

Environmental Compliance: Another Integrity Crisis or Too Many Rules?

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The wave of recent accounting scandals in corporate America has changed the way we look at all businesses in this country. The public seems automatically suspicious of corporations and their management. Suspicion may be justified in some cases, but the public's fears are being spread with a broad brush. Lawmakers are responding to the public outcry with passionate speeches and sweeping corporate "reform" legislation to "clean up" the system.

This wave of suspicion is affecting attitudes about all aspects of corporate behavior, including environmental compliance. Public skepticism about corporate environmental compliance is not new. If the popular media is any indication, the public's baseline assumption is that many companies break the rules, the only questions being the degree of noncompliance and whether it will be discovered. And even among the "insiders"—the regulated businesses and government officials who regulate them—it has become almost a given that no industrial facility is in compliance with all environmental regulations all of the time. But why? Would full compliance be too costly? Are the regulations too difficult to follow? Do companies just not care? Are regulators too lenient?

These questions, raised as modern environmental law enters its fourth decade, have spawned a great deal of introspection regarding compliance. As a step to finding answers to these questions, the authors conducted a survey of randomly selected members of the American Bar Association's Section of the Environment, Energy, and Resources (Section of Environment). Underlying the survey's questions were the competing models of the behavioral dimension of compliance that have emerged in the quest to improve compliance performance. One school of thought portrays compliance as simply the result of rational actor behavior—that is, profit-maximizing companies weigh the costs and benefits of complying and comply just as much as makes sense from the perspective of the bottom line. All noncompliance is voluntary under this "rational polluter" model. An opposing

view is that many companies are "good apples" to the core and would comply at higher rates than experienced but for obstacles put in the way, such as ambiguous regulations, constantly shifting rules, and conflicting mandates. Noncompliance, in this alternative model, has voluntary and involuntary components. Yet a third model portrays companies not as single-minded black boxes, but as amalgams of a wide variety of officer, manager, employee, and shareholder interests that produce complex resource allocation problems, of which compliance is but one among many. Much of the ongoing debate in the compliance introspection dialogue that is unfolding today is over which of these models should guide the design of compliance and enforcement policy.

But if, in fact, there are systemic obstacles to compliance that lead to involuntary noncompliance, it is not enough to know whether companies generally fit the rational polluter, good apple, or resource allocation model, as in any case at least some companies will seek to comply at some level and may face externally imposed barriers to doing so. Hence, whichever behavioral model regulators choose for policy design, they ought to pay attention to identifying and accounting for sources of involuntary noncompliance.

To facilitate that effort, we conducted a survey of randomly selected environmental lawyers to detect their level of concern about involuntary noncompliance and to identify its possible sources. Among the many sources that have been postulated in compliance literature, the one of particular concern to us is perhaps the most obvious but least understood of all—the sheer number of regulations. No practitioner of environmental law would describe the field as lean in terms of number of rules and standards. Usually, however, the complaints one hears about environmental law are that the rules are too complex, they are unclear, they require unreasonable expenditures, and they change too often. These traits may or may not correlate with number of rules. One could envision a world of few environmental rules, all of which are unclear, overly expensive, and so on. And it would be possible (though we have heard no one suggest it to be the case) that a multitude of environmental rules could consist entirely of rules that are clear, cost-efficient, and stable. So, in addition to exploring the presence and sources of environmental noncompliance generally, we designed our survey to identify whether practitioners perceive the

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number or rules as an independent factor contributing to involuntary noncompliance.

We sent surveys to 500 randomly selected members of the Section during fall 2000, well before the Enron or WorldCom stories broke. We chose the Section of Environment because it is a prominent forum for leading practitioners of environmental law in private practice, government, academic, and other practice settings. We greatly appreciate the Section of Environment's cooperation in providing the member names and contact information. (The ABA Section of Environment, Energy, and Resources did not commission, direct, or in any other way influence the design or implementation of the survey.) All funding for the survey and the data analysis was provided by The Florida State University College of Law. Of the 500 surveys sent, 168 completed surveys were returned. The survey was voluntary and responses were anonymous. We are, of course, grateful to the Section of Environment members who completed the survey.

