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# THE PROFESSIONALIZATION OF COMPLIANCE: ITS PROGRESS, IMPEDIMENTS, AND OUTCOMES

JAMES A. FANTO\*

## ABSTRACT

*This Article explores the background and reasons for the uncertain professional status of compliance. After identifying the nature and origin of compliance, it explains that there is now an accepted model of compliance activities. It then elaborates on the key features of an occupation that scholars identify as having achieved professional status and explains the ways in which compliance has progressed to achieving them. It discusses how this field does not possess all the features of a profession, particularly the state government-approved licensing that provides control over their occupation by practitioners. The Article then offers several reasons for this incomplete professional status, with the most significant being the ambiguous relationship between compliance and the established legal profession and the federal government's preference for compliance officers not to be members of a strong profession. It observes how, from time to time, legal authorities and lawyers assert control over compliance as if it were in their domain of influence, but at other times they have been passive or complacent with respect to compliance practitioners. It explains how the federal government through regulators and enforcement officials benefits from compliance officer's weak professional status by using them as their "eyes and ears" in organizations. The Article then argues that the outcome of compliance's professional journey matters for organizational conduct, contending that having a strong professional identity would give compliance officers the independence and authority in organizations that would enable them to guide and advise organizational actors on how to conduct their activities in accordance with law, regulation, and ethics. It offers recommendations as to the future of compliance as a profession, both from an ideal and practical perspective. It observes that compliance might ideally become an independent profession by being grounded in organizational studies. However, it explains that the legal profession will likely continue to exercise its authority over compliance, which means that the compliance field risks*

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*remaining a subdiscipline of that profession with negative professional consequences for compliance officers. The Article concludes by recommending that compliance officers who are lawyers should become a recognized part of the legal profession, but it acknowledges that this professional outcome awaits developments in the compliance field and pressure from compliance officers themselves demanding professional status.*

## INTRODUCTION

For the past three decades, the story of compliance has been one of progress as it has become recognized and accepted as an important internal control activity in business firms and other organizations. Compliance is the organizational function which ensures that those working in and on behalf of the organization, and thus the organization itself, are following laws, regulations, and internal rules.<sup>1</sup> Compliance is thus part of an organization's internal, as opposed to external, control because it is helping enforce internally the legal obligations imposed on organizational activities by the government, broadly defined to include federal, state, and local government authorities.<sup>2</sup>

Until relatively recently, compliance was not generally a stand-alone firm function, but was engaged in by those, like inside counsel, who had other organizational roles.<sup>3</sup> Because, over time, the number of laws and regulations applicable to organizations and their employees and agents has grown, as has the risk of organizational liability for legal violations, organizations have had to enhance their compliance function. In some domains, Congress or regulators have required organizations to have a chief compliance officer or "CCO" who implements a compliance program for the organization that involves a defined set of activities and practices in which compliance officers engage.<sup>4</sup> It is thus understandable that compliance has become a separate and established function in organizations, particularly large ones, where compliance officers often work in their own department.<sup>5</sup>

Thus, from being hidden away in the "back office" of organizations or being identified by their other tasks, those engaged in compliance now have a recognized title—compliance officer—and are visible in directing others on how to do their organizational activities in compliance with law and regulation and are consulted on an organization's practices and decisions.<sup>6</sup> The CCO is

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1. See GEOFFREY P. MILLER, *THE LAW OF GOVERNANCE, RISK MANAGEMENT, AND COMPLIANCE* 157 (2d ed. 2016).

2. See *id.* at 157–58.

3. See *infra* text accompanying notes 174–76.

4. See *infra* text accompanying notes 46–50.

5. See, e.g., *Global Compliance*, GOLDMAN SACHS, <https://www.goldmansachs.com/careers/divisions/global-compliance/index.html> (last visited Dec. 10, 2020) (describing compliance at this investment bank as being within the Global Compliance Division).

6. See *infra* text accompanying notes 65–89.

often a key member of the chief executive officer's senior executive team, meets regularly with the organization's board of directors, and provides advice on all major strategies and decisions.<sup>7</sup> Indeed, court decisions, laws and regulations, and regulatory guidelines have made it clear to boards of directors of all organizations that, as part of their duty to oversee their organization, they have to make sure that it has effective compliance, which generally includes having a CCO in charge of the compliance function.<sup>8</sup>

As a result of the increased prominence and status of a compliance officer, those taking the position, including many lawyers, no longer fear that compliance is a career "dead end." Rather, partners at major law firms accept CCO positions in major organizations, and compliance officers progress up the hierarchy in their organization or are recruited to other organizations, with enhanced responsibilities and compensation.<sup>9</sup> Universities and law schools have responded to the perceived growth in the importance of compliance by offering programs to their students to prepare them for this organizational activity and to assist them in being hired as compliance officers.<sup>10</sup> Those working in the compliance field recognize that they are engaged in a special activity and have formed organizations of compliance practitioners to share their specialized knowledge and practices.<sup>11</sup> This knowledge has become increasingly formalized and theorized,<sup>12</sup> and compliance is now receiving considerable attention from scholars in a range of fields from law to organizational studies.<sup>13</sup>

To those who study the history and development of occupations, the above story of compliance has the sound of one that is achieving professional status.

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7. See Deborah A. DeMott, *The Crucial but (Potentially) Precarious Position of the Chief Compliance Officer*, 8 BROOK. J. CORP., FIN. & COM. L. 56, 64 (2013) (describing this role of providing compliance advice to an organization's major actors).

8. See *infra* text accompanying notes 98–102.

9. On CCO compensation, see BARKERGILMORE, 2019 COMPLIANCE COMPENSATION REPORT 15 (2019) (noting that in large firms the total compensation of the CCO is in the neighborhood of \$500,000).

10. See generally James A. Fanto, *Preparing to Become a Compliance Officer, and the Academy*, in MODERN COMPLIANCE: BEST PRACTICES FOR SECURITIES & FINANCE 755, 760–63 (David H. Lui & John H. Walsh, eds., 2015) (discussing this trend). See also *infra* text accompanying notes 153–55.

11. See *infra* text accompanying notes 158–60.

12. See, e.g., INT'L ORG. FOR STANDARDIZATION, INTERNATIONAL STANDARD: COMPLIANCE MANAGEMENT SYSTEMS—GUIDELINES, ISO 19600 (2014) (a code of compliance management from an international organization for standardization of knowledge and practice).

13. The academic work on compliance is large and growing and will be cited from time to time in this Article. Representative works include Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2082–83 (2016); Ann E. Tenbrunsel et al., *Building Houses on Rocks: The Role of the Ethical Infrastructure in Organizations*, 16 SOC. JUST. RSCH. 285, 293–96 (2003). See *infra* text accompanying note 154 for a reference to the creation of theoretical knowledge about compliance.

As will be discussed in greater detail below,<sup>14</sup> an occupation can be said to achieve the status of a profession when its practitioners reach a number of milestones.<sup>15</sup> Conscious of performing a unique activity, they are empowered to define its nature and difference from other practices and to control who is allowed to engage in it.<sup>16</sup> Education and training for those who aspire to do the activity, which are overseen by practitioners, take place in universities or specialized schools associated with them.<sup>17</sup> Knowledge about the activity is created, theorized, and codified, again at the direction of practitioners generally working together and conscious of being engaged in a common endeavor.<sup>18</sup>

Certainly, compliance appears to be following the standard trajectory of a profession. As referred to above and as will be discussed more below,<sup>19</sup> compliance has emerged as a distinct internal control activity in organizations. Its practitioners, who are often grouped together in a particular organization, are aware that they engage in a distinct practice with a defined set of activities.<sup>20</sup> They develop and share their knowledge among each other, including in their own organizations, and engage in projects to theorize and codify it.<sup>21</sup> They have supported the growth of compliance training programs in universities and in business and law schools.<sup>22</sup>

Yet this professional ascendancy of compliance remains incomplete in a critical respect: compliance practitioners have not received from state governments the licensing monopoly of their occupation that is the hallmark of established professions in the United States.<sup>23</sup> While the government in general has been supportive of their activities—indeed the federal government has required organizations in certain domains to have a compliance function—it has not given them control of their field, typically evidenced by a state license, and its recognition that theirs is an activity requiring this special status because its practitioners act for the public interest.<sup>24</sup> Without this support and recognition, compliance officers, at least in the United States, find that, despite their advances, they have a weakened organizational status in comparison to recognized professionals who work in organizations. They also find that they

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14. See *infra* Section III.A.

15. See generally ELIOT FREIDSON, PROFESSIONALISM: THE THIRD LOGIC 127 (2001) (describing the milestones as specialized work grounded in theoretically based knowledge and skill, control over that work, protection in the labor markets arising from qualifications, formal training associated with higher education, and an ideological focus on doing good rather than just economic gain and efficiency).

16. See *infra* text accompanying notes 114–16.

17. See *infra* text accompanying notes 117–20.

18. See *infra* text accompanying notes 121–23.

19. See *infra* Section III.B.

20. See *infra* text accompanying notes 158–60.

21. See *infra* text accompanying note 160.

22. See *infra* text accompanying notes 153–54.

23. See *infra* text accompanying notes 124–28.

24. See *infra* text accompanying notes 164–67.

risk incurring a liability for organizational actions that would typically not be assessed against a professional advising an organization.<sup>25</sup>

This Article explores the reasons for the incomplete professional status of compliance. It argues that the most significant reason is that the legal profession, out of which compliance emerged, has been ambivalent towards compliance: at times, it claims that compliance is a legal activity over which legal authorities should assert control because it is related to legal practice or is a subfield under the professional authority of the law.<sup>26</sup> At other times, legal practitioners appear indifferent to compliance practice and turn a blind eye to lawyers practicing as compliance officers.<sup>27</sup> Another significant, related reason for the uncertain professional status of compliance is that the government, whether state or federal, has not tried to resolve this ambivalent relationship of compliance with the legal profession.<sup>28</sup> Indeed, while federal government officials have supported the distinction between compliance practitioners and lawyers, they have not done this to promote compliance as a stand-alone profession, but to maintain their own control over and use of compliance practitioners as their internal representatives in organizations.<sup>29</sup> In other words, without full professional status compliance practitioners cannot use an independent professional judgment to resist requests from government officials for them to serve specific regulatory or enforcement purposes in their organization.

The final reasons for compliance's professional situation that the Article explores are that its professionalization, with the above pressures from the legal profession and the government, is occurring at a time when those in other disciplines than the law are asserting that their discipline should be the intellectual foundation for compliance and when technological developments are transforming the very nature of compliance. Managerial scholars, particularly those outside the United States, contest the legal orientation of compliance and argue that compliance would be more effective if it had other intellectual foundations.<sup>30</sup> Moreover, technology is being used both to help compliance officers do their customary tasks and, sometimes, to replace them in a given activity.<sup>31</sup> Regulators who have in many cases required organizations to have a compliance function now expect organizations to make use of technology in their compliance, technology known as regulation technology or

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25. See, e.g., Court E. Golumbic, "The Big Chill": *Personal Liability and the Targeting of Financial Sector Compliance Officers*, 69 HASTINGS L.J. 45, 49 (2017) (discussing compliance officer liability in financial firms).

26. See *infra* text accompanying notes 178–85.

27. See *infra* text accompanying notes 186–92.

28. See *infra* text accompanying notes 203–06.

29. See *infra* text accompanying notes 207–13.

30. See *infra* text accompanying notes 217–21.

31. See *infra* text accompanying notes 232–36.

“Regtech.”<sup>32</sup> In other words, compliance is coming of professional age right at a time when technology is disrupting and transforming its practice, including by giving organizations a reason to reduce the number of compliance officers by automating compliance.

The Article contends that the outcome of compliance’s professional journey matters because compliance officers will be more effective if they are recognized professionals, rather than assistants to the legal department, deputies of a federal government agency, or technocrats of some kind. In the complex legal and ethical environment in which organizations function today, employees and other organizational actors need a compliance officer within the organization who understands well the organization’s business and affairs and the applicable legal and other obligations, and who can thus guide them in meeting these obligations. The officer must have the independence within the organization and outside it to be able to provide guidance and advice that balances organizational and governmental interests. That independence and distance from other interests can best be offered by a professional. Being a professional would also help the compliance officer resist the organizational and federal governmental pressure to be no more than an administrator of compliance technology.

This Article proceeds as follows. Part I describes the progress of compliance as an accepted and necessary internal control function within U.S. organizations. After identifying the nature of compliance, it briefly discusses its origin “stories” in regulation governing different industries and in criminal law. It then explains that there is now an accepted model of compliance activities. The Part also discusses the place of compliance in organizations and the importance of the position of the CCO, who oversees compliance in the organization, directs the compliance department, and advises senior executives and the board of directors on compliance. In addition, it examines the overall significance of compliance governance, which is the structure of compliance decision-making.

Part II discusses how compliance has progressed along the path to achieving professional status. The Part first briefly reviews the literature on professions to identify the key features of an occupation that scholars identify as having achieved professional status. These generally are (i) engaging in a distinct set of activities requiring the exercise of judgment and discretion, (ii) having training for the profession that is in institutions of higher learning but that is controlled by the profession, (iii) having practitioners with a shared sense of engaging in a common occupation who have established organizations for the sharing of knowledge and practices, and (iv) receiving from state governments exclusive control over the professional activities in the form of licensing requirements. It then examines how compliance imperfectly comports with this professional model. It explains that compliance has become a recognized occupation, with knowledge and skills that its practitioners must

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32. See *infra* text accompanying note 237.

obtain and exhibit, but some of the knowledge and skills are closely connected to the legal profession. Moreover, it observes that, as in the case of other professions, institutions of higher learning increasingly impart this knowledge and basic skills to aspiring compliance officers through courses of study, but that this training is not the exclusive path to compliance and that it even occurs in law schools. It discusses how compliance practitioners have a group identity of engaging in a common mission that is exemplified by their membership in professional organizations and by their engaging in projects of sharing their knowledge and practices. The Part explains, however, that compliance clearly does not possess the defining feature of professional status, which is the practitioners' control over the field (i.e., a monopoly of practice), which state governments grant to professions through mandating a license for professional practice (with professionals controlling access to the license), as exemplified most prominently by medicine and the law.

Part III explores in more detail the reasons for the incomplete professional status of compliance. It argues that the most significant reason is the ambivalent relationship between compliance and the established legal profession. It explains that because, in its origins, compliance was part of or under the authority of legal departments, from time to time, legal authorities and practitioners have asserted control over the practice of compliance as if it were clearly in their domain of influence. It points out, however, that at other times the legal profession has been passive or complacent with respect to the oversight of compliance practitioners, particularly those trained as lawyers, and has even allowed them to engage in clearly legally-related activities. The Part offers reasons for this ambivalence, including that the legal profession has acceded to the wishes of organizations that need compliance but that desire to have considerable control over it. The Part then discusses in more detail how the federal government through regulators and enforcement officials favors the ambiguous relationship between compliance and the legal profession and compliance's weaker professional status because these government officials can more easily enlist compliance officers to serve their purposes. In other words, federal government officials exploit the professional uncertainty of compliance to make compliance officers their "eyes and ears" in an organization.

The Part next examines two other reasons for the uncertain professional status of compliance, the pressure from scholars in other disciplines to pull compliance within their discipline's domain, and the influence of technology in compliance. As noted above, organizational and management studies challenge the legal orientation of compliance and claim that it should be under their theoretical inspiration to enhance its effectiveness. The Part discusses the bases for their contention, particularly that effective compliance is grounded in organizational ethics and culture that these disciplines study, and the fact that this orientation has support from compliance practitioners. The Part concludes by considering the disruptive influence of technology on compliance, which is coming of professional age right when technology is transforming its activities. Compliance officers use technology to assist them in their tasks; organizations want this use to save on compliance costs; and federal regulators desire it



because it may provide them with more access to information inside organizations. The Part discusses how technology puts the role of compliance at play as it automates and eliminates compliance tasks, leaving uncertainty as to what the compliance officer will do.

Part IV first argues that the outcome of compliance's professional journey matters for organizational conduct. It contends that having a strong professional identity will give compliance officers the independence and authority in organizations that would enable them to guide and advise organizational actors on how to conduct their activities in accordance with law, regulation, and ethics. It argues that this function of guidance and advice is critical in compliance because it represents compliance officers being brought in as trusted partners when organizational actors are considering courses of action. It explains how compliance practitioners might best draw their authority and status by being members of a stand-alone profession, rather than a subfield operating under the legal profession. It further discusses how the compliance profession could ideally be an entirely separate field with inspiration from organizational studies, which better reflects its broad mandate to help organizational actors comply with the law and other organizational standards and to promote the organization's ethical culture.

The Part concludes by explaining why the legal profession will likely continue to exert its authority over compliance and why, as a result, the compliance field risks remaining without professional status or, as appears to be happening, becoming a sub-profession under the legal profession's ultimate authority. It argues that, given the legal profession's continuing authority over compliance and the need for and benefits of compliance's professionalization, the legal profession should formally recognize compliance as a kind of legal practice when it is engaged in by members of the bar. It explains how this recognition would formally bring lawyers working as compliance officers inside the legal profession and how this professional identification would shore up the independence of these officers both with respect to federal government officials and inside their organization. It explores how this professionalism alternative for compliance might work but acknowledges that it must await developments in compliance and pressure from compliance officers who themselves demand professional status.

## I. THE TRIUMPH OF COMPLIANCE IN ORGANIZATIONS

The last two decades have witnessed the establishment of compliance in organizations throughout the United States. This Part provides an overview of compliance as an internal control function in organizations, its origin in law and regulation, and its basic features.

### *A. The Nature of Compliance*

Compliance is the function in an organization that helps to ensure that the organization, its employees, and its agents conduct their affairs in accordance with law, regulation, ethical standards, and any other external or internal rules

or standards that the organization wishes its employees and agents to follow.<sup>33</sup> It is thus an internal control function in an organization, which means that its purpose is for the organization to control the conduct of employees and agents.<sup>34</sup> Today, the federal government, through regulators and enforcement officials, supplements its own enforcement of laws and regulations, which constitutes “external control,” with the “internal control” conducted by the organizations themselves.<sup>35</sup> This internal control is necessary because government officials do not have the resources to make sure that the many private organizations and their employees are in fact complying with their legal obligations. Moreover, having organizations themselves responsible for compliance makes for more efficient and less intrusive control of their employees and agents, particularly in large organizations, because organizations know their own operations and affairs better than a regulator or prosecutor and can thus guide employees on fulfilling their legal obligations.<sup>36</sup> Efficiencies also arise from the fact that an organization has a specialized function devoted to keeping track of the legal obligations imposed on it and its employees and agents, instead of having each part of the organization figure them out for itself.<sup>37</sup>

Compliance is one of several internal control functions in an organization and thus part of an organization’s overall internal control. Under the standard model, there are three levels of organizational activity implicating internal control: (i) its business or operations, (ii) internal control functions, and (iii) a “check” or audit of the functioning of the preceding two, which is known as internal audit.<sup>38</sup> In addition to compliance, the second category includes any organizational function that supports the organization’s business or operations in achieving control objectives.<sup>39</sup> It would thus sweep in firm functions such as human resources, legal, finance, and risk management that help the business or operations personnel conduct their activities within the necessary controls.<sup>40</sup> Indeed, in current thinking and practice on internal control, risk management is

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33. See MILLER, *supra* note 1, at 157.

