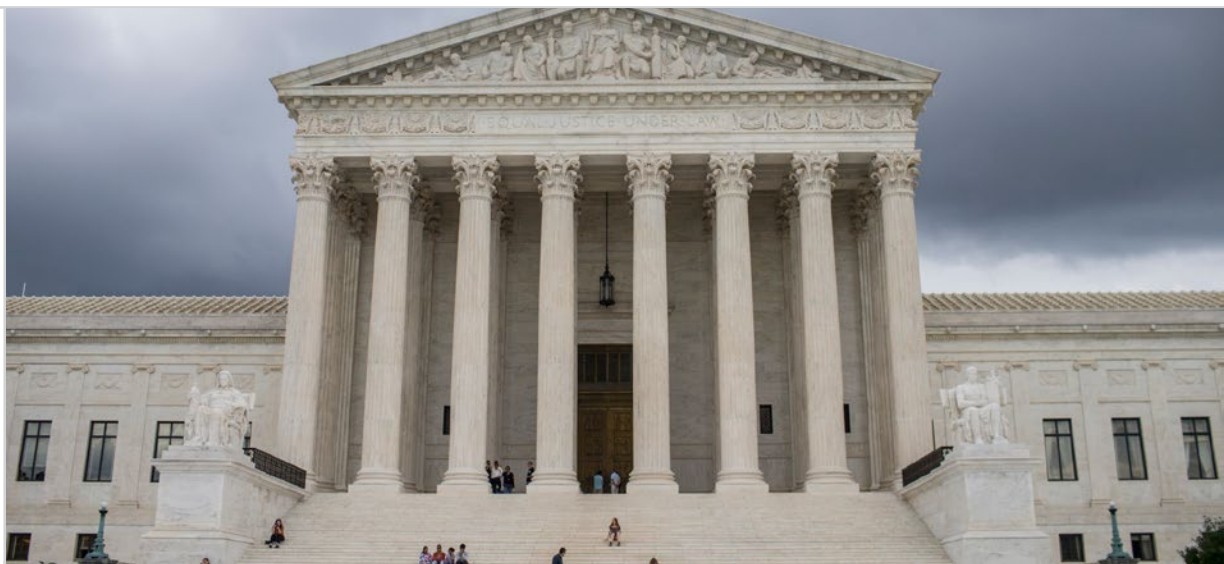




Regulatory Mapping Is Integral to Compliance Functions



Regulatory Mapping Is Integral to Compliance Functions

Compliance, which is part of a corporation's enterprise risk management process, has grown significantly in the past 20 years, both as a legal subject and as a field of practice.¹ Growth was spurred in large part by *In re Caremark*, which held that corporate boards had an obligation to ensure that the corporation had a system of internal reporting and compliance controls to monitor for illegal activities.²

In addition to the watershed *Caremark* opinion, federal regulatory concern for robust corporate compliance increased in the years before and after *Caremark* in disparate regulatory fields, including antitrust, financial services, health care, and defense contracting. An example of that interest is found in the U.S. Sentencing Commission's Organizational Sentencing Guidelines, which made the presence and quality of a compliance program a factor for consideration when imposing federal penalties for criminal wrongdoing. Likewise, the Sarbanes-Oxley Act mandated new requirements to address the risk of financial misreporting.³

Many businesses operate in environments where regulatory changes occur frequently. Despite the burden created by the volume and frequency of changes, businesses are not at liberty to ignore changes in legal requirements and will be presumed to have knowledge of relevant requirements.⁴ Failure to stay abreast of changes can lead to negative business consequences such as enforcement actions by regulators and private lawsuits.

"Under the *Caremark* decision, boards should insist on active compliance," said professor Charles M. Elson, director of the John L. Weinberg Center for Corporate Governance at the University of Delaware. "Vibrant compliance operations start with the culture at the top and commit to keeping abreast of changes that affect corporate operations."

