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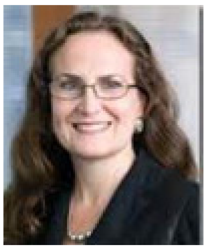
Corporate Compliance

General Counsels and the Ethics, Compliance & Risk Management Role: Optimizing the Integration of Integrity



By Andrea Bonime-Blanc

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A debate is raging within the corporate world (or a part of it) about the proper role and location of the chief ethics, compliance, governance, and/or risk function (CECO). For many years, the CECO role has been largely pigeon-holed into the legal department reporting to the general counsel or even a less senior lawyer. Given the increasingly complex and global complexion of corporate responsibility, ethics, and compliance, it is time for the CECO role to be liberated from its legal department shackles and be properly and independently relocated within the larger organizational constellation—and never exclusively within the legal department.

My views on this topic are based on almost 20 years of multi-industry, multi-company experience and tons of benchmarking and discussion with colleagues both within and outside the legal departments of many organizations (big and small, domestic and global, private and public). I have also been on both sides of this equation as well, as a GC and CECO simultaneously. I have gained great insights from my long-standing association with the likes of the Ethics & Compliance Officer Association (ECOA) and the Global Council on Business Conduct of the Conference Board.

Finally, the creation of an independent CECO role is a trend that government prosecutors, judges, and regulators—not only in the U.S. but increasingly globally—are beginning to insist on. It may only be a matter of time before your organization is mandated, as Pfizer was in 2009 at the heels of one of the largest corporate fines ever imposed, to separate its CECO from its legal department.

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Organizations should ask themselves the question: Why not be proactive at a time of relative calm, re-assess how the CECO function is organized within your company, take it out of the legal department, and place it where it belongs—as an independent function deployed to assist the business to be successful by ensuring the integration of integrity into business strategy and process?

What Is a CECO?

The precursor to today's CECO role emerged about 25 years ago at the heels of the scandals that gave way to the ground-breaking Defense Industry Initiative in 1985. [1] The role was given a huge boost in 1991 with the passage of the U.S. Organizational Sentencing Guidelines (especially Chapter Eight, which provided guidance on the creation of an internal compliance program) and subsequently by the efforts of organizations such as the ECOA, which was established in 1992 as the first professional association of CECOs, and the 90+ year-old Ethics Resource Center, the premier think tank in this area.

[1] *See* Andrea Bonime-Blanc, *The Defense Industry Initiative: From Business Conduct Innovator to Industry Standard?*, *in* Globalization and Self-Regulation: The Crucial Role that Corporate Codes of Conduct Play in Global Business (S. Prakash Sethi ed. 2011).

The principal tasks of a CECO revolve around what the U.S. Sentencing Guidelines have focused on since the beginning (with useful amendments in 2004 and 2008, as well as the development of other best practices within the CECO community since then). Among them is the creation of programs to reduce, mitigate or eliminate all manner of ethics, compliance, and reputational risk through:

- codes of conduct and a system of policies;
- periodic risk assessments;
- training and communications;
- hotlines and help-lines;
- the design of internal controls;
- the design of the CECO office;
- auditing and monitoring;
- consistent disciplinary systems; and
- constant learning and improvement.

A struggle has emerged during the past couple of decades as to where the CECO role belonged—within compliance, at the executive level, under the CFO, the GC, or someone else. With the two major waves of scandal book-ending the first decade of the 21st century—the Enron-led massive frauds of the beginning of the century and the unprecedented global financial scandals that closed the decade—it has become abundantly clear that governance and compliance efforts still have not been properly embedded into many companies or across industries.

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The Reporting Conundrum

The reporting debate centers around whom the CECO should report to—does it belong within the legal department, reporting to the GC? Or does it belong elsewhere reporting to a different function?

If the latter, where should it report? To the chief financial officer? Enterprise risk management? Chief operating officer? Chief executive officer (CEO)? How about human resources? What about the audit committee of the board? While examples exist of all of these reporting relationships, the two prevalent reporting relationships historically have been to either the GC or, more recently, the CEO.