34. See COMM. OF SPONSORING ORGS. OF THE TREADWAY COMM’N, INTERNAL CONTROL – INTEGRATED FRAMEWORK: FRAMEWORK AND APPENDICES 2 (2013).

35. See MILLER, *supra* note 1, at 157–60 (explaining internal control and its history in the United States).

36. See Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 959 (2009) (discussing this efficiency).

37. See Geoffrey P. Miller, *An Economic Analysis of Effective Compliance Programs*, in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 247, 247–48 nn.4–5 (Jennifer Arlen ed., 2018).

38. See COMM. OF SPONSORING ORGS. OF THE TREADWAY COMM’N, *supra* note 34, at 45, 147 (identifying the three lines of defense as (i) management and other front-line personnel, (ii) “business-enabling” internal-control functions, and (iii) internal auditors).

39. See *id.*

40. See *id.* at 147.

viewed as an internal control function that may encompass other ones.<sup>41</sup> For example, compliance can be viewed as part of risk management insofar as it is attempting to manage the risk of legal and ethical violations in organizations.<sup>42</sup> Having compliance be a part of risk management does not change its basic function but is just a way of organizing the hierarchy of internal controls in an organization.

### *B. Origins*

There is a rich, scholarly literature on the origins of compliance, and writers on compliance often restate what has become a standard story.<sup>43</sup> This Article presents an origin account only to emphasize a point that has sometimes been downplayed in other origin stories and that is important for its main arguments. This point is that there is both a regulatory and a criminal law origin to compliance, which explains why federal regulators and prosecutors are actively involved in and shape this field and affect the professionalization of compliance. Under the regulatory origin story, as a result of the growth of the federal administrative state in the twentieth century, organizations operating in regulated sectors of the economy found their activities subject to a growing number of detailed laws and regulations.<sup>44</sup> From a purely functional perspective, the organizations needed someone to keep track of all the pertinent regulatory obligations, to see how they affected or shaped firm operations, and then to guide employees and other firm agents in complying with the obligations when they conducted the organization's business and affairs.<sup>45</sup> It made sense for organizational insiders to do these tasks because they would have detailed knowledge and understanding of the organization's activities and would be on

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41. See *id.* at 181–86 (explaining the relationship between internal control and enterprise risk management). See also COMM. OF SPONSORING ORGS. OF THE TREADWAY COMM'N, ENTERPRISE RISK MANAGEMENT: ALIGNING RISK WITH STRATEGY AND PERFORMANCE, Vol. 1, at 10 (June 2017) (defining enterprise risk management as “[t]he culture, capabilities, and practices, integrated with strategy-setting and performance, that organizations rely on to manage risk in creating, preserving, and realizing value”) (emphasis omitted).

42. See, e.g., Griffith, *supra* note 13, at 2083 (“Compliance may thus be seen as a risk or control function, the core mission of which is to minimize downside risk associated with misconduct.”).

43. See, e.g., Michele DeStefano, *Creating a Culture of Compliance: Why Departmentalization May Not Be the Answer*, 10 HASTINGS BUS. L.J. 71, 87–91 (2014) (providing a criminal law story); Griffith, *supra* note 13, at 2083–92 (providing an almost exclusively criminal origin story); Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with Law*, 2002 COLUM. BUS. L. REV. 71, 77–79 (2002) (presenting a criminal law and regulatory origin story); John H. Walsh, *Institution-Based Financial Regulation: A Third Paradigm*, 49 HARV. INT'L L.J. 381, 390–92 (2008) (discussing the advent of the chief compliance officer in broker-dealers and investment advisers).

44. See MILLER, *supra* note 1, at 195–96 (explaining that the growth in the administrative state is a fundamental reason for the growth of compliance).

45. See Baer, *Governing Corporate Compliance*, *supra* note 36, at 959–60.

hand to train and guide organizational actors in properly conducting their activities in accordance with the regulations. The compliance function thus became a necessary part of a regulated firm.

In certain industries, Congress and federal regulators directly or indirectly imposed a compliance function on the regulated organization. An early example was in commercial banking, where Congress required banks to have an anti-money laundering compliance program with a compliance officer to oversee it.<sup>46</sup> Generally, however, federal regulation, rather than legislation, imposed the compliance function or program on the regulated organization. To take just a few examples, the Office of the Inspector General of Health and Human Services imposed it upon hospitals;<sup>47</sup> the Securities and Exchange Commission did the same for investment advisers and investment companies;<sup>48</sup> and the self-regulatory organizations in financial services required broker-dealers to have a CCO to establish and direct the compliance department and to guide the broker-dealer's board and management in compliance matters.<sup>49</sup> Indeed, as the nature of compliance became more standardized over time, the federal statutory and regulatory imposition of a compliance program became more detailed, whether in the law or in regulation, to reflect the generally understood model of compliance.<sup>50</sup>

The regulatory origin story of compliance also includes the fact that, from an enforcement perspective, federal regulators could use the legal doctrine of *respondeat superior* to hold an organization liable for misconduct by its employees and other agents (i.e., misconduct involving their failure to follow

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46. See 31 U.S.C. § 5318(h) (requiring a financial institution to establish an “anti-money laundering program[]” with, at a minimum, (i) “internal policies, procedures and controls,” (ii) “a compliance officer,” (iii) “employee training,” and (iv) “an independent audit function to test” the program).

47. See also Publication of the OIG Compliance Program Guidance for Hospitals, 63 Fed. Reg. 8987, 8993 (Feb. 23, 1998).

48. See, e.g., 17 C.F.R. § 275.206(4)–7 (2020) (investment adviser); 17 C.F.R. § 270.38a–1 (2020) (investment company).

49. See James A. Fanto, *Surveillant and Counselor: A Reorientation in Compliance for Broker-Dealers*, 2014 BYU L. REV. 1121, 1130–43 (2014) (discussing the FINRA rules); FIN. INDUS. REGUL. AUTH., INC., RULE 3130, ANNUAL CERTIFICATION OF COMPLIANCE AND SUPERVISORY PROCESS, <https://www.finra.org/rules-guidance/rulebooks/finra-rules> (for broker-dealers) (last visited Dec. 10, 2020). The list can go on. See also BD. OF GOVERNORS OF THE FED. RESV. SYS., SR 08-8/CA 08-11, COMPLIANCE RISK MANAGEMENT PROGRAMS AND OVERSIGHT AT LARGE BANKING ORGANIZATIONS WITH COMPLEX COMPLIANCE PROFILES (Oct. 16, 2008) (oversight of compliance in these institutions).

50. A good example is in the detailed requirements for a compliance program that was imposed on swap dealers both by statute in the Dodd-Frank Act, see 7 U.S.C. § 6s(k) (for swap dealers); 15 U.S.C. § 78o-10(k) (2018) (for security-based swap dealers); by regulation by the Commodity Futures Trading Commission, 17 C.F.R. § 3.3(a) (2020) (for swap dealers); and by the SEC, 17 C.F.R. § 240.15Fk-1(c) (2020) (for security-based swap dealers).

their regulatory obligations).<sup>51</sup> This organizational liability incentivizes an organization to prevent this misconduct. It thus makes sense for an organization to have a compliance function to keep track of the laws and regulations governing the organization's activities, particularly if they are detailed and complex, to instruct employees on how to do their work in compliance with them and to monitor the employees conduct so as to prevent and detect legal violations.<sup>52</sup> In some cases, Congress and regulators did not rely just on *respondeat superior* but made this organizational liability explicit. In the brokerage industry, for example, Congress imposed a duty of supervision on a registered broker-dealer, which made it liable as a supervisor if one of its brokerage employees violated the law.<sup>53</sup> Congress also provided broker-dealers with a statutory defense to the liability: a firm would not be liable if it had an effective and comprehensive system of supervision of the employees.<sup>54</sup> The firm function that created and administered the supervisory system was the compliance department. Through their prosecution of organizations because of regulatory violations, regulatory enforcement officials (who are lawyers) thus exert an authority over compliance and compliance officers, particularly when they determine whether the organization's efforts to prevent and detect violations (i.e., its compliance program) were adequate.

The criminal law origin story of compliance has been much emphasized in the scholarly literature because criminal liability applies to all organizations, not just to those that are regulated.<sup>55</sup> This liability is also based upon the organization's vicarious liability for the misconduct of its employees and agents.<sup>56</sup> Under this story, many attribute the growth and nature of compliance for U.S. organizations to the guidelines of the U.S. Sentencing Commission that help determine the appropriate punishment for an organization in which criminal conduct under federal law has occurred.<sup>57</sup> The guidelines recommend

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51. See Fanto, *supra* note 49, at 1131 n.25 (citing Task Force on Broker-Dealer Supervision and Compliance of the Comm. on Fed. Regul. of Secs., *Broker-Dealer Supervision of Registered Representatives and Branch Office Operations*, 44 BUS. LAW. 1361, 1363–64 (1989)).

52. See, e.g., Griffith, *supra* note 13, at 2082–83.

53. See Langevoort, *supra* note 43, at 78 (explaining the statutory basis for this duty in Section 15(b)(4)(E) of the Securities Exchange Act of 1934); James A. Fanto, *The Vanishing Supervisor*, 41 J. CORP. L. 117, 138–40 (2015) (discussing the industry and regulatory background and the legislative history of this statutory provision).

54. See 15 U.S.C. § 78o(b)(4)(E) (2018).

55. Examples include: Baer, *Governing Corporate Compliance*, *supra* note 36, at 962–66; Griffith, *supra* note 13, at 2083–86; Veronica Root, *Coordinating Compliance Incentives*, 102 CORNELL L. REV. 1003 (2017).

56. See Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 474–76 (2006) (discussing the flourishing of this liability, which common law courts imported from tort law); Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 689–90 (1997) (discussing the evolution of this wide-ranging vicarious liability and efforts by lawmakers to reduce it).

57. See, e.g., Griffith, *supra* note 13, at 2084–86.

that an organization receive a benefit in sentencing treatment if it had an effective compliance program at the time of the misconduct.<sup>58</sup> They also set forth the features of an effective program, which include having an official who is responsible for the day-to-day operations of the compliance function.<sup>59</sup> As the criminal law origin story goes, the guidelines powerfully incentivize an organization to have a compliance function because nearly every organization can be subject to criminal liability under federal law for the misconduct of its employees. But the main point here is that the guidelines made federal prosecutors, who recommend sentences, key authority figures in compliance because they would have a strong voice in determining what is an effective compliance program.

In fact, federal prosecutors have embraced their role in compliance and recognize their power because a criminal indictment of an organization can be devastating for it.<sup>60</sup> The Department of Justice (“DOJ”) sets forth its expectations for compliance in its prosecutorial manual and in guidelines on the enforcement of specific laws, such as the Foreign Corrupt Practices Act, which it commonly uses in the prosecution of organizations.<sup>61</sup> In numerous settlement agreements with organizations, federal prosecutors set out their views on the model of a compliance program by mandating how the targeted organization will improve its compliance function in the future.<sup>62</sup> At one point, the DOJ even had a compliance “expert” on its staff that guided organizations on the DOJ’s expectations for compliance,<sup>63</sup> and it has set these out in published guidelines.<sup>64</sup>

58. See U.S. SENT’G GUIDELINES MANUAL § 8B2.1(b) (U.S. SENT’G COMM’N 2016).

59. See *id.* In a later amendment, the guidelines expanded the definition of an effective compliance program to include compliance with ethical standards, in addition to law and regulation. See David Hess, *Ethical Infrastructures and Evidence-Based Corporate Compliance and Ethics Programs: Policy Implications from the Empirical Evidence*, 12 N.Y.U. J.L. & BUS. 317, 335 (2016) (discussing the amendment of the guidelines to require that an organization’s compliance program encourage the creation of an organizational culture promoting “ethical conduct”).

60. One of the examples of a firm collapsing as a result of prosecution is Arthur Andersen, which was criminally indicted and convicted for its involvement in the Enron scandal. Although its conviction was later overturned, it had long before gone out of business as clients fled it. See *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005). For a discussion of the firm’s predicament, see MILLER, *supra* note 1, at 431–33.

61. See U.S. DEP’T OF JUST., PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS, 9-28.800, at 14–16 (2019) (discussing compliance programs); CRIM. DIV., U.S. DEP’T OF JUST. & ENF’T DIV., SEC. & EXCH. COMM’N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 56–63 (2012) (setting out the elements of an effective program).

62. For a discussion of this phenomenon, see Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Nonprosecution*, 84 U. CHI. L. REV. 323, 335–39 (2017) (discussing the compliance program mandates imposed under agreements to defer prosecution).

63. See Hui Chen & Eugene Soltes, *Why Compliance Programs Fail—and How to Fix Them*, HARV. BUS. REV., Mar.–Apr. 2018, at 116. Hui Chen was the first compliance expert hired by the Department of Justice.

64. See CRIM. DIV., U.S. DEP’T OF JUST., EVALUATION OF CORPORATE COMPLIANCE PROGRAMS (Apr. 2019).

As will be discussed below, the importance of federal prosecutors (who are all lawyers) in compliance has had a significant impact upon the professionalization of this field.

### *C. The Model of Compliance*

#### 1. Compliance Activities

Whatever its genealogy, compliance, with compliance programs and compliance officers, is now an established part of the U.S. organizational landscape. Moreover, there is now a standard understanding, or “model,” for the functions of a compliance program and the tasks of compliance officers in it.<sup>65</sup> This distinctness of the compliance role or occupation is important because, as discussed below, it is a pre-condition for the professionalization of compliance. The initial task in a compliance program is for compliance officers to identify the legal obligations applicable to the organization and its employees and agents, ideally determining those with the greatest probability of being violated and those whose violations will have the greatest consequences—this is a compliance “risk analysis.”<sup>66</sup> The next task that follows from the first is for the officers to draft compliance policies and procedures to address these obligations in consideration of their risks—the policies set out general principles of conduct for organizational actors while the procedures instruct them on how, in detail, to conduct their affairs and business in accordance with the applicable laws and regulations.<sup>67</sup> Drafting the procedures is a highly distinctive compliance task because in doing so compliance officers must be intimately familiar with the organization’s affairs and understand how the applicable legal obligations can be translated into the actual conduct of organizational activities.

As the next logical part of the compliance program, compliance officers train employees and other organizational agents in the policies and procedures.<sup>68</sup>

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65. See Langevoort, *supra* note 43, at 81–83 (setting forward this model); DeStefano, *supra* note 43, at 94–97 (describing basic tasks). Indeed, now models of compliance are available in standardized guidelines. See INT’L ORG. FOR STANDARDIZATION, *supra* note 12 (providing a detailed model of compliance).

66. See INT’L ORG. FOR STANDARDIZATION, *supra* note 12, at 12 (paragraph 5.3.4 lists these and other compliance responsibilities); Robert C. Bird & Stephen Kim Park, *Turning Corporate Compliance into Competitive Advantage*, 19 U. PA. J. BUS. L. 285, 297 (2017) (arguing for a model of compliance that focuses on a dynamic analysis of the compliance risks).

67. See COMPLIANCE & LEGAL DIV., SEC. INDUS. ASS’N, WHITE PAPER ON THE ROLE OF COMPLIANCE 4 (2005) (discussing this task in compliance in the securities industry). The policies and procedures also need to incorporate the organization’s code of ethics and any other non-legal obligation that the organization wants its employees and other agents to follow. See DeStefano, *supra* note 43, at 95–96 (highlighting the role of compliance in enforcing ethical obligations).

68. See INT’L ORG. FOR STANDARDIZATION, *supra* note 12, at 12 (paragraph 5.3.4, “providing or organizing on-going training support for employees to ensure that all relevant employees are trained on a regular basis”). See also U.S. SENT’G GUIDELINES MANUAL §

This internal educational mission is a special, distinctive part of the compliance occupation where the compliance officer has to be somewhat of a teacher who experiments with teaching methods.<sup>69</sup> Significantly, and related to this educational role, compliance officers also advise organizational actors generally on almost a daily basis on how to conduct themselves in accordance with these guidelines, as well as on how to deal with new or unusual situations falling outside the express terms of the policies and procedures.<sup>70</sup> Here—and this is significant for the professional identity of compliance officers—the advisory compliance activity seems close to providing legal advice because, in a situation, the officer is instructing an employee how to engage in an activity in accordance with a given law or regulation.<sup>71</sup>

One of the main activities of compliance officers, which can be used to characterize them in a negative way<sup>72</sup> but also plays a major role in their professional story, is that they monitor organizational actors to ensure that the latter are following, and not violating, the policies and procedures.<sup>73</sup> In this role, the compliance officer is like a “cop on the beat,” although, as discussed below, the monitoring involves a considerable use of surveillance technology.<sup>74</sup>

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8B2.1(b)(4)(A) (U.S. SENT’G COMM’N 2016) (identifying “effective training programs” as a feature of an effective compliance and ethics program). Some regulatory systems mandate the compliance training. *See, e.g.,* FIN. INDUS. REGUL. AUTH., INC., *supra* note 49, at RULE 3110(b) (making training of personnel and an annual compliance meeting with each associated person part of a mandatory supervisory system).

69. *See, e.g.,* Kurt Wachholz, *Compliance Training*, in MODERN COMPLIANCE: BEST PRACTICES FOR SECURITIES & FINANCE 225 (David H. Lui & John H. Walsh eds., 2015) (a compliance officer describes his experiences as an educator).

70. *See* INT’L ORG. FOR STANDARDIZATION, *supra* note 12, at 12 (paragraph 5.3.4, explaining that one of the tasks of the compliance department is “providing objective advice to the organization on compliance-related matters”). *See* Fanto, *supra* note 49, at 1163–64 (arguing for the central place of this advisory role).