Study Population

We grouped our respondent population using several personal characteristics called for in the survey's opening questions. First, because of our interest in determining the influence of government work on perceptions of regulatory compliance, we divided respondents into three practice-setting categories: (1) 50 percent of respondents spent their entire practice careers representing industry in settings such as private law firms, in-house counsel, or trade associations; (2) 33 percent spent all or a part of their practice careers in a government position, regardless of other experience; and (3) the remaining respondents were those who had no government work but also some experiences other than representing industry, such as in judicial or academic settings. Second, to detect whether the resources of a regulated business affect compliance perceptions, we further subdivided the respondents who currently represent businesses or did so in the past according to the size of client predominantly represented. We based client size on Fortune 500 status and number of employees, with categories for large (30 percent), medium (8 percent), small (27 percent), and balanced (no predominant client type) (35 percent). Finally, because the volume and type of environmental regulation may vary across types of industries, we also characterized the respondents' clients according to four industry sectors: (1) manufacturing; (2) land and resource development; (3)

transportation and utilities; and (4) services. Almost one-fifth of respondents worked exclusively for clients in the manufacturing sector, 10 percent worked exclusively for land and resource development clients, and 25 percent worked for a client base representing both of those sectors. The remaining respondents worked for a variety of combinations of those sectors.

Survey Results

We designed our survey to elicit the respondents' perceptions for three topics relevant to compliance policy. First, a series of questions asked respondents to describe their perceptions of their own ability to assess environmental compliance and of their clients' ability to achieve compliance. Expecting that at least some respondents would report significant levels of noncompliance, another group of questions probed the respondents' perceptions of the institutional effects noncompliance has

on businesses. We did so to determine whether respondents would identify effects other than those consistent with the rational polluter model, as well as simply to see whether the respondents believe noncompliance is a serious concern. Turning to the heart of the matter, a group of questions then asked respondents to identify the sources of noncompliance. We closed the survey with questions about the solutions the respondents would recommend for reducing noncompliance, both within businesses and as a matter of policy. Overall, we found support for all of the compliance models in the responses, and we believe our core hypothesis—that the number of environmental regulations has become so large as to lead to involuntary noncompliance—is resoundingly supported by the results.

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Compliance Assessment and Performance. Environmental lawyers representing business clients have the unenviable task, day in and day out, of assessing their clients' level of compliance for past, present, and future activities. We designed a series of questions, limited to respondents who currently represent businesses or did so in the past, to capture what environmental lawyers think about regulation and compliance. We were not surprised to find that, overall, they think compliance is difficult both to assess and to achieve.

With respect to compliance assessment, a significant portion of the respondents said they find the task difficult for paperwork regulations (e.g., record keeping and reporting) and physical violations (e.g., discharge and disposal violations). Indeed, when asked whether

they agree with the statement that they can confidently assess absolute levels of compliance, roughly equal numbers agreed and disagreed:

	strongly agree	agree	indifferent	disagree	strongly disagree
paperwork	13	36	12	28	11
physical	9	38	13	31	9

(figures represent percent of responses)

The volume of regulation appears to play a role in making compliance assessment this challenging. The vast majority of respondents said they find keeping track of environmental regulations difficult. None described the task as easy, and only 14 percent found it moderately difficult, whereas 40 percent said it is a difficult task and 43 percent found it very difficult.

As difficult as they believe it is to assess compliance, many respondents also believe businesses often fall short of the goal both for all regulations generally and for regulations of major significance. When asked how consistently their clients achieved full compliance, a startling number of respondents said they believe their clients did so less than two-thirds of the time:

	always	90 percent	66 to 25 percent	never	can't estimate
all paperwork	<1	40	34	11	14
major paperwork	11	60	24	1	4
all physical	2	46	28	8	16
major physical	12	61	18	0	9

(figures represent percent of responses)

Responses to this series of questions on compliance assessment and compliance rates revealed remarkably uniform perceptions shared by our different respondent groups. Response distributions generally held true regardless of the respondent's practice background or type of business client. Of particular interest is that exposure to government work did not measurably affect response distributions.

