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Where The CCO Fits In The C-Suite: A Corporation's Moral Compass

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INTRODUCTION

In the wake of the 2008 financial crisis, the American public pressured Congress to hold individual corporate employees liable for misconduct that contributed to the collapse of the economy, adding to the most severe economic downturn since the Great Depression. In light of this public pressure, Congress enacted the Dodd–Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act" or the "Act") which, in part, mandates that the Securities and Exchange Commission ("SEC") and other government agencies must implement strict rules for corporations regarding corporate compliance to help prevent another financial disaster.[1]

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1. John C. Coffee, Jr., *The Political Economy of Dodd–Frank: Why Financial Reform Tends to be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019, 1049, 1056 (2012).

Former Assistant Attorney General Sally Quillian Yates wrote a memorandum (the "Yates Memo") on behalf of the Department of Justice ("DOJ") in 2015, emphasizing the continued importance of fighting corporate fraud and other misconduct.[2] Most importantly, the Yates Memo called for individual liability of corporate officers.[3] As a result of increased regulations, statutory provisions, and the Yates Memo, the DOJ and SEC have increased the number of actions against corporate officers.[4] One easy target for these government entities is the Chief Compliance Officer ("CCO"). Due to this increased scrutiny, seventy–four percent of compliance professionals in public corporations and eighty–nine percent in private corporations are either somewhat or extremely concerned about their personal liability as a CCO.[5]

In the interest of self–protection, corporations in many industries are implementing complex compliance programs and appointing CCOs to head these operations. In fact, seventy–two percent of United States corporations today have a CCO.[6] The CCO must wear many hats throughout the corporation, which often results in overlapping duties with the General Counsel ("GC"), Chief Executive Officer ("CEO"), and other corporate officers.[7]

Corporations have chosen to deal with the complex job description of a CCO in many different ways. Some corporations choose to clearly differentiate the duties of the CCO and the GC by having the CCO report to the GC; other corporations may take more drastic measures by hiring an independent CCO to handle their compliance function.[8] Depending upon the exact role of the CCO, he or she may be a member of the C–Suite or not.[9] Because the CCO's precise duties within the corporation may be

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2. Memorandum from Sally Quillian Yates, Deputy Attorney Gen., to all United States Attorneys (Sept. 9, 2015). [hereinafter Yates Memo].

3. *Id.* at 1-2, 4.

4. John F. Savarese, *White Collar and Regulatory Enforcement: What to Expect in 2017*, HARV. L. SCH. F. CORP. GOVERNANCE & FIN. REG. (Jan. 25, 2017), https://corpgov.law.harvard.edu/2017/01/25/white-collar-and-regulatory-enforcement-what-to-expect-in-2017/.

5. DLA PIPER'S 2016 COMPLIANCE & RISK REPORT: CCOs UNDER SCRUTINY 8 (2016).

6. *State of Compliance Study 2016*, PWC (2016), http://www.pwc.com/us/stateofcompliance.

7. *See* Shon Ramey, *Fauxtroversy: Combining or Separating GC and CCO Roles?*, NAVEX GLOBAL (July 14, 2014), http://www.navexglobal.com/blog/fauxtroversy-combining-or-separating-gc-and-cco-roles.

8. José A. Tabuena & Jennifer L. Smith, *The Chief Compliance Officer Versus the General Counsel: Friends or Foes? Tensions Can Exist Between the Two, So Define the Roles and Learn to Strike A Balance*, 8 J. Health Care Compliance 23, 25 (2006).

9. *See Chief Compliance Officer: The Fourth Ingredient in a World Class Ethics*

unclear, the CCO becomes an easy scapegoat for any corporate misconduct.[10]

Part II of this Article will discuss the history and evolution of the role of a CCO within a corporation. Part III will explore the industries that employ CCOs today and their stages of advancing compliance programs. Part IV of this Article will address the controversy concerning the often–conflicting roles of the CCO and GC. Finally, Part V will conclude with a discussion of the evolving risks facing CCOs of modern corporations.

