

Structuring the Chief Ethics and Compliance Officer and Compliance Function for Success:

Five essential features of an effective CECO position (with frequently asked questions)

By Donna C. Boehme¹

Why This is Important

In an ideal world, a company that is establishing a new chief compliance and ethics officer position (CECO) would dedicate considerable time and effort to high-level strategic thinking, contemplating the mandate for the function, the proper positioning for the officer, the competencies and experience necessary for the new position, and the resources required to do the job. After all, as your mother always told you, anything worth doing is worth doing well. But all too frequently, as reflected in the steady parade of companies with failed compliance programs in the headlines, the CECO position is created in haste and repented in leisure—sometimes under the watchful eye of a prosecutor or corporate monitor. In today’s perilous regulatory environment where carefully nurtured corporate reputations can be destroyed on the strength of a single individual act, revealed at the speed of a single Tweet or blog post, the CECO is the company’s first line of defense (after the business itself).² Compliance-savvy boards and senior management could make no better use of their scarce time than ensuring that their CECO and compliance function are structured for success, in a manner that is fit-for-purpose for their organization’s size, scope, risk profile, structure and culture.³ To facilitate this important endeavor, this chapter sets out a principles-based analysis based on five key criteria that are relevant to any CECO in any company: empowerment, independence, seat-at-the-table, line of sight and adequate resources—so that companies can structure their CECOs and compliance functions strategically for success, before prosecutors, regulators, investors or other stakeholders compel them to do so.

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² Interview with Deloitte partner Tom Rollauer “The Chief Compliance Officer of the Future: Embracing a Risk Intelligent Point of View.” Available at http://www.deloitte.com/view/en_US/us/Insights/Browse-by-Content-Type/podcasts/a8f8676d52c47310VgnVCM3000001c56f00aRCRD.htm.

³ United States Sentencing Commission, “Chapter Eight – Sentencing of Organizations,” *Guidelines Manual*, §3E1.1 (Nov. 2012).

Regulatory Scrutiny Around the World on the CECO Role

The Federal Sentencing Guidelines for Organizations (FSGO) set out for organizational compliance and ethics a roadmap of those elements viewed as critical to strong, effective programs, including senior management commitment and resources. An endless number of panel discussions and articles have been devoted to so-called “tone from the top,”⁴ which is often mistaken by CEOs as “talk at the top” (as coined by Joe Murphy, recognized C&E expert and author of *501 Ideas for Your Compliance and Ethics Program*⁵) in the form of a video or annual letter to the troops. In fact, the most robust form of “high-level commitment”—one that is now heavily scrutinized by prosecutors and regulators—is the proper structuring and resourcing of the CECO position, and by extension, the overall compliance program. That is because how well the CECO is positioned is the single most important indicator of whether the program will succeed or fail.

For these reasons, the CECO position demands the close attention and deliberation of the governing authority. Under the FSGO, the board has a key role to oversee the company’s compliance and ethics program, and this starts with ensuring that management has properly structured the CECO position.⁶ In addition, the 2010 amendments to the FSGO reflected government’s strong preference for the CECO to have “direct reporting obligations” to the governing authority, intended to create a direct CECO channel to the board (or independent board committee), unfiltered by any other senior officer. Former federal prosecutor Michael Volkov asks two basic questions to gauge the strength of a compliance program: “Does the [CECO] have independent authority and reporting access?” and “Does the [CECO] have the resources needed to carry out the job?”⁷ This year, the Department of Justice and Securities Exchange Commission’s Joint Resource Guide on the Foreign Corrupt Practices Act specifically observed that the CECO “*must have appropriate authority within the organization, adequate autonomy from management, and sufficient resources to ensure that the company’s compliance program is implemented effectively.*”⁸

⁴ Donna Boehme, “Boehme of Contention: Tone at the Top: The Movie,” *Compliance and Ethics Professional* (July/August, 2012): 21.

⁵ Joseph E. Murphy, *501 Ideas for Your Compliance and Ethics Program* (Minneapolis: Society of Corporate Compliance and Ethics) 2008.

⁶ Michael D. Greenberg, “Directors as Guardians of Compliance and Ethics within the Corporate Citadel: What the Policy Community Should Know,” *Conference Proceedings from RAND Center for Corporate Ethics and Governance* (2010). Available at http://www.rand.org/content/dam/rand/pubs/conf_proceedings/2010/RAND_CF277.pdf.

⁷ Michael Volkov, “Empowering Compliance Officers: The Key to an Effective Compliance Program” *Corruption, Crime and Compliance blog* (May 18, 2012). Available at <http://corruptioncrimecompliance.com/2012/05/empowering-compliance-officers-the-key-to-an-effective-compliance-program/>.

⁸ Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (Washington DC: Government Printing Office, 2012). Available at <http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>.