71. *See* R. Gerald Baker, *What is Compliance?*, in MODERN COMPLIANCE: BEST PRACTICES FOR SECURITIES & FINANCE 63, 66–67 (David H. Lui & John H. Walsh eds., 2015) (pointing out that the advisory function “immediately comes to mind” when identifying the responsibilities of a compliance officer, but noting that it may involve other control groups like legal). *See also* Jennifer M. Pacella, *The Regulation of Lawyers in Compliance*, 95 WASH. L. REV. 947, 956 (2020) (observing that lawyers in compliance roles offer firms and employees something like legal advice and arguing that such offering does not necessarily constitute legal practice).

72. *See, e.g.,* Kirsten Grind & Emily Glazer, *Nuns With Guns: The Strange Day-to-Day Struggles Between Bankers and Regulators*, WALL ST. J. (May 30, 2016) (describing the growth in compliance after the financial crisis, with bankers picturing compliance staff as nuns carrying guns).

73. *See* INT’L ORG. FOR STANDARDIZATION, *supra* note 12, at 12 (paragraph 5.3.4, a compliance program “monitor[s] and measur[es] compliance performance”). *See also* U.S. SENT’G GUIDELINES MANUAL § 8B2.1(b)(5)(A) (U.S. SENT’G COMM’N 2016) (stating that an effective compliance and ethics program has “monitoring and auditing to detect criminal conduct”). *See also* Langevoort, *supra* note 43, at 91–100 (discussing the monitoring role of compliance officers and the costs associated with it).

74. *See infra* text accompanying notes 235–37.



This beat cop is, in some domains, required to conduct internal inspections of the organization's activities and departments.<sup>75</sup> This monitoring, in turn, leads to other activities: compliance officers must follow up on any indication of a problem (often known as a "red flag")<sup>76</sup> to see whether in fact a violation has occurred.<sup>77</sup> This means that compliance officers engage in investigations, but, as in the case of providing legal advice on policies and procedures, this investigatory activity intersects with one of the main characteristics of inside and outside counsel to an organization—i.e., who are members of the legal profession—which is conducting investigations on the organization's behalf. Because a legal violation by an employee may trigger the organization's liability and because the legal department or counsel is generally tasked with the legal defense of the organization, the legal department is also charged with investigations of legal violations.<sup>78</sup> The intersection or overlap between compliance and legal on investigations points to compliance's blurry relationship with an established profession, which strongly affects its own professionalization.

Another task of compliance officers that follows from the monitoring is to check on the functioning and effectiveness of compliance in the organization and, if necessary, to modify the compliance program to address the occurrence of violations and to take account of any legal or business developments affecting the organization.<sup>79</sup> Among other things, compliance officers should probe into

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75. See, e.g., FIN. INDUS. REGUL. AUTH., INC., *supra* note 49, at RULE 3110(c) (requiring a firm to conduct an annual review of its businesses and an inspection (annual or otherwise, depending upon its size and operations) of its offices). See also Miriam H. Baer, *Confronting the Two Faces of Corporate Fraud*, 66 FLA. L. REV. 87, 148–54 (2014) (arguing that both government enforcement officials and many corporate actors actually prefer compliance to be a policing function, rather than one designed to prevent misconduct, in their firm).

76. See, e.g., J. Christopher Jackson, *Seeking to Avoid Chief Compliance Officer Liability*, in MODERN COMPLIANCE: BEST PRACTICES FOR SECURITIES & FINANCE 679, 697–98 (David H. Lui & John H. Walsh eds., 2015) (discussing what constitutes a red flag).

77. See, e.g., Publication of the OIG Compliance Program Guidance for Hospitals, *supra* note 47, 63 Fed. Reg., at 8994 (one of the tasks of the chief compliance officer is "[i]ndependently investigating and acting on matters related to compliance, including the flexibility to design and coordinate internal investigations (e.g., responding to reports of problems or suspected violations) and any resulting corrective action with all hospital departments, providers and sub-providers, agents and, if appropriate, independent contractors") (footnote omitted). One way in which compliance officers find out about potential violations is by reports made through an organization's system for confidential reporting or "whistleblowing," which is an element of a compliance program. See U.S. SENT'G GUIDELINES MANUAL § 8B2.1(b)(5)(C) (U.S. SENT'G COMM'N 2016) (identifying this kind of system). Compliance officers may be tasked with following up on the reports.

78. See N.Y.C. BAR ASS'N, REPORT OF THE TASK FORCE ON THE LAWYER'S ROLE IN CORPORATE GOVERNANCE 143–61 (2006) (discussing internal investigations at length as part of inside counsel's role).

79. See INT'L ORG. FOR STANDARDIZATION, *supra* note 12, at 12 (paragraph 5.3.4, listing these and other responsibilities of the compliance department). See also U.S. SENT'G GUIDELINES

the underlying causes of a legal violation to see whether the compliance program was sufficiently comprehensive to prevent it.<sup>80</sup> Here, as in the case of investigations, compliance intersects or overlaps with another internal control activity or occupation, internal audit; internal auditors also audit the functioning of compliance in the organization as part of their mandate, just as they check on all organizational activities.<sup>81</sup> This intersection, too, adds further complications to the professional identity of compliance officers, even if the general contours of the occupations of compliance officer and internal auditor are different.

An important, and distinct, role of a compliance officer that appears primarily, but not exclusively, in regulated firms is being the “point person” for inquiries from the applicable regulator or regulators and coordinator for regulatory examinations or inspections.<sup>82</sup> Depending upon the industry, the regulator may ask for information from the firm, require reports from it, particularly on violations of regulations, conduct inspections (announced or unannounced) on particular issues of concern, and conduct regular examinations of the firm.<sup>83</sup> In almost all of these cases, compliance officers are likely to be involved in providing the regulator with the information or access that it demands and in communicating to their firm the needs and demands of the regulator. Even in non-regulated organizations, compliance officers may be the organization with whom government officials, such as prosecutors or a court-appointed monitor, may communicate, particularly as to the firm’s

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MANUAL § 8B2.1(b)(5)(A), (B), & (7) (U.S. SENT’G COMM’N 2016) (stating that an effective compliance and ethics program has “monitoring and auditing to detect criminal conduct” ((b)(5)(A)); “evaluate[s] periodically [its] effectiveness” ((b)(5)(B)); and, after the occurrence of criminal conduct, takes “reasonable steps” to prevent its recurrence “including making any necessary modifications to the . . . program,” ((b)(7))))). Again, this evaluation of the effectiveness of a compliance program may be mandated by regulation. *See, e.g.*, FIN. INDUS. REGUL. AUTH., INC., *supra* note 49, at RULE 3120(a) (requiring a supervisory control system to test a firm’s supervisory system); FIN. INDUS. REGUL. AUTH., INC., *supra* note 49, at RULE 3130(b) (requiring a broker-dealer’s chief executive officer to certify annually, among other things, that the firm has in place processes “to test and modify” its compliance and supervisory procedures).

80. *See* David H. Lui, *Core Requirements of a Compliance Program*, in MODERN COMPLIANCE: BEST PRACTICES FOR SECURITIES & FINANCE 93, 107–11 (David H. Lui & John H. Walsh eds., 2015) (discussing testing and identifying testing involving causes of a violation as a “forensic testing”).

81. *See* COMM. OF SPONSORING ORGS. OF THE TREADWAY COMM’N, INTERNAL CONTROL, *supra* note 34, at 154 (stating that an audit should include internal control functions). *See also* Lui, *supra* note 80, at 110–11 (arguing that compliance and internal audit should coordinate their testing of the compliance program).

82. *See* Baker, *supra* note 71, at 69–70 (describing this task and its importance).

83. To take just the example of a broker-dealer, a firm has to provide information on rule violations and other misconduct to FINRA. *See* FIN. INDUS. REGUL. AUTH., INC., *supra* note 49, at RULE 4530. The firm must also provide information, testimony, and access to records. *See id.* at RULE 8210.

compliance program—especially when a firm needs to improve it following the occurrence of legal violations in the organization.<sup>84</sup>

A key set of tasks that compliance officers perform and that particularly distinguishes them in an organization involves their role in the promotion of ethics and the firm's culture.<sup>85</sup> This is why some organizations use the "CECO" (Chief Ethics and Compliance Officer), rather than the CCO title, to emphasize that the compliance officer has ethical responsibilities.<sup>86</sup> In some respects, these ethical tasks overlap with the compliance ones discussed above. For example, compliance officers draft policies and procedures that take into account the organization's code of ethics, as well as applicable law and regulation, train employees in the code, and monitor their compliance with it.<sup>87</sup> However, because ethical guidelines are likely to be vaguer and fuzzier than the law, compliance officers might have to spend more time advising organizational actors about whether their conduct is in accordance with the guidelines.<sup>88</sup> This role of compliance officers in promoting ethics in the firm is, moreover, directly related to their contribution to an organization's culture because culture, which generally means the conduct and attitudes that typify an organization, is closely bound up with its ethical guidelines or code of ethics, which generally deal with how organizational actors behave towards one another, their clients, other organizations, and the government.<sup>89</sup>

## 2. Compliance's Organizational Place

As will be discussed below, a key part of the analysis of compliance's professionalization involves an understanding of the position of compliance officers in organizations—both as an abstract matter (i.e., their place in the organizational hierarchy) and as a physical matter (i.e., their literal physical place in an organization). The abstract matter is actually part of the organization's governance which assigns decision-making and other authority

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84. See Rory Van Loo, *Regulatory Monitors: Policing Firms in the Compliance Era*, 119 COLUM. L. REV. 369, 398–402 (2019) (discussing the phenomenon of regulatory monitors who can monitor and inspect firms and their interaction with compliance departments).

85. The Federal Sentencing Guidelines refer to an organization's "compliance and ethics program." See U.S. SENT'G GUIDELINES MANUAL § 8B2.1 (U.S. SENT'G COMM'N 2016).

86. See SOC'Y OF CORP. COMPLIANCE & ETHICS & NYSE GOVERNANCE SERV., COMPLIANCE AND ETHICS PROGRAM ENVIRONMENT REPORT 9 (2014) (noting that 8% of those surveyed use this title).

87. See Lee Augsburger, *How Compliance Can Teach Ethics*, in MODERN COMPLIANCE: BEST PRACTICES FOR SECURITIES & FINANCE 179, 190 (David H. Lui & John H. Walsh eds., 2015) (making this point about their similarities).

88. See *id.* (noting that "[r]egulation is hard; ethics is soft").

89. See generally Hess, *supra* note 59, at 347–51 (presenting a model of organizational conduct in which the organizational climate is foundational, subsuming culture, and upon which ethics and compliance are built).

of organizational actors over given matters and other actors.<sup>90</sup> In fact, the compliance program is expected to assign compliance responsibilities and decision-making to organizational actors, including compliance officers themselves, in order to set forth the governance of compliance.<sup>91</sup> As in the case of compliance tasks discussed in the preceding section, compliance governance has become standardized through law, regulation, and practice. The physical position or “departmentalization” of compliance generally follows from its governance. If, as is clear from the preceding section, compliance officers have a distinct compliance role and tasks, they are likely to belong to a particular department in an organization and even to be set apart in their own physical location.<sup>92</sup>

Typical compliance governance today requires that the governing body of an organization, such as its board of directors, insist that the organization have a compliance program, oversee its implementation, regularly receive its findings, and periodically review its effectiveness.<sup>93</sup> Indeed, boards of public companies know that one of their main oversight duties is to ensure that the organization has in place an effective compliance function.<sup>94</sup> Boards of companies listed on stock exchanges are required to put compliance oversight within the mandate of the board’s audit committee<sup>95</sup> and they are increasingly encouraged to establish a compliance committee for this task.<sup>96</sup> Senior

90. See PRINCIPLES OF THE LAW: COMPLIANCE, RISK MANAGEMENT, AND ENFORCEMENT § 3.01 (AM. L. INST., Tentative Draft No. 1, 2019); MILLER, *supra* note 1, at 2 (discussing governance).

91. See U.S. SENT’G GUIDELINES MANUAL § 8B2.1(b)(2) (U.S. SENT’G COMM’N 2016) (discussing this governance within the compliance and ethics program).

92. See DeStefano, *supra* note 43, at 73–75 (discussing compliance departments generally).

93. See generally COMM. OF SPONSORING ORGS. OF THE TREADWAY COMM’N, *supra* note 34, at 46 (discussing this governance structure); U.S. SENT’G GUIDELINES MANUAL § 8B2.1(b)(2)(A) (U.S. SENT’G COMM’N 2016) (specifying the board’s role).

94. See, e.g., *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996) (“a director’s obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists”); *Stone v. Ritter*, 911 A.2d 362 (Del. 2006) (accepting that the board’s oversight obligation includes the responsibility to ensure that the corporation has an adequate compliance function). See also CORP. LS. COMM., A.B.A. SECTION OF BUS. L., CORPORATE DIRECTOR’S GUIDEBOOK, 66 BUS. LAW. 975, 986 (2011) (discussing this oversight); Stavros Gadinis & Amelia Miazad, *The Hidden Power of Compliance*, 103 MINN. L. REV. 2135, 2156–60 (2019) (contending that legal and compliance officers can influence the board’s exercise of their *Caremark* duty when they provide the board with detailed reports on legal violations within the firm, which reports the board ignores at its peril).

95. See NYSE, INC., LISTED COMPANY MANUAL § 303A.07(b)(i)(A) (2018) (specifying this role of the audit committee). See also A.B.A. SECTION OF BUS. L., CORP. LAWS COMM., *supra* note 94, at 1018, 1022 (discussing how audit committee meets its oversight responsibilities over compliance).

96. The audit committee may be aided by another committee to fulfill this mission. See A.B.A. SECTION OF BUS. L., CORP. LAWS COMM., *supra* note 94, at 999–1000 (noting how companies have established a compliance or legal-affairs committee to ease the burden of the audit

executives of the organization, chiefly the CEO, have the responsibility of directing the formulation and implementation of the compliance program and of assuring that the board, or a board committee, is in place and functioning well.<sup>97</sup>

This governance structure necessitates that there be a group or department responsible for designing and implementing the compliance program in the organization, and an individual, either the CCO or CECO, who administers and manages it, and who represents it before the board and senior executives.<sup>98</sup> Turning to the CCO first, this officer is the organization's specialist in compliance who is responsible for the design and implementation of the compliance program, and who thus must be knowledgeable about the subject.<sup>99</sup> This position is mandated in certain regulated industries<sup>100</sup> and—this is important for the professional discussion—is increasingly one that should not

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committee). *See also* *Marchand v. Barnhill*, 212 A.3d 805, 822 (Del. 2019) (stating that a board must itself have “protocols” and a committee structure to ensure that it receives information about the firm’s compliance with legal obligations). *See generally* PWC STATE OF COMPLIANCE STUDY 2016: LAYING A STRATEGIC FOUNDATION FOR STRONG COMPLIANCE RISK MANAGEMENT 3, 13 (2016) (global survey of 800 executives reveals that 20% of firms have a “separate, stand-alone compliance/ethics committee,” while 65% report that the audit committee oversees compliance). *But see* John Armour et al., *Taking Compliance Seriously*, 37 YALE J. ON REG. 1 (2020) (contending that, on the basis of their stock-based compensation, directors have an inadequate incentive to promote compliance in organizations and that their oversight duty is too weak to promote effective compliance; arguing for a clawback of director compensation to address this problem); John Armour et al., *Board Compliance*, 104 MINN. L. REV. 1191 (2020) (presenting data on the fact that few U.S. companies have designated board compliance committees, proposing reasons for this absence, and explaining why boards often resist the compliance oversight role).

97. *See* U.S. SENT’G GUIDELINES MANUAL § 8B2.1(b)(2)(B) (U.S. SENT’G COMM’N 2016) (specifying this role).

98. *See* DeMott, *supra* note 7, at 64 (discussing this position).

99. *See* INT’L ORG. FOR STANDARDIZATION, *supra* note 12, at 10 (“Many organizations have a dedicated person (e.g. a compliance officer) responsible for day-to-day compliance management . . .”). *See also* CONTROL RISKS, INTERNATIONAL BUSINESS ATTITUDES TO COMPLIANCE: REPORT 2017 11 (2017) (reporting that 47% of U.S. companies surveyed in a global survey have a compliance function led by a dedicated compliance officer); U.S. SENT’G GUIDELINES MANUAL § 8B2.1(b)(2)(C) (U.S. SENT’G COMM’N 2016) (“Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program.”).

100. *See, e.g.*, Off. of Inspector Gen., Dep’t of Health and Hum. Servs., *supra* note 47, at 8989 (noting that one element of a compliance program for hospitals is “[t]he designation of a chief compliance officer . . . charged with the responsibility of operating and monitoring the compliance program”); FIN. INDUS. REGUL. AUTH., INC., *supra* note 49, at RULE 3130(a) (requiring a broker-dealer that is a member of FINRA to designate one or more principals as CCO(s)); 17 C.F.R. § 275.206(4)-7(c) (2020) (requiring a registered investment adviser to have a CCO); 17 C.F.R. § 270.38a-1(a)(4) (2020) (requiring the same for a registered investment company); 15 U.S.C. § 78o-8(k)(1) (2020) (requiring each security-based swap dealer and participant to have a CCO); 17 C.F.R. § 240.15Fk-1(a) (2020) (implementing the CCO rule in security-based swap dealers and major security-based participants).

be held by someone with another position in the organization.<sup>101</sup> Moreover, as will be important for the discussion below, today, in large organizations, it is increasingly a position filled by a lawyer from an exemplary background—often one who has had prestigious federal prosecutorial or regulatory positions.<sup>102</sup>

Reporting by the CCO is also indicative of the position's current importance and has professional implications. Organizational reporting generally has two meanings: an organizational actor (i) reports to one who has authority over the actor's position and who determines the actor's conditions of employment, and (ii) provides information to other such actors. Both meanings are significant in highlighting the CCO's distinct organizational role. The recommended structure today is to have the CCO under the direct authority of the CEO and have a seat at the CEO's table as a key officer with the board or a board committee having a say on, or a veto over, the hiring and firing of the officer.<sup>103</sup> With respect to information reporting, it is becoming standard practice for the CCO to report directly to the board or board committee in addition to reporting to the CEO or another senior executive.<sup>104</sup>

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101. See, e.g., BASEL COMM. ON BANKING SUPERVISION, COMPLIANCE AND THE COMPLIANCE FUNCTION IN BANKS 12 (2005) ("The independence of the head of compliance and any other staff having compliance responsibilities may be undermined if they are placed in a position where there is a real or potential conflict between their compliance responsibilities and their other responsibilities. It is the preference of the Committee that compliance function staff perform only compliance responsibilities."). Regulators allow smaller firms to allow other employees to fulfill the CCO role—for cost reasons. See *id.*

102. See Miriam H. Baer, *Compliance Elites*, 88 FORDHAM L. REV. 1599, 1601–02 (2020) (discussing this elitism in CCOs and its consequences for having these CCOs detect misconduct in organizations).

