

A License to Comply: Drafting and negotiating license agreement terms to support compliance

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As appropriate, a large organization should **encourage small organizations** (especially those that have, or seek to have, a business relationship with the large organization) **to implement effective compliance and ethics programs.**

- U.S. Sentencing Commission

We can hope that as [private contractual compliance] assurances become more routine, a consensus will emerge around generally accepted practices for demanding and enforcing assurances from one's counterparty and its value chain. **Today, however, [private contractual] compliance is in its awkward, adolescent phase.**

- Scott Killingsworth, "The Privatization of Compliance"



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Getting Started



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Agenda

- Focus: Licensing for Compliance Pros and “Dual Hats”
- Playing Offense and Defense: Key Clauses, Issues and Tips
- Four Tricks and Trip-Ups
- Crowd Sourcing: Your Questions / Peeves / Lessons

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- **LeadGood: Elevating Education**
- Bespoke C&E education / EdTech procurement / Education program assessments / Education sector compliance
- Former SMB general counsel, chief compliance officer, executive
- Decades at the intersection of education, ethical leadership & compliance
 - => LeadGood
 - => LRN
 - => EduNeering
- **8x Entrepreneur and “Counsel for Growing Businesses”**

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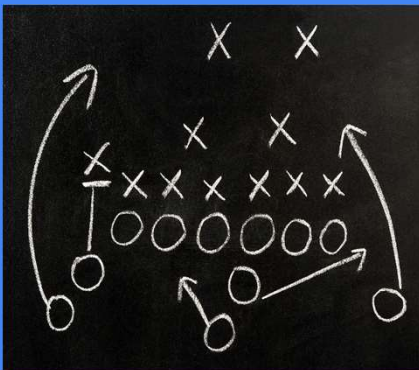
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Playing Offense and Defense in Peer-to-Peer Compliance



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“Playing Offense and Defense”



OFFENSE: Using contract clauses to strengthen and expand my compliance program, internally and externally

DEFENSE: Avoiding contract clauses that weaken, dilute or jeopardize my compliance program or impose onerous or burdensome requirements

It all depends on your perspective...

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In This Corner...

Licensee

Established enterprise provider?

Smaller custom developer?

**Bugaboo: The Standard Master
Services Agreement**

Licensor

Fortune 500?

SMB with core need?

**Bugaboo: The Standard
Solutions Agreement**

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Common License Terms with Compliance Impact



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Standard Terms & Issues

- Scope of License
 - Users? Seats? Locations? Machines? Copies?
 - Overage Charges
 - Issue: License Compliance itself

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Standard Terms & Issues

- Confidentiality
 - Remember: back-ups, monitoring
 - Anonymized and aggregated data?
- Data Privacy
 - Get granular!
 - “Right to be forgotten”
- Cybersecurity
 - Get specific

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Service Level Agreement

(Ask for it by name)

If Supplier fails to provide the Services in accordance with the Service Level Specifications set forth in the applicable Service Level Agreement, Supplier shall apply the resulting Service Level Credits against the Charges owed to Supplier for the month following the month in which the Service Level Credits were incurred...

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Auditing Rights Clause

Auditing Rights. Provider may audit the records of Client to ensure compliance with this Agreement. Vendor agrees that it will retain such records for a minimum of three (3) years after Termination. Except for audits based on alleged violation of ethics or laws where no notice is required, Provider will notify Client in writing at least ten (10) business days prior to any such audit. Any such audit will be conducted during Client's regular business hours at Client's offices and will not interfere unreasonably with Client's business activities. Provider may audit Vendor no more than once in any six (6) month period...

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Monitoring & Auditing Tips

For licensor: Central to License contract terms compliance

For programs: Make clear the difference between who is in charge of contract compliance and who is in charge of corporate compliance

Detail informal dispute resolution options prior to adversarial steps

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Monitoring & Auditing Tips

Overlooked on “Offense”?

Be sure your contract language permits your CE program to monitor and audit in the areas needed, and as often as may be necessary to protect your company

Ensure that non-cooperation with the exercise of auditing rights is a basis for termination

Ensure sufficient document retention clauses to meet mandatory flow-downs and to enable auditing within reasonable timeframe after performance

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Code of Conduct Clause

Code of Conduct. Vendor hereby represents and agrees to adopt and act in a manner consistent with the ethical and professional standards set forth in the Client's Code of Business Ethics, as well as obligations identified therein, including prompt reporting of fraudulent or unlawful conduct.

