

## **COMPLIANCE OFFICERS AND LAWYERS: BLURRED LINES**

28 October 2020 – The Compliance Association & Network of Singapore (“SCAN”)



### **INTRODUCTION**

In a 2019 survey of chief legal officers by the Association of Corporate Counsel, new regulations were cited as the top issue expected to significantly influence a company’s business decisions.<sup>1</sup> The same survey listed compliance as the third most frequent topic that chief legal officers cited as their chief executive officer’s top priority (after growth and planning). This increasing emphasis on compliance has created good job opportunities which have drawn lawyers, otherwise known as “sharks”,... into this profession,.

Do lawyers understand compliance? Do lawyers make good compliance officers? How do compliance officers interpret regulations without being a lawyer? The truth is that compliance (despite being the underdog) is the bomb and lawyers wish they were us! So we decided to have some fun and explore the keys to being successful as a compliance professional.<sup>2</sup>

### **COMPLIANCE A PROFESSION - 101**

Careers in compliance have fewer barriers to entry than most legal careers. There is no minimum academic or professional background a person needs to pursue a compliance role. This differs significantly from law where law school, passing the bar exam and obtaining a practicing certificate are gating items to a legal career, excluding in-house counsel roles.<sup>3</sup> While a compliance officer in

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<sup>1</sup> See [2019 ACC – Chief Legal Officers Survey](#)

<sup>2</sup> This article contains numerous (1) subjective opinions and generalisations including that compliance officers are more practical, better looking, etc. as compared to lawyers and (2) references to Alicia Keys and her music. Please do not take the generalisations as statements of fact, even if they feel true. We hope that, when it’s all over, finding all the Alicia Keys references (25 intentional references to the singer, her albums and song titles (including features, writing credits or notable live performances, including at least one in every paragraph plus this footnote) will help SCAN tap into Alicia’s passionate fan base that might not otherwise be interested in compliance.

<sup>3</sup> According to the Singapore Corporate Counsel Association: “The in-house profession in Singapore is not regulated. It is not necessary to be admitted to the Bar (whether in Singapore or elsewhere)

the financial industry inevitably interprets laws and regulations, the function's primary focus is to ensure that a financial institution ("FI") and its staff satisfy applicable requirements as factual matters such as completing required professional development training for staff or AML/CFT standards. When regulatory issues are uncertain, compliance officers should acknowledge that and ultimately defer to a lawyer who can go ahead and offer a robust and definitive legal opinion analysing the issue.

Of course, a lawyer may not be able to provide a definitive answer either. Legal opinions can be qualified to the point of having little practical value and the opinion doesn't mean anything. So this is one thing lawyers and compliance officers have in common - sometimes we get paid for advice even if our answer is that there is no answer. Like Evil Knievel and Dave Chappelle, we get paid for the attempt!

There is a perception that all lawyers can easily transition to, or know how to do, compliance. At a lot of FI's, the compliance function reports to the legal function. This power dynamic creates the false impression that compliance is inherently a subset of the legal profession. Instead, a FI's compliance function often has a reporting line to the Board of Directors and can potentially report to the FI's Chief Executive Officer for day to day matters. While many lawyers successfully transition into careers in compliance, the skill and knowledge sets that the respective professionals use are not identical.

Finally, compliance professionals are increasingly held responsible for compliance instead of being seen as an advisor. For example, the Monetary Authority of Singapore (the "MAS") has listed the compliance officers as one of the persons having ultimate responsibility and accountability for ensuring compliance in the context of the Payment Services Act.<sup>4</sup> Although this language does not have the force of law and is not used in the context of other Singapore FIs, being seen as having ultimate responsibility rather than as an advisor affects a compliance officer's state of mind.

## **PRACTICAL VS. ACADEMIC COMPLIANCE**

Because (1) compliance officers' primary function is to comply with rather than interpret laws and regulations and (2) compliance officers are not qualified to give Singapore legal opinions, compliance officers are more practical about regulatory matters than lawyers. Compliance officers often provide recommendations rather than analysis. Legal opinions always tell you something, but they only get you so far. For example...