103. See, e.g., Dave Lefort, *Poll-apalooza: Let us help you benchmark your compliance program*, COMPLIANCE WEEK 2018 SURVEY (June 4, 2018), <https://www.complianceweek.com/poll-apalooza-let-us-help-you-benchmark-your-compliance-program/2245.article> (presenting data on, among other things, CCO reporting from an audience pool at the Compliance Week 2018 conference in Washington, D.C.); ETHICS & COMPLIANCE CERTIFICATION INST., PRINCIPLES AND PRACTICES OF HIGH-QUALITY ETHICS & COMPLIANCE PROGRAMS: REPORT OF ECI'S BLUE RIBBON PANEL 18–20 (2016) (identifying these best practices); 17 C.F.R. § 270.38a-1(a)(4)(i) & (ii) (2020) (stating the board of a registered investment company (including a majority of its independent directors) must approve the hiring, compensation, and removal of the company's chief compliance officer).

104. See INT'L ORG. FOR STANDARDIZATION, *supra* note 12, at 11 (requiring that the governing body and top management have a compliance department with "clear and unambiguous support from and direct access to the governing body and top management"); U.S. SENT'G GUIDELINES MANUAL § 8B2.1(b)(2)(C) (U.S. SENT'G COMM'N 2016) (providing that "[i]ndividual(s) with operational responsibility [for the compliance and ethics program] shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority"). See generally John H. Walsh, *Right the First Time: Regulation, Quality, and Preventive Compliance in the Securities Industry*, 1997 COLUM. BUS. L. REV. 165, 236 (1997) (discussing generally the value of this CCO reporting in broker-dealers and investment advisers).

The compliance department, which the CCO administers and manages, is composed of compliance officers who conduct all the compliance program tasks identified in the preceding section.<sup>105</sup> Whether the officers work together—and separately from others—in the compliance department, are integrated with the operations of the organization, or engage in some combination of both, they report to and are under the authority of the CCO.<sup>106</sup> This organizational separation and line of authority distinguishes the officers from other organizational actors and other occupational categories—even from those in other internal control functions. They also reinforce the distinctness of the compliance occupation and, as discussed below, make possible and conceivable its professionalization.

## II. THE PROFESSIONAL STATUS OF THE COMPLIANCE FIELD

This Part discusses the ways in which the activity of compliance has progressed along the path to achieving professional status. The Part first briefly reviews the prior literature on professions in general to identify the key features of an activity having professional status. It then examines how compliance comports with this professional model, first by reviewing other analyses of compliance as a profession. It then points out how compliance practitioners do not possess a defining feature of professional status, which is their control over the practice of compliance (i.e., a monopoly of practice), which the state governments grant to a field through licensing.

### A. *The Standard Features of a Profession*

The most well-known, established professions have been the subject of a rich scholarly analysis and debate.<sup>107</sup> This is not the place to consider in detail the literature, which, among other things, looks at the history and social position of the professions.<sup>108</sup> For the analytical purposes here, which are to examine the professional status of compliance officers and its relationship to other professions—particularly the law—several insights from that scholarship are particularly useful. First, scholars of professions identify the general features

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105. See Baker, *supra* note 71, at 64 (speaking of the “big C” as being the compliance department).

106. See *id.* at 75–6 (discussing different compliance structures in firms).

107. For one of the classic studies on them, see EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (George Simpson trans., 1933) (1893). For a review of the scholarly literature on professions, see ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* 9–20 (1988). See also RICHARD SUSSKIND & DANIEL SUSSKIND, *THE FUTURE OF THE PROFESSIONS: HOW TECHNOLOGY WILL TRANSFORM THE WORK OF HUMAN EXPERTS* 23–30 (2015) (reviewing the theories of professions).

108. See, e.g., BURTON J. BLEDSTEIN, *THE CULTURE OF PROFESSIONALISM: THE MIDDLE CLASS AND THE DEVELOPMENT OF HIGHER EDUCATION IN AMERICA* (1976); MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977). The focus will also be primarily upon professionalization in the United States.

of an occupation that achieves professional status.<sup>109</sup> These are (i) the acquisition of a specific body of knowledge and skills in its application, which involve judgment and discretion, (ii) training for the profession that is in institutions of higher learning but that is controlled by the professional practitioners, (iii) the sharing by practitioners of a social identity of being engaged in a common endeavor, and (iv) the receiving from the government, i.e., states, control over professional activities that is justified because of the profession's contribution to the public interest.<sup>110</sup> While a particular profession might be characterized by its possession of one or more of the above features, established professions generally have all of these features to some extent.<sup>111</sup> Second, professions emerge and continue by exerting a recognized jurisdiction or control over a social activity, often in opposition to other occupations seeking that same jurisdiction.<sup>112</sup> Third, being in a profession likely has a social status effect, which may translate into certain economic rewards, but also other kinds of benefits, such as symbolic ones.<sup>113</sup>

With respect to the first feature, for an occupation to achieve professional status, its practitioners must acquire a defined body of generally theoretical knowledge and the related practical skills in applying it that are necessary to conduct the activity in question.<sup>114</sup> This knowledge and these skills should be distinct from those used by people engaged in other occupations. One thinks of the doctrinal knowledge required of the legal profession and the various skills of its application, albeit in different kinds of contexts. The application of the knowledge and the exercise of the skills typically require discretion and judgment; a profession is a highly intellectual activity.<sup>115</sup> In this application and exercise, in other words, a professional activity is distinguished from a technical occupation, which requires specialization, but which involves routines and less judgment in its application. Of course, professional work involves routines as well, and the self-presentation of a profession may downplay its routines and

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109. See FREIDSON, *supra* note 15, at 127 (setting forth these features).

110. See *id.*

111. See *id.* at 127–28.

112. See ABBOTT, *supra* note 107, at 71 (“Every profession aims for a heartland of work over which it has complete, legally established control. . . . Every profession aims not only to possess such a heartland, but to defend and expand it.”).

113. See FREIDSON, *supra* note 15, at 199. For a discussion of how the sustained criticism of professionals as unworthy experts promoting their own social advancement undermined the professional ideal of the legal profession of helping clients navigate between the market and the government, see Dana A. Remus, *Reconstructing Professionalism*, 51 GA. L. REV. 807 (2017). See also Rebecca Roiphe, *The Decline of Professionalism*, 29 GEO. J. L. ETHICS 649 (2016) (similarly arguing that the traditional understanding of professions as promoting the public good was lost as a result of criticism of expertise and institutions, among other things).

114. See FREIDSON, *supra* note 15, at 34–35 (“The ideal-typical position of professionalism is founded on the official belief that the knowledge and skill of a particular specialization requires a foundation in abstract concepts and formal learning and necessitates the exercise of discretion.”).

115. See *id.*



overemphasize professional judgment.<sup>116</sup> But in its ideal form, a professional uses judgment in applying acquired knowledge to a particular situation.

Another important professional feature is that the acquisition of the required body of knowledge and the basic associated practical skills takes place in universities, not in the labor market.<sup>117</sup> Professional schools located within universities act as a required gateway or passage for aspiring members of a profession because in these institutions professionals devoted to research and education train students for their future occupation.<sup>118</sup> Thus, we have the paradigmatic examples of medical and law schools, where doctors and lawyers, albeit ones devoted to research, train the next generation of practitioners. The university is also important for the development of theoretical professional knowledge by scholar-professionals who are insulated from the pressures of practice and who can reflect on developments and create new approaches in the field.<sup>119</sup> Certainly professionals develop their knowledge and, particularly, their skills outside professional schools, but their basic professional formation occurs in them. The connection with the university also conveys a cultural and social prestige on the members of the profession and adds to its authority, particularly in its jurisdictional contests with other occupations and professions.<sup>120</sup>

Yet another “ideal” professional feature is the consciousness by its practitioners that they engage in a common occupation; they have a shared social identity associated with being members of a specific profession.<sup>121</sup> The consciousness and identity generally emerge from the shared professional formation in the university-based professional schools and are further supported and promoted by societies and organizations devoted to standardizing, advancing, and sharing professional knowledge and practices, which professionals customarily join.<sup>122</sup> Professionals, in other words, have a strong self-identity that is connected with their occupation and that they share only with other similar professionals. This self-identity may be furthered by and related to the social status and social recognition that is accorded to established professions by those outside them.<sup>123</sup>

An additional professional feature—and indeed the most distinguishing one—is that the government accords to the occupation official recognition by giving its practitioners a monopoly of practice and exclusive control of the

116. See SUSSKIND & SUSSKIND, *supra* note 107, at 119–21 (making this point).

117. See FREIDSON, *supra* note 15, at 84.

118. See BLEDSTEIN, *supra* note 108, at 121–28.

119. See FREIDSON, *supra* note 15, at 92; ABBOTT, *supra* note 107, at 55.

120. See FREIDSON, *supra* note 15, at 102–04; ABBOTT, *supra* note 107, at 53–54.

121. See FREIDSON, *supra* note 15, at 105–23 (describing an ideology whereby the professional works for professional values); ABBOTT, *supra* note 107, at 119 (pointing out that “professionals draw their self-esteem from their own world . . .”).

122. See FREIDSON, *supra* note 15, at 141–46. This is an ideal, of course, since there is generally a hierarchy within a profession.

123. See LARSON, *supra* note 108, at xvii (describing a profession as a social mobility project).

activity.<sup>124</sup> The government thus makes it illegal for anyone to engage in the profession unless the practitioner is an authorized member of it, and becoming a member requires approval by current members of the profession through a government-approved licensing process. Thus, state medical associations control who can be a doctor, and state bar associations approve who can be a lawyer.<sup>125</sup> The government's granting professional status to an occupation's practitioners is occasionally referred to as the "grand bargain."<sup>126</sup> That is, the government grants the status only to an occupation which convinces it that the monopoly of practice is necessary for the public benefit or interest; a profession justifies its special status on the grounds that the service it provides is both essential to public welfare and should be engaged in only by professionals, again for the public interest.<sup>127</sup> In the United States, the "government" granting professional status through a license is a state; in other countries, the national government determines which occupation is a profession.<sup>128</sup> Therefore, while those engaged in many occupations today call themselves "professionals,"<sup>129</sup> they often do not have the monopoly of practice that is characteristic of established professions and that is indicative of the fundamental importance of the social activities that professions conduct.

Aside from its ideal features, a key point about a profession is that it must have jurisdiction over a domain of social activities and defend it from encroachment by other professions and occupations.<sup>130</sup> This assertion of jurisdiction is related to the above feature of the government's grant of monopoly of practice because a profession that has this monopoly over a set of activities has a legal basis for its jurisdiction.<sup>131</sup> A profession also achieves and retains its jurisdiction by persuading the public (i.e., its clients) to grant this exclusive control to the profession and by taking over particular tasks in the workplace.<sup>132</sup> Moreover, while a profession may have a clearly separate domain, professions in similar domains generally have all kinds of relationships with one another. A profession may emerge from another profession; one profession may dominate another and keep it in a subordinate position as a "sub- or para- profession," or exert a weaker form of intellectual control over it; a

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124. See FREIDSON, *supra* note 15, at 59–60 ("Occupational control of the division of labor is a central element of ideal-typical professionalism."); ABBOTT, *supra* note 107, at 64 (speaking of the "legally established world of jurisdiction").

125. As Professor Andrew Abbott notes, "the tenancy of one profession generally excludes that of another." ABBOTT, *supra* note 107, at 89.

126. See SUSSKIND & SUSSKIND, *supra* note 107, at 22 (providing their own definition of this bargain).

127. See *id.*

128. See generally ABBOTT, *supra* note 107, at 62–63 (discussing differences in government recognition in Britain, France, and the United States).

129. See *id.* at 14 (making this point).

130. See generally *id.* at 59–79.

131. See *id.* at 62.

132. See *id.* at 60–61.

profession may offer advice about another's domain, as a way of making inroads into it.<sup>133</sup> Professions may also subdivide on the basis of their clients.<sup>134</sup> In sum, an analysis of a profession—or of any occupation for that matter—should assume that its situation is dynamic, rather than static, in relationship to other professions and to occupations that have not yet achieved professional status.

Another issue that is relevant for professions—and will play a role in the discussion of the professionalization of compliance—is the social status associated with a profession. As noted above,<sup>135</sup> scholars have argued that professions are a method for members of an occupation to acquire economic value and the social status associated with it. My point here is a more limited one. It is that the contest among professions (and sub-professions) for jurisdiction over certain activities will generally have economic and social consequences.<sup>136</sup> Therefore, those engaged in a particular occupation may find it useful for economic purposes to be part, or to fall under the umbrella, of a particular profession rather than another.<sup>137</sup>

Admittedly, these features are abstract and not always present in all professions or aspiring ones. Yet they provide guidelines that compliance can be measured against in determining whether and how it is a profession. It is to that task that this Part now turns.

### *B. Is Compliance a Profession?*

It should first be pointed out that there has been little legal academic literature specifically discussing whether compliance is a profession. Scholars who write on compliance often assume, without analysis, that it is a profession in a colloquial sense. For example, Donald Langevoort, who has written perceptively about compliance and its challenges, assumes the existence of a compliance profession that is trying to establish itself in organizations.<sup>138</sup> Michele DeStefano, who comprehensively reviewed the compliance field, noted the existence of a “new profession of compliance” without exploring the bases

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133. See *id.* at 69–77 (referring to these relationships as “settlements”).

134. See *id.* at 77–79.

135. See BLEDSSTEIN, *supra* note 108; LARSON, *supra* note 108.

136. See ABBOTT, *supra* note 107, at 167 (referring to “dominant, oligarchical professions”).

137. See *id.* at 105 (speaking of the amalgamation of groups and subordinates into a profession).

138. See Donald C. Langevoort, *Getting (Too) Comfortable: In-House Lawyers, Enterprise Risk, and the Financial Crisis*, 2012 WIS. L. REV. 495, 500 (2012) (when discussing the argument for the separation of legal from compliance, Langevoort perceptively notes that “there is a strong scent of professional competition here. The fast-developing compliance industry seeks both status and autonomy in the corporate world, which requires a separation from control by the legal profession . . .”) (footnote omitted). See also *id.* at 502 (referring to the “compliance profession”); *id.* at 518 (talking about the “professional autonomy” of the compliance industry).

for this characterization.<sup>139</sup> John Walsh, a noted practitioner and former regulator who has written thoughtfully on compliance and who is one of the foremost authorities on brokerage and investment advisory compliance, evaluated whether compliance satisfied the “classic” definition of a profession offered by scholars of professions and concluded that its professional journey is incomplete.<sup>140</sup>

The scholar who has dealt most comprehensively—albeit some twenty years ago—with compliance as a new profession is Christine Parker.<sup>141</sup> She argues that the deregulatory movement, in which regulators encourage firms to regulate themselves, opened the space in many regulated industries for a new compliance profession that separated itself from the legal profession.<sup>142</sup> She contends that this new profession is more akin to a management, than a legal, practice because it is designed to integrate and harmonize legal norms with an organization’s goals and culture, rather than just to make sure that organizational actors are following the law.<sup>143</sup> She also finds that compliance is characterized by its special connection to regulators because compliance officers are representing the external, regulatory values in their organization.<sup>144</sup> In her view, this “dual facing” towards both an organization and regulators shows the uniqueness of the compliance profession and particularly distinguishes compliance practitioners from lawyers, who owe loyalty only to their clients.<sup>145</sup>

Certainly, a case could be made that the compliance occupation satisfies the prominent professional feature of requiring its practitioners to acquire a distinct theoretical body of knowledge and the related practical skills to apply it.<sup>146</sup> As discussed in Part II, compliance is recognized today as an occupation

139. See DeStefano, *supra* note 43, at 91.

140. See, e.g., John H. Walsh, *Compliance as a Profession*, in MODERN COMPLIANCE: BEST PRACTICES FOR SECURITIES & FINANCE 765, 776–88 (David H. Lui & John H. Walsh eds., 2015). See also Baer, *Compliance Elites*, *supra* note 102, at 1613 (assuming the existence of a “compliance profession,” albeit where many of its members come from the legal profession).

141. See Christine Parker, *Lawyer Deregulation via Business Deregulation: Compliance Professionalism and Legal Professionalism*, 6 INT’L J. LEGAL PRO. 175 (1999). Parker, sometimes with co-authors, has written extensively on compliance, often highlighting its professional aspirations and achievements, albeit in Australia. See, e.g., Christine Parker, *Compliance Professionalism and Regulatory Community: The Australian Trade Practices Regime*, 26 J.L. & SOC’Y 215 (1999) (discussing, among other things, how regulators can promote compliance professionalism); Christine Parker & Viebeke Lehmann Nielsen, *Do Businesses Take Compliance Systems Seriously? An Empirical Study of the Implementation of Trade Practices Compliance Systems in Australia*, 30 MELB. U. L. REV. 441 (2006) (discussing, among other things, how the applicable regulator can enhance trade practice compliance systems).

142. See Parker, *Lawyer Deregulation via Business Deregulation*, *supra* note 141, at 181.

143. See *id.* at 183–86.

144. See *id.* at 186–87.

145. See *id.* at 188.

146. See Walsh, *supra* note 140, at 779–80 (discussing this feature).

that demands theoretical knowledge that is embodied in an abstract format and that serves as the foundation for the defined compliance activities (e.g., assessing risk of legal violations in an organization and preparing compliance policies and procedures).<sup>147</sup> Moreover, a compliance practitioner must learn and develop certain skills and techniques for appropriately conducting these activities.<sup>148</sup> Practitioners and scholars are developing and enhancing the theoretical and practical knowledge about compliance, which is evidenced by a growing number of articles and books on the subject.<sup>149</sup>

However, compliance's satisfaction of this first feature is imperfect. Much compliance knowledge is basically about laws, regulations, and their application to a particular organization, arguably knowledge that is within the domain of the legal profession. Indeed, this is why compliance activities were initially conducted in legal departments and why today many lawyers serve as compliance officers.<sup>150</sup> It is true that compliance involves different, albeit related, skills from those of a practicing organizational lawyer, such as designing and drafting compliance policies and procedures and the accompanying training and monitoring.<sup>151</sup> But, as will be discussed further below,<sup>152</sup> the close relationship between law and compliance complicates compliance's professional status, and this complication clearly appears in the question whether compliance's knowledge and skills are distinct.