The CECO also has the attention of standard-setting bodies outside the U.S. In 2010, 38 signatory nations to the OECD Good Practice Guidance for Internal Controls, Ethics and Compliance⁹ endorsed the CECO standard of a “senior corporate officer, with adequate level of autonomy from management, resources and authority.” Similarly, the Canadian Competition Bureau has stated in its Corporate Compliance Programs brochure that the chief compliance officer “must be in a position to act effectively, in that there is independence, professionalism, empowerment, financial support and a solid understanding of what is taking place within the business.”¹⁰

Focus on the empowered CECO continues worldwide. In 2012 the French Competition Authority adopted “Procedural Notice on the French settlement procedure,” setting out the requirements for an effective compliance program, including a CECO who is “empowered” to implement and oversee the compliance program “with the necessary autonomy and means to fulfill [the] role.”¹¹ Also in 2012, the Chilean competition agency (Fiscalía Nacional Económica, the “FNE”) published new Guidelines on Competition Law Compliance Programs, including this specific guidance on the CECO role:

“Finally, to the extent that the degree of market power justifies it and there are sufficient resources, the person responsible for enforcing the correct implementation of the compliance program must have full autonomy and independence within the company (for example, that person reports directly to the Board of Directors and can be removed only under specifically defined conditions).”¹²

The list of regulatory and standard-setting bodies around the world that are issuing guidelines for effective C&E programs continues to expand annually. These guidelines are

⁹ Working Group on Bribery in International Business Transactions, “Annex II: Good Practice Guidance on Internal Controls, Ethics, and Compliance,” in *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (Paris: Organisation for Economic Cooperation and Development, 2010). Available at <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/44884389.pdf>.

¹⁰ Competition Bureau Canada, *Corporate Compliance Programs* (Gatineau QC: Competition Bureau, 2010). Available at http://www.competitionbureau.gc.ca/cic/site/cb-bc.nsf/eng/03280.html#s4_1.

¹¹ Autorité de la concurrence, *Communiqué de procédure du 10 février 2012 relatif à la non - contestation des griefs* (Paris: Autorité de la concurrence, 2012). Available at

http://www.autoritedelaconcurrence.fr/doc/communiqué_ncg_10fevrier2012.pdf. See also

<http://www.omm.com/SnapshotFiles/a517d31c-b101-4568-87e2-44e69011c09b/Subscriber.snapshot>.

¹² Fiscalía Nacional Económica, *Programas de Cumplimiento de la Normativa de Libre Competencia* (Santiago, Chile: Fiscalía Nacional Económica, 2012). Available at <http://www.fne.gob.cl/wp-content/uploads/2012/06/Programas-de-Cumplimiento.pdf>. Official English translation pending, but unofficial translation of this portion of the guideline provided by Joe Murphy:

<http://www.corporatecomplianceinsights.com/lessons-on-antitrust-compliance-from-south-america/>.

increasingly addressing the seniority, positioning, empowerment, independence and resources assigned by companies to the CECO role.

Ripped from the Headlines

The headlines are full of ill-conceived CECO roles created seemingly overnight under pressure from regulators or investors. A global scandal-plagued company recently made a big announcement: the appointment of a new “chief compliance officer” and a corresponding “infrastructure.” The press release may have played well with regulators, shareholders, and the media, but the reaction in the compliance community was... a collective yawn. That’s because just beneath the flashy press headline were the less-than impressive details: The general counsel was taking on the additional CECO title and one of his in-house legal direct reports was adding a “deputy compliance officer” role to her business card. Both were keeping their existing full-time jobs and “adding on” the second set of duties. New titles, same people, same old organizational chart. As Joe Murphy, a leading compliance practitioner, commented: “So what, exactly, changed? They took two people who already had full-time jobs and put another title on them. Was this supposed to send a positive message? Maybe it just sends the message that this is a company that still doesn’t get it.”¹³

Another company, shaken by a widely publicized bribery and corruption scandal, reacted by appointing—surprise!—a “global compliance officer” dedicated to FCPA. Which begged the questions: (1) What about all the other C&E risks of the company—would there be a CECO standing separate from the FCPA chief, without line-of-sight and ability to implement an integrated C&E program that includes FCPA? (2) Is it ever a good thing to “fight the last war” without an eye on the future for other high-risk areas that require the time and attention of a dedicated CECO? (3) Should any company really appoint a new CECO for every risk area that blows up (any way you look at it, a truly terrible idea)?¹⁴ In fact, the creation of a compliance “silo” for one immediate risk area, rather than integration of the risk into an overall holistic compliance and ethics program designed to evaluate and address all of the company’s C&E risks, is a practice specifically discouraged by a number of prominent guidelines, including the Joint FCPA Resource Guide and the OECD Good Practice Guidance.