II. THE HISTORY AND EVOLUTION OF THE ROLE OF THE COMPLIANCE OFFICER IN A CORPORATION

A. Foreshadowing to the 2008 Financial Crisis

Corporate GCs are historically responsible for overseeing the compliance function of a corporation. In the past, corporations employed the minimal standards for compliance, which established a system of dangerously low accountability.[11] However, in the twentieth century, courts began to impose joint and several liability on corporation individuals and agents.[12] High–level officers within corporations used "reciprocal risk shifting" to displace their risk of liability and loss to subordinate employees; by transferring the risk of legally imposed losses back and forth, they relied on employee indemnity to recover losses on account of the agency while simultaneously depending on employer indemnity to recoup losses imposed through vicarious liability.[13] The resulting "indemnification equilibrium" created an equal balance of risks, thus allowing the corporation to escape enforcement functions for individual liability.[14]

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and Compliance Program, DELOITTE 3 (2015) [hereinafter *Chief Compliance Officer*], https://www2.deloitte.com/us/en/pages/risk/articles/the-chief-compliance-officer-cco-the-fourth-ingredient-in-a-world-class-ethics-and-compliance-program.html.

10. *See* Julie Dimauro, *The State of the Chief Compliance Officer in 2016*, CORP. COMPLIANCE INSIGHTS (May 25, 2016), http://www.corporatecomplianceinsights.com/state-chief-compliance-officer-2016/.

11. William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343, n.251 (1999) (citing Peg. A. Schoenfelder, Preventive Law "Marketing Tips" for Corporate Counsel, Preventive L. Rep., Fall 1995, at 19).

12. *Id*. at 1346.

13. Christopher D. Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 YALE L.J. 1, 45–7 (1980); *see* Laufer, *supra* note 12, at 1346 (foreshadowing the issues demonstrated by the 2008 financial crisis).

14. Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857, 859 (1984).

From the 1980s to early 2000s, courts and government officials pushed for increased regulation and transparency, urging corporate entities to monitor their employees for violations of criminal law.[15] The government began to provide incentives for corporations to separate their compliance responsibilities from their general counsel department. For example, in the late 1990s, the Office of Inspector General ("OIG") for the Department of Health and Human Services ("DHHS") took a stance urging for more stringent compliance guidelines. OIG suggested that the CCO should be a member of senior management who reports directly to the CEO and the Board of Directors. This "free standing" permits the CCO to work independently from other "key management positions such as general counsel, comptroller, or chief financial officer."[16]

In 2002, after the Enron, WorldCom, and several other scandals occurred, the American Bar Association ("ABA") appointed a task force to "examine systemic issues relating to corporate responsibility arising out of the unexpected and traumatic bankruptcy of Enron and other[s] which [shook] confidence in the effectiveness of the governance and disclosure systems applicable to public companies in the United States."[17] With regulatory expectations rising in corporations across the world, there was "tremendous pressure on organizations, particularly those with international operations," to implement compliance programs.[18]

In addition, in 2002 Congress passed the Sarbanes–Oxley Act, implementing "the most far reaching reform of American business practices" in decades.[19] Its reforms included enhanced corporate responsibility and mandatory financial disclosures.[20] As a result of such

15. *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (expanding the scope of the work–product doctrine in holding that companies can invoke attorney–client privilege for communications between company lawyers and non–management employees); *In re* Grand Jury Proceedings Oct. 12, 1995, 78 F.3d 251, 254 (6th Cir. 1996) ("By voluntarily disclosing her attorney's advice to a third party . . . a client is held to have waived the privilege because the disclosure runs counter to the notion of confidentiality."); SEC v. Koninklijke Ahold N.V. (Royal Ahold), Litigation Release No. 18929 (Oct. 13, 2004) (resulting in a corporation promptly taking remedial actions including revising its internal controls and terminating employees responsible for the wrongdoing).

