Poll #1

The principles of Attorney-Client Privilege mean that:

A) The compliance function must be excluded from privileged investigations e.g. bribery investigation.

B) Reports on investigation should be provided only to lawyers.

C) The compliance function must report to the General Counsel.

D) None of the above
Poll #2

In a recent survey of the state of chief compliance officer roles, the percentage of CCOs reporting to the General Counsel and to the CEO, respectively, were:

A) 35% & 32%
B) 58% & 27%
C) 44% & 38%
D) 29% & 49%

PRECONFERENCE OVERVIEW:
What do Lawyers & In-House Counsel Need to Know about Compliance and Ethics?

- Role of Privilege, Confidentiality & Other Legal Principles in a Compliance Context
- Compliance is not a legal function, but lawyers & in-house counsel have many critical roles in program
- Compliance and Legal have separate, but (mostly) mutually supportive mandates
- Understand “scary topics” e.g. Risk Assessments, Investigations & Reporting through Compliance Lens
RIPPED FROM THE HEADLINES
Takeaways for Lawyers & CCOs?
WHAT IS A COMPLIANCE AND ETHICS PROGRAM? (let’s parse)
• A multi-disciplinary management control system consistent with relevant standards (including the Organizational Sentencing Guidelines)
  that seeks to “detect and prevent misconduct” and support a culture of accountability and transparency
  including by conducting risk assessment, setting clear written standards, training, communicating and engaging employees, monitoring and auditing the program and reporting to management and the board
  and continuous improvement in response to detected problems

How to build trust and accountability
7 elements of an effective C&E program
(Organizational Sentencing Guidelines)

<table>
<thead>
<tr>
<th>management commitment &amp; resources</th>
<th>standards, controls &amp; procedures</th>
<th>training &amp; communication</th>
<th>monitoring, evaluation &amp; reporting</th>
</tr>
</thead>
<tbody>
<tr>
<td>• “walk the talk”</td>
<td>• policies &amp; procedures</td>
<td>• job related &amp; continuous</td>
<td>• metrics &amp; measurement</td>
</tr>
<tr>
<td>• high level personnel</td>
<td>• beyond “legalese”</td>
<td>• multimedia</td>
<td>• internal reporting lines</td>
</tr>
<tr>
<td>• resources</td>
<td>• understood by humans</td>
<td>• Board training</td>
<td>• reports to senior management &amp; Board</td>
</tr>
</tbody>
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<table>
<thead>
<tr>
<th>enforcement, discipline &amp; incentives</th>
<th>substantial personnel authority</th>
<th>review &amp; modify program</th>
</tr>
</thead>
<tbody>
<tr>
<td>• no “double standard”</td>
<td>• avoid discretionary authority to managers likely to violate</td>
<td>• ongoing risk assessment</td>
</tr>
<tr>
<td>• no retaliation</td>
<td>• promotions &amp; new hires</td>
<td>• including after breaches</td>
</tr>
</tbody>
</table>
THE CECO
Chief Compliance Officer
Chief Ethics & Compliance Officer
Director of Global Compliance
VP – Business Practices & Compliance
Global Ethics Director

Leader of Compliance & Ethics Function
Overseer of Compliance & Ethics Program
Subject Matter Expert of C&E
Door Opener/Empowerer of Team
Coach & Educator to Management
Rally Chair/Symbol for Employees
Direct Access Reporter to Board
Liaise to Regulators

MODULE 1: PRIVILEGE, WORK PRODUCT, CONFIDENTIALITY & OTHER LEGAL PRINCIPLES

❖ Through a Compliance Lens
❖ Myths and reality
The “lawyer” privilege

- Anything a lawyer does is privileged
- If a client is involved the privilege is weakened
- If a lawyer thinks and writes something it’s protected as work product
- Anybody who reports to a lawyer is under the privilege
- But this privilege applies only when the lawyer is riding a unicorn