It is encouraging that more than 70 percent of the respondents believe their clients achieved full compliance at least 90 percent of the time for major paperwork and physical regulations. Of course, 30 percent believe that noncompliance prevails *at least* a third of the time. Moreover, the respondents' estimates of compliance rates were considerably higher for major regulations than for all regulations, which means that respondents believe business compliance rates for non-major paperwork and physical regulations are quite low. Like many of the findings discussed below, this re-

sult can be interpreted consistent with any of the three compliance behavior models. A rational polluter may view the consequences of violating major rules as more

significant than for violations of nonmajor rules, and thus devote more compliance effort to major rules. A good apple may view major rules as having the most important environmental protection benefits and thus make complying with them

a more unyielding corporate ethic. Managers and employees in a resource allocation scenario may seek to work on major compliance issues, or to be associated with high-budget allocations of corporate resources, and thus the major rules get more attention. In either case, however, the findings suggest high levels of non-compliance with nonmajor rules and not insubstantial levels of noncompliance with major rules.

Institutional Effects of Noncompliance. We know that it occurs and is hard to assess, but how serious an institutional concern to businesses is the problem of regulatory noncompliance? The rational polluter model predicts that businesses will perceive of noncompliance as simply a cost of doing business, whereas the good

apple model suggests that businesses will suffer institutional discordance if non-compliance rates become significant. The resource allocation model suggests that employees associated with high noncompliance may feel threatened. Our survey results suggest that each of the models has some explanatory value. First, the

vast majority of respondents identified significant institutional costs associated with noncompliance. Respondents agreed or strongly agreed that noncompliance hurts the corporate public image (85 percent), creates friction between businesses and government (81 percent), increases administrative costs (82 percent), and demoralizes company personnel (74 percent). These response rates sound like the worries of good apples. On the other hand, consistent with the rational polluter model, 68 percent of respondents agreed or strongly agreed that noncompliance is simply another business risk to manage. Perhaps the prevailing compliance behavior is that of a rational good apple—concerned about the psychic and other nonpecuniary costs of involuntary noncompliance, but also confronting its consequences as a risk management issue. In any event, very few respondents—fewer than 9 percent—agreed that noncompliance is not a significant concern. It is difficult to square these results with the notion that all

noncompliance is the result of voluntary, calculated decisions about what is best for the bottom line.

Respondents with at least some government experience tended to rate the demoralizing effects of noncompliance as less significant a consequence, but otherwise conformed with results for the study population as a whole. Response distributions also were unaffected by client size and sector, once again demonstrating remarkable uniformity of perception about compliance matters.

Sources of Involuntary Noncompliance. The respondents generally agreed that involuntary noncompliance presents an array of institutional harms for businesses. Agreement on what to do about it may be more elusive. Taking action, both by government and businesses, will require first identifying the sources of noncompliance. This is an important question for both behavioral models. Under the rational polluter model, any negative consequences of noncompliance that can be efficiently reduced will allow a company to improve the bottom line. Under the good apple model, noncompliance is involuntary, but not necessarily beyond the company's control if it can be better understood and thus more effectively combated. The resource allocation model suggests that noncompliance can be weeded out if managers and employees value doing so high enough compared to competing corporate goals. So what, other than the deliberate decision not to comply, causes noncompliance?

To explore that question more deeply, we culled explanations for noncompliance found in the compliance behavior literature, particularly the body of work developing the rational polluter and good apple models, and asked our survey population to rate each in terms of its importance in contributing to noncompliance. As shown below, the overwhelming majority of our respondents found many of the factors associated with *involuntary* noncompliance at least relevant; indeed, most were rated important to very important by a majority of respondents.