16. Greg Radinsky, *The Compliance Officer Conundrum: Assessing Privilege Issues in a Health Care Setting*, 5 DEPAUL J. HEALTH CARE L. 1, 2 (2002).

17. J.H. CHEEK III ET AL., REPORT OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON CORPORATE RESPONSIBILITY 3–4 (Am. Bar. Ass'n, 2003).

18. *See Chief Compliance Officer*, *supra* note 9, at 1–2.

19. *The Laws that Govern the Securities Industry*, SEC (Oct 1, 2013), https://www.sec.gov/about/laws.shtml#secexact1934 (quoting President George W. Bush, Speech on the Sarbanes–Oxley Act Implementation (Jul. 30, 2002)); *see* Sarbanes–Oxley Act, § 3, 15 U.S.C. § 72072 (2002).

20. *The Laws that Govern the Securities Industry*, *supra* note 19.

guidance, the CCO became a "direct line to the top." [21] The position now entails not only collaborating with the corporation's various sub–divisions to ensure compliance, but communicating information about potential wrongdoing to top officials as well.[22]

B. The Push Towards Modern CCOs

The 2008 collapse of financial institutions almost brought down the world's economic system.[23] Highly respected credit rating agencies negligently and incorrectly rated mortgage–backed securities issued by Wall Street firms as "low risk," or "AAA," meaning the best and safest.[24] Through subprime housing mortgages, people could now purchase real estate out of their price range at very low interest rates. Banks and hedge funds invested heavily in these securities, selling them to special purpose financial vehicles.[25] A rapid decline in housing values led to soaring subprime mortgage defaults, as people were unable to pay back their loans. The "AAA" securities lost much of their value, forcing home foreclosures and sales. This quickly affected the prime mortgage market as well. The special purpose vehicles that had bought the loans from the banks were insured against defaults, so denied responsibility for any sort of repayment.[26] Banks were often unable to refinance their liabilities; thus, the federal government had to step in to bail them out.[27]

After 2008, the public called for corporations to self–regulate, urging them to adopt internal programs to regulate their internal compliance.[28] There was a push for publicly traded companies to report wrongdoing

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21. Alison MacDonald Duncan, *Preserving the Attorney–Client Privilege in an Age of Transparency: New Challenges for Compliance Officers and In–House Counsel*, ALH (2005), http://archive.healthlawyers.org/google/health_law_archive/program_papers2/2005_COMPLIANCE/%5B2005_COMPLIANCE%5D%20104.%20Preserving%20the%20Attorney-Client%20Privilege%20in%20an%20Age%20of%20Transparency-%20.pdf.

22. *Id.*

23. *The Origins of the Financial Crisis: Crash Course*, THE ECONOMIST (Sept. 7, 2013), http://www.economist.com/news/schoolsbrief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article (explaining the collapse occurred because moneylenders carelessly provided high amounts of cheap financing to borrowers with histories of poor credit).

24. Jeff Holt, *A Summary of the Primary Causes of the Housing Bubble and the Resulting Credit Crisis: A Non-Technical Paper*, 8 J. BUS. INQUIRY 120, 122, 125–26 (2009).

25. *Id.* at 123, 125–126.

26. *See id.* at 127.

27. *Id.* at 122.

28. *See* Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C.L. REV. 949, 951–52 (2009)*; see also* Sarbanes–Oxley Act of 2002, Pub.L. No. 107–204, 116 Stat. 745 (2002).

within the company as soon as possible.[29] Such demands required a previously unheard–of degree of transparency within the corporate sector, forcing companies to proactively implement internal investigations.[30]

In 2010, President Barack Obama implemented the Dodd–Frank Act, which resulted in drastic changes to the United States financial regulatory system, including heightened corporate governance and disclosure requirements.[31] The Dodd–Frank Act includes 16 titles and requires that regulators create 243 rules, conduct 67 studies, and issue 22 periodic reports.[32] The Act highlights three areas of corporate governance in financial institutions and public companies, requiring such companies to establish risk management committees, provide additional disclosures about their organizational structures, and allow the SEC to adopt proxy access.[33] The Dodd–Frank Act also sets up an annual SEC report and triannual Government Accountability Office ("GAO") audit reports to Congress, to assess the "effectiveness" of their "internal supervisory controls" and procedures for financial reporting.[34]

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29. Duncan, *supra* note 21, at 7.