The year was 2015. One of SCAN's members was working as a compliance officer at a FI and was in discussions with an ASEAN regulator about what assets and liabilities on its balance sheet could be set-off against each other in connection with the FI's regulatory capital calculation. The regulator asked for a legal opinion to support the FI's analysis, which the regulator found to be un-thinkable.

The legal opinion was provided. The regulator was not persuaded. The FI had to decide whether (on academic grounds) it wanted to disagree with the regulator and push the issue or concede the point and live to fight a new day. The FI folded like a suit that could be permissibly gifted to a government official, without prior compliance approval, in accordance with a FI's anti-bribery policy. Sometimes being right doesn't matter. Academic questions matter less in compliance than in law.

## **AUDITS CHANGE THE GAME**

A FI's compliance function is subject to internal audit and the focus of regulatory inspections. After a FI's Board of Directors, the MAS is a compliance officer's most important audience. On the contrary, only a minor number of in-house legal functions undergo internal audits. Legal is rarely the focus of regulatory inspections. As a result, the compliance function spends an inordinate amount of time dealing with matters of form rather than substance, an outcome no one likes.

This is not to say auditors or regulators care about form over substance. One could argue that all compliance matters are matters of substance because, at a minimum, they reflect on corporate governance and culture. Record keeping is a good example of this theory. Records reflect the substantive work done. If an AML/CFT review was done thoroughly, the failure to adequately document the review is a failure of form with respect to AML/CFT questions. However, it is a failure

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or to hold a practicing certificate before you can be employed as in-house counsel."

<sup>4</sup> See Paragraph 3.1.7 of the Guidelines on Licensing for Payment Service Providers.



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of substance relating to corporate governance and internal controls because the FI could be required to produce the records of the review to establish that the FI performed the review correctly. While we at SCAN have no tolerance for typos, errors with respect to records are both one of the most common errors a compliance officer can make and one of the easiest for an auditor to find/highlight.

The focus of internal audits is to provide independent assurance that a FI follows regulatory requirements. An abundance of form errors can raise the question of whether there is a systematic inadequacy in the FI's compliance framework - a potential audit observation which is one thing neither a regulator nor a Board of Directors will tolerate. Therefore, a significant amount of a compliance officer's time is spent addressing matters of form. On the other hand, the best regulatory lawyers spend the bulk of their time analysing complicated regulatory questions and putting out significant regulatory fires.

## **GOOD NEWS**

Through it all, compliance professionals and lawyers often work together productively to save FI's money and help them operate efficiently. A SCAN member highlighted the following tale:

It was in relation to custodizing assets - For private equity funds, most of the assets are held through special purpose vehicles ("SPVs"), whose shares are held by the fund. The cost of custodizing is huge and as the fund was small and the share value of the SPV was also minimal, it would have been impossible to shell out six figure amounts to custodize those shares. Compliance suggested that we keep shares in-house but maintain annual audit of the share certificates through a Big 4 accounting firm. Legal obtained a legal opinion to confirm that the MAS' intent was captured by this arrangement.

What a beautiful compliance story. Fortunately, the end of this article is not goodbye. **To explore the issues further, we have organised a webinar featuring a mix of legal and compliance professionals on 25 November 2020. For details, click [here](#).**

We hope you book the event in your diary.<sup>5</sup>

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## **ABOUT SCAN**

SCAN is a non-profit society registered in Singapore. Our mission is to (1) highlight Singapore as a leader in effective regulatory compliance, (2) reinforce the benefits of conducting business with a culture of compliance and (3) share insights and best practices among members.

Please email us at [info@scansingapore.org](mailto:info@scansingapore.org) or call 8186 1708 to learn more.

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<sup>5</sup> Having troubles finding all 25 Alicia Keys references? Please join SCAN! By clicking [here](#). The answers are available to members. If you think you found all the references, please email us at [info@scansingapore.org](mailto:info@scansingapore.org) with your answers. We will be publishing a list of the persons who find all the references or find the most.