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Code of Conduct Clause

Code of Conduct. Client and Vendor each agree it shall (a) conduct business in conformance with sound ethical standards of integrity and honesty and in compliance with all applicable laws; (b) conduct business in such a way as to not give the appearance of impropriety, even when the behavior or activity is in compliance with the law; (c) not achieve business results by illegal acts or unethical conduct; (d) comply with U.S. and local anti-bribery laws, such as the United States Foreign Corrupt Practices Act, United Kingdom Bribery Act, and other similar local laws; (e) prohibit its employees, agents and subcontractors from offering, paying or authorizing financial or other advantage to be given to any official or employee of any government or political party, political candidates or employees of government enterprises (each, an Official) for the purposes of (1) obtaining an improper business advantage; (2) influencing such Official to take, or not to take, any action or decision; or (3) inducing such Official to use his or her influence to affect any act or decision of a government; (f) not be involved with any form of exploitation of children or under age child labor; and (g) provide employees and any contracted individuals engaged by it with a work environment free of coercion and harassment including harassment or discrimination based on race, religion, color, marital status, pregnancy, gender, or national origin.

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Training Clause

Training. Vendor will be required to certify that its employees, sub-distributors, representatives, and agents have completed all anti-corruption and anti-bribery training requirements, consistent with Client's standards, whether by taking advantage of access to trainings provided by Client or by separately arranging for comprehensive training by area experts. Trainings should be provided in the appropriate language(s) for the recipient.

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Training & Education Tips

Licensee: How does systems education fit in your program? What do you need Licensor team to know and sign off on?

Licensor: What systems education and compliance do you need from users and admins?

Clearly describe in contract language any training that the other party will provide to your employees

Rewards and risks of offering specific training to the other party – better to just require/report/monitor/obtain certification of completion?

Protect your company with indemnification if the training is deficient

Be aware of flow-down requirements from the Government or major contracts

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Indemnification

(The “because we say so” clause)

Indemnification. Vendor shall defend, indemnify and hold Client and Client’s franchisees, affiliates and licensees harmless from and against all claims... arising in connection with (i) the failure of the Products to meet label claims or Client’s quality control standards, or (ii) the promotion, sale or use of the Products or any litigation or threatened litigation based thereon. Such right of indemnity shall exist in favor of Client, even though the negligence, gross negligence, strict liability, common law or statutory fault of Client was the sole cause, a producing clause or the concurring cause of the claim...

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Indemnification

(Let’s get real)

(Let’s match our risk profile)

Indemnification. Company, at its own expense, will defend claims brought against Client in the United States by third parties that are alleged to arise solely and exclusively due to an infringement claim brought by a third party against Client arising from Client’s use of the Solution or the Company Site (“Claim”)...

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Four Tricks and Trip Ups



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“The Click-Through Gambit”

This Agreement sets forth the entire understanding and agreement between you and Vendor with respect to the subject matter hereof and supersedes all previous understandings and agreements between the parties, whether oral or written.

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“The Rider Defense”

...Notwithstanding anything in the foregoing to the contrary..

...In the event of a conflict between this Exhibit C and the Master Agreement, this Exhibit shall control..

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“The Intel Gambit”

... As transistor scale gets ever smaller Intel expects to continue to deliver on Moore’s prediction well into the foreseeable future..

... The future of Moore’s Law could deliver a magnitude of exponential capability increases..

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“The Reasonable Defense”

Ask questions

Keep asking.

Listen. Really.



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Primary Lessons

More than bargaining power?

Take credit

But balance...

- The risks and burden on each party
- Compliance vs. Business Objective

Know the deal

“Working,” not “Winning”

- Dispute resolution clause
- A “User Guide” for the Parties
- The lawyer as “closer”
- Pick your battles

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The Culture of Compliance and The Culture of Negotiation

(or, be careful what you ask for...)

"Adhesion tactics" may result in covenants without commitment

Insistence may ensure concealment or breach

Asking for powers you will not exercise sends a counterproductive message

Watch out for ...

- blank checks (agreeing without seeing)
- empty promises (agreeing without educating)

So apply the approach that works internally:

- Shared Values, over Rules
- Shared Interests, over Mandates

Play "The Intel Gambit"... but for your values

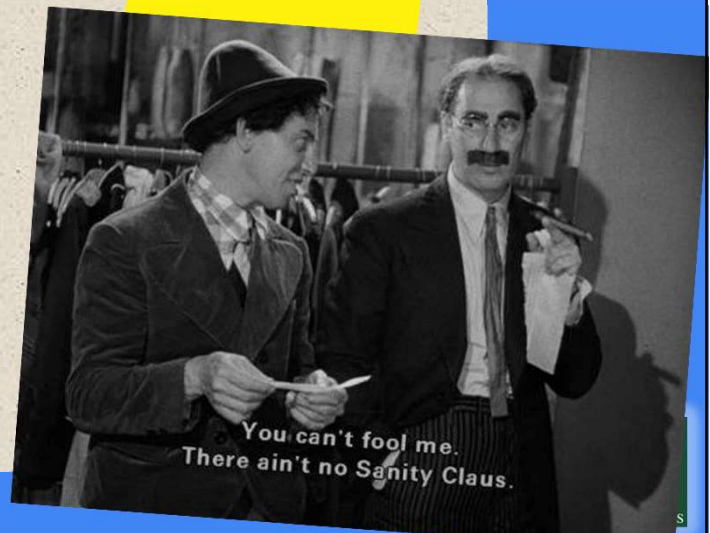
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Crowd-Sourcing

What's your "sanity clause"?