30. *Id.*; *See* U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f) (U.S. SENTENCING COMM'N 2004) (providing rules for the culpability of organizations with "Effective Compliance and Ethics Programs"); Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44969, SEC Docket (Oct. 23, 2001), available at https://www.sec.gov/litigation/investreport/34-44969.htm (outlining criteria to help in assessing the extent to which a company's self-policing and cooperation efforts will influence its decision to bring enforcement action); Memorandum from Deputy Attorney Gen. Larry D. Thompson to Heads of Dep't Components United States Attorneys (Jan. 20, 2003) (on file with author) (expanding and revising Eric Holder's 1999 memorandum and identifying nine factors federal prosecutors should use in charging corporations or other business entities including the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents); Memorandum from the Deputy Attorney Gen. Eric Holder to All Component Heads and United States Attorneys (June 16, 1999) (on file with author) ("Finally, in the experience of our members and their outside counsel, companies faced with waiver requests virtually always accede to them. In seeking to resolve the threat to the short–term best interest of the business and its shareholders, particularly the risk of a criminal prosecution of the company, senior corporate management do not dare lose an opportunity for favorable treatment (or, conversely, trigger the wrath of prosecutors).").

31. S*ee generally* Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub.L. No. 111–203, 124 Stat. 1376–2223 (2010).

32. DAVIS POLK & WARDWELL LLP, SUMMARY OF THE DODD–FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT, ENACTED INTO LAW ON JULY 21, 2010 87 (2010).

33. *Id.*

34. *Id.* at 88.

C. Modern CCOs: The "Moral Compass" of the Company

CCOs are not simply watchdogs for policing organizations. Instead, CCOs are seen as "business partners, collaborators, strategists, and internal consultants," who add value to the company by helping decision makers "achieve objectives within the guidelines of what is permissible."[35] Because corporate entities are now held accountable for the actions of their subordinate employees, CCOs must implement holistic compliance programs.

Compliance has evolved into a "universal corporate governance activity" because of the numerous statutes and regulatory regimes.[36] By having rules that directly and indirectly require corporations to adopt programs against internal misconduct, corporations must comply at the risk of facing "highly punitive consequences for their failure to do so."[37] Compliance programs are expected to address:

> Portfolio management, trading practices, an adviser's proprietary trading and personal trading activities of supervised personnel; accuracy of disclosures made to investors; safeguards to prevent advisory personnel from converting or inappropriately using client assets; the creation and maintenance of required records; marketing advisory services; processes to value client holdings and assess fees based on those valuations; client privacy safeguards; business continuity plans.[38]

The CCO must know and understand the laws and regulations to ensure everyone in the corporation abides by these rules. A CCO's responsibilities may require him or her to, among other things: conduct interviews and hold meetings with the board or directors, employees, and other officers; detect and prevent financial malfeasance; enforce the organization's code of conduct; and promote integration between corporate business operations.[39] Furthermore, it is the CCO's responsibility to create easy–to–use protocols by which they "review compliance issues, create internal control processes . . . ensure reports are filed promptly, and provide training to all employees whose jobs touch on compliance in any way."[40]

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35. *Chief Compliance Officer*, *supra* note 9, at 4.

36. Tanina Rostain, *General Counsel in the Age of Compliance: Preliminary Findings and New Research Questions*, 21 GEO. J. LEGAL ETHICS 465, 466–67 (2008).

37. Baer, *supra* note 28, at 951–952 (2009).

38. Compliance Programs of Investment Companies and Investment Advisers, 68 Fed. Reg. 74714, 74716 (Dec. 24, 2003) (to be codified at 17 C.F.R. pts. 270, 275, 279).