The professional feature, which is that the acquisition of professional knowledge and skills occurs in universities, is also not clearly possessed by compliance. Admittedly, the teaching of basic compliance knowledge and skills has increasingly become part of the university curriculum. Universities, particularly in their law and business schools, are offering students courses of study and degrees in compliance, with the promise and understanding that they are preparing students for careers in compliance.<sup>153</sup> The development of the theoretical knowledge about compliance and the reflection on compliance

147. See *supra* text accompanying notes 65–89.

148. See COMPLIANCE & LEGAL DIV., SEC. INDUS. ASS'N, *supra* note 67, and accompanying text (discussing drafting policies and procedures). See also ABBOTT, *supra* note 107, at 195 (explaining that the modern way of legitimating a profession is through its “scientization or rationalization of technique and [based] on efficiency of service”).

149. Practical information is shared in such publications as COMPLIANCE WEEK and PRACTICAL COMPLIANCE & RISK MANAGEMENT FOR THE SECURITIES INDUSTRY. Scholars share information on Compliance.net. The footnotes in this article bear witness to the growing compliance scholarship.

150. See, e.g., COMPLIANCE & LEGAL DIV., SEC. INDUS. ASS'N, *supra* note 67, at 1 (recounting how, prior to the early 1960s, legal departments generally had responsibility for compliance in the brokerage industry). See also *infra* text accompanying notes 175–77.

151. See *supra* text accompanying notes 65–89.

152. See *infra* Section V.A.

153. See generally Fanto, *supra* note 10, at 760–63. See also Pacella, *supra* note 71, at 950 (discussing these developments).

practice also occurs in these institutional settings.<sup>154</sup> Certainly, this university support for compliance is in an embryonic form and is thus not at the level of established professions: i.e., there are no “compliance schools” like law and medical schools. Because compliance is a relatively new occupation, it would not be expected to be completely established in universities at this stage of its professional development.<sup>155</sup>

However, there are some features about compliance’s passage into the university that are troubling from the perspective of professional features. That compliance teaching often takes place in law schools could suggest that compliance is a legal activity or a para-professional one associated with, or under the authority of, the legal profession. Moreover, and significantly from this perspective, the passage through specific university studies is not—at least yet—a requirement for compliance practice, as it is for established professions. People enter the compliance field from diverse backgrounds in many ways, including from other internal control fields, and they become compliance officers primarily through “on the job” training.<sup>156</sup> This kind of varied and open formation is characteristic of a technical field, rather than of a profession.<sup>157</sup>

With respect to the professional feature dealing with consciousness of engaging in a well-defined occupation, compliance officers and practitioners demonstrate that they are aware of being in and furthering a common occupation; they increasingly have a professional social identity.<sup>158</sup> This consciousness and identity are evidenced by the fact that “professional” groups or societies for compliance officers exist.<sup>159</sup> Not only do these societies have journals and other publications that promote standard compliance practices and professional codes of ethics and that develop theoretical and practical knowledge on compliance, but they also have conventions and other meetings where compliance practitioners gather to become acquainted and to share with

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154. To cite one example, there is the *Program on Corporate Compliance and Enforcement* at NYU School of Law, N.Y.U. SCH. OF L., <https://www.law.nyu.edu/centers/corporatecompliance> (last visited Dec. 10, 2020).

155. See Walsh, *supra* note 140, at 782 (discussing compliance training conducted in universities).

156. See Lui, *supra* note 80, at 130 (making this point but noting that many compliance officers come from a legal background).

157. See FREIDSON, *supra* note 15, at 90 (discussing how certain “technical” occupations have an “ambiguous and unstable” position in the labor market).

158. On social identity, see Michael A. Hogg & Dominic Abrams, *Social Identity and Social Cognition: Historical Background and Current Trends*, in *SOCIAL IDENTITY AND SOCIAL COGNITION: AN INTRODUCTION* 8–12 (Dominic Abrams & Michael A. Hogg eds., 1999) (i.e., the self-definition as a group member that affects a person’s perceptions).

159. See, e.g., SOC’Y OF CORP. COMPLIANCE & ETHICS, <https://www.corporatecompliance.org> (last visited Sept. 10, 2020); NAT’L SOC’Y OF COMPLIANCE PROS., <https://nscp.org> (last visited Dec. 10, 2020).

each other their knowledge and skills.<sup>160</sup> These meetings enhance and foster the social identity of compliance practitioners. In addition, through the resources of these societies, compliance positions are advertised,<sup>161</sup> which shows that compliance practitioners can have a compliance career where they move from organization to organization, including to firms composed of only compliance practitioners, rather than having their employing organization alone define their work identity.<sup>162</sup> In other words, this occupational mobility for compliance officers shows that the job of compliance has become distinct from its organizational setting, which is generally a necessary professional feature.<sup>163</sup>

However, compliance does not possess the most distinguishing feature of established professions: the authority and monopoly of practice given by the government, generally through a state licensing regime, to professionals to control their occupation, particularly to determine who can engage in it, and to separate and distinguish it from other activities. In other words, there has been no “grand bargain” between the government and compliance practitioners.<sup>164</sup> There has been no concerted movement by compliance practitioners to obtain this authority over their field, which would empower them to have the exclusive right to train those who wish to enter the compliance “profession.”<sup>165</sup> Indeed, anybody is free to practice compliance or to hold himself or herself out as a compliance officer, consultant, or specialist, without any objection from the “true” compliance officers recognized by a state licensing regime. Moreover, organizations can make anyone they choose a compliance officer or even the head of compliance—something that would not be allowed for a general counsel position. The *federal* government, through its regulators, may require that a certain kind of organization have a chief compliance officer,<sup>166</sup> but it does not require that only those with specific educational credentials be eligible for that position or for other compliance officer roles. Regulators even allow someone with another position in an organization also to act as a compliance officer.<sup>167</sup> Significantly, no *state* government requires the licensing of compliance officers.

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160. See, e.g., *All Conferences*, SOC’Y OF CORP. COMPLIANCE & ETHICS, <https://www.corporatecompliance.org/all-conferences> (last visited Dec. 10, 2020).

161. See, e.g., *All Jobs*, SOC’Y OF CORP. COMPLIANCE & ETHICS, <https://www.corporatecompliance.org/all-jobs> (last visited Dec. 10, 2020).

162. See FREIDSON, *supra* note 15, at 76 (explaining how this inter-organization movement characterizes professional control).

163. See *id.* (explaining that a profession transcends bureaucratic control, where the organization defines the position and the nature of its work).

164. See SUSSKIND & SUSSKIND, *supra* note 107, at 22.

165. See Walsh, *supra* note 140, at 787–88. See also *id.* at 788–94 (Walsh appears to suggest that, if compliance practitioners keep acting as separate professionals and promote standards and ethical codes for compliance practice, the government recognition will eventually come).

166. See *supra* text accompanying notes 46–50.

167. This is shown by regulatory pronouncements stating that compliance officers can fulfill other organizational duties. See, e.g., Publication of the OIG Compliance Program Guidance for Hospitals, *supra* note 47, 63 Fed. Reg. at 8993 (“Every hospital should designate a compliance

Certainly, it may be unfair to expect the relatively young occupation of compliance to have achieved this professional feature, which is granted to an incipient profession only after its practitioners spend considerable time and lobbying efforts to persuade state legislatures.<sup>168</sup> But, as will be discussed below, states have few incentives to grant compliance this monopoly of practice, and the federal government has reasons to prefer this status quo.<sup>169</sup> This government situation thus presents compliance with an important impediment to the attainment of this critical professional feature.

Compliance must also establish itself within—to use Abbott’s words—the system of professions and related occupations. It must take jurisdiction over a given domain or domains, whether they are occupied or not by an existing profession, and hold them against encroachments by other professions or domains looking to occupy or re-occupy them.<sup>170</sup> Clearly, as Parker perceptively observes, compliance established itself as an occupation or set of tasks distinct from legal practice in response to governmental pressure for organizations to regulate themselves.<sup>171</sup> From a systems perspective, compliance thus occupied a new jurisdiction that was at the periphery of the legal profession’s “heartland.”<sup>172</sup> But, as will be discussed in detail below, compliance’s relationship to the legal profession is complex and dynamic, jurisdictional issues are far from being resolved, and the outcome of the relationship implicates issues of social status.<sup>173</sup> Moreover, this relationship may prevent compliance from achieving full professional status. In other words, compliance is still enmeshed in a struggle to define its place in the professional system.

The above discussion of compliance’s incomplete professional status demands further analysis of the reasons, such as its relationship to the legal profession, that have contributed to this state of affairs. This analysis may also

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officer to serve as the focal point for compliance activities. This responsibility may be the individual’s sole duty or added to other management responsibilities, depending upon the size and resources of the hospital and the complexity of the task.”); Compliance Programs of Investment Companies and Investment Advisers, 68 Fed. Reg. 74714, 74725 n.109 (Dec. 24, 2003) (stating SEC’s awareness that small investment advisers need not hire a separate chief compliance officer).

168. See LARSON, *supra* note 108, at 66–79 (discussing the lengthy procedures involved in how established professions achieved the government-granted monopoly of practice). Abbott explains that this government recognition often follows from public recognition of the necessity of a given profession. See ABBOTT, *supra* note 107, at 59–69. Compliance may also suffer because its practitioners do not interact directly with the public, which may demand that they be treated only by professionals.

169. See *infra* text accompanying note 206.

170. See ABBOTT, *supra* note 107, at 87 (“Of the various exclusive properties of professions, jurisdiction is the most important.”).

171. See Parker, *Lawyer Deregulation via Business Deregulation*, *supra* note 141, at 181.

172. See ABBOTT, *supra* note 107, at 71 (“Every profession aims for a heartland of work over which it has complete, legally established control.”).

173. See *infra* text accompanying notes 174–202.



provide a view on compliance's future as a profession. It is to this analysis that the next Part is devoted.

### III. EXPLORATION OF THE REASONS FOR THE CURRENT PROFESSIONAL STATUS OF COMPLIANCE

Part III explores, in order of their importance, four central reasons for the current incomplete and uncertain professional status of compliance. These are (i) the complicated relationship between compliance and the established legal profession, (ii) the fact that the federal government through regulators and enforcement officials appears to favor a weak professional status for compliance, (iii) claims by organizational and management scholars that challenge the legal orientation of compliance and that contend that compliance should receive its theoretical underpinning from them, and (iv) the disruptive effects of technology upon compliance practice.

#### *A. The Complicated Relationship Between Compliance and the Legal Profession*

A primary reason for the incomplete and uncertain professional status of compliance is its complex relationship with the established legal profession. That compliance is closely connected to the legal profession is not surprising because compliance emerged from the legal department in organizations.<sup>174</sup> Historically, a major task of inside counsel in organizations was "preventive law," the legal process designed to ensure that employees and other agents complied with law and regulation in conducting organizational activities.<sup>175</sup> However, preventive law is just another name for compliance. Indeed, the National Center for Preventive Law, an organization composed of general counsel and other organizational lawyers, wrote an early codification of compliance principles.<sup>176</sup> The close connection between the legal profession and compliance is still evidenced by the fact that in many organizations the general counsel also serves as the CCO or is the person to whom the CCO directly reports.<sup>177</sup>

Moreover, because doing at least some of the major compliance tasks is arguably engaging in legal or law-related activities,<sup>178</sup> the legal profession has not relinquished its control over the compliance field, even while the latter

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174. See *supra* note 150 and accompanying text.

175. See Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgement and Organizational Representation*, 64 IND. L.J. 479, 522 (1989).

176. See NAT'L CTR. FOR PREVENTIVE LAW, CORPORATE COMPLIANCE PRINCIPLES (1996).

177. See LRN, THE 2015 ETHICS AND COMPLIANCE EFFECTIVENESS REPORT 7–8 (2015) (showing that, collectively, chief compliance officers report more often to others, such as the audit committee and the chief executive officer, rather than to the general counsel, although the latter remains the largest single reporting line).

178. See *supra* text accompanying notes 66–71.

increasingly became a distinct organizational function.<sup>179</sup> In a rich debate about the relationship between compliance and the law, general counsel—and their supporters in the academy—reason, on the basis of the legal aspects of compliance, that compliance should be subject to the authority of the legal department in organizations and that the CCO should report to the general counsel (if there is a standalone CCO position).<sup>180</sup> They justify this assertion of authority, among other things, by the argument that the legal interpretations and other related legal work of compliance officers are subject to the judgment and authority of the general counsel and the organization's legal staff.<sup>181</sup> This assertion might even make sense to and be accepted by compliance officers, many of whom were trained and practiced as lawyers.

In fact, the American Law Institute's ongoing project on compliance could be seen as a good, recent example of the legal profession's continued exercise of authority over the compliance field.<sup>182</sup> In the project, the Institute, an authoritative organization composed of judges, practicing lawyers, and legal scholars and engaged in the standardization of the law,<sup>183</sup> sets forth the "principles" of compliance for organizations. These principles provide the elements of compliance (i.e., what compliance officers do) and the compliance roles of the various organizational actors, including the CCO and the compliance officers (i.e., compliance governance).<sup>184</sup> This articulation of *legal*

179. See Dana A. Remus, *Out of Practice: The Twenty-First-Century Legal Profession*, 63 DUKE L.J. 1243, 1259–61 (2014) (discussing how the bar never took clear control of fields like compliance nor clearly excluded them).

180. For one general counsel's perspective, see Ben W. Heineman, Jr., *Don't Divorce the GC and Compliance Officer*, CORP. COUNSEL, Jan. 2011, at 48. For representative academic views supportive of the general counsel, see DeStefano, *supra* note 43, at 98–101 (discussing general counsel authority over compliance); *id.* at 120–55 (comprehensively covering arguments for and against legal department control of compliance); Robert C. Bird & Stephen Kim Park, *The Domains of Corporate Counsel in an Era of Compliance*, 53 AM. BUS. L.J. 203, 204–05 (2016) (recognizing the assertion of authority by general counsel over compliance and arguing for certain involvement by them in the compliance function); Tanina Rostain, *General Counsel in the Age of Compliance: Preliminary Findings and New Research Questions*, 21 GEO. J. LEGAL ETHICS 465, 473–77, 481 (2008) (presenting general counsel survey data regarding their overall control over compliance).

181. See Heineman, *supra* note 180, at 48; DeStefano, *supra* note 43, at 144–55 (critically explaining the expansive role of corporate counsel in promoting law and ethics and problems arising from separating counsel from compliance).

182. See PRINCIPLES OF THE LAW: COMPLIANCE, RISK MANAGEMENT, AND ENFORCEMENT, *supra* note 90. The author is an associate reporter on this project who is responsible for the drafting of chapter three on governance of compliance and risk management.

183. As its website explains, "The American Law Institute is the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law." See *About ALI*, AM. L. INST., <https://www.ali.org/about-ali> (last visited Dec. 10, 2020).

184. Chapter 3 of the Principles set forth those dealing with governance; Chapter 5 outlines those discussing compliance. See PRINCIPLES OF THE LAW: COMPLIANCE, RISK MANAGEMENT, AND ENFORCEMENT (AM. L. INST., Tentative Draft No. 1, 2019).

principles of compliance practice makes sense only if the legal profession believes—or is willing to take the position—that the subject matter of compliance falls within its domain or authority.<sup>185</sup>

As scholars have pointed out, however, the legal profession has not clearly asserted its authority over occupations like compliance that operate in the shadow of the law.<sup>186</sup> The practice of compliance, as it occurs in organizations today,<sup>187</sup> could be seen to be close to, but not squarely within, the practice of the law or the provision of legal services.<sup>188</sup> That is, compliance officers, many of whom are lawyers, may be viewed as offering legal advice to organizational actors whether through the policies and procedures that they draft or through their interpretation of these policies and procedures in particular circumstances.<sup>189</sup> As Professor Jennifer Pacella has explained at length, this kind of activity might well fall within the definition of “law-related services” that are defined in the American Bar Association’s Model Rule 5.7.<sup>190</sup> Yet, as she also explains and as will be discussed more below, commentary to the Rule does not list compliance as one of the “law-related services” and the wording of the Rule does not clearly cover compliance officers (whether lawyers or otherwise) providing services individually and not in connection with lawyers who are providing legal services.<sup>191</sup> Despite this uncertainty as to how compliance exactly fits within the canons of legal practice, the legal profession through its state bar associations has generally not put any impediments in the

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185. On the project page, the Institute says the following: “This project will address the need for a set of recommended standards and best practices on the law of compliance and risk management.” See PRINCIPLES OF THE LAW: COMPLIANCE, RISK MANAGEMENT, AND ENFORCEMENT (AM. L. INST., Tentative Draft No. 1, 2019), <https://www.ali.org/projects/show/compliance-enforcement-and-risk-management-corporations-nonprofits-and-other-organizations> (last visited Dec. 10, 2020).

186. See Tanina Rostain, *The Emergence of “Law Consultants,”* 75 FORDHAM L. REV. 1397, 1407–11 (2006) (discussing how lawyers and others avoid the reach of the legal profession by engaging in consulting practices where practitioners do not provide their clients with legal opinions or legal representation).

187. See *supra* Section I.C.

188. As Professor Pacella has explained, the definition of the practice of law and the provision of legal services has been left to the individual states to define, and their definitions focus on the application of legal judgment and on litigation-related services. See Pacella, *supra* note 71, at 963–69.

189. See *id.* at 970–71 (discussion of how compliance officers provide legal advice).

190. See *id.* at 970 (making this argument and citing to Rule 5.7(b), which explains that such services “denote[] services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a non-lawyer.”) (quoting MODEL RULES OF PRO. CONDUCT r. 5.7(b) (AM. BAR. ASS’N 1983)).

191. See *id.* at 970–73 (also explaining that the original purpose of the provision was to address the situation where lawyers provided ancillary services or businesses as part of their law practice).

way of lawyers (and others) engaging in compliance activities, so long as they do not hold themselves out as being engaged in legal practice.<sup>192</sup>

Scholars have offered various explanations for the above ambivalence of the legal profession in asserting its authority over compliance. One explanation is that the legal profession is reluctant to do this in situations where organizations need legal advice and direction that must be given in complex organizational settings. That is, organizations need legal guidance that has to be fully integrated into their operations and that takes into account a range of constraints, including business strategy, accounting, finance, and technology. Compliance is this kind of integrated law-related service because for it to function well it must be part of the operations of an organization.<sup>193</sup> From this perspective, the legal profession has generally taken a “hands-off” approach to compliance so that compliance can develop as a useful law-related (but not legal) service provided by lawyers and others to organizations.

