

Compliance: What Is It and Where Does It Belong?

By [Robert F. Cusumano](#)

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This article is the fifth in a six-article series discussing the changing and dynamic role of general counsel and the realities they face as they create strategies to facilitate profitable and compliant business practices.

Compliance was once a thing people did (or did not do) until it became its own business or some kind of seemingly definable business function. We can trace this evolution to its origins in various corporate scandals, and we can follow it over time through the emergence of compliance as a specialty, Compliance as a Capital-C department, and compliance as an emerging career path complete with its own professional literature, conferences and bottomless pool of anxieties.

We know that a strong compliance ethic is critical to corporate success, or at least to the reduction of risk of catastrophic failure. We know that corporations are now populated by compliance professionals dedicated to the reduction of misbehavior. And we know that a variety of regulatory schemes now require, explicitly or implicitly, the establishment of compliance protocols. But do we really know what compliance is and where a compliance department should be situated within a company?

The development of compliance functions has been muddled by the absence of rigorous attention to the most basic organizational and professional aspects of the role. Because compliance tends to mean “compliance with law,” it sounds like a legal function. Therefore it is most often populated by individuals with some legal background and it is placed squarely within the jurisdiction of the general counsel and the legal department. Because it is casually thought that a good compliance officer must first and foremost be knowledgeable about the laws and regulations being complied with, it seems natural to recruit for legal experience and to promote based on standards similar to those applicable to lawyers. The result of this is, in most places, that compliance becomes a kind of junior partner to lawyers and Legal, subordinated both in organizational terms and in seniority.

This subordinated quasi-legal role has a number of consequences that tend to undermine the effectiveness of compliance professionals, not to mention their emotional wellbeing. Integration into Legal and subordination to lawyers places compliance in a particularly unempowered place in the corporate hierarchy. Lawyers do not run businesses, but are instead advisors, and having Compliance as the junior partner of an advisory function is not going to enhance its institutional authority. In addition, perceiving compliance as a quasi-legal function populates compliance with individuals who are often ill-prepared to understand the businesses and processes that need to become compliant. And the inevitable clash between business efficiency and the often anti-profitable activities of compliance overseers creates an environment of near despair for many in the profession, as they walk a tightrope every day, barely keeping their balance among the competing contradictory mandates being inflicted on them.

It is no secret that compliance lives in a paradox every day. The compliance literature is heavy with self-reflective thought pieces about how to be effective in an environment where your job is inherently alienating to others, about how to obtain the information you need when people do not want to give it to you, about how to be better “aligned,” about how to choreograph the disclosure of bad news without ruining relationships and wrecking information access, and about how to persuade people to somehow “be better.” This literature has spawned the abundant use of new-agey words like “embedded” and “facilitative” and “aligned,” to the point where it is difficult to know what those

words mean. Compliance literature is, by and large, all about emotional and social intelligence; it has become a forum for weeping together. Positioned as an unempowered quasi-legal function, Compliance fights human nature every day on behalf of our “better angels” and just about every compliance professional has the scars to show for it.

I believe that it is time to recast the compliance role entirely. Compliance is not, and should not be made into, a part of the legal advisory function in corporations. Compliance is an elemental *business function*, and it should be populated by individuals who understand business processes, the art and science of management, and the collection and use of data. Compliance skills, therefore, will certainly vary widely based on what products are being produced and how, but the core skills and training will have a central universal commonality: an understanding of the management of businesses. Compliance professional will, like other executives and employees, need to understand the law (and be advised by corporate counsel about the law), but their core professionalism lies elsewhere.

This model has enormous implications for the manner in which we may drive Compliance forward into becoming its own profession. The model implies business school over law school for basic training. It implies working in the business as on-the-job training, rather than working in the legal department. It implies matrixed reporting lines that are entirely the opposite of those I recommended for lawyers in an earlier article in this series: Compliance should report primarily through the business lines and only secondarily through Legal (if at all). At the senior levels, Compliance should be afforded direct reporting to both the CEO and the Board of Directors. Perhaps most importantly, Compliance should become its own profession with its own clearly delineated standards for admission into the profession, much like lawyers and accountants and auditors already have arranged.

An inevitable result of this kind of clarification of the role of Compliance, with its emphasis on professionalism and business knowledge and training, will be an elevation of the reputation and prestige of the compliance function and the individuals who reside within it. One might even imagine a symbiotic relationship between management and compliance in which there is an employment revolving door between the two, or in which tours of duty within compliance are regarded as essential to long-term career paths within management. Even failing that rosy aspiration, it seems clear the building Compliance on a firm base of business savvy, and getting it out of Legal, will do good service by removing one of the many causes of anxiety and ineffectuality in the field.

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