What's your INsanity Clause?

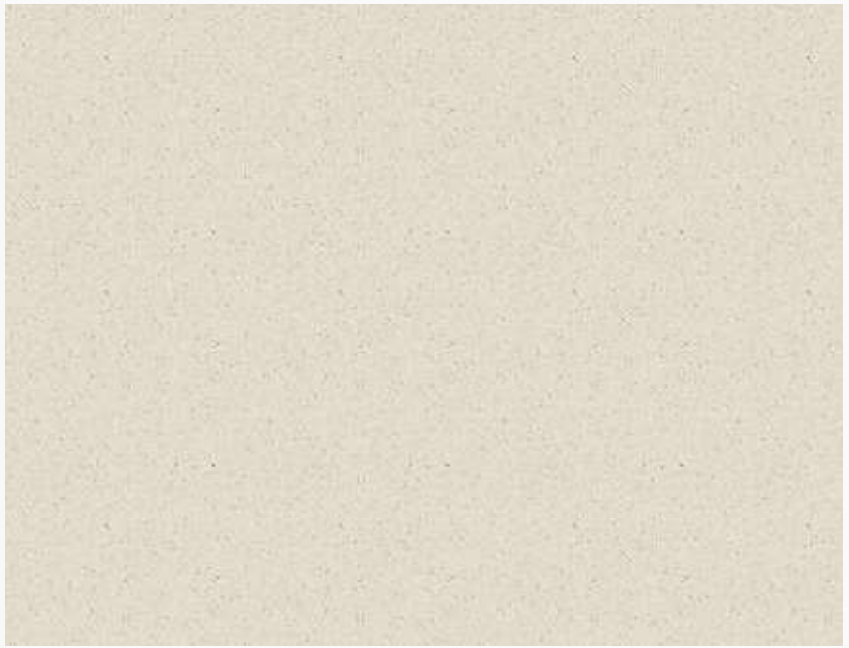
Any questions?



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In closing...

What's the worst contract clause for an authentic compliance and ethics program?



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Final Questions /Discussion?



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Thanks!

Please, keep in touch!

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Appendix

Other clauses we could discuss...



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Investigations Clause

Investigations. Vendor agrees to cooperate and participate fully in investigations initiated by Client. Upon Client request, Vendor agrees to promptly provide any and all documents, including any information stored digitally, and to make available for interviews any Vendor employees Client deems necessary for internal Client investigations. Vendor further agrees to immediately notify Client if any employee, director, officer or agent of the Vendor comes under investigation for conduct arising out of or related to performance under this Agreement and shall promptly share all internal investigative findings, conclusions, recommendations and corrective action plans with Client.

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Quality Agreement

Quality. Notwithstanding anything in this Agreement, Client is ultimately responsible for approving or rejecting the Products, and is further responsible for the release of Products or other finished goods for distribution to the public and consumers and any and all liability arising therefrom.

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Sales Incentive Clause

Sales Incentives. Vendor agrees not to implement any sales incentives programs, bonus programs or structures, or performance incentives for employees which reward financial returns under this Agreement without a quantifiable measurement of compliant and ethical conduct in the achievement of the financial return. Vendor agrees to provide information to Client on any formula or criteria used to calculate bonus payments.

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Mandatory Flow-down Clauses

§ 200.326 Contract provisions.

The non-Federal entity's contracts must contain the applicable provisions described in Appendix II to Part 200 - Contract Provisions for non-Federal Entity Contracts Under Federal Awards.

Davis-Bacon Act.

WHEREAS, because the relevant prime construction contract is in excess of \$2,000, Contractor is required to include provisions for compliance with the Davis-Bacon Act and DOL regulations..

THEREFORE, Subcontractor is required to pay wages to laborers and mechanics, not less than once a week, at a rate not less than the Prevailing Wages. Subcontractor shall report all suspected or reported violations. Subcontractor is prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which they are otherwise entitled.

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Reporting

Hotline?

- Require that violations be reported to your hotline ?
- Info in contract language?
- (Does your agreement with vendor include increased number of callers?)

Require any complaints or concerns related to your company that come through the other party's hotline to be immediately reported to you

Make failure to report violations (and retaliation) a basis for termination of the contract – and for fed funded programs, include indemnification (when mandatory disclosure is required to avoid suspension and debarment)

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Investigations

Require cooperation and participation by:

- Making witnesses available
- Producing and providing documents and evidence

If the other party requests reciprocal cooperation:

- Ensure that you retain some control over the exercise of attorney-client privilege
- Consider how participation may compromise your assertion of privilege

Ensure that the other party is required to investigate misconduct or fraud related to the performance of the contract and share the findings with your company

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Discipline & Incentives

Not many options for contract language, but...

- Consider R&W of adequate disciplinary processes in place to address misconduct involving contract performance
- Consider R&W that they do not have any incentive structure in place (ex: performance bonus) that may encourage non-compliance or misconduct; particularly on time & materials type contracts billable to the government

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