A more critical perspective on this situation would contend that the legal profession not asserting authority over compliance allows lawyers acting as compliance officers to serve purely organizational interests without being subject to professional oversight.<sup>194</sup> This view is related to the claim that organizations (particularly large business firms) increasingly incorporate professionals whose services they need into an organization’s hierarchy and disassociate them from their respective profession.<sup>195</sup> Thus, according to this perspective, pushed by their business firm clients, the legal profession accepts limited authority over compliance just as, in an earlier period, it permitted organizations to control their inside counsel.<sup>196</sup>

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192. See *id.* at 987–89 (explaining that there have been no cases involving compliance officers and applying state versions of Rule 5.7 but noting that there is a risk of such a rule violation to a lawyer acting as a compliance officer). See also Rostain, *supra* note 186, at 1408 (discussing how few cases targeted people in the position of compliance officers). The American Bar Association even published a book on compliance in which the authors focus on practical tasks of compliance officers and do not squarely address the officers’ professional status as lawyers. See ANDREW S. BOUTROS, ET AL., *THE ABA COMPLIANCE OFFICER’S DESKBOOK* (2017).

193. See Rostain, *supra* note 186, at 1420–25 (discussing the advantages of this law-related consulting in organizations).

194. See Remus, *supra* note 179, at 1269–70 (“The proliferation of quasi-legal roles allows corporate management to expand its strategic access to legal expertise under a greater range of conditions and subject to fewer constraints.”).

195. See FREIDSON, *supra* note 15, at 210 (“Employing organizations are likely to intensify efforts to standardize the work of rank-and-file professionals in order to reduce their cost and better control and supervise them.”).

196. Control may be too strong a word. Inside counsel become part of the politics of an organization, rather than external professionals with no stake in it. See Rosen, *supra* note 175, at 536 (“[L]awyers influence not only corporate actions to comply with the law, but also corporate goals and commitments beyond the law’s dictates.”). Professor Dana Remus suggests that organizations have more control over their compliance officers than their legal counsel. See Remus, *Out of Practice*, *supra* note 179, at 1270 (“If compliance officers are located outside of the general counsel’s office, management derives the benefits of a lawyer’s expertise and reputational capital

Several explicitly professionalism “stories” could be added to, and could even incorporate parts of, the above explanations of the legal profession’s relationship to compliance. Although, as discussed above, compliance emerged out of legal practice as an important organizational function, the legal profession has little incentive to assert more than a general authority over it. In other words, so long as the legal profession’s ultimate authority over the law—its heartland—is recognized and undisputed, it might allow compliance to co-exist as a subsidiary, satellite occupation or a “sub-profession” to legal practice.<sup>197</sup> The legal profession might even benefit in status by keeping compliance both under its authority *and* distinguished from it because compliance involves routinized, organizational law-related activities, such as drafting procedures and monitoring.<sup>198</sup> Therefore, one professional story for compliance is that it has developed, and will likely remain, as a sub-profession to the legal profession where compliance practitioners work almost exclusively in organizations. This story suggests that compliance will not acquire all the features of a strong profession, particularly the government-awarded monopoly of control over its activities, unless it becomes entirely incorporated into the legal profession.

Yet a more positive professional story of the relationship between law and compliance could be offered. Under it, compliance practitioners, whether lawyers or others, saw the growing need for their services in organizations and the opportunity to develop them outside legal departments, which did not strongly oppose this development. These practitioners have been able to convince organizations of the need for and the importance of the compliance function, in light of the internalization of enforcement,<sup>199</sup> and achieved the organizational role and identity discussed above.<sup>200</sup> Rather than being content to remain within the orbit of, or to be an ancillary occupation to, the legal profession, compliance practitioners are asserting their professional independence and status. They increasingly highlight the difference between their activities, on the one hand, and the practice of law on the other. In Abbott’s words, a new collection of activities or “jurisdiction” has emerged in compliance; the legal profession has ceded it to compliance practitioners (many

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in the compliance role while ceding far less control than if the lawyer-compliance officer was subject to professional regulation.”) (footnote omitted).

197. See ABBOTT, *supra* note 107, at 71 (discussing the professional phenomenon of one occupation being subordinate to a profession, such as in the doctor-nursing relationship). That is, doctors have the ultimate authority, in medical treatment, over nurses and nurse practitioners but allow them a certain freedom of practice.

198. See *id.* at 125–28 (discussing the consequences of the routinization and degradation of profession work). Abbott explains that this can result in a subordinate profession or in stratification within the profession. See *id.* at 127–28. The stratification can also arise in situations where a demand for professional services decreases, which relegates lower status professionals to quasi-professional roles. See *id.* at 119. Certainly, the increased hiring of lawyers in compliance roles could reflect their failure to find places in higher status law firms.

199. See *id.* at 91 (as he notes, “tasks usually antedate groups”).

200. See *supra* Section I.C.1.

of whom are lawyers); and the practitioners are resisting any reassertion of control by the legal profession by trying to establish their own independent profession.<sup>201</sup> This kind of emergence of one profession out of another because of new work that becomes the new profession's jurisdiction is common in the history of professions.<sup>202</sup>

Yet whatever is the professional story of the legal profession's relationship to compliance, the relationship has prevented the straightforward transition of compliance into a strong profession and contributes to compliance's uncertain professional status. This relationship, however, is not the only reason for compliance's professional situation, because the government has a hand in it as well.

### *B. The Federal Government's Use of Compliance*

The federal government, whether through the actions and pronouncements of regulators or enforcement officials, has also contributed to the uncertain professional status of compliance officers because it has an interest in their not being members of a "strong" profession.<sup>203</sup> Not surprisingly then, it has not advocated for the professionalization of compliance officers. As noted earlier, the federal government mandated or encouraged organizations to have compliance as part of their internal control, which is an internalization in organizations of external or government control.<sup>204</sup> Compliance officers are thus organizational actors who have been "deputized" to act for regulators and enforcement officials in their organization. In this they serve the federal government's purposes and have a quasi-governmental role.<sup>205</sup>

Juxtaposed with this anti-professional stance on the part of federal government officials is the indifference of the state government towards licensing compliance officers. This indifference is not surprising. In the history of professions, state licensing would appear when the state legislature accepts that the public must be protected by having only knowledgeable practitioners exercise a particular occupation. State legislatures arrive at this conclusion because they would perceive that the task performed by the occupation is central

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201. See ABBOTT, *supra* note 107, at 64 ("In the workplace, jurisdiction is a simple claim to control certain kinds of work.").

202. Abbott discusses ways in which a new profession emerges, many of which could well apply to compliance. For example, he discusses the phenomenon of "enclosure." See, e.g., *id.* at 95 ("Typically, there emerge specialties in several professions, performing similar sorts of work but retaining their original allegiance. Eventually these groups make common cause and consider forming a new profession, enclosing their common work as a single jurisdiction independent of their parents."). Arguably, compliance today has specialists from law, accounting, and systems analysis who are banding together as members of a new profession.

203. For simplicity's sake, the term "federal government" will be used interchangeably with "regulators" and "enforcement officials."

204. See *supra* text accompanying notes 46–49.

205. See *supra* text accompanying notes 33–36.

to public welfare in some respect and because the practitioners, aided by the public and the media, convince them that the occupation must be restricted to these knowledgeable practitioners to ensure this welfare. But there has been no public “movement” directed at state legislatures and organized by compliance practitioners to have the practice of compliance require a state license that these practitioners control. This may well be because the harm to consumers from having unlicensed persons act as compliance officers in organizations is not evident or direct. Thus, it is not surprising that supporters of compliance have not lobbied state legislatures for the professional license privilege, given how difficult it might be for them to persuade legislators of the direct public benefit from the licensing regime.<sup>206</sup>

The weak and undefined professional status of compliance officers that follows from the absence of state licensing allows the federal government more freedom to use them for its own purposes than would be the case if compliance officers were members of an established profession. This government, rather than a profession, establishes the duties and tasks of compliance officers.<sup>207</sup> Because compliance officers are its “eyes and ears,” a regulator expects them to report regularly to it on what is occurring within their organization.<sup>208</sup> Regulators also use compliance officers for specific, and changing, government purposes.<sup>209</sup> This kind of control, which involves dictating the scope of compliance’s work, undermines its professional status because professionals generally have control over their work.<sup>210</sup> Indeed, that regulations do not

206. And the revenue stream from licenses, which might be attractive to legislators, might not be that large as well, or large enough to motivate them. I owe this observation to Professor Baer.

207. See *supra* text accompanying notes 65–89 (on these duties).

208. See *supra* text accompanying notes 82–84. As Professor Baer has argued, government enforcement officials prefer this model of compliance officer as police officer, helping them prevent and detect organizational wrongdoers. See Baer, *Confronting the Two Faces of Corporate Fraud*, *supra* note 75, at 148–50. This policing model of compliance runs counter to what Professor Baer characterizes as an “architectural approach,” pursuant to which a compliance officer designs structures with the purpose of encouraging compliance by organizational actors. See *id.* at 133. Her architectural approach is akin to that followed by a professional in the classic sense, who exercises discretion and judgment on a given subject matter as applied to a particular situation.

209. A good example of this in the brokerage industry is that each year, the SEC and FINRA set forth priorities for their examinations. See, e.g., SEC. AND EXCH. COMM’N, 2020 EXAMINATION PRIORITIES: OFFICE OF COMPLIANCE INSPECTIONS AND EXAMINATIONS 1 (2020) (“As a threshold matter, we would like to emphasize that compliance programs, chief compliance officers, and other compliance staff play critically important roles at firms.”); FIN. INDUS. REGUL. AUTH., INC., 2020 RISK MONITORING AND EXAMINATION PRIORITIES LETTER 1 (2020) (“[T]he letter includes a list of practical considerations and questions for each of the highlighted topics, which firms may use to evaluate the state of their compliance, supervisory and risk management programs.”). These are, among other things, messages to compliance officers about the areas and concerns that the regulators would like compliance officers to make sure that their firms address.

210. See *supra* text accompanying note 124. Admittedly, the history of professions shows that the government occasionally circumscribes or limits their power so that they serve its purposes. See ABBOTT, *supra* note 107, at 141 (discussing the government’s control over the medical

require any particular training or education for the compliance officer role—and specifically allow anyone to be a compliance officer—contributes to this weak professional status of the field.<sup>211</sup> While regulators are protective of compliance officers,<sup>212</sup> they also punish them harshly when an officer is perceived not to be appropriately serving government interests by completing compliance tasks.<sup>213</sup>

If compliance officers were recognized professionals—say, for example, members of the legal profession—they could further the federal government’s interests in preventing and detecting legal violations, but they would also be subject to the canons or guidelines of their profession. This professional status and the expected professional conduct would insulate them from government pressure and allow them to exercise their discretion in their work and follow their professional judgment instead of the direction of regulators or enforcement officials. For example, a lawyer is supposed to serve the public interest; this professional purpose is a justification for the lawyer’s professional status.<sup>214</sup> Yet the lawyer’s professional relationship with and loyalty to his or her organizational client also affects how he or she satisfies the public interest.<sup>215</sup> By contrast, a compliance officer has no professional status and purposes to use as a bulwark against the government’s control over the officer’s services.

In fact, the real struggle involving the control over and role of compliance officers is not between the federal government through its regulators and enforcement officials and an incipient compliance profession, but between the government and the organizations in which they work. In organizational theory parlance, this is a contest over the bureaucratic—not professional—control of compliance officers.<sup>216</sup> Regulators and enforcement officials try to make

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profession). Indeed, while granting a profession its external support for the profession’s monopoly of practice, the government also uses the profession in the service of its own values and pushes the profession to adopt its own bureaucratic division of labor versus the focus on expertise typical of a profession. *See id.* at 172–73.

211. *See supra* text accompanying notes 98–102. That is, the federal government may require the compliance officer position and specify its duties, but it does not require that the officer be a member of the compliance “profession.” It allows those with other operational responsibilities to fulfill the compliance officer role. Indeed, there are anecdotal reports that regulators prefer compliance officers not to be lawyers, i.e., not to be members of a strong profession.

212. *See, e.g.*, Public Statement, Luis A. Aguilar, Comm’r, Sec. and Exch. Comm’n, “The Role of Chief Compliance Officers Must Be Supported” (June 29, 2015), <https://www.sec.gov/news/statement/supporting-role-of-chief-compliance-officers.html> (discussing, among other things, the SEC’s support for compliance officers).

213. *See generally* Golumbic, *supra* note 25, at 51–69 (surveying prominent cases against compliance officers).

214. *See* LARSON, *supra* note 108, at 172–73 (discussing how the promoters of the legal profession in the 1910–1930s publicized their public interest side).

215. *See* Remus, *Out of Practice*, *supra* note 179, at 1250 (discussing the traditional model of the legal canons where the lawyer balances the interests of the client and the state).

216. *See* FREIDSON, *supra* note 15, at 48–51 (discussing the bureaucratic division of labor).



compliance officers serve their purposes as much as possible. That is, regulators contest with organizations the position and activities of an organization's compliance officers because, understandably, an organization also places these officers within its own hierarchy and wants them to serve organizational purposes. But in this struggle over which bureaucracy—whether a federal regulator or an employing organization—has the dominance over compliance officers, the professionalization of compliance is undermined and ignored. A compliance profession would protect compliance officers from being completely subsumed by this bureaucratic control, whether by their organization or by the applicable regulator.

So, government efforts to control compliance officers, just as the relationship between the legal profession and compliance, contribute to compliance's uncertain professional status. There are several other developments that also arguably impede compliance's professional status, to which this Part now turns.

### *C. Other Disciplines as an Intellectual Foundation for Compliance*

Not only has the legal profession been ambivalent about embracing compliance—with federal government acquiescence in this ambivalence—but scholars from other intellectual disciplines, and even some compliance practitioners, argue against the alignment of compliance with the law. They have criticized the legal orientation of compliance, preferring to base it on other intellectual foundations.<sup>217</sup> They contend that a purely legally-oriented compliance will have limited effectiveness in deterring violations of the law.

From the scholarly side, organizational and business ethics scholars argue that compliance should have a different foundation from the law.<sup>218</sup> On the basis of their research, they contend that compliance is most effective when it fosters ethical decision-making and an ethical culture in an organization, rather than focusing primarily on legal compliance.<sup>219</sup> In fact, in their view, the

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217. See, e.g., Christine E. Parker et al., *The Two Faces of Lawyers: Professional Ethics and Business Compliance with Regulation*, 22 GEO. J. LEG. ETHICS 201, 205 (2009) ("Our data suggest that to the extent lawyers influence clients, it is towards game-playing, not commitment to compliance or resistance to compliance.").

218. See Gary R. Weaver & Linda Klebe Treviño, *Compliance and Values Oriented Ethics Programs: Influences on Employees' Attitudes and Behavior*, 9 BUS. ETHICS Q. 315 (1999) (finding that a values orientation is more effective than a legal orientation in compliance); Christine Parker & Vibeke Lehmann Nielsen, *Introduction: From Regulation to Compliance*, in EXPLAINING COMPLIANCE: BUSINESS RESPONSES TO REGULATION 1, 11–14 (Christine Parker & Vibeke Lehmann Nielsen eds., 2011) (discussing the normative motives for compliance). See also Todd Haugh, *Nudging Corporate Compliance*, 54 AM. BUS. L.J. 683, 686 (2017) (explaining how "behavioral ethics nudging" may make employees engage in more compliance conduct).

219. See, e.g., Tenbrunsel et al., *supra* note 13, at 293–96 (explaining how organizational climates for ethics, respect, and procedural justice support an organization's ethical infrastructural and formal systems of conduct); Linda Klebe Treviño et al., *Legitimizing the Legitimate: A Grounded Theory Study of Legitimacy Work Among Ethics and Compliance Officers*, 123

emphasis on legal compliance can “crowd out” an ethical orientation that would lead employees otherwise to try to do the “right thing” in a given situation, rather than just complying with the letter of the law. From their perspective, the goal of compliance should be to foster an ethical culture that will be the foundation for legal compliance.<sup>220</sup> Unethical culture for them can lead to noncompliance and destructive organizational problems. It should be noted that several of these scholars, such as Christine Parker, are in countries outside the United States where compliance does not have the strong association with and origin in the legal profession as it does in this country.<sup>221</sup>

Practicing compliance officers have echoed this assertion about the importance of an ethical culture—with less focus on law.<sup>222</sup> These practitioners insist upon using the title of “Chief Ethics and Compliance Officer,” which emphasizes the aspect of their position that promotes a firm’s ethical culture.<sup>223</sup> Like the scholars whose work they draw upon, they, too, see ethics as the foundation for a compliant organization.<sup>224</sup> They thus seek to develop and to share practices that promote ethical conduct and “good” culture in an organization.<sup>225</sup>

This scholarly and practical alternative to the legal orientation of compliance also has consequences for its professionalization because it offers a different professional outcome than that compliance be integrated with, or become a subservient discipline to, the legal profession. From a professional formation perspective, the study of compliance and the preparation of future compliance officers would occur in business, not law, schools and compliance

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ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 186, 194–95 (2014) (discussing the legal mindset that impedes the fostering of ethics in an organization). *But see* Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 966–967 (2017) (emphasizing the individual and institutional pressures that run counter to the establishment of an ethical culture in organizations).

220. *See, e.g.*, Hess, *supra* note 59, at 351–55 (arguing for a nuanced view that recognizes the complexities involved in the relationship between extrinsic (often legal) and intrinsic (ethical) motivations for compliance).

221. *See List of Contributors to Christine Parker & Vibeke Lehmann Nielsen, supra* note 218, at xii (Parker’s biography).

222. *See* Christine Parker, *The Ethics of Advising on Regulatory Compliance: Autonomy or Interdependence?*, 28 J. BUS. ETHICS. 339, 342–45 (2000) (describing, on the basis of interviews, compliance officers’ view of themselves as distinct from lawyers and fostering firm culture and ethics).

223. *See, e.g.*, ETHICS RES. CTR., LEADING CORPORATE INTEGRITY: DEFINING THE ROLE OF THE CHIEF ETHICS & COMPLIANCE OFFICER (CECO) 18 (2007).

224. *See, e.g.*, Joseph E. Murphy, *Policies in Conflict: Undermining Corporate Self-Policing*, 69 RUTGERS U. L. REV. 421, 425 (2017) (making this point).