39. Sally Bernstein & Andrea Falcione, *What it Means to be a "Chief" Compliance Officer: Today's Challenges, Tomorrow's Opportunities*, PWC 2, 3 (2014), https://www.pwc.com/mx/es/riesgos/archivo/2015-03-challenges.pdf.

40. *The Growing Role of Compliance Within Banks*, ROBERT WALTERS, https://www.robertwalters-usa.com/career-advice/the-growing-importance-of-compliance-within-banks.html (last visited Feb. 19, 2017).

To check that the corporation's compliance program is successfully completing these tasks, the CCO must subject the program to regular voluntary audits.[41] A corporation's failure to have these compliance policies and procedures may result in civil or even criminal penalties.[42]

The SEC requires regulated corporations to implement a compliance program as described above. Specifically, Rule 38a–1 of the Investment Company Act of 1940 and Rule 206(4)–7 of the Investment Advisers Act of 1940 ("Compliance Rules") require money managers to implement written compliance programs administered by a designated CCO.[43] Rule 38a–1 states that the fund's board of directors, including a majority of independent directors, must approve the designation and compensation of the CCO.[44] The board may also remove the CCO from his or her position at any time.[45] The CCO reports directly to the board including furnishing an annual written report, and must conduct the annual review of the policies and procedures for the fund.[46]

Rule 206(4)–7 says the CCO should be "an individual with sufficient knowledge of the Advisers Act, empowered with full responsibility and authority to develop and enforce appropriate policies and procedures . . . and [having] sufficient seniority and authority to compel others to adhere to [them]".[47] Under this rule, the CCO conducts the annual review, considers compliance matters that arose during previous year, appraises changes in business activities, and evaluates new regulatory developments.[48]

Compliance functions are best carried out as a "free standing" process that allows CCOs to report directly to the board.[49] This process ensures independent and objective legal review as well as financial analysis of the corporation's compliance efforts and activities.[50] An Ernst & Young study surveying eighty–three companies across eleven industries in four countries concluded that the CCO's role is best implemented as an independent

41. *Id.* (quoting Adrian Morrissey, Manager of the Compliance Division, Robert Walters New York).

42. *See, e.g.*, *Compliance Programs of Investment Companies and Investment Advisers*, Rel. No. IA–2204 (Dec. 17, 2003).

43. Jeffrey S. Puretz et al., *Compliance Rules as a New Enforcement Regime*, ALI–CLE 159, 163 (Nov. 2–3, 2015).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Compliance Programs of Investment Companies and Investment Advisers*, Rel. No. IA–2204 (Dec. 17, 2003).

48. Puretz et al., *supra* note 43, at 164.

49. *Id.*

50. Radinsky, *supra* note 16, at 2.

officer who reports directly to the board and has no employment stake in the corporation.[51]

1. CCOs in Action

Compliance officers are found in healthcare and financial services corporations, pharmaceutical companies, hospitals, money center banks, insurance companies, and most recently in aerospace.[52] While the healthcare industry began implementing compliance programs long ago, recently, the banking sector has become the epicenter for driving cultural change when addressing a corporation's duty to self–regulate.[53] In 1991, the United States Sentencing Commission articulated its first rendition of the elements of an effective compliance program, and the government promised to reduce corporate penalties if a corporation can show it had a good compliance program in place.[54] The Sentencing Commission's current factors for effective compliance practices are: (1) rules, (2) high level engagement and appropriate delegation, (3) diligence in hiring, (4) communication and training, (5) monitoring and testing, (6) alignment of incentives, and (7) appropriate remediation.[55] On the other hand, in the insurance industry, seventy–eight percent of insurance firms still have a GC overseeing the compliance function, not because this is effective, but because it is the newest industry to begin implementing rules calling for compliance programs headed by CCOs.[56]

III. THE RELATIONSHIP BETWEEN THE CCO AND THE GENERAL COUNSEL

Some large publicly traded corporations have distinct Compliance and Legal departments because there is a clear line between the roles of

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51. *See* Ernst & Young, *Best in Show: Cross Industry Corporate Compliance Survey Results*, BUS. RISK. SERVS. 1, 5–7 (2003) (exploring how large corporations have implemented corporate compliance programs, identifying key indicators of corporate compliance activities, and validating the applicability of those measures in companies across various industries. The study also determined that a successful CCO informs all executive officers of the requirements for corporate compliance and ethical business practices).