Attorney-Client Privilege: the facts

- Non-lawyers can play a role in compliance matters even if conducted under privilege
- Protection requires a client asking for confidential legal advice
- Non-lawyers can act under counsel’s direction & control
- “Upjohn letter”
- BUT: in EU, privilege for in-house counsel not generally recognized (Akzo Nobel). Unlike UK & US.
Work Product Protection: the facts

✓ Under FRCP, work product privilege does not require lawyer
  ✓ The rule covers preparation relating to litigation by a “party”

✓ But it is always best to use lawyers for case preparation, even when non-lawyers are involved

✓ Don’t forget – it also applies for potentially bringing a case against someone else

✓ Protection is only qualified for fact gathering, but absolute for counsel’s mental impressions

But isn’t it safer to have lawyers do everything and claim blanket privilege for all compliance activities?

✓ How do you prove your case that you had an effective program in place if you cloak everything with privilege

✓ Sharing with the government likely waives attorney-client privilege

✓ The best protection is to fix what you find

✓ Claiming privilege for everything undercuts your credibility
Legal ethical issues for compliance lawyers

- Who is the client?
- Upjohn/Miranda warnings?
- Duty to escalate
- SOX 307 escalation
- Confidentiality & disclosure

Scenario: The Case of Angst in Azerbaijan

Mark, CECO for International Pipeline Co, is currently overseeing a hotline call from an anonymous source at the company’s Azerbaijan operations. The caller suspects that a member of a government official’s family is involved in a lucrative transaction with the local subsidiary, which is bidding on a big government contract. In consultation with the Compliance Committee, which includes the General Counsel, a decision is made to bring in an outside law firm to investigate. The General Counsel tells Mark that from now on, due to privilege matters, the Legal department will work directly with the outside expert, and Compliance will be out of the loop until final resolution. Meanwhile, the local compliance leader, HR and the anonymous caller continue to reach out to Mark and his team with questions and the Compliance & Ethics report to the Board is due in a week.
Scenario
The Case of Angst in Azerbaijan

What are the issues?

Who are the stakeholders?

How does this impact the integrity of the compliance program?

How should this be resolved?

MODULE 2: THE MANY ROLES IN COMPLIANCE
(So many roles, so few lawyers!)

- In-house counsel/legal department are key, invaluable partners to Compliance function

- Yet there is often confusion about overlap & interface ("fence" problem)

- Defining roles is the solution, & the empowering factor

- Often the difference between a high-performing program and a hot mess!
Some common roles for in-house counsel

✓ Compliance Officer
  (more on this later)

✓ Lawyer for the Compliance Function

✓ Subject Matter Expert (SME)

✓ Risk Owner

✓ Compliance Program Owner

✓ Lead investigator/ Investigator

✓ Regional liaison

And here’s the tough part:

Whatever the role, the in-house counsel’s compliance program activities are subject to the oversight of the Compliance Officer

The Compliance Officer as the “client”

(talk amongst yourselves)
THE CONTROVERSIES: WHERE SHOULD COMPLIANCE REPORT? SHOULD THE GC ALSO BE THE CCO?

- **2010 Amendments to Sentencing Guidelines**
  - "Reporting to the Board"
  - Must have direct, unfiltered access to the Board and Senior Management
  - Must be the person with "day to day" responsibility! – Can that be a GC with another full-time job?

- **Recent Corporate Integrity Agreements have routinely required segregation of Compliance Group from the Law Department**
  - Tenet Healthcare (Grassley quote)
  - Pfizer Agreement – Segregates Functions
  - But: Siemens Compliance Group – Recombines Law and Compliance!

