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# Constitutive Compliance

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## CONSTITUTIVE COMPLIANCE

*Edward J. Janger\**

I come to the topic of this roundtable as an outsider. I teach bankruptcy, contracts, and commercial law, so my observations about antitrust and compliance are trans-substantive; brief, and offered at the highest level of abstraction. I offer three broad insights about the role of compliance, generally within a firm: (1) compliance should be viewed as a core topic in corporate governance; (2) compliance should focus on fundamental behavioral norms rather than complex rules; and (3) compliance should be thought of as constitutive rather than constraining. Insofar as these insights apply to antitrust, there are considerable differences among types of violations as to which level of the firm needs to be the focus of the compliance obligation: directors, officers, and product line employees.

### I. COMPLIANCE AS GOVERNANCE

As a starting point, “compliance” is not just a department—it is a goal of the firm as a whole.<sup>1</sup> Antitrust violations do not just happen within business lines. Compliance operates differently on different levels of the firm. Owners face different incentives and have different obligations from directors. Directors have different concerns than officers, and both face different incentives than product line employees. Where antitrust is involved, the types of violations that can be committed vary with the level of the firm. Mergers are arranged at a high level within the firm, while price fixing and other forms of anti-competitive behavior happen at both high and lower levels of the hierarchy. Once compliance is viewed as pervasive, it is more than an “auditing” function. At the top

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<sup>1</sup> James Fanto, *Advising Compliance in Financial Firms: A New Mission for the Legal Academy*, 8 BROOKLYN J. OF CORP., FIN., & COM. L. 1 (2013).

level, fiduciary duties and capital requirements compliment anti-trust compliance by ensuring that the firm has the wherewithal to internalize the risks associated with its operation. At the operations level, compensation structures might reinforce compliance efforts by ensuring that managers both benefit from their successes and have skin in the game over the long haul, if short-term successes turn into long-term failures due to violations of the law. These techniques will help integrate compliance norms into corporate behavior.

Treating compliance as pervasive also moves the “function” beyond the compliance professionals themselves and makes it an element of firm culture—a topic for firm leadership at the highest level. This is important because compliance professionals are often seen in an adversarial posture to the business people, imposing complicated rules that interfere with the money-making aspects of the business. This adversary relationship makes it difficult for compliance officers to gather information and obtain cooperation.

Compliance can, instead, be viewed as an aspect of firm culture—part of the overall mission and identity of the firm. Financial services firms, for example, can describe themselves as “lean and hungry,” made up of people who “eat what they kill,” or alternatively, as a firm that “makes markets and invests in valuable enterprises.” A Systematically Important Financial Institution (“SIFI”) might find it important to also make it part of its firm culture to avoid “breaking the economy.” A manufacturing firm can describe itself as providing “quality products to consumers to improve their lives” or it can describe itself as “pushing by maximizing market share.” Tech firms can make, “malware,” or they can “do no evil.” The difference in characterization will guide behavior throughout the firm, and will suggest contrasting stances toward compliance with the law. If compliance is viewed as part of the mission of the firm, then the compliance professionals can work from a stance of “enlistment” rather than “enforcement.” Instead of sending the message that business line employees are suspected of wrongdoing, the message can start from an assumption the employees are honorable and loyal to the firm’s mission.

## II. RULES V. PRINCIPLES

Law does not exist for its own sake. Legislators, regulators, and judges seek to influence behavior in ways that further social welfare. Compliance, too, seeks to ensure that behavior is consistent with the goals and interests of the firm and hence the law.

A consistent problem in antitrust compliance, securities compliance, banking, and healthcare compliance is that the law has become quite complicated. This complexity may be driven by the complexity of modern transactions or by the desire of regulators to catch businesses that are fitting within the letter of the law but ignoring the spirit. Complexity can also be driven by industry desire for safe harbors for particular transaction types. In either case, the complexity of the rules can obscure the underlying behavioral norm that is at stake. Compliance may appear pointless and silly. When a firm is oriented toward compliance with the letter of the law rather than its spirit, or pushing the boundaries of the law, compliance efforts seem divorced from rationality and sense.

Since compliance takes the law as it finds it, this complexity is part of the landscape, particularly where antitrust is involved. This creates two related problems. On the one hand, legislative drafters may obscure the underlying behavior that is at issue—the “why” of the prohibition. Second, courts, in explaining outcomes may not lose the thread as well. If the goal is influencing behavior. But legal complexity need not hamstring compliance (or at least most of it). Instead, compliance professionals need to become adept at articulating the underlying principles in ways that can be understood by ordinary business people without doing case research. This is just as true for line employees as it is for high level corporate managers. Where antitrust is involved, everybody in the firm needs to understand the need to compete rather than collude. Compliance is about articulating “cans” and “cannots,” but it is also about explaining the “whys,” so that unfamiliar situations can be addressed.

### III. COMPLIANCE AS CONSTITUTIVE

In sum, compliance norms need to be incorporated into firm culture. If the firm sets out to be a good corporate citizen, it will share with its employees the fact that the duty of the corporation is not just to maximize profits in the near term, but also to build the company’s reputation as a good corporate citizen; not just as an instrumental means to an end, an exercise in the firm’s self-definition. Back at the turn of the 20<sup>th</sup> century, Brandeis challenged the idea that the sole goal of a business person was to maximize the return to shareholders.<sup>2</sup> The view has not been widely accepted,

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<sup>2</sup> Louis D. Brandeis, *Business: A Profession (Chapter 1)* (available at:

but if the health of the firm is viewed over a the long-term, the Brandeisian broad view and the modern narrow view of fiduciary obligation are likely to merge. Reputations take a long time to build and a short time to destroy. There are firms with reputations as both good and bad corporate citizens, and the officers and directors can choose which type of firm they want to be, and what message they wish to convey to employees. Just as nations seek to identify themselves by articulating national values, compliance helps the firm to constitute itself by articulating the values of the firm as a whole—by establishing the culture of the firm.

Yet how is a firm with a “good” antitrust compliance culture to compete in a world of less enlightened firms? Must the shareholders pay the price? First and foremost, it is the role of the law to ensure that firms with good compliance are rewarded. But even in a world where legal rules are optimally framed, the biggest winners will not be the firms that color within the lines. John Langevoort has pointed out that in a world where legal risk is normally distributed, the big winners will be the “lucky” risk takers.<sup>3</sup> The big losers will be the unlucky risk takers. The “reasonable” risk takers will perform more closely to the mean—at least in the near or medium term. This is where compensation structures become important. Effective compliance and a compliance oriented firm culture may reduce risk taking. This will reduce legal risk to the firm, but it may also harm results in the short term. This, again suggests the importance of compliance integrated into firm culture, compensation structures as well as compliance processes.

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<https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/business-a-profession-chapter-1>) (“real success in business is to be found in achievements comparable rather with those of the artist or the scientist, of the inventor or the statesman. And the joys sought in the profession of business must be like their joys and not the mere vulgar satisfaction which is experienced in the acquisition of money, in the exercise of power or in the frivolous pleasure of mere winning.”).

<sup>3</sup> Donald C. Langevoort, *Behavioral Approaches to Corporate Law*, RES. HANDBOOK ON THE ECON. OF CORP. L. (Claire A. Hill and Brett H. McDonnell eds., Northampton, Mass.: Edward Elgar 2012).