52. *Chief Compliance Officer*, *supra* note 9, at 3; Ernst & Young, *supra* note 51 ("financial services and aerospace industries had the highest average industry scores").

53. Cynthia Dow & Jason Lim, *How the Chief Compliance Officer Role is Transforming Across Financial Services*, RUSSELL REYNOLDS ASSOCIATES (Apr. 28, 2016), http://www.russellreynolds.com/en/Insights/thought-leadership/Documents/R605016-rr0063-%20CCO%20in%20FS%20v16.pdf.

54. Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 50 WM. & MARY L. REV. 2075, 2084–85 (2016).

55. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b) (U.S. SENTENCING COMM'N 2015).

56. Dow et al., *supra* note 53.

compliance officers and general counsel.[57] The role of the GC tends to be broader than that of the CCO. The GC "typically occupies multiple roles within the organization" and must be able to both delegate to outside counsel and inform the corporation of current law in a variety of areas.[58] The GC is often a high–paid member of senior management, who is closely involved in high–level strategic decisions as an adviser.[59] The CCO, in contrast, is generally a freestanding or partially autonomous officer who develops programs to ensure adherence to regulations, and can present objective opinions on the legality of corporate practices to management, the board, or law enforcement. As one scholar noted, "[l]awyers say what you *can* do and compliance officers say what you *should* do."[60]

The CCO does not act as in–house lawyer representing the company, but rather manages corporate ethics by taking steps to prevent, detect, and respond to compliance transgressions.[61] As one CCO explains:

> Compliance officers need to be very good at figuring out what the law is and explaining it to your clients . . . Compliance is getting up out of your chair and following your clients back into their business and making sure they really are doing all of the things that you've advised them to do.[62]

In some cases, the CCO is responsible for doing "whatever it takes to prevent and detect misconduct."[63] This often means translating legal advice into specific management action. CCOs work to prevent mistakes before they happen to avoid legal issues down the line. CCOs also implement and monitor processes to ensure established standards are met.[64] Therefore, as a corporate officer, it is important for the CCO to understand the regulations or laws that could adversely affect the company and devise "programs, plans, strategies to adhere to the laws, while at the same time not making it too difficult for the company to make money to do what it does best."[65]

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57. *See* PFIZER, http://www.pfizer.com/about/compliance (last visited Feb. 6, 2017); GAP, INC. http://www.gapinc.com/content/gapinc/html/investors/corporate_compliance.html (last visited Feb. 6, 2017).

58. Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 FORDHAM L. REV. 955, 955 (2005).

59. *Id.* at 960.

60. Michele DeStafano, *Compliance and Claim Funding: Testing the Borders of Lawyers' Monopoly and the Unauthorized Practice of Law*, 82 FORDHAM L. REV. 2961, 2978 (2014) (emphasis added).

61. *Id.* at 2976.

62. *Id.* at 2977 (citing Anonymous Telephone Interview with Chief Ethics and Compliance Officer (June 21, 2010)).

63. Tabuena et al., *supra* note 8, at 25.

64. *Id.* at 26.

65. DeStafano, *supra* note 60, at 2977 (citing Anonymous Telephone Interview with Compliance Manager (May 18, 2011)).

The CCO's responsibilities differ from the GC because although he or she must use legal acumen, the role also requires significant human resource, management, communications, auditing, and internal control training.[66] The CCO and the GC should be separate but equal positions that both instruct the CEO, Chief Financial Officer, and the Board of Directors on a regular basis.[67] If the CCO is not on equal ground with other senior officers, it will be difficult for him to create a compliance program that directs those officers to comply with the laws and regulations of the industry and provide a productive business culture for the company to thrive.[68]

The following sections describe three models for structuring the relationship between the GC and CCO, and justify why companies should adopt distinct legal and compliance departments.

