

BUSINESS VS COMPLIANCE

5 October 2020 – The Founding Members of SCAN



INTRODUCTION

In the first editorial of the Compliance Association & Network of Singapore (“**SCAN**”), we are delighted to share our perspective on the timeless debate: Business vs. Compliance.

To start, we would like to dispel some common myths about compliance officers:

- Compliance officers hate making money – Not true.
- Compliance officers get off on saying no – Sometimes true. It feels amazing when the front office has been a pain all week.
- Compliance officers are humourless – Absolutely not true! Perhaps you should be taking a hard look in the mirror regarding the quality of your jokes.¹

The reason many of these myths exist is due to the literal and figurative walls that exist between compliance and the front office. Despite working together to achieve common goals, the two groups do not know each other well. Having said that, at the end of this article we have included a selection of our favourite stories of compliance and business working together well... and/or badly.

THE IMPERFECT ALIGNMENT OF INCENTIVES

One could argue that the relationship between the front office and compliance is designed to be adversarial. The Monetary Authority of Singapore’s (“**MAS**”) Guidelines on Risk Management Practices – Internal Controls contains the following content regarding staff compensation:

Compensation policies for risk management, control and valuation functions should be sufficiently independent of the performance of trading activities or sales and revenue targets. This is to avoid providing incentives for such staff to condone excessive risk-taking in the institution.[emphasis added]²

¹ This would also be a fair comment to direct to the President of SCAN.

² See Paragraph 2.10 of the Guidelines

Compliance officers generally expect that their overall compensation to be higher if the financial institution's ("FI") revenues are higher. When a FI makes more money there is generally more money available to compensate employees. On the other hand, the amount of money a compliance officer saves when he or she helps a FI avoid a regulatory issue is harder to quantify.

When you look at the MAS' guidance regarding the compensation of compliance officers, it states that compensation should be sufficiently independent from revenue targets to avoid providing incentives to condone excessive risk taking.³ For economic and governance reasons, compliance officers are risk averse compared staff who are not in control functions. Therefore, when there is a difference of opinion between a compliance officer and a business person, in many cases both people are correct because they have been instructed to weigh the risks and rewards differently.

GREY IN COMPLIANCE

There is a remarkable amount of grey in compliance. Market practice can differ from or be more important than technical application of the law. There are also issues where a person can receive conflicting advice or have conflicting experience with a regulator.⁴

For these and other reasons, answers in compliance are not always black and white. Biz folks... we realize this disappoints you. We should also acknowledge that some issues are time-sensitive which requires a quick decision such that, if the compliance officer needs time to study the issue, that can be the same as a "no".

We would be remiss not to acknowledge the potential for a compliance officer to make an issue sound complicated in order to avoid giving a definitive answer and risk later being found to be wrong. While this may be an understandable human frailty, it is a legitimate frustration of business people.

THE INCREASING ACCOUNTABILITY OF THE COMPLIANCE OFFICER

In general, responsibility for management of a company is held by the FI's board of directors. However, the accountability of compliance officers seems to continue to increase. For example, in the MAS' Guidelines on Licensing for Payment Service Providers, the MAS included the compliance officer as one of the persons (along with directors, the CEO and certain other roles) as having "the ultimate responsibility and accountability for ensuring compliance with applicable laws and regulations."⁵ In Hong Kong, the Securities and Futures Commissions critically commented on a FI's Legal & Compliance function noting that the department "merely performed an advisory function and did not exercise a supervisory or review function."⁶

We believe compliance is fundamentally an advisory role. Many compliance issues boil down to questions of risk tolerance. However, if regulators ascribe ultimate accountability to the compliance function, it is inevitable that compliance officers will become more conservative as they would be subject to increased personal and reputational risk. Meanwhile, because a compliance officer lacks the authority to ultimately control the decisions of the business, the options to become (i) to document and escalate all matters that are grey (because there is little perceived upside to taking a risk) and/or (ii) quit your job. These options also raise the stakes for front office staff who now have to sign off on a matter questioned by the compliance function. Of course, the front office can document why they think the compliance officer is being unreasonable... and so it goes.

THE PROCESS OVER SUBSTANCE DILEMMA

Many areas of compliance emphasize process over substance. We have seen cases where a FI has been critiqued on the basis of "not documented equals not done". Often compliance seems to be a

³ One could argue that this language implies that front office staff are incentivised to take excessive risks.

⁴ We have been in arguments where both sides support their case by saying "I've spoken to the regulator".

⁵ See Paragraph 3.1.7 of the Guidelines on Licensing for Payment Service Providers.

⁶ See Paragraph 20 of the [Statement of Disciplinary Actions against Guosen Securities \(HK\) Brokerage Company, Limited.](#)

theatre of procedures rather than a genuine attempt to comply with the spirit of applicable law.

There are no easy answers to this issue. Process defends against exploitation by bad actors who would otherwise take advantage of gaps in a less detailed governance system. Unfortunately, process also burdens the good actor with additional costs and efforts that reduce his or her productivity. Reasonable people can disagree on the appropriate balance of process vs substance. However, absent a big picture lens it is understandable that good actors would be frustrated by compliance.

LACK OF TRUST

For the foregoing and other reasons, in many FIs there can be a lack of trust between the front office and compliance. Ideally, the different perspectives help the FI weigh risks vs opportunities. However, the distinct priorities can cause tensions and problems, including causing business people to stop trusting the judgement of the compliance function.

GOOD NEWS

Obviously, we need to find a way to wrap up this first article on an optimistic note... or we could host a cage match where business vs compliance fights to the death.

We've decided on a middle ground – to sponsor a panel on Wednesday, 28 October at 6 pm discussing these issues with a mix of business and compliance executives. For details, click [here](#).

It will be like a compliance training course except that it will not count towards your required training hours for regulatory purposes.

Try to tell us now that SCAN does not understand business people!

Our Favourite Business vs. Compliance Stories

For the sake of everyone, these stories are anonymous.

The Anonymous Feedback

Anonymous feedback after an AML training course conducted by the compliance officer - "I learned a lot, including how to launder money without getting caught. Can you please do a course on insider trading?"

The Phantom Letter

Several years ago, our New York office had closed. One of the traders said he heard that the New York compliance department had sent out a letter to all clients about the closure. The whole trading desk became furious saying that the letter gave the impression that our business in Asia was closing and was the reason for the downturn in sales in Asia – a downturn they had apparently spent weeks trying to figure out. They kept saying "Now it all makes sense." For that day, Compliance was the reason that we had struggled in Asia for three months... until New York woke up and I could establish that no letter had ever been sent.

I came in the next morning ready to accept an apology graciously. The wait continues.

The Uncooperative Client

A notoriously difficult client, who was set to have their account closed due to delays in replying to compliance inquiries, contacted the business team saying they'd be bringing their business elsewhere. A member of the business team raised the issue to compliance and a one-sided shouting match ensued. The compliance officer was told that this is a well known client and a personal friend but as they continued to ask questions, this client was downgraded from friend to acquaintance and then eventually it turned out they don't know each other. Fortunately, a compromise was reached and the client was given the chance to respond to inquiries and did so fully. The compliance officer received an apology in this instance.