225. *See, e.g.*, Lee Augsburger, *How Compliance Can Teach Ethics*, in MODERN COMPLIANCE: BEST PRACTICES FOR SECURITIES & FINANCE 179, 185–89 (David H. Lui & John H. Walsh eds., 2015) (discussing practices for effective ethics programs in financial firms).

would be a specialty in management and business administration.<sup>226</sup> Its intellectual foundation would rest upon disciplines associated with those schools, like organizational studies, business ethics, and social psychology.<sup>227</sup> The separate departmentalization of compliance in business organizations, with all that it entails (e.g., making the CCO a position separate from the chief legal officer), would reinforce compliance's distinct professional position apart from the law.

More will be said in the next Part about the outcome of this contest between fields for the jurisdiction of compliance. Certainly, the history of professions is full of examples of professions opposing others when expanding into a new occupation.<sup>228</sup> My point here is that the struggle between the legal profession and management studies over compliance contributes to the field's uncertain professional status by arguably pulling it in different professional directions. That is, having another theoretical and practical orientation, with strong advocates, prevents compliance from stabilizing within the orbit of the legal profession and thus keeps its professional status in flux. Although the influence of managerial and organizational studies may enable compliance to establish itself as a standalone profession separate from the law, this is likely to occur only if the legal profession completely relinquishes its influence over compliance, which, as discussed above and further below, does not seem likely.

In sum, the ethical and managerial orientation of compliance contributes to its uncertain professional status. This is also true of the final reason that this part explores: the place of technology in compliance's operation within organizations.

#### *D. The Disruptive Force of Technology in Compliance*

That technology is influencing, and even disrupting, compliance practice today also contributes to compliance's uncertain professional status. Compliance has always had a close relationship with technology because it was originally a "back office" function in industries like finance whose operations depended upon their communications and other technology.<sup>229</sup> Compliance practitioners were intimately familiar with their firm's operations, which is why they were well positioned to make sure that the operations were done in

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226. See, e.g., *Ethics and Compliance*, MIAMI HERBERT BUS. SCH., <https://www.bus.miami.edu/our-perspective/ethics-compliance/index.html> (last visited Dec. 10, 2020) (discussing University of Miami's ethics program in its business school).

227. See *infra* Section III.A.

228. See ABBOTT, *supra* note 107, at 91 ("External forces directly disturb the system by opening new task areas for jurisdiction and by destroying old jurisdictions. A new task appears, and some profession achieves jurisdiction over it . . .").

229. See John H. Walsh, *A History of Compliance*, in MODERN COMPLIANCE: BEST PRACTICES FOR SECURITIES & FINANCE 5, 13–19 (David H. Lui & John H. Walsh eds., 2015) (discussing how compliance in the securities industry fell from senior management to those lower in the institutional hierarchy).

accordance with law and regulation. For example, a compliance officer of a broker-dealer had to understand how customer stock trades were communicated and processed so as to be able to ensure that they were done in conformity with the regulation of trading.<sup>230</sup> Even today when compliance practice demands increasing “legal” knowledge, it still draws practitioners from an organization’s management of operations, which is heavily involved with information technology.<sup>231</sup>

The influence of technology on compliance is even more direct than the fact that compliance practitioners have to understand well the operations of organizations, including its technology. Technology is now being used in and is shaping many of the main compliance tasks.<sup>232</sup> As discussed above, compliance practitioners establish policies and procedures for an organization’s employees, train them in these forms of guidance, monitor their compliance and regularly test the compliance systems.<sup>233</sup> Many of these compliance tasks are increasingly being automated or otherwise assisted by technological means.<sup>234</sup> If, for example, a compliance officer has to monitor employee communications and activities outside the organization—which certain regulatory schemes require<sup>235</sup>—it would be difficult and time-consuming if the compliance officer did not have the use of certain software that could look over the communications or could not do web searches on the employees and, say, highlight problematic emails or outside activities for the officer’s further review.<sup>236</sup> Indeed, increasingly compliance practitioners are expected to be skilled in or conversant with the technology enabling this automation and associated data analysis, which is known as “Regtech.”<sup>237</sup>

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230. See ADVISORY COMM. TO THE SECURITIES & EXCH. COMM’N, GUIDE TO BROKER-DEALER COMPLIANCE: REPORT OF THE ADVISORY COMMITTEE ON A MODEL BROKER-DEALER COMPLIANCE PROGRAM 34 (1974) (explaining supervision of customer trading in early broker-dealer compliance manual).

231. After all, the International Standard’s guidelines on compliance are entitled “compliance management systems.” See INT’L ORG. FOR STANDARDIZATION, *supra* note 12.

232. For these tasks, see *supra* Section I.C.1. For a comprehensive account of the use of technology in compliance, albeit with an emphasis on technology in risk management, see Kenneth A. Bamberger, *Technologies of Compliance: Risk and Regulation in a Digital Age*, 88 TEX. L. REV. 669 (2010).

233. See text accompanying notes 67–78.

234. See generally James A. Fanto, *Dashboard Compliance: Benefit, Threat, or Both?*, 11 BROOK. J. CORP. FIN. & COM. L. 1 (2016) (discussing this process); Bamberger, *supra* note 232, at 683–702 (explaining how many compliance tasks have necessarily become automated and how this process reflects a new regulatory paradigm where regulators allow regulated firms to design the regulatory systems).

235. See, e.g., FIN. INDUS. REGUL. AUTH., INC., *supra* note 49, at RULE 3110(b)(4) (requiring communications monitoring).

236. See generally KPMG, INNOVATING COMPLIANCE THROUGH AUTOMATION 4 (2018) (identifying compliance tasks to automate).

237. See generally Nizan Geslevich Packin, *Regtech, Compliance and Technology Judgment Rule*, 93 CHI.-KENT L. REV. 193, 206–10 (2018) (describing RegTech).

Therefore, as a result of technology an alternative professional view of a compliance practitioner may be developing, which is not squarely in either the legal profession or organizational ethics. This is not surprising from a professionalism perspective because technology has historically created new jurisdictions for professions, or for new professions, to occupy, or has eliminated those of existing professions.<sup>238</sup> Regulators have arguably been indirectly advocating for this view of compliance because they are attracted by the surveillance possibilities that RegTech opens for them.<sup>239</sup> That is, regulators are mandated by law to oversee regulated firms,<sup>240</sup> and what better way to do this than by themselves accessing the data within the firms? As regulators' representatives, compliance officers would assist regulators in accessing all the firm data that the regulator in question wants and needs. Compliance officers would thus be tasked, among other things, with making sure that their organization has up-to-date compliance technology and that this technology is compatible with that used by the regulators—work that likely would demand intellectual technology expertise.<sup>241</sup>

This view of a compliance practitioner as a technology specialist who assists in regulatory surveillance of organizations is at odds with the classic picture of a professional who exercises judgment and discretion on behalf of clients. It could certainly be contended that technology liberates compliance practitioners from the drudgery and routine of certain compliance tasks, such as reviewing communications and monitoring operations, and provides them time to accomplish the higher-valued work of transforming the ethical culture of an organization and dealing with the “hard” compliance cases.<sup>242</sup> However, RegTech is inexorably automating and thus eliminating certain compliance tasks, which means that firms are investing in it to save on the cost of

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238. See ABBOTT, *supra* note 107, at 92 (“Today new technologies create potential jurisdiction both rapidly and often.”); *id.* (“Just as technology creates jurisdictions, so also it destroys them.”).

239. A good example of this is in FIN. INDUS. REGUL. AUTH., INC., TECHNOLOGY BASED INNOVATIONS FOR REGULATORY COMPLIANCE (“REGTECH”) IN THE SECURITIES INDUSTRY (2018) (reporting on RegTech in the industry and explaining the benefits for broker-dealers of these developments and technologies). Professor Kenneth Bamberger questions whether regulators overly rely on the technology solutions of regulated firms, rather than designing them in conjunction with the firms. See Bamberger, *supra* note 232, at 705.

240. See, e.g., 15 U.S.C. § 78s (2020) (SEC’s oversight of self-regulatory organizations in the securities industry).

241. See, e.g., PWC, COMPLIANCE ON THE FOREFRONT: SETTING THE PACE FOR INNOVATION: 2019 STATE OF COMPLIANCE STUDY 11 (2019) (noting, on compliance hiring, “it is imperative to focus on humans who are compliance process specialists *and* who have core, integrated technology skill sets in such areas as data, analytics, and cyberrisk”).

242. See Fanto, *Dashboard Compliance*, *supra* note 234, at 15–17 (discussing the increased productivity made possible by technologically-enhanced or “dashboard” compliance).

compliance by reducing the number of compliance officers.<sup>243</sup> Information technology could transform compliance into a necessary and valuable, but technical occupation in organizations with an increasing number of its tasks being done by machines. The field would be shaped by regulators, particularly as the latter's technological capabilities increase, with some oversight by the legal profession through an organization's legal department because compliance administers technical systems that apply the law and identify legal violations. This is not a particularly positive professional outcome for compliance because technical occupations are generally of a lower status and may even disappear when the technology on which they are based is surpassed.

There is, of course, a more positive interpretation of these technological developments in compliance that is more attractive to compliance practitioners who want technology to enrich, not eliminate, their positions. Compliance officers could become operations professionals with considerable technological expertise (and some legal knowledge). They would fall within the orbit of fields like computer engineering and data science, and possibly need a scientific foundation and training. Rather than being technicians, they would be data scientists with valued expertise and knowledge of data analytic systems, albeit those applied to an organization's compliance. They could identify the contributions and the limitations of technological solutions for senior management and for regulators, which would be important in ensuring that compliance achieves its public goals.<sup>244</sup> But however technology affects and shapes the compliance occupation, even a positive view of its effect on compliance complicates compliance officers' professional status and contributes to their uncertain professional path.<sup>245</sup>

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It is clear from the above that there are several reasons for compliance's incomplete professional status, some stronger than others and several of them reinforcing or resisting one other. The importance of compliance's professional outcome and a prediction on what it might be are the subjects of the next Part.

#### IV. THE FUTURE OF COMPLIANCE AS A PROFESSION

The outcome of the professionalization of compliance is not just an academic matter but has real world consequences. It deals with the functioning of this important internal control function in organizations that is intended to prevent and detect organizational misconduct. Because the resolution of

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243. See *id.* at 16 (highlighting the possible loss of compliance officer positions due to compliance technology).

244. See Bamberger, *supra* note 232, at 705–14 (identifying “perils” in compliance technology that limit its effectiveness).

245. This uncertainty also arises from the fact that the technology used in compliance (e.g., data analytics) is changing so rapidly.

compliance's professional status will influence its practice in organizations, it may well affect the kind and level of this misconduct.

This Part first argues for having a strong compliance profession, distinct and independent from other ones. It contends that this kind of professionalization would make compliance officers more effective in their duties by preventing them from being completely subsumed within federal government or organizational bureaucracies and missions. It then acknowledges that this ideal scenario is unlikely to come to pass, given the strength of the reasons that have led to compliance's current uncertain professional status. It thus argues that the most realistic professional strategy for compliance is for compliance officers who are lawyers to become recognized members of the legal profession and suggests a way for this to occur.

#### *A. Compliance as a Strong and Independent Profession*

This Section argues that compliance officers will be more effective in organizations if they are members of a strong, independent profession, rather than being subprofessionals operating at the periphery and under the authority of the legal profession, deputies of a government agency, or technology specialists. In the complex legal, ethical, and social environment in which organizations function today, boards, executives, and employees need compliance officers who understand well the organization's business and affairs and the applicable legal, ethical, and other obligations applicable to them and who can knowledgeably guide them in meeting those obligations. This function of guidance and advice is critical in compliance because organizational actors follow the direction of and consult with compliance officers when they are performing everyday organizational tasks and are deciding on strategies and courses of action in an organization's affairs.<sup>246</sup> The officers must have the necessary knowledge and skills to provide this guidance and advice and the independence and authority that encourages organizational actors to follow it—all of which comes from being in a strong profession that has been granted the control over its occupation by—at least in the United States—state government licensing.<sup>247</sup>

The legal profession, out of which compliance emerged, plainly demonstrates the advantages when an internal control officer in an organization is a member of a strong profession. Admittedly, inside legal counsel have not always been synonymous with professional ideals and with independence from organizations where they work.<sup>248</sup> However, that position, as well as the conduct of many lawyers in it, does suggest how individuals who have a strong professional identity can resist organizational pressures to go along with

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246. See *supra* text accompanying note 70.

247. See FREIDSON, *supra* note 15, at 157–59 (discussing the epistemological authority of professionals).

248. See Rosen, *supra* note 175, at 496 (discussing the influence of corporate power on inside counsel professional position).

problematic organizational strategies and decisions—in other words, can influence, rather than be completely subject to, organizational control.<sup>249</sup> They can also push organizations and organizational actors to have their conduct follow guidelines (in this case laws and regulations, as well as non-legal organizational aspirations) that may interfere with organizational goals. The lawyers can achieve their organizational influence precisely because they are not, and are not seen by others in the organization as being, entirely part of and defined by the organization and are able to appeal to an extra-organizational authority.<sup>250</sup>

Compliance officers would benefit by having a similarly strong professional position as inside counsel that is based upon an authority and status that come from outside the organization. The purpose of compliance is to ensure that organizational actors conduct themselves in accordance with law, regulation, an organization's code of ethics, and any other policies that it adopts, all of which embrace goals that transcend organizational ones in the narrow sense.<sup>251</sup> Compliance officers will have authority with organizational actors regarding these “outside” purposes if they have a recognized status with respect to these purposes. As compliance scholars recognize,<sup>252</sup> the officers cannot be complete outsiders and must be well-integrated into the organization, because they must understand how the organization works and how the laws, regulations, and ethical standards can be translated into organizational policies and procedures. But the officers cannot be entirely subsumed within the organization's control and hierarchy because compliance would then be entirely subject to the organization's preferences.<sup>253</sup>

Compliance officers could have the requisite authority and status by being the deputies of federal regulators and enforcement officials, a position that, as discussed above, makes sense because the role of compliance officers has been created by the federal government and because the officers are helping regulators and enforcement officials perform an oversight role as to their organization.<sup>254</sup> However, this kind of status would reduce the effectiveness of compliance officers because they would be seen as being too close to these government officials. In other words, executives and employees would be reluctant to disclose all their plans, strategies and proposed decisions to compliance officers out of fear that they would be rapidly communicated to

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249. *See id.* at 501 (explaining that “legal service can be political. It can involve getting clients to make decisions, influencing the goals they select and engaging them about the level at which they will comply with the law.”).

250. *See id.* at 524–25 (discussing the delicate exercise of professional judgment by inside counsel in preventive law).

251. *See supra* text accompanying note 35.

252. *See* DeStefano, *supra* note 43, at 128–30 (discussing the problems associated with compliance officers being seen as “outsiders”).

253. *See id.* at 155 (emphasizing the need of compliance officers for autonomy and independence).

254. *See supra* text accompanying notes 204–12.



regulators and enforcement officials.<sup>255</sup> By contrast, professional status removes compliance officers from government control and overreach even though the officers serve public purposes in ensuring that the organization complies with law and regulation. Compliance officers still have reporting and other responsibilities to government officials, but such responsibilities are compatible and even expected with professional status. But the status ensures that they can exercise their discretion and judgment in performing their compliance duties and enables them not to be entirely subservient to regulators and enforcement officials, which independence would encourage executives and employees to see the officers as separate from the officials and to seek out their advice.

Compliance might best draw its authority and status by being a stand-alone profession, rather than a subfield operating under the legal profession. While there are benefits to being within the legal profession's orbit, as will be discussed in the next Section, this alignment and subservience of compliance to that profession both undermines the authority of compliance officers and puts them, like organizational lawyers, in an adversarial position with organizational actors.<sup>256</sup> Rather, as explained earlier, the compliance profession could be an entirely separate field with inspiration from organizational studies, which better reflects its broad mandate to help organizational actors comply with the law and other organizational standards and to promote the organization's ethical culture.<sup>257</sup> This would give compliance a nonlegal mission and therefore a distinct professional identity that reflects its organizational function.<sup>258</sup>

Professional status may also aid compliance officers in dealing with the growing influence of technology on compliance that was discussed earlier. Technological pressures can reinforce the organizational and government efforts to subsume compliance officers into their bureaucratic control. Professional status would give compliance officers more control over their work so that they could resist being relegated by organizations to the level of lower status technicians who could not question organizational goals and strategies and so that they could have the discretion to limit their assistance to a regulator's "high tech" surveillance of their organization. This status, however, is not intended to stand completely in the way of technological developments that are changing compliance practice, just as they affect other occupations.<sup>259</sup>

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255. See Langevoort, *supra* note 43, at 96–98 (discussing effects of zealous monitoring by compliance officers).

256. But see DeStefano, *supra* note 43, at 123–24 (arguing that the standard view is that compliance officers might report problems to the government that lawyers might keep confidential).

257. See *supra* text accompanying notes 217–20.

258. In addition, as a pragmatic matter, it might also address the concern of regulators and enforcement officials that compliance officers, if too closely aligned with the legal profession, will assert legal privileges when asked to report to them. See *supra* note 25 and accompanying text.

259. On this transformation, see SUSSKIND & SUSSKIND, *supra* note 107, at 2–3 (setting forth their broad argument on this point).

Compliance will almost certainly retain a special relationship with technology, but that does not mean that it has to become a lower-level technical occupation. Compliance has the advantage of coming of age as a profession during an intellectual technology “golden age” that could provide compliance officers with the useful skills to make the collaboration between regulators and firms on compliance systems more effective.<sup>260</sup> Compliance may thus conceivably become a profession that serves as a model for demonstrating how technology can be an integral part of the delivery of professional services.

The above suggests several ways in which compliance might best go forward as a strong, independent profession. However, the next Section explains how, as a real-world matter, the professionalization of compliance may well proceed.

### *B. Compliance as a Recognized Part of the Legal Profession*

Although it is interesting to speculate on the ideal professional outcome for compliance, in reality the legal profession will continue to exert its authority over this occupation. Therefore, there is a real possibility that compliance might continue to operate at the periphery of the legal profession as a related, somewhat technical occupation or “semi-profession,” much in the way that various medical occupations such as nursing function under the authority of doctors.<sup>261</sup> The discussion in this Section explains why this outcome should be avoided and how the professional position of compliance can be enhanced in this “second best” scenario of its remaining connected to the law.

As discussed above, the ambivalent relationship between the legal profession and compliance greatly contributes to compliance’s uncertain professional status.<sup>262</sup> The legal profession’s occasional assertion of authority over compliance is likely to continue. In fact, circumstances are pushing compliance into that profession’s sphere of influence. First, in many regulated industries, such as finance and healthcare, compliance has an almost exclusively legal orientation because law and regulation inform and shape the conduct of nearly all the activities of a regulated firm and because the regulator oversees the firm’s compliance with them.<sup>263</sup> This legal focus of compliance requires that compliance officers possess considerable legal knowledge and training, which has led to their recruitment from law schools or law programs.<sup>264</sup> Although compliance officers in these industries also focus on the ethical culture of their organization, they generally have less time to devote to it, given

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260. See Bamberger, *supra* note 232, at 730–34 (arguing for more transparency in firm compliance technologies).