A. Models for structuring the relationship between the CCO and GC.

The models for structuring the relationship between the GC and the CCO depend primarily on the company's size and resources.[69] The first model works for small and midsize organizations without the resources to create an entirely new position. Under this model, the CCO and GC are combined into one role. The advantages of this model are that since compliance issues are inherently legal, combining the positions can be functionally and operationally efficient.[70] By making compliance into a legal matter, it is often easier to make it seem like compliance matters are important and warrant employees taking compliance more seriously. The disadvantages include that government regulators worry that having the positions combined allows "attorney–client privilege" for compliance matters that prevents the government from being able to get information or regulate effectively.[71]

In the second model, the CCO reports to the GC.[72] This solves some of the issues with checks and balances that occur when the positions are

66. Tabuena et al., *supra* note 8, at 26.

67. *Id.* at 25 (separating the jobs of CCO and GC can be beneficial because it helps promote a "checks and balances" system).

68. *Id.* at 26.

69. *Id.* at 24 (citing OIG Supplemental Compliance Program Guidance for Hospitals, 70 Fed. Reg. 4858, 4874 (Jan. 31, 2005); *see also* Memorandum from Gabriel L. Imperato, Analysis of Chief Compliance Officer and General Counsel Functions for Health Care Organizations.

70. *See* José A. Tabuena & Jennifer L. Smith, *The Chief Compliance Officer Versus the General Counsel: Friends or Foes? Part II Having Appropriate Checks and Balances to Ensure Proper Oversight Is Necessary but May Spur Conflict*, 8 J. HEALTH CARE COMPLIANCE 13, 14 (2006) [hereinafter Tabuena et al., *Part II*].

71. *Id.*

72. *Chief Compliance Officer*, *supra* note 9, at 3 (stating that twenty–one percent of

combined, and can be very efficient because it allows the GC to go about his legal business and simply sign off on the CCO's decisions regarding corporate compliance.[73] Direct reporting makes sense because they have to work closely together in the first place. The disadvantages of this model are that CCOs can face pressure from the GC if the GC disagrees with a decision. This could create tension between the two positions and implies that since the CCO is inferior to the GC, he cannot objectively monitor the GC's actions.[74]

The third model provides that the CCO and GC are independent.[75] Recent changes to corporate criminal liability rules, sentencing guidelines, and settlement patterns all appear to be pushing corporations towards adopting independent compliance departments.[76] Under this model, the CCO is classified as a senior officer that is given respect and authority within the corporation. As a result, the compliance department enjoys a substantial budget, support, and access.[77] The CCO is then free to monitor the GC without worrying about job security or backlash. However, there are times when the GC and CCO should work together. In certain situations, the CCO may want to go to the GC for legal advice that could help mitigate the problem before it gets out of hand. CCOs in this model tend to develop a relationship with the GC and the board by providing "balanced and unvarnished information."[78] This is the best way to ensure a fair system of checks and balances within the corporation.

V. REPORTING MISCONDUCT

Although the GC and the CCO are theoretically both protected by the Sarbanes–Oxley Act, the GC has separate professional ethics obligations that may impose restrictions on his ability to report misconduct within the corporation. Sarbanes–Oxley encourages the disclosure of corporate fraud; Congress enacted Section 806 specifically to encourage whistleblower employees of publicly traded companies to report illegal activities.[79] Section 806 of the Sarbanes–Oxley Act, which was a comprehensive attempt to identify and eradicate corporate fraud in public corporations,

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CCOs report to the GC).

73. Tabuena et al., *Part II, supra* note 70, at 15–16.

74. *Id.* at 15.