Pros & Cons of the CECO—GC Direct Reporting Relationship

Arguments can always be made to support or detract from the direct reporting line and oversight by the GC of the CECO function. Below are a few good arguments on both sides of this ledger. [2]

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[2] The pros and cons of reporting to the GC or being an independent function reporting elsewhere are captured nicely in Chapter 2 of *The Ethics and Compliance Handbook: A Practical Guide from Leading Organizations*, authored by the ECOA Foundation (2008), at 37.

Arguments in favor of the GC overseeing the CECO role:

- The complexity of modern compliance legislation and regulation requires legal expertise and therefore belongs within the legal department.
- The GC is in a better position to coordinate disclosure and regulatory contact.
- Attorney-client privilege is automatically created.
- The legal department provides investigations support or oversight in the first place.
- Compliance is paramount, and legal compliance is within the purview of the legal department.

Arguments in favor of the independence of the CECO role:

- Ethics, compliance, and risk management are best served through independence from the GC as there can be inherent conflicts of interest.
- Separation of the CECO role from the GC role serves as a check and balance on other functions such as HR, finance, etc.
- The CECO role covers many more areas than strictly legal and regulatory compliance.
- The CECO role is focused much more on creating a culture of integrity within the business than a culture of only compliance.
- The GC may be conflicted by the demands of the business, and thus not able to exercise completely independent judgment regarding ethical issues.

While there is no black and white answer to this conundrum, I would argue that there is a third way. It is to design the CECO role based on the specifics of the organization—its business lines, geography, stakeholders, and leadership—always maintaining high level executive independence for the role and a direct reporting relationship to the highest governance body of the organization. This is not to say that the GC does not have a role in the CECO function—indeed, the right kind of GC can even oversee the role from an administrative standpoint. The GC can and ideally should always be a strong partner and advocate for the CECO function but it should not be the ultimate boss.

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The Critical Role of the CEO

Throughout this consideration of where the CECO role belongs, the unique and critical importance of leadership within an organization cannot be over-emphasized, as it sets up the culture and behavior of the entire organization. Without the right tone from the top—the very tippy top, meaning the CEO and chairman of the board—very little can be done to create the right culture of integrity and risk management. The tone from the senior leadership and mid-level managers is also crucial, but it will always be dependent on the tone of the very top. If that tone is missing, integrating integrity into the DNA of the organization becomes an uphill (and perhaps impossible) battle.

A Third Way: Toward an Independent Collaborative Model

So what is the true value of a CECO function? It isn't a legal role—it's a risk management, cultural, and behavioral role that focuses overwhelmingly on tasks to prevent and deter not only compliance risks but all kinds of risks—to reputation, to the business, to employees, and to other stakeholders. The activities typical of a CECO are not legal department activities—they are enterprise risk management activities that cross boundaries—functional, geographic, and business.

The bottom line is this: whether the CECO reports to the GC or another business function, that relationship should be purely administrative, and the more important, weighty, and critical reporting relationship is to ensure that there is a direct line to the board of directors, preferably the audit committee of the board. Of course, the board (especially the audit committee) should have independent members who can objectively and proactively support the CECO function.

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A critical aspect of creating a successful culture of integrity and risk management is to properly design and implement the CECO role within an organization. Integrity and risk management are like two sides of the same coin: corporate responsibility. Hence the efforts of leading companies—some of them hit by scandal who have become serious about reform and yet others led by enlightened leaders to begin with—to address their corporate responsibility, risk management, ethics, and compliance needs in a new and more effective way that integrates integrity into business process and strategy. [3] This trend is only beginning and is likely to lead to the emergence of a new executive function over the next few years, spearheaded by a few and joined eventually by many.

[3] *See* Andrea Bonime-Blanc & Anne Nobles, *Building Sustainable Integrity into Organizational Strategy and Operations*, The Conference Board Executive Action Series No. 347, April 2011. In this article, co-authored by Anne Nobles, a senior vice president and the CECO of Eli Lilly and Co., the authors describe how the CECO role at Eli Lilly has been integrated into the executive team independently of the legal department; it provides a leading edge example of how ethics and compliance are being integrated into the strategy and the quality management efforts of the company on a global basis.

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