



# Society of Corporate Compliance & Ethics

*Compliance  
and Ethics  
Magazine*

Volume Six  
Number Three  
June 2009  
Bimonthly

**Meet**

**Martin T. Biegelman**  
Director, Financial Integrity Unit,  
Microsoft Corporation and

**Daniel R. Biegelman**  
Attorney-at-Law and Author  
PAGE 16

**Earn CEU Credit**

VISIT: [WWW.CORPORATECOMPLIANCE.ORG/QUIZ](http://WWW.CORPORATECOMPLIANCE.ORG/QUIZ)  
OR SEE PAGE 11

**When the government  
calls: Corporate response  
to an inquiry**  
PAGE 20

*Special Issue!*

**Compliance &  
Ethics Institute**

[www.complianceethicsinstitute.org](http://www.complianceethicsinstitute.org)  
September 13-16, 2009 | Las Vegas, NV

ALSO:  
**College and university  
compliance with the  
FTC's Red Flag Rules**

PAGE 34

# General Counsel as CCEO? Not an obvious answer

By Joseph E. Murphy, Catherine Finamore Henry, and Ted Banks

*Editor's Note: Whether the general counsel (GC) should also serve as the chief compliance and ethics officer (CCEO) has been a very hot topic on our Compliance & Ethics Social Network. Recently, we had more than 50 people participate in this topic and have had some very smart discussions. This is a topic that goes "on and on" but always remains a topic of interest. We have asked a few of our participants from different backgrounds to give us their views: Joe Murphy, Compliance Systems Legal Group and author of 501 Ideas for Your Compliance & Ethics Program (published by SCCE in 2008); Catherine Finamore Henry, CIA, Vice President, Business Development and Ethics Officer, Smart Pros Legal & Ethics, Ltd.; and Ted Banks, President, Compliance & Competition Consultants, LLC.*

*We welcome any comments you may have on this topic. Please send you comments to "Letter to the Editor" [marlene.robinson@corporatecompliance.org](mailto:marlene.robinson@corporatecompliance.org)*

*Joe opens the discussion and is answered by Catherine and Ted.*

## Joe Murphy:

I believe those with legal backgrounds can make excellent compliance and ethics officers, and do a very effective job in positions throughout the program. Where the problem exists is when the compliance and ethics program is part of the Law department, and/or when the GC is the compliance and ethics officer.

From what I have heard, use of privilege remains a factor in where the Compliance

and Ethics office is positioned. There has just been a major battle with the Justice Department to stop them from forcing companies to waive privilege. So, it still is a big issue and may cause companies to use Counsel as their compliance officer, even where that is not the best course. But, the concerns about using the GC relate to many issues. First, by having Counsel play both a legal role and the non-legal role of compliance manager, there is a risk of role confusion and potential waiver of privilege. Moreover, if the company ever needs to prove it had a program and if that program was run by the lawyers, then the lawyers would have to be witnesses about the program. This risks waiving privilege and would disqualify the lawyer from representing the company in court in the same proceeding.

But, the bigger concern is that having the GC run the program may be a misalignment of functions and expertise. The compliance and ethics function is not the business of giving legal advice. It is a management function that calls for good project management skills. It calls for a focus on ethics and compliance, when often lawyers focus on just the law. (I had a general counsel say very clearly that the Legal department is not the "conscience" of the company.) It requires more than competent advice; compliance and ethics people need to be vigilant and active to prevent and detect misconduct. And placing this function in the Legal department can send the message that this is more "legal stuff" that can just be left to the lawyers.

In practice, for example, lawyers focus on litigation risk. If particular activity could be used in litigation against the company, or a step may increase the risk of litigation, then the lawyer's approach would be to reject anything that increases that risk. The compliance and ethics person focuses on the impact on culture and the integrity of the company. For example, a lawyer may say it is best to allow a wrongdoer to resign quietly with a large severance and a laudatory press release. The compliance and ethics person knows this will undercut employee trust in the company's integrity and wants to use discipline as an employee learning experience.

As for the argument that one should simply do whatever works best in a given culture, in this case culture is much like beauty – it is in the eye of the beholder. If the GC takes the compliance position because this is his/her "area," that is not culture; that is turf protection. I would be very careful buying the culture argument.