75. *Chief Compliance Officer*, *supra* note 9, at 3 (noting that thirty–six percent of CCOs stated that they report to CEO directly and twenty-one percent said they report to board of directors).

76. DeStafano*, supra* note 60, at 2974–75.

77. Tabuena et al., *supra* note 8, at 23.

78. *Id.*

79. *See* Sarbanes–Oxley Act of 2002, Pub. L. No. 107–204, § 806, 116 Stat. 745 (2002).

protects employee whistleblowers of publicly traded companies from retaliation.[80]

Under Section 806, the Department of Labor will protect employees from retaliation upon the lodging of a whistleblower complaint against employer. It also authorizes the Department of Justice to criminally charge those responsible for the retaliation. A public company may not "discharge, demote, suspend, threaten, harass, or in any manner discriminate against an employee " in response to any act the employee took with a "reasonable belief" of violation of law.[81] The whistleblower protections afforded by Section 806 cover disclosures made to federal regulatory agencies and law enforcement agencies, members and committees of Congress, and agents of the employer.[82]

The role of the GC centers on "vigorous representation" of the corporate client, while the CCO's main job is to neutrally ensure corporate compliance with applicable laws.[83] The GC generally adheres to an "up and out reporting" method, first alerting his supervisory authority within the corporation of the violation, and only moving "out" to the board members upon being dismissed by the supervisor.[84] If the GC fails to follow this process, he may face ABA sanctions and could even be disbarred. In contrast, the CCO has no such disciplinary body.[85] José Tabuena and Jennifer Smith identify the Code of Ethics for Healthcare Compliance Association, created in 1999, as the closest thing to an overseeing entity for CCOs.[86] However, this is specific to the healthcare sector, and has no official enforcement power or legal backing.[87]

The GC and CCO also experience different motivations for actually reporting. The GC, with his or her main job being "vigorous representation" of the organization, is unlikely to feel obligated to report further to external law enforcement authorities. I n the event the GC chooses to report outside the organization as a whistleblower protected by Section 806, this action implicates the confidentiality and attorney–client

80. *Id.* (providing protection for employees of publicly traded companies from retaliation if provide information to government on certain types of misconduct); Vincent Agnello & Audrey Agnello, *The Sarbanes–Oxley Act Section 806: Ten Years Later*, BRC ACAD. J. BUS. 19, 19–20 (2013).

81. Agnello et al., *supra* note 80, at 23; *see* Sarbanes–Oxley Act of 2002, Pub. L. No. 107–204, § 806, 116 Stat. 745 (2002).

82. Agnello et al., *supra* note 80, at 23; *see* Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, § 806, 116 Stat. 745 (2002).

83. Tabuena et al., *supra* note 8, at 25–6.

84. *Id*. at 27.

85. This discussion assumes a CCO is not a barred attorney.

86. Tabuena et al., *supra* note 8, at 27.

87. *Id.* at 27–8.

privilege requirements he has assumed in representing the corporation as a client. The CCO is not professionally bound to protect privileged and confidential information, and, thus has more of a motivation to blow the whistle on illegal corporate practices without implicating the risk of professional discipline.

CONCLUSION

Compliance officers and compliance departments do not sit as judge and jury over their organizations; instead, they are a resource to the organization officers, board, and employees. CCOs should not act, and should not be treated, as the ultimate authority within a corporation, but it is prudent of corporate management to recognize the extent to which compliance programs benefit corporations.[88] By regulating everyday employee compliance and acting as an in–house expert on relevant federal regulations, CCOs effectively reduce the number of fines and penalties an organization may face.[89] For a modern–day company, a strong compliance program is fundamental to successfully navigate the multitude of government restrictions and limitations on corporate action.

88. *See* Roy Snell, *Greg Luce Talks About the Relationship Between Legal Counsel and Compliance Seasoned Veteran Discusses How Compliance Has Evolved and What It Takes to Be Effective*, 9 J. OF HEALTH CARE COMPLIANCE 31, 34–5 (2007).

89. *See generally id.*