¹³ To read the full discussion, go to:

<http://community.corporatecompliance.org/Communities/DiscussionGroups/ViewThread/?GroupId=97&MI D=14988>.

¹⁴ Both the OECD Guide to Internal Controls, Ethics and Compliance and the Joint DOJ/SEC Resource Guide for the Foreign Corrupt Practices Act specifically recommend that the FCPA compliance program be integrated into the overall company C&E program, to avoid silos, gaps and inefficient use of company resource.

Roy Snell, CEO of the Society of Corporate Compliance and Ethics, has even harsher words on the topic: “The people who were hiding under the table when the problems occurred in the past don’t know how difficult it is to fix the problems you find. If they would have looked for, found, and actually fixed all the problems, they would know how tough this job is.”¹⁵ Gone are the days when companies in want of an official “chief compliance officer” could simply slap a new title on their GC and be done with it. Even former GE general counsel and highly vocal advocate for the in-house bar, Ben Heineman, now agrees that “the GC should not be CCO” because that job “demands too much time.”¹⁶ The CECO position has evolved into a high-level, established position on par with the heads of other control functions such as Legal and Internal Audit, one that former Citigroup chief compliance officer and Deloitte partner Tom Rollauer has called “an official member of the C-Suite.”¹⁷ Although it is true that when it comes to compliance programs and CECOs, no one size fits all, the five principles discussed in this chapter are universal to strong, effective compliance programs.¹⁸

What the Settlement Agreements Tell Us (the stakes have been raised)

Other clear indicia that the stakes have been raised are the number of settlement agreements and consent decrees that place the compliance function firmly in the spotlight. A long line of health care settlement agreements have yielded a now-standard undertaking, that the CECO “should not be, and should not be subordinate to, the general counsel or the chief financial officer.”¹⁹ More recently, prosecutors and regulators have taken aim at the compliance programs of large financial institutions involved in money-laundering, mortgage fraud and LIBOR rate rigging, to name a few areas of headline-making scandals. In the HSBC settlement agreement, prosecutors not only demanded a separation of legal from compliance (independence), but also elevation of the CECO role to the top 50 managers (empowerment and seat at the table), revised reporting lines for firm-wide compliance officers (independence and line of sight), reformed mandate (empowerment), and a ninefold

¹⁵ Roy Snell, “Letter from the CEO: Speaking for Our Profession.” *Compliance Today* (July 2011) 20.

¹⁶ “Don’t Divorce the GC and the Compliance Officer,” *The Harvard Law School Forum on Corporate Governance and Financial Regulation*, <http://blogs.law.harvard.edu/corpgov/2010/12/26/don-t-divorce-the-gc-and-compliance-officer/>.

¹⁷ See footnote 2.

¹⁸ Michael D. Greenberg, “Perspectives of Chief Ethics and Compliance Officers on the Detection and Prevention of Corporate Misdeeds: What the Policy Community Should Know,” *Conference Proceedings from RAND Center for Corporate Ethics and Governance* (2009). Available at http://www.rand.org/content/dam/rand/pubs/conf_proceedings/2009/RAND_CF258.sum.pdf.

¹⁹ Office of Inspector General, Department of Health and Human Services, “Corporate Integrity Agreement between the Office of Inspector General of the Department of Health and Human Services and Tenet Healthcare Corporation.” Available at <http://oig.hhs.gov/fraud/cia/agreements/TenetCIAFinal.pdf>.

increase of the compliance budget (resources).²⁰ Major overhauls of compliance functions at other big banks tell a similar story.²¹ Even in the absence of an actual settlement agreement, banks are feeling the heavy pressure from regulators and investors (and in at least one case, Senate investigating committees) and reforming their compliance functions to add one or more of the essential features discussed in this chapter.²² At press time for this chapter, Citigroup is busy working on a report to the Federal Reserve on improvements to its anti-money laundering compliance program, including reporting lines, independence and resources.²³

How can companies get ahead of this wagon train for effectively structured CECOs and compliance functions? How can CECOs evaluating potential in-house positions better define their due diligence process? A review of the following essential CECO features is a start.

Structuring for Success: the Five Essential Features

Following is a discussion of five essential and interrelated features to be carefully considered by boards and senior management who are serious about structuring (or updating) the CECO position for success. Whatever an organization's structure, size, complexity, industry, regulatory environment, or risk portfolio, its CECO position must reflect the following criteria to be effective:

²⁰ The HSBC settlement agreement has been called a "roadmap for compliance." See Ryan McConnell and Charlotte Simon, "The HSBC Settlement's 5-Page Road Map to Corporate Compliance," *Corporate Counsel* (December 13, 2012), http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202581251736&The_HSBC_Settlements_5Page_Road_Map_to_Corporate_Compliance&slreturn=20130228105010. See also Donna Boehme, "DOJ Tells HSBC an Corporate America: Reform Your Compliance Departments," *Corporate Counsel* (December 20, 2012), http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202582054989&DOJ_Tells_HSBC_and_Corporate_America_Reform_Your_Compliance_Departments.