Regulatory Requirements Come from Varied Sources

Sources of regulatory change include international, national, state, and local legislative action (enacted laws), court decisions, and executive actions (regulations, guidelines, and enforcement), and can arise quickly.⁵ For instance, the omnibus spending bill signed by President Donald Trump in March 2018 included the Clarifying Lawful Overseas Use of Data Act,⁶ which effectively mooted⁷ *United States v. Microsoft Corp.*⁸



Failure to stay abreast of changes can lead to negative business consequences.

1 Donald C. Langevoort, "Caremark and Compliance: a Twenty Year Lookback," Georgetown University Law Center, *Temple Law Review*, 2018, p. 1, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3135950

2 Ibid, pp. 1-2

3 Ibid, p. 2

4 Carole Switzer, "Reckless Regulatory Change Management," *Compliance Week*, January 2014, p. 42, https://www.complianceweek.com/news/news-article/reckless-regulatory-change-management#.Wwbe0_ZFzIV

5 Alexandra Megaris, "The Keys to Managing Regulatory Change," *insideARM*, Dec. 20, 2017, <https://www.insidearm.com/news/00043553-keys-managing-regulatory-change/>

6 Katitza Rodriguez, "The U.S. Cloud Act and the EU: A Privacy Protection Race to the Bottom," Electronic Frontier Foundation, April 9, 2018, <https://www.eff.org/deeplinks/2018/04/us-cloud-act-and-eu-privacy-protection-race-bottom>

7 Lauren C. Williams, "How will the CLOUD Act Work?," *FCW*, April 5, 2018, <https://fcw.com/articles/2018/04/05/cloud-act-in-practice.aspx>

8 *United States v. Microsoft Corp.*, 584 U.S. ____ (April 17, 2018) (per curium) (vacating and remanding case)



Sources of regulatory change include legislative action, court decisions, and executive actions, and can arise quickly.

The CLOUD Act lays out parameters for responding to federal warrants, and the Department of Justice served a warrant for the information on Microsoft less than two weeks after passage of the Act—even though questions remain about the effects of the legislation.⁹

In addition to federal legislation, companies are potentially subject to the laws and regulations of 50 U.S. states, multiple federal territories, and Native American tribes, as well as more than 35,000 municipal governments and more than 3,000 county governments, all of which have legislative and executive functions. Many of these jurisdictions also have judicial and quasi-judicial functions.

Judicial decisions also bring about regulatory changes. The U.S. has a multitude of judicial sources of change. In addition to the courts in the 50 states, there are 94 federal trial courts, 13 federal courts of appeal—which in the year ending in March 2017 handled almost 6,500 federal agency appeals¹⁰—and the U.S. Supreme Court. Each of these courts issues rulings related to labor and employment, the environment, privacy, and the like, which affect companies nationally and internationally.

Last, executive agencies at the federal, state, and local levels are responsible for issuing rules, regulations, and guidelines related to legislation and judicial opinions, and for civil and criminal enforcement actions.

The level of activity in the U.S. alone can be daunting. In addition to U.S. regulatory entities, many companies must also stay current with changes instituted by international governments, courts, and bodies.

Because regulatory change comes from the many different sources described above, companies must regularly monitor multiple venues of possible change. The stakes for staying informed are high, and attempting to follow frequently changing regulatory requirements can seem overwhelming.

International Regulatory Field Presents Challenges

Carole Switzer, president and co-founder of the non-profit OCEG (the Open Compliance and Ethics Group) noted the high level of challenge presented by the varied sources of regulatory change, particularly at the international level.

“One big challenge is native language,” she said. “We can see English proposed or final regulations, but what about those from Japan or Saudi Arabia or other countries which operate in their own language? It is not sufficient in most cases to only read a brief English summary, or even a supposed English translation, which is often incorrect.”

Switzer highlighted the challenge presented when attempting to map the meaning and coverage of regulations that overlap or are from different countries, as well as those presented by varying levels of specificity in laws. “Some countries’ laws themselves have significant detail, while in other countries the regulations, or even policy documents, are where the real requirements are found,” she said.

Building an Effective Regulatory Mapping Process

Regulatory mapping, or regulatory change management, is part of a business’s compliance program and is the mechanism for being aware of regulatory changes. Businesses use regulatory mapping to identify the laws, regulations, and requirements specific to them and their industry, products, and geographic area.



