

Need a second opinion?

In compliance-conscious times, it's only natural that companies should look beyond their own capabilities and seek advice from external advisers. But in what circumstances should they be doing so? And how can they ensure they're getting their money's worth? *WorldECR* explores.

Back in December 2018, US Treasury Under Secretary Sigal Mandelker gave a wide-ranging speech at the American Bar Association's Financial Crimes Enforcement Conference in which, amongst other themes, she elaborated on the Treasury's expectations of companies' compliance efforts.

Over the years, she said, the Treasury had seen 'the types of best practices that lead to strong and effective compliance programmes. We have also seen where entities fell short...'

Mandelker proceeded to outline what she considered to be the hallmarks of strong compliance, including senior management commitment, frequent risk assessments, and ensuring that 'all relevant personnel receive tailored training on OFAC obligation and authorities in general and the compliance programme in particular.'

And yet the compliance 'ask' increasingly gets tougher. As Mandelker's erstwhile colleague John E Smith (formerly director of OFAC and now a partner at the law firm Morrison & Foerster) says: 'In my experience, companies want to try to do the right thing. Where they're falling down is not generally out of willfulness, but because they're not paying attention to their supply chains and distribution chains or financial arrangements. In other words, they're not matching their commercial growth with their compliance efforts.'

Nowhere did Mandelker's speech describe circumstances in which there is an obligation or expectation to hire the services of external counsel or other third-party advisers – indeed, outside of settlement or consent agreements or where a company believes it may have committed a violation, there are none.

Nonetheless, engagement with outside counsel or consultants is seen by most companies as a *sine qua non* of their compliance programme, albeit that there exists no prescriptive

template for managing that relationship. But is it best practice?

Deep pools

The pool of compliance expertise to draw on is broader and deeper than it has ever been.

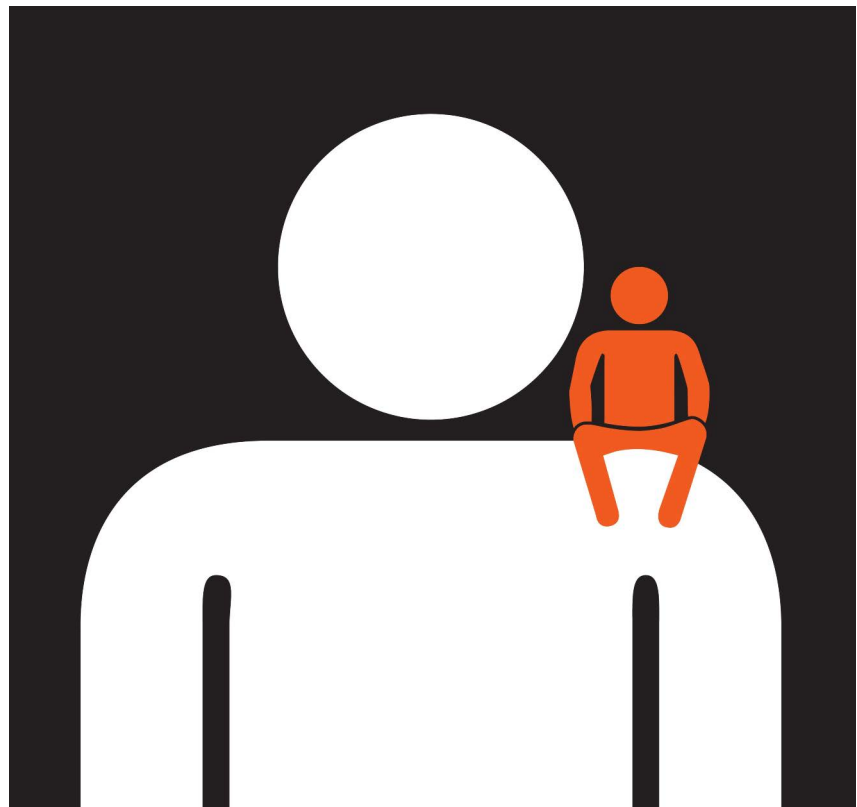
'The evolution of modern compliance dates back to the 2002 Sarbanes-Oxley Act,' says Daniel Chapman, CEO at Texas-based consulting firm Presyse – Compliance Systems and Expertise. 'That brought many practitioners into the field. More than 15 years later, we have for the first time a group of extremely experienced compliance professionals.'