²¹ Donna Boehme, "Big Banks Giving the CCO a Seat at the Table," *Corporate Counsel* (March 1, 2013) http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202590410783&Big_Banks_Giving_the_CCO_a_Seat_at_the_Table.

²² Jessica Silver-Greenberg, "Deal-Book: Amid a Shake-Up, JPMorgan's Risk Officer Takes a Leave," *The New York Times* (January 25, 2013), <http://dealbook.nytimes.com/2013/01/25/top-jpmorgan-executive-takes-temporary-leave-amid-reshuffling/>. See also Michael Volkov and Donna Boehme, "JP Morgan Takes a Giant Step on CCO Independence," *Corporate Counsel* (January 29, 2013) http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202586012597&JPMorgan_Chase_Takes_a_Giant_Step_on_CCO_Independence.

²³ The Citigroup consent decree can be viewed here <http://www.federalreserve.gov/newsevents/press/enforcement/enf20130326a1.pdf>.

Essential feature #1: Empowerment

The CECO must have the appropriate unambiguous mandate, delegation of authority, senior-level positioning, and empowerment to carry out his/her duties. One evolving best practice is the establishment of “compliance program charter” that sets out in sufficient detail the elements of the program and how it is expected to work, including the description of any “compliance committee” of peers to generate support, collaboration and real-world perspective for the program, and periodic reporting to the governing authority. More and more companies are opting to create the CECO mandate via board resolution, adopting the charter.²⁴ The CECO’s job description is another tool to further clarify the function’s mandate, and at a minimum should encompass the single point accountability to “develop, implement and oversee an effective compliance and ethics program to detect and prevent misconduct”; but again, in order to communicate the full weight and commitment of the board and senior management, a board resolution is best practice. A close working relationship with an independent board committee, unfiltered by any other company officer, is a strong indicium of both empowerment and independence (discussed separately below).

As Michael Volkov has observed: “COs should never be pigeon-holed in a legal office or buried in an auditing office. They need to be a separate and distinct office, with a C-Level office and designation, and with full authority to carry out their mission.”

Essential feature #2: Independence

Closely related to empowerment is independence. The CECO must have sufficient authority and independence to oversee the integrity of the compliance program. Levers of independence include reporting line, unfiltered board access, a nondiscretionary escalation clause, an employment agreement, prior board approval required for any change in employment terms (including dismissal), an independent budget, and an adequate staff to properly manage the overall compliance program. Of these elements, reporting line has generated the most controversy, particularly on the question of whether the CECO should report to the general counsel (GC). Many in the GC community incorrectly view compliance and ethics as a strictly legal function, and champion a CECO role that is either held by the GC, or reports to the GC.²⁵ In the CECO community, the call for a stand-alone position,

²⁴ See “Tenet Healthcare Corporation’s Quality, Compliance and Ethics Program Charter (effective Sept 27, 2011)” Available at [http://www.tenethealth.com/About/Documents/Ethics and Compliance/Final Tenet Compliance Program Charter 08 30 2011.pdf](http://www.tenethealth.com/About/Documents/Ethics%20and%20Compliance/Final%20Tenet%20Compliance%20Program%20Charter%2008%2030%202011.pdf).

²⁵ For a thoughtful piece on why compliance should not be managed and viewed through a legal lens, see José Tabuena, “Fitting a Square Peg into a Round Hole: Addressing the inherent conflict when the compliance officer is also the general counsel,” *Corporate Secretary* (September 1, 2009), at <http://www.corporatesecretary.com/articles/regulation-and-legal/11191/fitting-square-peg-round-hole/>. See also Donna Boehme, “The Real Happy Marriage Between the General Counsel and the CCO,” *Corporate Counsel* (May 2, 2012). Available at

unfiltered by the GC or any other company officer, has grown from a whisper to a roar.²⁶ Corporate scandals in the headlines continue to illustrate the potential weaknesses of the GC-controlled model and spotlight issues such as conflicts of interest, competing mandates, and filtering of vital information from the governing body.²⁷ Many regulators, prosecutors, and policymakers are increasingly taking the view that a reporting line to the GC provides insufficient independence and authority for the CECO.²⁸ This trend is also reflected in a recent industry study indicating that the CECO-reporting-to-GC model declined by 6%, from 41% in 2011 to 35% in 2012, among the companies surveyed.²⁹ See further discussion below under “Frequently Asked Questions.”