It is not sufficient to rely on English language summaries of international requirements.

⁹ Elizabeth Harding, Romaine Marshall, Craig Stewart, “The CLOUD Act: Where It Sheds Light and Where Shadows Remain,” JDSUPRA, May 15, 2018, <https://www.jdsupra.com/legalnews/the-cloud-act-where-it-sheds-light-and-95969/>

¹⁰ “U.S. Courts of Appeal—Judicial Business 2017,” Administrative Office of the U.S. Courts, <http://www.uscourts.gov/statistics-reports/us-courts-appeals-judicial-business-2017>

However, regulatory mapping can only protect a business or provide actionable information if it is designed and implemented well. Effective regulatory mapping systems are not static and must be able to identify changes that affect, or may affect, an organization's compliance obligations, and do so in a way that provides decision-makers with relevant information for making informed choices. This can be done in a variety of ways, such as assigning in-house staff, usually in the general counsel's office, with monitoring and analysis tasks, hiring outside law firms, or hiring specialized third parties with subject matter and technical expertise in monitoring regulatory change.

The regulatory mapping process should be able to analyze changes to determine their applicability and scope. In the best circumstances, the process could be capable of analyzing changes and include a forward-looking function that makes predictions about future changes.

Effective mapping also requires implementing processes to satisfy obligations once changes are identified and understood. Implementation should include not only what change must be undertaken, but also who will make the change and how, and the deadline for accomplishing the change.

In addition, regulatory changes, as well as actions undertaken in response, should be documented by updating policies, procedures, and other affected areas. Consideration should be given to documenting the reasons for the changes with regulatory analysis supporting why certain steps were taken.¹¹ Conducting an audit or internal review a few months after implementing the change can help identify any needed improvements.¹²



Effective regulatory mapping includes what change will be made, who will make it, when, and why.

¹¹ Alexandra Megaris, "The Keys to Managing Regulatory Change," *insideARM*, Dec. 20, 2017, <https://www.insidearm.com/news/00043553-keys-managing-regulatory-change/>

¹² Allison Burns, "Managing Change Effectively—Consumer Affairs Update," Federal Reserve Bank of Minneapolis, March 14, 2016, <https://www.minneapolisfed.org/publications/banking-in-the-ninth/managing-change-effectively>



Change Management Process Elements

Identify Changes	<ul style="list-style-type: none"> Identify regulatory changes and business process changes through risk-monitoring practices
Create action items	<ul style="list-style-type: none"> Research the change Evaluate the impact to the bank's policies and procedures, software, vendors, and internal controls Update processes and procedures where needed Assign training to staff
Establish responsible parties	<ul style="list-style-type: none"> Assign responsibility for action items to staff members Appoint someone to monitor the entire change process from start to finish
Track due dates	<ul style="list-style-type: none"> Report progress to senior management and the board of directors
Evaluate effectiveness of changes post-implementation	<ul style="list-style-type: none"> Verify that implementation of changes was effective using internal and external audits or more targeted reviews
Establish a repeatable process	<ul style="list-style-type: none"> Use a similar process for future changes

Source: Burns, "Managing Change Effectively," Federal Reserve Bank of Minneapolis

Historic Methods of Monitoring Change Fall Short

Not so long ago, businesses could meet their obligations by monitoring regulators' websites and reaching out to in-house or outside lawyers if a new rule seemed complex.¹³ This is no longer true. Today, the volume and frequency of changes requires significantly more effort. Meeting the challenges of tracking and addressing regulatory change often means that businesses should consider implementing regulatory mapping processes that combine subject matter expertise with technological capabilities.

"When I started my career as a lawyer in private practice in Washington, D.C., in the early 1980s, a large part of my job was keeping up with regulatory changes that affected our clients," Switzer said. "It could end up pretty hit or miss, and we normally weren't able to see upcoming changes until an actual regulatory proposal was published."

According to Switzer, the norm was to skim the daily Federal Register, read trade association bulletins, and stay in touch with key regulatory staffers. "As technology for information management began to come into play, we shifted to checking websites and keyword searching, but challenges still remained," she said.