Bottom line, there may be companies where the only one in senior management that anyone really trusts is the GC. In that case, I would agree with having the GC take the position. I have seen companies (very few) where I would have picked the GC. But, to increase the likelihood that a program will really reach the employees, and to convince an outside skeptic who is assessing the strength and legitimacy of a compliance program to see that the company is serious, I would think long and hard before having the GC be the compliance officer. And, as for having a lawyer who reports to the GC be the compliance officer, I cannot even imagine a circumstance where this could ever be justified. If you find yourself in this position, get out as quickly as you can!

### **Catherine Finamore Henry:**

The question at hand is not whether or not an attorney can function as a chief compliance and ethics officer (CCEO). Certainly, a professional trained as a lawyer may have the skill set required for the function of CCEO. The questions are whether or not it is advisable for one individual to have the dual function of GC/CCEO, and whether or not a CCEO can be effective reporting to GC.

Inherent conflicts of interest and other challenges exist when the CCEO holds the concurrent role of GC. In my opinion, the CCEO should not hold a concurrent role as GC or be subordinate to a GC. This dual function does still exist in a fair number of companies, and although the CCEO reporting to the GC is most likely to exist in smaller companies and/or companies in industries with low regulatory intensity, it is seen in large companies as well.<sup>1</sup> The dual function arrangement can be successful, as long controls are put in place to manage potential conflicts of interest and challenges. Conflicts and challenges inherent in a concurrent GC/CCEO arrangement include the following:

- The GC's role to minimize legal liability may conflict with the CCEO's role in uncovering risks and unethical behavior. The GC defends the company; the CCEO is responsible for defending the stakeholder position. This is particularly important today in light of the current economic crisis and parallel corporate ethics and compliance crisis. There is growing consensus<sup>2,3</sup> that the success of vanguard companies such as IBM, Cisco, and Proctor & Gamble is defined by an enterprise or common good approach to business. It would seem that a dual

GC/CCEO role would fly in the face of this approach.

- In addition to responsibilities of GC and CCEO, the GC may also function as corporate secretary (CS) and advisor to the board. As the number of roles increase, so does that likelihood of conflicts of interest. Consider the GC who is also corporate secretary and CCEO and reports to the CEO, who, unfortunately, all too often may be CEO and chairman of the board. The GC's professional career and financial interests are tied closely to the CEO/chairman. The GC/CS/CCEO is advisor to the CEO/chairman, and also advisor to the board, which is charged with oversight of management. A situation arises in which there is a conflict between management and the board. The GC/CS/CCEO is obligated to advise the board when it should retain its own independent legal counsel to protect its interests, which are conflicting with the interests of management. Of course, the board also may have been handpicked by the CEO/chairman, yet be expected to advocate for stakeholders other than management. At a time like this, it would be essential for the outside counsel and board to work closely with the CCEO, who should represent the interests of non-management stakeholders – but the CCEO just happens to be the GC who is advising the CEO? Or the CCEO is a more junior employee who reports to the GC? This is an untenable situation.
- The CCEO is expected to provide an independent view of alleged infractions. The GC is expected to defend the company's viewpoint.
- If the company has to prove that it has an effective program under the Federal

Sentencing Guidelines, the CCEO would likely be called as a witness to the program's effectiveness. If a lawyer (the GC) acts as a witness, he/she cannot represent the client in the same proceeding.

- The dual role can jeopardize the attorney-client privilege.
- The GC and the CCEO function in different ways. An ethics and compliance program is a management tool which involves consideration of legal expertise, but also requires management competencies in the areas of training, human resources, organizational change and engagement, communications, auditing, risk, and internal controls.

When the dual function does exist, the development and implementation of controls to mitigate potential conflicts of interest related to the concurrent roles will be critical to the integrity and performance of the compliance and ethics function. It is when the organization is in crisis or under stress that these controls will be tested. At a minimum, these controls should include the following:

- Designate a single, high-level individual to oversee day-to-day compliance and ethics operations.
- Document this responsibility in the individual's job description and any relevant charters or organization charts. Give this individual, who has day-to-day operational responsibilities, direct access to the CEO, Audit Committee and board of directors.
- Give this individual an opportunity to present to the Audit Committee and board of directors at least annually, without having the presentation screened by the GC.
- Develop a policy and procedure that

*Continued on page 8*

allows the GC to recuse himself/herself from a compliance investigation if the matter involves the conduct or judgment of the GC.