Essential feature #3: Seat at the table

The CECO must have formal and informal connections into the business and functions of the organization—a seat at the table at important meetings where all major business matters are discussed and decided. At a minimum, the CECO should participate in budget reviews, strategic planning meetings, disclosure committee meetings, operational reviews, and risk and crisis management meetings. One barometer for “seat at the table” is whether the CECO attends the top management meetings of the company. For example, a company that holds an annual senior management meeting of the top 10% of its company leaders, but does not invite the CECO to the table, fails this criterion. In fact, many organizations with strong ethical leadership cultures regularly include on their senior management meeting agendas a session for the CECO to engage top leaders on the state of the C&E program.

Some lessons on seat-at-the-table leap out from the media headlines. With every high-profile FCPA bribery, corporate spying, money-laundering or off-label marketing scandal, one could ask “Was there a strong, independent compliance and ethics voice in the C-Suite making the case for more robust protocols, resources, or a different path?” In one recent high-profile bribery scandal, media reports describe allegations that the top legal officer, CFO and CEO

<http://compliancestrategists.net/sitebuildercontent/sitebuilderfiles/corporatecounsel.5.2.12.RealHappyMarriage.boehme.pdf>.

²⁶ For example, see Erica Salmon-Byrne and Jodie Frederickson, “The Business Case for Creating a Standalone Chief Compliance Officer Position,” *Ethisphere* white paper. Available at <http://ethisphere.com/the-business-case-for-creating-a-standalone-chief-compliance-officer-position/>, and Tabuena: “Fitting a square peg in a round hole.”

²⁷ Donna Boehme: “WalMart. Whistleblower. Whitewash. Talk Amongst Yourselves.” *Whistleblowers Protection Blog* (May 4, 2012). Available at <http://www.whistleblowersblog.org/2012/05/articles/corporate-1/walmart-whistleblower-whitewash-talk-amongst-yourselves/>.

²⁸ See further discussion in Boehme: “The Real Happy Marriage.”

²⁹ “Broader Perspectives; Higher Performance. State of Compliance: 2012 Study” *Compliance Week* and PriceWaterhouseCoopers, June 2012. Available at http://www.pwc.com/en_US/us/risk-management/assets/2012-compliance-study.pdf.

participated in a group decision to “hush up” an on-going investigation by returning the case to the very same local counsel who had approved the illicit payments in the first place.³⁰ A strong independent CECO voice in that C-suite challenging the “groupthink” momentum might have resulted in a wiser decision. Similarly, an IT giant’s decision to conduct a “pretexting” spy regime on its own board members and reporters was another disastrous idea hatched by its board chairman and general counsel in the absence of a strong independent CCO voice.³¹

Essential feature #4: Line of sight

The CECO must have unfettered access to relevant information to be able to form independent opinions and oversee the program effectively. Where important areas of risk such as safety or environment are “carved out” from the CECO’s line of sight, the CECO will be unable to perform adequate oversight of the program for that risk, and oversight for related areas will be impaired. Correctly structuring the line of sight also enables the CECO to coordinate and leverage compliance activities, and to decrease “compliance fatigue” in the organization. This does not mean that every risk area or subject matter expert must report to the CECO administratively, but formal mechanisms should be established to integrate those compliance activities into the overall program, as overseen by the CECO. For example, an FCPA anticorruption compliance program is usually “owned” and implemented by Legal, but should not stand outside the CECO’s line of sight. Similarly, HR “owns” and manages sexual harassment and discrimination risk, but these programs need to be integrated into the overall program. Certain other areas of compliance risk, such as safety and environmental are often of sufficient significance in some organizations to merit a separate department. But that does not mean that they should operate outside the standards of effective compliance programs or be isolated from the best practice or information sharing critical to the company’s overall compliance approach. Each of these groups should keep the CECO regularly informed of the status of their risk area programs, and any gaps or challenges that may arise. “Line of sight” means that the CECO sets the standard for an effective compliance program in individual risk areas, even if those programs are developed and implemented by another company function – an important feature that should be expressly stated in the compliance mandate, discussed above. If any part of the organization is immune to the CECO’s line of sight, then that is the first place to look for problems.

³⁰ The original *New York Times* article on the case can be viewed here
http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html?pagewanted=all&_r=0.

³¹ See <http://www.prnewswire.com/news-releases/newsworld-cover-scandal-at-hp-the-boss-who-spied-on-her-board-55976222.html>.

Essential feature #5: Resources

Imagine a single police captain with a team of four sent in to safeguard the cities of Trenton, New Jersey or Miami Beach, Florida (both with current populations of over 80,000). In the words of Vizzini, the Sicilian boss character from the 1987 film, *The Princess Bride*... “*Inconceivable!*” Yet one need not look far for CECOs who manage an ambitious mandate no less than “to develop, implement and oversee a compliance program to detect and prevent misconduct” for their organizations of 80,000 with teams of 5 or less. Compliance functions are often leanly staffed with matrix responsibilities – a reality discussed by Michael Volkov in his article “Person of the Year – The Chief Compliance Officer” in which he calls the CECOs the ‘unsung heroes’ of the workplace.³² Assuming that all the other essential features of an effective CECO position have been established: empowerment, independence, seat at the table and line of sight, any company serious about compliance must also consider the amount of dedicated resources for the mission.

