Navigating International Compliance Waters for Financial Institutions and Families

John Shoemaker, a Registered Foreign Lawyer for US law firm Butler Snow in Singapore, offered delegates at the Hubbis Compliance in Asian Wealth Management Forum 2020 a detailed guide to many of the key facets of regulation and more importantly the compliance issues and practices for financial intermediaries and their wealthy Asian or other clients.

SHOEMAKER FIRST OFFERED THE AUDIENCE SOME OF HIS PROFESSIONAL BACKGROUND, as a means of framing the talk. He reported that he began his working life on the regulatory side, working for the legislative staff for the State of Kansas and then for the insurance department in Kansas, before moving into an insurance company as in-house counsel, then covering a 13-state jurisdiction.

"That," he reported, "in fact gave me my first interaction with multi-jurisdictional compliance, and was a springboard to move to Switzerland to work for a Swiss bank, and I was later relocated to Singapore and here I am now in private practice for a law firm helping clients in relation particularly to the US and how that integrates with other jurisdictions. And that all helped me assemble the big picture that I want to convey today."

Awareness and expertise – know the difference

In his brief presentation, he said he could not offer too much detail, but wanted to cover the major theme of understanding the difference between awareness and expertise. "Both are valuable but when they need to be deployed and having the skills to spot the difference between those is, I think, critical for anyone involved with compliance," he commented. "I will

JOHN SHOEMAKER
Butler Snow

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today also touch very briefly on the types of regulatory standards or rules that you may not have thought about, and then lastly I will offer a few views on what I think are great standards to put in place that will help the efficiency and effectiveness of your compliance plans."

He explained that transparency is the new reality in the financial sector, and that means that the legitimate purpose, knowing why a structure or a banking relationship or a transaction being conducted is essential. "In the old world of banking secrecy and far less cross-country exchange of information," he noted, "that was not so integral because certain institutions or families would have assumed nobody will truly scrutinise any structure or the transactions, but as we know, that's changed now."

Accordingly, industry participants need to understand why a structure, a transaction, a client is being onboarded. It is not possible to know everything, he noted, but the key is to be able to spot where they might have a problem and bring in a colleague or other expertise when necessary.

Referring to a detailed and informative slide presentation [see link attached], he highlighted how industry participants must be aware not to fall into easy mistakes or potential traps. "You should have always a healthy scepticism and question your assumptions," he advised. "And sometimes you need to mine down to the technical details, which in the case of wealth management might make the difference between whether you are compliant or not when dealing with a regulatory audit or a fine for your entity. So, being able to understand the difference between a high-level awareness to avoid big mistakes and knowing when to involve an expert to get a very technical answer is a key theme of my presentation today."

The fine print

Shoemaker then delved into greater detail on a variety of topics, beginning with reporting requirements for FATCA, CRS, and AEOI. "But I want to focus today not on those, which I think you know well, but on MDR, the Mandatory Disclosure Rules," he reported. "The concept behind MDR is as a follow-up to FATCA and CRS, closing the gaps there, and sets out the need for any professionals involved with family tax planning and structuring that results in reduced tax (for the DAC6 implementation, that means in an EU country) to report it back to the home authority. It is remarkably intrusive and, in some ways, it discourages cross-border interaction between advisers within an organisation, but it cannot and must not be ignored."

Going public

He also pointed to registries. "If you are banking for a trust, if you are trustee of a trust, if you are advising a family on a trust, there may be inadvertent registration requirements that you weren't aware of, for example simply holding UK securities that produce a UK tax liability could mean you have to register a trust that otherwise has no UK connections or UK settlor or UK beneficiaries or UK trust protector. But you will still have to register that trust on the UK registry and now expose certain beneficial ownership data to the eyes of the individuals who otherwise wouldn't have had that information."

Similarly, he noted that some of the offshore jurisdictions, such as the Caribbean jurisdictions and the Channel Islands, now have new beneficial ownership (BO) registers, so by using a company in that type of jurisdiction the clients might be exposed to a public disclosure about their name and identity. "So, in short," Shoemaker advised, "you

should be very careful of where you choose the jurisdiction of certain companies that you are using in structuring, or for which you are holding accounts."

As an aside, he explained that the definition of 'public' can get very technical within these rules. He said that for some jurisdictions, public means law enforcement can access the information, but the general public cannot. In other jurisdictions, it means that the general public can easily see who the owners of a company might be, if they so request. "My advice," he remarked, "is to dig into what the definition of public disclosure for that particular jurisdiction is, it may not be as difficult as you fear, or it may be worse."

Know your IDR

He then turned back to offer more on FATCA and CRS, noting that it is very helpful to see the obligations relating to what are very complex information change regimes through the means of IDR, representing the need to identify, document and then report. "You will never get lost if a client or any colleague asks you a FATCA and CRS question, if you can remember the IDR concept" said Shoemaker.

Identify, the first step, has two stages. Every entity in the world has to first identify itself what it is, whether perhaps a financial institution or an NFE, non-financial entity, then it needs to identify the persons or entities associated with the structure.

Then there is the need to document. "In the second stage you need to document the entity and classify it, then you document the individuals that you had earlier identified, then you report either up to the home jurisdiction or over to another," he explained. "If you follow that simple guide, you should never get lost in FATCA and CRS."

He then said there are always grey areas, and the line between avoidance and evasion in tax matters must be carefully assessed. "To be smart," he advised, "hire appropriate professionals and be efficient in your compliance standards, we as an industry want to communicate to the regulators and help to preserve the very clear distinction between genuine avoidance, which is conducted legally and correctly, versus evasion, which is illegal."

Closing his talk, he offered delegates additional insights into US tax exposures and consequences. Advising the audience to keep an eye out for the obvious duties and actions or structures that might inadvertently trigger a regulatory compliance standard that the protagonists had not expected.

Be vigilant and thoughtful

Finally, he pointed to GDPR, the General Data Protection Regulation, another EU based set of rules that govern how to collect data, how to get rid of data, and how data can be used. "Every organisation should have an officer, an individual in charge of looking at this," he recommended. "And just because you are compliant with a multi-jurisdictional standard doesn't mean you are fully safe, because it might conflict with a rule in another jurisdiction where you are forbidden from exposing certain data. In short, my advice is to take expert-level advice to resolve any such issues."

His final word was to implore delegates to be aware and thoughtful. "We can call this the ABC," he said, "standing for Always Be Contemplative. Don't fall int the trap of being over-confident, always be humble, and thoughtful." ■