Although the dual role may be considered an acceptable “best practice” today, it is clear from the current crises that best practice in corporate governance oversight may not be best. As Eleanor Bloxham pointed out in the December 29, 2008 issue of *The Corporate Governance Alliance Digest*, this is a time to recognize the limitations of best practice, to take the opportunity to wake up to new possibilities, and to turn to best principles rather than best practices.

Perhaps the larger question for compliance and ethics professionals is this: With the imminent increase in investment in compliance and ethics stemming from the Stimulus Bill and/or new regulations in response to the current crisis, we have an opportunity to elevate the status and recognition of our profession. How can we do that if we ourselves do not advocate for the independence of this function, and if we accept that it can be an added or tag-on function to another role, such as the GC?

#### **Ted Banks:**

Corporate compliance and ethics programs generally have emerged out of corporate Law departments. Company lawyers were charged with making sure that the company did not stub its toe on a legal requirement, and over the years, figured out that “preventive law” was a good idea. It was always better to prevent a problem from happening in the first place than to try to clean up a mess after the fact. In the early days, concepts such as giving credit for having

a company compliance program in the penalty phase of a trial was a radical idea, but now the concept seems to be well-entrenched in US jurisprudence. The role of compliance officer is now well-recognized as a separate specialty area, and, if not a legal specialty, then at least as a quasi-legal one.

During this evolution, lawyers naturally filled the key roles, some getting the designation as chief compliance officer (CCO) as that position became more common. In some enterprises, there were other traditions that influenced how the compliance role developed. There may have been recognition of the role of the ombudsperson, an individual who was empowered to act as a neutral to operate with independence to resolve disputes. Auditors or inspectors held sway in other enterprises, tasked with ferreting out wrongdoing.

Lawyers brought to the compliance role certain benefits and burdens. Presumably, their legal training prepared them for dealing with the substantive content of their compliance programs, even if they lacked a background in the other skills that are key to a successful compliance officer, including project management, accounting, psychology, education savvy, and computer programming. They also approached the job with the history of serving as an advocate for the organization, and not necessarily an impartial one. The corporate attorney is responsible for protecting his/her corporate client, and is given the protection of attorney-client privilege to aid that role.<sup>4</sup>

Focusing on the role of the attorney as “protecting the bad guy,” criticisms were leveled at the notion of attorneys serving in compliance roles. The Inspector Gen-

eral of the Department of Health and Human Services stated that the compliance function should be independent of the GC, in order to ensure independent and objective legal review and financial analysis of a hospital’s compliance efforts and activities.<sup>5</sup> Senator Charles Grassley has famously criticized the “smell” of the arrangement whereby a GC is also responsible for Compliance.<sup>6</sup> But the problem with the separation approach is that it confuses specific problem instances with a general rule. I would phrase the question like this: In a given enterprise, what is the best way to achieve “compliance?” My answer would be: It depends.

There are some drawbacks to having the GC serve as CCO, as outlined in Joe Murphy’s and Catherine Henry’s articles. I would suggest that rather than assuming that these are reasons why it should not happen, they should be thought of as factors to consider in answering the question I posed above. In a given corporation, a GC may command the respect of senior management, and carry the organizational clout to get things done that others do not have. Although many believe that it is a best practice to have the CCO as an independent function reporting directly to the board of directors, a specific individual may be totally incapable of bringing the necessary influence and gravitas to the role, no matter where it appears on the organization chart. The CEO or the head of the Audit Committee may listen to what the CCO reports, and then say, “OK, what does the GC think?” The middle manager in a remote location may well view the compliance officer as someone detached from the “real” business of the company, and not particularly deserving of attention.

*Continued on page 11*

“Wait,” you say, “that shouldn’t happen – that would be wrong!” Of course, but we’re dealing with reality, not high concept. We need to come back to the original question, which can be shortened to two words: What works?

Here is where we need to remember that the ultimate goal of the GC and CCO are the same: to make certain that the enterprise complies with the law. There are a lot of pieces to this, and this is not to say that the GC can or should do them all, unless the size of the organization dictates that there can only be a staff of one. But, the drawbacks to having the GC serve as CCO are all secondary to the consideration of who can get the job done. And some of the drawbacks are definitely more theoretical than real.