As regulators, prosecutors and investors are increasingly demanding, the CECO must have adequate resources (i.e., budget and headcount) to get the job done. The principle of independence also supports the dedication of standalone resources to the CECO and program, rather than a shared budget with another function (e.g., Legal). Headcount can be either personnel reporting to the CECO, shared resource, or “dotted line” resources (part-time or full-time) identified and dedicated to the compliance program from other parts of the organization. Some companies have also developed senior-level “compliance leaders” in the business units and functions of the organization to implement compliance activities in their areas—an evolving best practice that also increases the CECO’s line of sight.

In a properly scoped compliance program, many managers outside the compliance function have some degree of responsibility, whether as subject matter expert, risk program owner or investigative leader. It’s even possible that some of these individuals are already performing these roles in practice. However, the difference between a failed program and a successful one is often the clarification and formalization of these responsibilities. All roles supporting the compliance program should be clearly defined and properly linked to the CECO and the program through dotted line reporting, performance evaluation input or other similar mechanisms. Many may row, but they all must be headed in the same direction.

As we have noted, there is no one-size-fits-all model, and these essential features can take various forms depending on a company’s size, scope, risk profile and culture. But an analysis of any CECO position lacking one or more of these criteria quickly reveals the flaws in that model. Below are some frequently asked questions when structuring a CECO position and function, and our brief reflection on these topics.

³² <http://www.jdsupra.com/legalnews/person-of-the-year-the-chief-compliance-91623/>

Structuring the Chief Ethics and Compliance Officer Position: Frequently Asked Questions

Q: What are the most common organizational models?

A: Types of common organizational models for positioning the chief ethics and compliance officer (CECO) include:

- Reporting to the board (or an independent board committee)
- Reporting to the chief executive officer (CEO)
- Reporting to the chief financial officer (CFO)
- Reporting to the chief operating officer (COO)
- Reporting to the general counsel (GC) or within the Legal department
- Jointly reporting to the GC and the CFO
- Reporting to another senior officer
- Reporting to a senior officer, “dotted line” to the governing authority
- The GC (or another senior officer) is also the CECO.

Q: Isn't ‘independence’ the same as ‘empowerment’?

A: These two features are interrelated but each has a slightly different scope. In a Venn diagram, they would certainly overlap. Empowerment is about having the senior management’s imprimatur to do the job, and that requires clarity about what the job is, what’s in and what’s out, and the badge and the gun, so to speak. It’s impossible to be empowered without independence e.g. another exec filtering your reports or vetoing your everyday decisions about how to run the program. Independence is critical to the CECO’s ability to “speak truth to power” when necessary, to be another voice in the C-Suite with a lens on compliance and ethics without other considerations that create built-in conflicts of interest. Imagine a situation where the CECO has independence from Legal through a dotted line to the Board or escalation protocols, but is pigeon-holed doing administrative compliance work without the empowerment to discharge the broader CECO mandate.³³ An effective CECO needs both empowerment and independence.

³³ Michael Volkov has written a column on why hospitals need to elevate and empower their CECOs, who are sometimes independent but not empowered. You need both independence and empowerment. . See Michael Volkov, “An Independent CCO is a Compliance Program Requirement,” *Corporate Counsel* (April 9, 2013). Available at http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202595223223&An_Independent_CCO_is_a_Compliance_Program_Requireme.

Q: What do you mean by direct ‘reporting’?

A: For chief ethics and compliance officers, there are two types of “reporting”: (1) information reporting to the governing authority (e.g., periodic reports on the status of the compliance program)³⁴; and (2) administrative line reporting (e.g., “hire and fire”). The 2010 amendments to the Federal Sentencing Guidelines for Organizations (FSGO) bolstered the independence of the CECO by emphasizing the value of the CECO’s “direct reporting obligations to the governing authority.” This requirement refers to information reporting, but has been incorrectly interpreted by some as administrative line reporting. Although people often confuse one kind of reporting with the other, both are critical to the structuring of the CECO position.³⁵ So, for instance, the CECO may report administratively to the CEO, and appear before the Audit Committee of the Board to deliver an (unfiltered) quarterly written report.

Q: What do you mean by ‘unfiltered’? Our GC doesn’t change the message, but is the one to deliver the CECO’s report to the Board. How is that ‘filtering’?