Clearly, the most important factor by far was the

sheer number of regulations, and the least important factor was costs of compliance. Most of the literature supporting the good apple model of environmental compliance behavior focuses on the complexity, ambiguity, inconsistency, and fluidity of regulations, qualitative factors that can operate independent of the quantitative number of regulations. We would not have been surprised to find number of regulations scoring roughly the same as these other factors, but to have it rated significantly more important suggests that the *quantity* of regulations has an effect on compliance at least partly independent of the *quality* of the regulations. This suggests that advocates of the good apple model have been missing an important factor in support of their position.

	Very important	Important	Relevant	Minor	Not significant
Sheer number of regulations	64	26	8	2	<1
Complexity of regulations	44	36	19	1	0
Ambiguity of regulations	39	31	21	7	1
Too many different and conflicting requirements	36	40	13	8	3
Keeping track of changes in regulations	32	42	22	5	0
Size of business operation	32	39	21	6	2
Agencies relying on informal guidance	25	28	32	14	1
Unpredictability of inspectors and enforcement	24	21	30	20	5
Too many levels of government authority	16	35	30	16	4
Costs of compliance	13	25	39	22	1

(figures represent percent of responses)

Given how prominent the cost of compliance in environmental policy dialogue generally, the low score that costs of compliance received in the responses was also a curious result. To be sure, cost of compliance was rated as at least relevant by three quarters of the respondents, but the rational polluter model predicts that cost of compliance should be rated the *most* important factor, as compliance behavior is purely a cost-benefit decision process. Yet almost a quarter of respondents described cost of compliance as of minor or no significance, and its

scores for very important and important pale in comparison to the ratings for number of regulations and the factors focusing on qualities of regulation.

Nevertheless, these results could be interpreted consistent with either behavioral model. On the one hand, the prominence of factors such as number and complexity of regulations supports the good apple model, as it points primarily to sources of noncompliance that are external to the business. On the other hand, it may simply be that businesses generally have arranged their internal affairs as they see fit for purposes of overall profit efficiency, so that the external sources of noncompliance have become the driving factors in the rational pollution decision. Or, under the resource allocation model, one would expect a wide variety of factors to influence resource allocation decisions by the numerous managers and employees involved. For us, the important message is that, regardless of which model one espouses, the results point strongly toward external sources of noncompliance that are largely outside the control of businesses and their employees, thus supporting the notion that a significant component of noncompliance is in fact involuntary in character.

While respondents with government experience did tend to rate conflicting requirements and regulatory ambiguity as less important than did industry lawyers, they did not depart from the general study population in their perception of which factors were the most and least important. And, once again, client size and sector did not affect response distributions. It appears that environmental lawyers of all flavors share a common perception about the sources of noncompliance, and that the sheer number of rules is foremost on all their minds as a chief cause.

Remedies. The sources of environmental noncompliance are numerous, varied, and complex, suggesting no easy solutions. Nevertheless, one frequently heard maxim, particularly from advocates of the rational polluter model, is that companies simply need to devote more budget resources to compliance in order to improve compliance performance. Of course, this sweeping generality doesn't answer how companies should deploy the money, something the resource allocation model attempts to solve. But in any event, this view was not widely held among our respondents. When asked whether a two-fold increase in environmental regulation compliance budgets would ensure full compliance at least 90 percent of the

time, only 40 percent of respondents agreed it would. Thirty percent disagreed, and 30 percent were indifferent. Ironically, respondents with at least some government experience were more likely to disagree (i.e., to have less faith that more money means more compliance). At the very least, these responses suggest that something in addition to budget increases will be needed to boost compliance rates.

Another commonly held notion our respondents' answers did not support is that the federal government is the principal source of regulatory overload. Although EPA clearly is the most prominent (and perhaps prolific) environmental agency, a significant majority of the respondents (63 percent) agreed that levels of noncompliance are the same for federal, state, and local regulations. Of those who identified a particular level of regulation as spawning more noncompliance, roughly equal numbers identified federal (19 percent) and state (13 percent) regulations, while local regulations were identified the least (5 percent). Whatever its source, therefore, noncompliance does not appear to be a problem isolated to a particular level of government regulation. The problem, in other words, is systemwide.