Sarbanes-Oxley raised the bar for board oversight over corporate financial statements and introduced stricter penalties for fraud. The focus of successive US administrations on national security following 9/11 and the growing use of targeted sanctions has

shone a spotlight on compliance as a career – which can flourish, as readers of *WorldECR*, who make up much of that community, will know – in everything from one-, two- or three-partner boutiques operating from office suites in Austin, Amsterdam or Abu Dhabi to big-name, do-it-all corporate powerhouses on K Street or Canary Wharf.

But who, when and why should they be called in to advise?

For private practice advisers, says an experienced international trade lawyer, the following is a familiar scenario: 'OFAC (say) announces some major designations, or there's the announcement of a new executive order, and all of a sudden, we get client calls from companies suddenly worried about their exposure in a particular part of the world, or their relationship with a company or borrower. They want the reassurance, and they want a



second opinion...Or, there's a deal on the table, and just before they sign off and crack open the champagne, they want to be doubly sure that it's all compliant.'

That 'need for reassurance' may cloak disagreements and uncertainties between internal elements within the company – or oneself.

One senior compliance official within a US defence company told *WorldECR* that, in her experience, 'There's a number of aspects to consider when it comes to engaging external counsel. One is about looking inward, and asking yourself when you need help, by which I mean, knowing when you're up against the edge of your knowledge and experience, and recognising your limitations.

'It's also dependent on how your position and authority are viewed in the company. Some people have the gravitas – and the respect of management – which is sufficient to say, "I know the path forward." But if you don't, it may be that they want that expertise bought it.'

The structure of the company also has a significant bearing, she points out. 'For example, if trade compliance reports directly to senior leadership, then trade compliance may make that kind of decision. But if it reports to the legal department – it's left to "legal" to decide. And sometimes, where you've said, "Hold your horses", the commercial department will say they want a second opinion from a lawyer because they want the deal to go through.'

What external advisers can offer

External advisers can provide comfort in situations where the judgement of the business may be called into question in the future; to advise on whether certain goods can be exported to Iran, for example. They can 'sign off' the results of an in-house investigation, to reassure shareholders and mitigate risk – and provide specialist knowledge to complement the understanding of the general counsel or compliance team.

'In-house counsel may have a thorough understanding of the Russia sanctions, for example,' says Sheppard Mullin partner Reid Whitten, 'but when a question on EAR encryption comes around, they may decide that this needs to be checked out.'

And, as one highly experienced compliance manager in the defence

industry notes, 'What you need is someone with very specific expertise, who knows the regulator well, who is not going to just read the regs at me.'

But our compliance official (who did not want to be named in this article) cautions against the 'cronyism' of the legally qualified who may regard

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themselves as a cut above the non-legally qualified, but highly experienced compliance personnel: 'A frustration is that where external counsel has been chosen by the legal department "to assist you", sometimes, they don't actually know a great deal about trade compliance. It's just that the legal team always uses a particular firm for M&A or HR or something else. It can be really annoying. Sometimes the legal department is just heavily biased toward anyone with a law degree (regardless of their actual knowledge of sanctions or export controls) and against even highly experienced compliance people. What I really don't need is someone to come along and read the regs to me, when I've been living and breathing them for years.'

But, she says, good advice from experienced practitioners is invaluable, 'in specific, but also more general ways – such as benchmarking'. So, 'It's hard to ask peers in other companies, "What are you discussing with regard to Iran?" But you can ask an outside lawyer, "What's standard practice in other companies?" And even though they're bound by attorney-client privilege, they can give you the insight that comes with having worked across a range of businesses.'