A: Filtering is anything that impairs the quality of information being reported to the governing authority. The CECO is the subject matter expert on what makes an effective C&E program, and provides that lens to the board through periodic and ad hoc reporting. The closer the reporter is to the information, the better the information—a fact tacitly reflected in the 2010 FSGO amendments supporting “direct reporting” by the person with day-to-day operation of the program. Filtering can take the shape of a senior executive deleting unfavorable data, or changing or “watering down” the CECO’s message. But even when there is no intention to “change the message,” another executive that is once or twice removed from operating or overseeing the program (and who likely does not have the subject matter expertise) is not well equipped to know how a program really works on the ground, which aspects merit highlighting, or what details are most relevant to a Board’s understanding of the company’s C&E risks. The model of a CECO providing a report to the GC who then delivers it to the board is in increasing disfavor following the 2010 FSGO amendments and the many settlement agreements that mandate direct, unfiltered reporting.

Q: What other features are important to consider in structuring the CECO position?

A: As noted in a 2009 RAND Symposium report on the topic, “CECOs have the potential to play the pivotal role in companies, but their effectiveness depends on independence,

³⁴ Donna Boehme, “Board Engagement, Training, and Reporting: Strategies for the Chief Ethics and Compliance Officer,” in *The Complete Compliance and Ethics Manual*, eds. David Childers, C. Lee Essrig, Lisa Kuca, and Greg Triguba (Minneapolis, MN: Society of Corporate Compliance and Ethics, 2010), 3.37-3.54.

³⁵ USSG, Ch. 8.

seniority, ‘seat at the table’, and empowerment.”³⁶ The choices a company makes on these essential features in the aggregate will land the CECO role somewhere on a spectrum ranging from strong and “best practice” (i.e., independent, empowered, and structured for success) to mere window-dressing (i.e., generally ineffective, by design destined to fail). That’s why it’s fair to say that every company has the kind of compliance program it wants, because the choices the board and C-suite make about *how* it is structured and led will ultimately determine success or failure.

Companies also make choices on whether to establish a so-called “compliance committee” populated by senior officers (e.g., CFO, GC, HR, Audit) and often the business (an element which is growing steadily in popularity) and mechanisms for giving the CECO direct access to the governing body. In a recent PWC survey of CECOs in large US companies with annual revenues of more than \$1 billion, 71% of those surveyed said their companies had a form of Compliance Committee.³⁷

Q: What is the scope of the typical Compliance Committee mandate?

A: The Compliance Committee is not a substitute for the CECO, but a senior-level peer group that can be employed to support and offer input into key aspects of the compliance program and to increase ownership and engagement at the top levels of the organization. Nor should the Compliance Committee act as a mechanism to filter the independent judgment and reports of the CECO to the governing body. Topics typically discussed by the compliance committee are culture, accountability, values, performance criteria, training and communication plans, resource allocation, policies, investigations, and disciplinary matters. Compliance committee responsibilities vary by company, but in all cases, the group should have a clear written mandate that is broad enough to support the compliance program (but does not interfere with or impinge the ability of the CECO to manage the program on a day-to-day basis), independently oversee the program, or have unfiltered access to the governing body.

Q: What is meant by board access?

A: All board access is not created equal. Many companies now stipulate that a board committee or member has an “open door” to the CECO. But what does this really mean? A mechanism that “allows” a CECO to communicate on an ad hoc basis with the board or request a meeting is actually the *weakest* form of access, because a CECO has to affirmatively exercise his/her discretion to contact the board, making this more of a nuclear option. Depending on the relationship of the CECO to the board, this kind of access may ironically ensure that the CECO will *never* escalate an issue if the only available option is perceived as career-limiting.

³⁶ Greenberg, “Perspectives of Chief Ethics and Compliance Officers.”

³⁷ “Broader Perspectives; Higher Performance.”

A better approach is a mandatory escalation policy that automatically raises to board attention certain types of matters, such as allegations involving a senior manager or acts of retaliation against the CECO or compliance team members. Information reporting is another form of board access, but its efficacy depends on the frequency of the reporting (e.g. quarterly scheduled sessions) and the degree of “filtering” by others in the organization. As discussed above, filtering undermines CECO independence and the quality of the information received by the board, and negatively impacts the effectiveness of the program.

Despite the strong support by the 2010 FSGO amendments for an independent CECO with unfiltered access to the board, many companies have not yet established mechanisms to do so. In fact, many firms continue to place the CECO within the Legal department, with the general counsel actively filtering reports of the CECO, a model that is increasingly disfavored. The general counsel-controlled CECO model is discussed further below.

Q: What are the current trends in CECO structure?

