance program is more than developing it and a one-time deployment. It requires continuous monitoring, maintenance, adjustment and, sometimes, significant modification to maintain the organization's willingness and ability to follow the program and remain compliant.

The more robust a compliance program is in its specificity, the greater the opportunity for noncompliance with the program. Accordingly, to lessen this risk, some attorneys prefer more general, high-level requirements. However, it is difficult to ensure consistent, compliant results, at the transaction level,

if individuals performing tasks do not have guidelines by which to operate on a daily basis. It is a challenge to construct a program that is specific enough to provide meaningful direction, yet flexible enough to be implemented locally in a variety of ways,



without impairing the integrity of the program and its intent. This is the compliance professional's responsibility and represents one of the dimensions of the compliance professional's role that is more art than science.

Managing the Devil

Regardless of the compliance program's unique content, structure, deployment, or level of automation, it should reflect an understanding that all noncompliance happens at the transaction level; that is, "the devil is in the details." Without enough depth and breadth to allow for scrutiny of each relevant transaction, the compliance program is inadequate in its coverage and its intended risk management. Risk is not managed by decree, proclamation, mandate, or general statements. It must be managed at the detailed transaction level, as this is where noncompliance occurs. It is managed using well-defined and well-executed processes that are consistent in their use, decision-making, and output and that are sufficiently flexible to allow for unique implementation at the local level.

Managing at the individual transaction level implies a certain amount of specificity regarding how certain details are to be handled. Every specification as to how risk is managed in your organization is an opportunity for noncompliance with your specification. This is the challenge. The less you specify, the less reliable your compliance program and

your organization's compliance levels and your management of risk. The more you specify, the more opportunity there is for non-compliance with your specifications. That is, if too specific in its requirements, a compliance program may be impractical or

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burdensome to implement in all applicable situations. The challenge is to construct an internal program that is relatively easy to communicate, use, and manage, and that addresses, but does not dictate detailed handling of, activity at the transaction level, where noncompliance occurs. Also, monitoring for correctness and completeness of use of the compliance program is critical, to ensure adequate coverage. This is the work of compliance professionals, who have sufficient knowledge of the risk and the law or regulation to construct compliance processes and practices, who have operational experience and know-how which enable them to operationalize the risk mitigation effort, and who have equal respect for compliance, the operations of the organization, and the burden that operationalizing compliance puts on the organization. Compliance and risk management may be a global effort involving a limited array of individuals in an organization, or the entire organization. In any event, its development, execution and management require a unique skill set which meshes legal and

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operational considerations of the organization, to deliver results that match what the organization has determined as its appetite for risk, including the risk of noncompliance.

While this discussion has focused on managing risk, as opposed to influencing that which defines risk, another dimension to risk management is seeking to influence those laws and regulations that define the risk parameters. That too is within the purview of the compliance professional, who may engage in lobbying efforts, global organizations' subcommittees, or governmental advisory committees. Each organization defines its own path, and each professional decides if he or she finds this work appealing. The intent of this essay was to acquaint you with the work of the compliance professional, regardless of what your relationship to that role may be. Risk will be managed either explicitly or by default. The compliance professional seeks to manage it explicitly, so that the organization's risk tolerance and approach are reflected in its action. You, the attorney, may or may not deal with legal and regulatory compliance in the course of your career. Regardless of your level of responsibility, your awareness of the compliance role and its challenges and impact on the organization will serve to further the success of whatever business with which you may engage. **BLB**

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¹ Note that examples are provided for illustrative purposes only. While directionally correct, they are not intended, and should not be relied upon, to provide specific guidance or reflect correctness at the detail level. All information in this article reflects the author's personal point of view, based on her experience. It is not a representation of the view of any employer — past or present.

² See Export Administration Regulations, 15 C.F.R. § 730 (2007).

³ The Bureau of Industry and Security is a division of the United States Department of Commerce. See United States Bureau of Industry and Security, <http://www.bis.doc.gov>.

⁴ Enforcement and Protective Measures, 15 C.F.R. § 764.1-764.8 (2007).

⁵ See Export Administration Regulations Database, <http://www.access.gpo.gov/bis/ear/pdf/ccl5-pt2.pdf> (last visited Feb. 6, 2008).