- **2012 PWC/Compliance Week State of Compliance Survey**
  - CECO Reports to:
    - 35% to GC (down 6% from 2011) ;32% to CEO; 16% to CFO;
    - 14% to Other Exec; 3% to Board or Audit Committee
MODULE 3: “SCARY TOPICS”

- Topics where Compliance and Legal often interface
- And sometimes disagree
- Examples: Risk Assessment, Discipline & Whistleblowers

Risk Assessments

- The foundation of an effective compliance program
- The only way to determine which risks to cover—where to put resources
- Some GC’s FEAR risk assessment & seek to avoid it
- Pat Gnazzo UTC story
Discipline

- One of 7 elements - apply principles of discipline consistently
- Can’t guarantee results but can guarantee process
- It’s easier to fire the mailroom guy than the high-flyer
- Every company has a defining moment (2 war stories)
- Coaching/Soft landing vs Public Hanging/ Transparency

Disciplinary Caution

- Don’t forget
  - Discipline for failure to take reasonable steps to prevent or detect criminal conduct
  - No “gee, whiz, I had no idea all my direct reports were committing felonies”
  - This means the bosses are at risk in an investigation
  - Remember, the client is the corporation, not the senior managers
Whistleblowers

- Big developments: Dodd Frank, IRS bounty program (UBS case)
- But society & companies are ambivalent about WBs
- Company “white blood cells” want to attack WBs
- Sometimes led by Legal

The Company’s WB Dilemma

- Company needs WBs to come forward and raise issues before they reach the media & regulators
- The goal of Federal Sentencing Guidelines compliance program: “to detect and prevent wrongdoing”
- BUT...... whistleblowers are often 1) fired 2) forced out 3) shunned 4) demoted 5) marginalized 6) harassed 7) did I say shunned?
- Consider: “Take your whistleblower to lunch”
3 Undeniable Truths About Whistleblowers

- WBs are not always “model employees
- Bounty programs level the playing field
- If you leave misconduct on the table, someone is now more likely to report it (“arbitrage”)

Example: ex-UBS banker Bradley Birkenfeld (the “Tarantula”)

Scenario: The Case of the Ostrich Solution

Claire is CECO of Awesome, Inc, a US-based manufacturing multinational operating in 60 countries. As part of a risk assessment pilot, some of Claire’s compliance team are meeting with three of the company’s businesses based in the US, Italy and China. Early results from the pilots are indicating risks arising from third party intermediaries (safety, environmental and bribery). Colleagues from Legal who have participated in the pilots as subject matter experts have raised concerns with the GC, who meets with Claire and requests that the risk assessments be quietly closed. The written comments from managers produced by the pilots are worrisome as they are not privileged and may be subject to discovery.
Scenario: The Case of the Ostrich Solution

What are the issues?

Who are the stakeholders?

How does this impact the integrity of the compliance program?

How should this be resolved?

MODULE 4: NOT YOUR FATHER’S INVESTIGATION

- Investigations are where the rubber meets the road (close the deal)

- All other elements can be present, but if investigations don’t uncover the right facts to decision-makers, program is mere window-dressing

- How are investigations carried out in your organization?

- Who leads, what training, conflicts, how documented?
SEVEN INVESTIGATION MYTHS

1. Legal should conduct all investigations.
2. Compliance should conduct all investigations.
3. If the matter is privileged, non-lawyers can’t be involved.
4. We can use experienced investigators from other parts of the company without further training.
5. Any lawyer or HR person can conduct effective investigations – its an innate skill for them
6. Investigation training is about detecting fraud, how to interview, how to detect lying.
7. Best way to control confidentiality is to give warnings in writing to all lead investigators & witnesses.

HALLMARKS OF MODERN, EFFECTIVE COMPLIANCE INVESTIGATIONS

- Clear written investigation guidelines, including confidentiality, objectivity, impartiality, professionalism, timeliness, competence & non-retaliation
- Need to know list
- Investigation training for all who lead or support investigations
- Nonretaliation policy includes protections for CCO
- Everyone understands respective roles
- CCO has line of sight
Scenario: The Case of Zack, the Very Bitter, Problem Employee

Steve, VP HR at BestSale, Inc, receives a visit from Zack, a purchasing manager in the company’s government contracts division. Zack is known to HR as a problem employee who is currently under a performance improvement plan with his supervisor. Today, Zack is concerned about some irregularities he has observed in an ongoing bid process for some defense items. He has taken extensive notes and wishes to raise a concern as encouraged by the Code of Conduct. Steve suspects the complaint is spurious and refers the matter to Legal, who commence an investigation, bringing in an outside employment law firm to interview Zack and his teammates. Later that week, Steve sees Jackie, the Chief Compliance Officer in the cafeteria and mentions the issue to her in passing.