Large international businesses will often assemble a panel of law firms to advise on different compliance functions, taking into account considerations such as the synergy between in-house counsel and private practice partners; inside knowledge and relationships with the regulator; the need for a particular specialisation; and the value of fielding a firm with an

awe-inspiring reputation if things get sticky.

'I make sure that we have all the tools in the toolbox available,' says John Pisa-Relli, managing director of global trade compliance at Accenture. 'If that means going outside the panel to get the best advice, we will ensure that we can do that.'

Of course, not all third-party advice comes from law firms. Consultancies, large and small, supply a range of needs. They may offer lower costs and the flexibility to advise on smaller projects – or, conversely, advise and implement major compliance programmes or the procurement of compliance tools which law firms are often not equipped to undertake.

In either case, distinctions are increasingly blurred: lawyers move easily from law firms to 'consultancies' where they undertake roles that are pretty much inseparable from their former employment, while law firms themselves take on non-legally qualified consultants as trade advisers or directors. At the end of the day, it's the experience that counts.

Meanwhile, the growth in competition, commensurate with perceived risk and higher penalties, does raise the bar for all involved.

'The clients are more sophisticated, the work is more difficult,' says Daniel Martin, partner at UK law firm HFW, which advises the shipping, commodities, aerospace and insurance sectors.

Firms have to go beyond the traditional service mile. Inducements can include cut-price due diligence to regular clients, who have to evaluate whether it is worth incurring the cost of compliance for a transaction to pass muster. Martin suggests that providing a 'cradle-to-grave' service spanning everyday compliance to investigations fosters confidence in external counsel, and that it will, in turn, lead to a thorough understanding of the client's business.

Another incentive is face-to-face in-house training, tailored to cover developments that affect each particular business. 'We find this more effective in an era in which the volume of client alerts and briefings risks information overload,' says Martin. Clients expect anticipatory rather than responsive advice: 'They really value it when trade lawyers alert them to changes that are about to happen,' says Whitten.

Who is the best point of contact in the business?

Views are mixed on whether the point of contact for external counsel should be the in-house legal team. ‘If the nature of the business is highly commoditised so that the legal context has been addressed already, then it is possible to liaise with a client manager who has no legal role,’ says Martin.

Others argue that legal questions and regulatory discussions should only take place between legal specialists ‘to avoid misinterpretation and ensure a streamlined communication.’

‘Nonetheless, in order to manage cross-functional topics or work on evaluating certain business projects, representatives from programme management or procurement may be embedded into the dialogue – led by trade compliance,’ says Alex Groba, director of foreign trade at MTU Aero Engines.

Easy as ICP?

All those spoken to for this article – trade compliance managers, consultants, private practice lawyers, in-house counsel – agree that external

legal providers have a vital role in advising on building a successful internal compliance programme (‘ICP’).

‘Considering the evolving requirements and, more than ever, the importance of a comprehensive internal rule set, establishing an ICP

‘A mixed team of lawyers and consultants may be a wise choice, as long as roles and responsibilities have been clearly defined.’

goes far beyond ensuring appropriate classifications and shipment/technology controls,’ says Groba.

The downside? A lack of knowledge of the internal business culture of the company may mean that proposed policies and procedures will not function well in practice.

‘External legal counsel does not have the experience to develop a pragmatic compliance programme

unless they have been in-house,’ argues Chapman. ‘They may not understand R&D, finance, logistics. When you are building internal controls, you must have solid expertise. An over-reliance on external counsel can mean the processes are not fit for purpose and may result in a major violation.’

Groba points to the need for a ‘detailed understanding of a company’s internal processes’, how they fit into the ICP as well as ‘a climate of mutual trust between the trade compliance team and other departments,’ without which ‘external counsel will just cost money but will not improve overall compliance,’ he says.

‘A mixed team of lawyers and consultants may be a wise choice, as long as roles and responsibilities have been clearly defined,’ says Groba.

Whether to work with a range of legal specialists, or trust one or two firms, is a decision each business has to take on its own. ‘In the end what is important is a deep understanding of the individual business model to ensure legal advice is tailored to the customer, instead of general regulatory explanations,’ says Groba.




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