"The great breakthrough today, in being able to more completely identify requirements in the first instance, is the advent of machine learning and artificial intelligence," Switzer said. Getting the "big data" view from thousands of sources is helpful but can also be problematic.

"You can end up drowning in data," she said. "So, it is essential to keep the human element for defining what is necessary to monitor, what is meaningful to read, and what is most likely to impact your achievement of objectives."

Methods of Building an Effective Program

"Key to an effective regulatory change management system is having a culture that insists on compliance by requiring corporate integrity. Adequate staffing, resources, and support to act are also required," said Elson of the University of Delaware. Should a situation involving government regulators arise, they will review, among other things, the extent to which resources were allocated to the compliance function when undertaking action.¹⁴

¹³ Joe Mont, "Smarter Approaches to Regulatory Change Management," *Compliance Week*, April 17, 2015, <https://www.complianceweek.com/news/news-article/smarter-approaches-to-regulatory-change-management#WwbznzPZFzIV>

¹⁴ Department of Justice, "Evaluating Corporate Compliance Programs," p. 2, <https://www.justice.gov/criminal-fraud/page/file/937501/download>

Conducting Regulatory Mapping In-House

One method of creating a regulatory mapping process is to house the function within the corporation. If pursuing this route, “companies should have a separate and specific compliance function either within the organization’s general counsel’s office or within a separate organizational entity tasked with focusing on regulatory issues,” Elson said.

Companies pursuing an in-house function may create a department or name an individual within the organization to build and update the necessary repository. An in-house function will require that the tasked department or staff maintain required expertise in the business functions of the company, as well as in the areas where requirements apply, and how and when they apply.

An in-house function requires the commitment of resources, in the form of staffing, time, and money, as well as other resources such as legislative subscription services, trade association memberships, and the like. It may also be wise to ensure that staff receive education in legal and government affairs, and be properly supported by technology investments, such as software that can accurately translate foreign regulations accurately.

Outsourcing Regulatory Mapping to Lawyers

An alternative to an in-house regulatory mapping function involves hiring an outside law firm to monitor and update relevant regulations. The decision to retain an outside law firm requires careful consideration of expense and expertise, both with respect to understanding the underlying business and tracking all applicable developments. It is imperative that an outside firm be well-versed in the corporation’s business and processes to adequately understand which regulatory changes affect the business and how.

One concern that needs to be addressed is the extent to which the outside law firm has the resources to map regulations across geographic areas, especially for companies with international business interests in areas where English is not the spoken language. Another concern requiring evaluation is the extent to which the law firm uses technological solutions to minimize time spent by staff in analyzing regulations, thereby enabling cost savings.

Leveraging Expertise with Third-Party Specialists

Another possibility is hiring a third-party service that combines subject matter expertise in the business of the corporation with technological solutions and legal acumen to monitor, collect, incorporate, and disseminate requirements throughout the relevant areas of the business.

Third-party services often take the time to understand the business of the company, as well as its processes, to identify areas of regulatory concern. Coupling business subject matter expertise with the latest innovations in artificial intelligence and other technologies to monitor numerous information sources allows third-party services to provide up-to-date notification of changes. In addition, combining subject matter expertise with technology allows for customized analysis tailored to the organization’s needs.

Such services may even use technology solutions that not only enable delivery of changing information to the organization, but also allow the information to be mapped directly to the established policies, procedures, and controls for the client organization. In short, the right blend of expertise and technology ensures that changing information gets to the right people at the right time, enabling an organization to be accurate and nimble in meeting new challenges.¹⁵

Conclusion

New rules and regulations are promulgated almost daily, requiring companies to implement a robust regulatory mapping system to ward off fines and penalties, while also protecting a company’s image and brand. “The law does not require perfection, but it does require a demonstration of an effective program if penalties are to be limited,” Elson said.

Automation, technology, and expertise help transform the regulatory mapping and compliance functions from merely a cost center to a function that supports financially sound and efficient decision-making by capitalizing on business intelligence and supporting the commitment to appropriate compliance processes.

¹⁵ Carole Switzer, “Reckless Regulatory Change Management”

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