Scenario: The Case of Zack, the Very Bitter, Problem Employee

What are the issues?

Who are the stakeholders?

How does this impact the integrity of the compliance program?

How should this be resolved?
MODULE 5: BOARD TRAINING & REPORTING
What Your Board Needs to Know About Compliance and Ethics

- 2004 FSG Amendments: Board must “be knowledgeable” about program content and operation and exercise “reasonable oversight” of implementation and effectiveness

- 2010 FSG Amendments provided for “direct reporting” to the Board by “individual responsible for day-day operation of the program”

- The train has left the station for unfiltered access/reporting

- The board needs to be trained (FSG item 4), and that is not the same as reporting (FSG item 2)

What do today’s boards need to know about C&E?

Role, responsibilities & risks

Oversight of program implementation & effectiveness

Knowledgeable of program content & operation

“training”

“reporting”
Modern Boards Need to Catch Up

- Must understand and know how to mitigate risks they create in their roles as board members
- More active, more interaction with the business
- Passive endorsement of CEO answers not enough
- Conflicts, Insider training, Reg FD, harassment, antitrust, securities fraud, etc.

Evolving Standards for Board Training & Reporting

OLD PRACTICE

- One time or annual briefing
- 1 way PPT show
- Mile high ethics review & the ‘state of the world’
- Statistics without context
- Scare factor: what happens in “other” companies

BEST PRACTICE

- Planned curriculum – regularly scheduled sessions covering successive topics
- 2-way dialogue about Board’s role/ responsibilities & the program
- Focus on highest risk areas -metrics that matter -real stories
- Effectiveness/Impact of program on organization
- Direct support of Board’s legal responsibilities
MODULE 6: COMPLIANCE AS AN ALTERNATE CAREER PATH

“If you are someone who still gets angry over abuses of power and still has a desire to make things better . . . Compliance and ethics . . . might be just the right path for you”

“Compliance Careers for Lawyers,” Ch. 6, Murphy & Leet, “Building a Career in Compliance & Ethics”

The Role of the Compliance Lawyer

- The CECO does not need to BE a lawyer
- He/she just needs to HAVE a good lawyer
- What are the legal risks of the compliance program?
A Little Test: In which country have government regulators ever said all of the following:

- Adopting a code of conduct without negotiating with the workers violates national labor laws?
- If you hire someone outside your company to investigate a worker, you have to get the worker’s permission first, and disclose all the results to the worker when the report is done?
- You should not ask about criminal convictions on job applications?
- National labor law prohibits you from telling those interviewed in an investigation not to discuss the investigation with others?
Recommended Reading (1)

- Murphy & Leet, Building a Career in Compliance and Ethics (SCCE; 2007)


- Boehme, “The Real Happy Marriage Between the GC and the Compliance Officer” (2012 Open Letter to Ben Heineman)
  [http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202550879126&The_Real_Happy_Marriage_Between_the_GC_and_Compliance_Officer](http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202550879126&The_Real_Happy_Marriage_Between_the_GC_and_Compliance_Officer)

- NY State Bar Association Opinion 650 – 6/30/93 (3-93)

Recommended Reading (2)

- Tabuena, “Fitting a Square Peg into a Round Hole” (2009)

- Snell, “Just how Independent Should the CECO Be (from Legal)?” (Boehme interview 2011)

- Gnazzo, “The Chief Ethics and Compliance Officer – A Test of Endurance” Bentley College White Paper (Dec 2011)

EVOLUTION OF AN IDEA

STAGE 1: IT WILL NEVER WORK

STAGE 2: IT MAY WORK, BUT THERE ARE PROBLEMS

STAGE 3: IT WAS MY IDEA

Comments or Questions?

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