If the simple answers of budget increases and wresting EPA under control are not enough, what should companies do to control involuntary noncompliance? Once again, we culled through the environmental compliance literature to compile a list of remedies for respondents to rate in terms of importance. We first asked respondents to rate the importance of different compliance resources. The emphasis on internal compliance mechanisms such as technical staff, versus external resources such as trade associations, was pronounced:

	Very important	Important	Relevant	Minor	Not important
In-house technical staff	77	19	4	1	0
Contact with agency officials	38	35	21	5	<1
In-house legal staff	33	36	27	1	0
Outside technical consultants	22	44	28	1	0
Outside legal counsel	21	53	26	1	0
Educational programs/seminars	20	36	33	11	0
Trade association support	13	44	28	13	<1

(figures represent percent of responses)

These responses were remarkably consistent with the answers we received to a question asking how respondents would deploy a two-fold increase in regulatory compliance budgets among a variety of options,

with the goal of maximizing compliance. The emphasis, once again, was on devoting more dollars to internal compliance resources, followed by physical facility improvements, and then, of least importance, expenditures on external resources:

Conclusions

Our interest in describing involuntary environmental compliance is motivated by the debate between the rational polluter, good apple, and resource allocation

models of environmental compliance behavior, but is not intended to settle it. The debate whether corporations are bad actors or just caught in a web of complex regulations (or a combination of both) will continue, particularly when fueled by stories of corporate misconduct. Having said that, after analyzing our survey results we do, however, have a clearer picture of the issue. We believe each of the models underestimate the importance of involuntary noncompliance and thus fails adequately to address its sources and solutions. Many of the results of our survey could be interpreted to support either model, but they also support our hypothesis that much environmental noncompliance is involuntary and that a significant source of that component of noncompliance is the quantity of regulations.

	High Priority	Medium Priority	Low Priority	No Investment
Increase employee education on regulatory requirements	67	29	4	0
Hire more in-house technical staff	61	34	5	1
Increase environmental compliance monitoring	59	31	9	1
Invest in facility repair and renovation	53	39	7	1
Invest in new pollution control and other new technology	42	40	16	3
Increase contacts and relations with government agencies	22	44	25	8
Hire more in-house legal staff	13	43	40	4
Increase retention of outside technical consultants	10	53	35	2
Increase retention of outside legal counsel	7	45	43	6
(figures represent percent of responses)				

There was no significant difference in response distributions to any of these questions between respondents who had at least some government experience and those who had none. Likewise, client size and sector had no influence on the results.

These results suggest that the highest priority environmental compliance resources are those devoted to internal compliance problem-solving, a result that is entirely consistent with the finding that the primary sources of noncompliance are the quantity and qualities of environmental regulation. This finding also favors the resource allocation model as explaining what really transpires in the corporate "black box." First and foremost, human resources are needed to confront the challenge of understanding and complying with the vastness and complexity of environmental law. When their work identifies the need for capital investments, that becomes a priority. Where greater expertise levels are needed to solve compliance problems or address conflicts with government or citizens, outside technical and legal resources can be employed.

Perhaps the most curious results of the survey, therefore, are the responses to the final two questions. First, we asked what clients thought of the statement that additional specificity in environmental regulations would facilitate compliance. Over half the respondents agreed or strongly agreed it would, almost one-third disagreed or strongly disagreed, and the rest were indifferent. Clearly, there is a strong yearning among environmental lawyers for more specificity in environmental regulation. But in the final survey question we asked respondents whether they agree or disagree that reducing the number of environmental regulations would improve compliance without reducing environmental quality. Almost one-half agreed (42 percent), and almost one-third strongly agreed (27 percent), while only 20 percent disagreed or strongly disagreed. This result, of course, further supports our hypothesis that the number of regulations has become a compliance impediment, but it also leads to another research question: How can so many respondents desire and believe that the specificity of regulations can be increased while the number of regulations decreased? Alas, that is for another day. 