In the “early days” of compliance programs (like the 1990s), some companies thought that it was necessary to clothe everything in the mantle of attorney-client privilege. They discovered that it was not necessary – and in fact, it was counterproductive. There is so much to be gained by a detailed elucidation of a compliance program, and so little to be gained by keeping it secret, that this concern is really gone. Even in investigations, it is frequently the case that more is gained by “coming clean” with the government than by trying to keep the facts under cover.

In addition, a lawyer has an additional obligation to “report up” evidence of material breaches of the securities laws, breaches of fiduciary duty, or other similar violations by the company or any of its agents. The communication is to the chief legal officer or CEO, and then, if appropriate action is not taken, to the board of directors.<sup>7</sup> If no

satisfactory action is taken, then the lawyer is to execute a “noisy withdrawal” from representing the enterprise. It is interesting to note that the noisy withdrawal was how the details of the Ponzi scheme executed by the Stanford Investment Group became known to the SEC after the company failed to follow the compliance advice of its lawyer.<sup>8</sup> A non-lawyer facing a corporate refusal to do the right thing does not have the same legal obligation, and may or may not choose to become a whistleblower.

What this all says to me is that it is inappropriate to reflexively conclude that the GC and the CCO can never be in the same group (or be the same person), or automatically assume that they go together. Instead, you need to look at the structure and culture of the organization and find an answer that will lead to the most effective compliance program—for that organization. ■

- 1 Biegelman Martin T. and Daniel R: *Building a World Class Compliance Program: Best Practices and Strategies for Success*. Wiley, 2008
- 2 “Transforming Giants,” Harvard Business Review, Jan. 2008
- 3 R. Edward Freeman, Jeffrey S. Harrison. Andrew C. Wicks: *Managing for Stakeholders*. Yale University Press, 2007
- 4 “[T]he attorney-client privilege encourages organizational clients to have their agents confide in lawyers in order to realize the organization’s legal rights and to achieve compliance with law.” Restatement of the Law Governing Lawyers § 123 comment b.
- 5 HHS OIG and American Health Lawyers Assn., Appendix, The Role of the General Counsel, <http://oig.hhs.gov/fraud/docs/complianceguidance/Tab%204E%20Appendx-Final.pdf> (July 1, 2004).
- 6 “Apparently, neither Tenet nor Ms. Sulzbach saw any conflict in her wearing two hats as Tenet’s General Counsel and Chief Compliance Officer. As General Counsel, Ms. Sulzbach zealously defended Tenet against claims of ethical and legal non-compliance, e.g., the April 2001 *qui tam* suit, while as Chief Compliance Officer, she supposedly ensured compliance by Tenet’s officers, directors, and employees. It doesn’t take a pig farmer from Iowa to smell the stench of conflict in that arrangement.” Letter from Sen. Charles Grassley to Trevor Fetter, Acting Chief Executive Officer of Tenet Healthcare (Sept. 5, 2003), <http://grassley.senate.gov/releases/2003/p03r09-08.htm>.
- 7 Sarbanes-Oxley Act, § 307.
- 8 Z. Lowe: “Stanford Financial Scandal and Whistleblowing Rules for Lawyers,” Am Law Daily (Feb. 19, 2009).

## Be Sure to Get Your CCEP CEUs

Complete the **Compliance & Ethics** quiz related to the articles below:

- **Amendments to the Federal Acquisition Rule: The final changes**—By Rick Kulevich, on page 4
- **When the government calls: Corporate response to an inquiry**—By James M. Lord and Jeffrey Coopersmith, on page 20
- **Are you training your Board? a benchmarking survey**—By Rebecca Walker, on page 36

### New CEU Credit Procedure

To obtain your CEUs, visit [www.corporatecompliance.org/](http://www.corporatecompliance.org/) quiz. Select a quiz, fill in your contact information, and answer the questions. The online quiz is self-scoring and you will see your results almost immediately. Or, you may FAX or MAIL the completed quiz to Liz Hergert at SCCE. Questions? Please call Liz Hergert at 888/277-4977.

Please note that credit will be given only for quizzes received before the expiration date indicated on the quiz.