261. See FREIDSON, *supra* note 15, at 90 (discussing the role of nurses as “technicians” in a subordinate position).

262. See *supra* Section III.A.

263. See generally Fanto, *Surveillant and Counselor*, *supra* note 49, at 1130–43 (discussing SEC and FINRA rules imposing compliance obligations on broker-dealers).

264. See Fanto, *supra* note 10, at 756–58; Pacella, *supra* note 71, at 953–58.

the sheer—and ever growing—number of laws and regulations that they must incorporate in policies and procedures for the organization's benefit; legal compliance takes almost all of their attention and time. Indeed, as regulators keep promulgating regulations and various kinds of regulatory guidance, they can no longer assert with a straight face that they prefer compliance officers not to be lawyers when, by their very actions, they are pushing compliance into the legal profession's sphere of influence.

Although this “legalization” of compliance characterizes regulated industries, these industries are significant in the economy. In addition, even nonregulated organizations are subject to numerous laws and regulations. Moreover, the governance and internal control of regulated firms often serve as a model for other organizations, as mandated practices in the former get taken up as “best practices” in the latter.<sup>265</sup> Thus, the focus on legal compliance and the influence of the legal profession on compliance officers and programs are likely to become more widespread.

Second, federal prosecutors and enforcement officials, who are generally all lawyers, have considerable influence over compliance in all organizations, even those that are not subject to special regulatory oversight.<sup>266</sup> As discussed above, they evaluate the efficacy of organizations' compliance programs in their decisions whether to prosecute organizations where serious legal violations have occurred.<sup>267</sup> In their settlements with an organization, they often compel the target organization to modify its compliance program to meet their preferences.<sup>268</sup> Indeed, the U.S. Department of Justice even had a compliance expert on its staff to assist in these evaluations and modifications.<sup>269</sup>

Federal prosecutors and enforcement officials jealously guard this influence over compliance and show no inclination to relinquish it.<sup>270</sup> They continue to formulate and to publicize their views on the elements of an effective compliance program, which suggests that they believe that these pronouncements should be authoritative.<sup>271</sup> The ethical culture of compliance

265. See James Fanto, *Paternalistic Regulation of Public Company Management: Lessons from Bank Regulation*, 58 FLA. L. REV. 859 (2006) (arguing that bank regulation has become a model for the regulation of public companies).

266. See *supra* text accompanying notes 55–63.

267. See Arlen & Kahan, *supra* note 62.

268. See, e.g., Plea Agreement, *United States v. Volkswagen AG*, No. 16-CR-20394, (E.D. Mich. Jan. 11, 2017) (including compliance monitor and specifications for the same).

269. See Chen & Soltes, *supra* note 63.

270. See Todd Haugh, *The Criminalization of Compliance*, 92 NOTRE DAME L. REV. 1215, 1239 (2017) (describing prosecutors as “super-regulators” through their power over compliance in organizations).

271. Indeed, the American Law Institute project on compliance has a chapter devoted to enforcement that, among other things, offers principles to guide enforcement officials in their evaluation of compliance programs. See PRINCIPLES OF THE LAW: COMPLIANCE, RISK MANAGEMENT, AND ENFORCEMENT, *supra* note 90, at Chapter VI.

in organizations no doubt matters to prosecutors and enforcement officials.<sup>272</sup> However, their main focus in either guidelines or settlements with respect to compliance programs is on legal compliance because they are pushing organizations to establish or to reform a compliance program to ensure that the legal violations do not occur or recur. The effect of this prosecutorial and enforcement activity is to reinforce in all organizations the connection between compliance and the law, and thus the influence of the legal profession on compliance.

Third, the ideal theoretical foundation for the compliance profession may be organizational studies, as discussed above.<sup>273</sup> Yet compliance is unlikely to become a managerial field given the pressures on organizations to demonstrate legal compliance. Moreover, the managerial field has not been professionalized in a strong way (i.e., in the sense of having state licensing regimes), perhaps because it is closely associated with executive positions in organizations that ultimately follow their own organizational purposes and logic.<sup>274</sup> Therefore, making compliance a managerial discipline pushes it along a path that is weaker for professional recognition. For similar reasons (i.e., legalization of compliance), it is unlikely that compliance can become a primarily technological field.

Fourth, a social status story also supports the continued, and even growing, influence of the legal profession on compliance.<sup>275</sup> As more lawyers enter the compliance field, like inside counsel from a previous time, they may advocate that they be recognized as an important part of the legal profession for which they were trained.<sup>276</sup> Clearly aligning themselves with that established profession may be the only way for compliance officers to attain an organizational position equivalent to inside counsel and the benefits resulting from a strong professional identity—particularly state government-sanctioned control over their occupation. Moreover, the inside counsel position has to be socially attractive to compliance practitioners because it combines recognized authority within an organization with extra-organization status.

Therefore, for these reasons the legal profession will continue to exert its authority over compliance. But this means that the compliance field risks remaining without full professional status or, as appears to be happening, will become a sub-profession under the legal profession's ultimate authority, more akin to the subservient relationship of nursing to the medical profession. It also

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272. See, e.g., CRIM. DIV., U.S. DEP'T OF JUST., *supra* note 64, at 10 (stating that "it is important for a company to create and foster a culture of ethics and compliance with the law . . .").

273. See *supra* Section IV.A.

274. As Abbott observes, "perhaps the reason that business administration has never successfully managed to 'professionalize' is that it commonly recruits from other professions, particularly law, accounting, and engineering." ABBOTT, *supra* note 107, at 132.

275. See LARSON, *supra* note 108, at 66–79 (describing professions as a social mobility project).

276. See Rosen, *supra* note 175, at 490–502 (discussing the empowerment of inside counsel).

means that the negative consequences of this incomplete professional status will continue, with no clear path to ameliorate or eliminate them. There would thus be no professional bulwark to resist increasing federal government demands upon compliance officers. Moreover, organizations could continue to structure the compliance function—and make compliance officers work—according to their organizational logic and technological demands, rather than compliance’s professional goals.

Given the legal profession’s authority over compliance and the benefits of compliance’s professionalization weighed against the status quo, a strong argument could be made that the legal profession should formally recognize compliance as a legal practice while engaged in by members of the bar. This recognition would formally bring lawyers working as compliance officers inside the legal profession. This professional identification would shore up the independence of these officers both with respect to the government and inside their organization. On the basis of this clear, established professional identity, compliance officers could more easily present themselves as providers of professional advice and deserving of professional protection, which would make it more difficult for the government to use them for its purposes. Having compliance officers who are lawyers considered to be part of the legal profession would also give them more control over their occupation in organizations and thus not allow an organization itself to define their role and place. It would also allow them more decision-making power with respect to whether and how to use “RegTech” in their jobs.

As Professor Pacella has argued, it is not difficult to see compliance as a kind of legal practice.<sup>277</sup> Many compliance tasks involve applying the law to given facts and circumstances in an organization, even if on a broad basis. After all, compliance policies and procedures involve guiding in detail an organization’s operations and affairs so that they are conducted in accordance with the laws and regulations applicable to an organization. Training in the policies and procedures and monitoring the organization’s employees and agents for compliance with them are just derivative of this initial application of the law. Advising boards, executives, and employees about the procedures and policies and particularly helping them in situations that are not clearly within the policies and procedures could be construed as providing legal advice. Here the compliance officer applies the law to a specific set of facts so as to guide specific conduct or decision-making of an organizational actor. It could even involve an action that is clearly legal as drafting a contract so as to ensure that a counterparty with the organization complies with the law.

Yet how exactly compliance practice *should* fit within the formal definition of legal practice is a more difficult question. Professor Pacella argues that compliance clearly is—and the Model Rules of Professional Responsibility should be formally clarified and modified to recognize it as—a “law-related

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277. See Pacella, *supra* note 71, at 965.

service,” rather than a “legal service.”<sup>278</sup> An important attraction of her argument is that, as a “law-related service,” compliance could still be engaged in, as it is now, by those who are not lawyers. If it were a legal service, it would be part of legal practice and thus off limits to nonlawyers, which would disrupt the current state of compliance. Professor Pacella explains that clarifying that compliance is a law-related service could be achieved through modifications to Model Rule 5.7 that would serve two purposes: (i) protect the lawyer acting as a compliance officer from professional liability for not following professional rules, and (ii) help the recipient of compliance services provided by the lawyer-compliance officer understand the exact role of the lawyer in compliance practice.<sup>279</sup>

Professor Pacella’s argument is compelling because it tries to solve a current problem, the uncertain position of a lawyer acting as a compliance officer in an organization and thus engaging in actions that appear to fall within the definition of legal practice. She is rightly pushing the American Bar Association and state bar associations to address this problem and to clarify the applicability of professional canons to a lawyer as compliance officer’s position. However, from the professionalism perspective argued here, her solution—making compliance a law-related, but not a legal, service—would contribute to the subordination of the compliance field outlined above. That is, by making compliance law-related, rather than legal, she would maintain compliance practice as a legal sub-profession and group it with other such ancillary fields that are listed in the Model Rules whose practitioners assist lawyers.<sup>280</sup> This approach keeps compliance practitioners in their weak quasi-professional position, but has the advantage of reflecting compliance practice today and being more accommodating to the many, non-legally trained persons engaged in compliance.<sup>281</sup>

An alternative would be for compliance to be a legal, not a law-related, service and for a compliance officer, at least one who is a lawyer, to be in a

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278. *See id.* at 968–69. She argues that the provision of compliance services plainly fits within the ABA’s Model Rule 5.7, which requires a lawyer to comply with the professional conduct rules when he or she provides “law-related service” unless the lawyer takes “reasonable measures” so that the person receiving the services knows that they are not legal services and that the protections of the client-lawyer relationship do not exist. *See id.*

279. *See id.* at 970–72. Professor Pacella offers edits to Rule 5.7, as well as to its notes, that make this clarification. *See id.* at 993–94.

280. *See id.* at 970 (citing the commentary to the Rule that lists such examples as “providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.”) (citing MODEL RULES OF PRO. CONDUCT r. 5.7 cmt. 9 (AM. BAR ASS’N 1983)).

281. This outcome means that compliance officers would continue to have lucrative positions with high social status, even without a professional status, not unlike the position of management consultants, some of whom are lawyers, in the consulting arms of large accounting firms like Deloitte or PWC.

position similar to a member of the legal staff of an organization's legal department. As discussed above, this interpretation of compliance would be primarily based on the legal interpretative and advisory nature of a compliance officer's activities.<sup>282</sup> This view of compliance as a legal service would have significant consequences, both for the lawyer acting as a compliance officer and for nonlawyers engaged in this field—which Professor Pacella recognizes and which lead her to prefer her alternative. For example, a lawyer providing compliance advice would have to follow the lawyer's professional conduct rules and deal with issues of confidentiality and privilege in communications with his or her organizational client, with all the complications that this raises in the compliance setting.<sup>283</sup> Although there are exceptions to the attorney confidentiality and the attorney-client privilege, they may not be broad enough to cover the regular reporting and communications with regulators that are an integral and expected part of the compliance role.<sup>284</sup> Moreover, making compliance a legal service could mean that only lawyers could be compliance officers because nonlawyers doing compliance would be engaging in the unauthorized practice of law.<sup>285</sup> This could be seriously disruptive of the current practice of compliance that includes many nonlawyers. However, this full legalization of compliance is powerful from a professionalism perspective because lawyers who are compliance officers would receive the status and protection of the legal profession and because this would resolve their uncertain professional position.

The resolution of compliance's relationship with the legal profession may well have to await developments "on the ground" such as pressure from compliance practitioners and public acknowledgement of their need for professional status, as it often does in the history of professions.<sup>286</sup> That is, it may be necessary to see if, as is likely, with the continued movement of lawyers into compliance these lawyers demand professional recognition, as did inside counsel before them. How a profession (the law) occupies an adjacent jurisdiction (compliance) is not usually only or even a theoretical matter; the theoretical justification may follow from the reality of compliance practice. My point here is that this alignment of compliance with the legal profession seems both inevitable and professionally desirable for the lawyers who are compliance

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282. Professor Pacella acknowledges that this advisory role runs contrary to the litigation-orientation of the definition of legal practice. *See* Pacella, *supra* note 71, at 965–68 (discussing state definitions of the practice of law that have this focus).

283. For example, when advising, training or monitoring employees, the lawyer-compliance officer might well have to warn them—as would inside counsel—that he or she does not represent them, but the organization.

284. *See* Pacella, *supra* note 71, at 960–62 (discussing exceptions to Model Rules 1.6 and 1.13 dealing with reporting crime or fraud that will result in a substantial injury to others).

285. Under this interpretation, a nonlawyer doing compliance would fall afoul of Model Rule 5.5 that prohibits the unauthorized practice of the law.

286. *See* ABBOTT, *supra* note 107, at 59–67 (discussing the contradictions in the emergence of a profession from others).

officers. If that is the case, care must be taken as to how the legal profession ultimately defines compliance in its own canons and rules so that compliance does not remain at its periphery in a subordinate position, with the negative effects discussed above.<sup>287</sup>

This recommended approach of having compliance either under the authority of (i.e., law-related services) or squarely part of (i.e., legal services) the legal profession will likely not be a desired professional outcome outside the United States, where compliance is not as “law centric” as here, where other professional identities for compliance have been offered, and where professional status may depend upon national, not state or local, government recognition.<sup>288</sup> However, this is not surprising because the specific professional outcome for a given occupation is highly dependent upon geographical factors, including the state’s control of and interference in occupations generally.<sup>289</sup> Accordingly, that compliance remains a subfield (at worse) or becomes a recognized part (at best) of the legal profession in the United States is both descriptive and normative only for this context because compliance is associated with a profession that has been so closely linked to that occupation over the years and out of which it emerged.

#### CONCLUSION

This Article has examined the uncertain professional position of compliance. Part II set the stage for this analysis by discussing how compliance became an accepted and necessary internal control function within U.S. organizations. It identified the nature of compliance and its origins in law and regulation governing different industries. It also explained the accepted model of compliance activities and compliance governance, emphasizing the position of the CCO.

Part III discussed the ways in which the compliance occupation has progressed along the path to achieving professional status. After setting forth the key features of a profession, it examined how compliance satisfies this professional model. It explained that compliance has many professional features: it has become a recognized occupation, with certain knowledge and skills that its practitioners must obtain and exhibit; institutions of higher learning increasingly train aspiring compliance officers through courses of study; and compliance practitioners have a group identity of engaging in a

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287. Although, moreover, this is not necessarily an intellectually consistent position, to address compliance officers who are not lawyers, legal canons could define lawyers doing compliance as “legal,” while allowing non-lawyers engaged in it to be seen as providing “law-related” services. In time, it may be only lawyer-compliance officers who are actually providing compliance advice that is legal advice in organizations.

288. See Parker et al., *supra* note 217, at 207 (on the basis of data from Australia, making an argument for the non-legal compliance profession).

289. See ABBOTT, *supra* note 107, at 177–211 (discussing the “cultural environment” to professions in multiple countries).



common mission that is exemplified by their membership in professional organizations and by their engaging in projects of codification and theorization of their knowledge. The Part emphasized, however, that compliance does not possess a defining feature of professional status, which is control over the practice of compliance (i.e., a monopoly of practice), which in this country state governments grant to a professional field, as exemplified by established professions.

Part IV explored in more detail reasons for the incomplete professional status of compliance. It argued that the most significant reason is the ambivalent relationship between compliance and the established legal profession, where from time to time, legal authorities and lawyers have asserted control over the practice of compliance as if it were in their domain of influence but where at other times they have been passive or complacent with respect to the oversight of compliance practitioners, particularly those trained as lawyers. The Part discussed the reasons for this ambivalence, including that the legal profession has acceded to the wishes of organizations that need compliance but that desire to have considerable control over its position in the organization. The Part then identified another important reason for the incomplete professional status in that the federal government through regulators and enforcement officials favors compliance's weaker professional status because it can more easily enlist compliance officers to serve its purposes. In other words, federal government officials exploit the professional uncertainty of compliance to make compliance officers their "eyes and ears" in the organization and draw them into its, rather than the organization's, hierarchy.

The Part also examined two other reasons for the uncertain professional status of compliance, inspiration from other disciplines and the influence of technology in compliance. It explained how organizational and management studies challenge the legal orientation of compliance and claim that it should be under their theoretical guidance to enhance its effectiveness. The Part discussed the basis for their contention, particularly that effective compliance is grounded in organizational ethics and culture that these disciplines study. The Part also considered the disruptive influence of technology upon compliance, which is coming of professional age right when technology is transforming its activities. It explained how compliance officers use technology to assist them in their tasks; organizations want this use to save on compliance costs; and federal regulators desire it because it may provide them with more access to information inside organizations. The Part discussed how technology questions the future role of compliance, as it automates and eliminates certain compliance tasks, pushing compliance in the direction of a technical occupation.

Part V argued that the outcome of compliance's professional story matters for organizational conduct. It contended that having a strong professional identity will give compliance officers the independence and authority in organizations that would enable them to guide and advise organizational actors on how to conduct their activities in accordance with law, regulation and ethics. It argued that this function of guidance and advice is critical in compliance because it represents compliance officers being brought in as trusted partners

when organizational actors are considering courses of action. It explained how compliance practitioners might best draw their authority and status by being members of a stand-alone profession, rather than a subfield operating under the legal profession, and that this profession could draw inspiration from organizational studies, which better reflects its broad mandate to help organizational actors comply with the law and other organizational standards and to promote the organization's ethical culture.

The Part concluded by explaining why in the real world the legal profession will continue to exert its authority over compliance and, as a result, the compliance field risks remaining without professional status or, as appears to be happening, becoming a subprofession under the legal profession's ultimate authority. It argued that, given the legal profession's continuing authority over compliance and the benefits of compliance's professionalization weighed against the status quo, the legal profession should formally recognize compliance as a kind of legal practice while engaged in by members of the bar. It explained how this recognition would formally bring lawyers working as compliance officers inside the legal profession and how this professional identification would shore up the independence of these officers both with respect to the government and inside their organization. It explored how this professionalism alternative might work but acknowledged that it must await developments in compliance and pressure from compliance officers themselves.