A: A number of highly regulated industries are leading the way with very specific guidance or standards for the CECO reporting structure, such as the mutual funds industry, where Rule 38a-1 of the Investment Act of 1940 requires the CECO to report to the fund board.³⁸ In the health care industry, various guidances from the Office of Inspector General of the Department of Health & Human Services and a long line of settlement agreements set expectations for CECO independence, direct access to the board, and separation from the GC and CFO.³⁹ As highlighted in the landmark 2009 Pfizer \$2.3 billion settlement (which also separated legal and compliance): “The lawyers tell you whether you can do something, and compliance tells you whether you should. We think upper management should hear both arguments.”⁴⁰

Enforcement officials, regulators, policymakers, and members of Congress have also weighed in, taking a strong interest in CECO independence and empowerment.⁴¹ In 2003, Senator Chuck Grassley famously commented on the double-hatted GC/CECO role at Tenet Healthcare, “It doesn’t take a pig farmer from Iowa to smell the stench of conflict in that arrangement.” Former federal prosecutor Michael Volkov, writing in his widely-read

³⁸ U.S. Securities and Exchange Commission, “Final Rule: Compliance Programs of Investment Companies and Investment Advisers.” 17 CFR Parts 270 and 275. Available at <http://www.sec.gov/rules/final/ia-2204.htm>.

³⁹ The series of OIG guidances can be viewed at <http://oig.hhs.gov/compliance/compliance-guidance/index.asp>.

⁴⁰ Office of Inspector General, Department of Health and Human Services, “Corporate Integrity Agreement between the Office of Inspector General of the Department of Health and Human Services and Pfizer Inc.” Available at https://oig.hhs.gov/fraud/cia/agreements/pfizer_inc_08312009.pdf.

⁴¹ See <http://www.grassley.senate.gov/releases/2003/p03r09-08.htm>.

blog “Corruption, Crime and Compliance” has said that a CECO reporting to a GC is a sign of a “bare bones” compliance program that is likely “a disaster waiting to happen.”⁴² In 2012, a senior Securities and Exchange Commission official confirmed his view that “it sends a strong message that compliance and ethics are important if a company includes an independent CECO in the C-Suite” and encouraged boards to provide CECOs with “the necessary resources, independence, standing, and authority to be effective.”⁴³

More recently, as noted above under “What Settlement Agreements Tell Us,” a series of large financial institutions have taken unprecedented action to reform their compliance functions and CECO positions under pressure from regulators, prosecutors and investors.⁴⁴

As discussed above, the 2010 FSGO amendments offer strong support for CECO independence. All these factors point solidly towards a trend to increase the profile and empowerment of the CECO position.⁴⁵ That said, although the momentum for an elevated CECO position is clear, the levers of independence and empowerment remain inconsistently implemented. Anecdotally, most companies involved in headline-making C&E scandals appear to have either a poorly designed CECO position/program or a person with inadequate competencies and experience at the helm, a topic that merits the close attention of boards.

Q: Should the CECO report to the GC?

A: The CECO-reporting-to-Legal model has generated considerable controversy, particularly among some in the in-house legal community that seeks to maintain reporting control over the CECO, and in the CECO community, where the prevailing view is strongly in favor of independence.^{46, 47} As demonstrated by a long line of companies forced to separate their CECO from Legal under corporate integrity agreements, and headlines such as the very public Wal-Mart bribery scandal earlier this year,⁴⁸ companies that structure CECO positions lacking in independence (including independence from Legal) do so at their peril. Although this structure remains common, at least one major industry survey indicates that the model is

⁴² See Michael Volkov, “Empowering the Compliance Officer the Key,” *Corruption, Crime and Compliance* (May 18, 2012). Available at <http://www.jdsupra.com/legalnews/empowering-compliance-officers-the-key-54542/>.

⁴³ See Donna Boehme, “Yes Virginia, Compliance and Ethics is a Profession,” *Corruption, Crime and Compliance* (October 30, 2012). Available at <http://www.jdsupra.com/legalnews/yes-virginia-compliance-and-ethics-is-33005/>.

⁴⁴ See Donna Boehme, “Big Banks Giving the CCO.”

⁴⁵ See also Salmon-Byrne and Frederickson, “The Business Case.”

⁴⁶ See Boehme, “The Real Happy Marriage.”

⁴⁷ Ben Heineman, Jr., “Can the Marriage of the GC and the Compliance Officer Last?” *Corporate Counsel* (March 30, 2012).

⁴⁸ See Boehme, “Wal-Mart. Whistleblowers. Whitewash.”

losing momentum. The 2012 PWC State of Compliance Study indicates that the number of CECOs reporting to the General Counsel fell by 6%, from 41% in 2011 to 35% in 2012.⁴⁹

In the early days of the modern CECO position, the Legal department seemed to be the natural home for the CECO in many companies. As compliance and ethics has advanced into a vibrant and multi-faceted profession,⁵⁰ with an increasing depth of experience and evolving best practices, the distinctions between the CECO and the GC have become steadily apparent. The CECO and the GC have separate and distinct mandates and require different competencies and skills. Compliance is not a legal function, but a multidisciplinary management control function that interfaces with all of the other functions connected to the business. To quote one commentator: “It is the trained lawyer who chooses to operate in the attorney mind-set when in the compliance and ethics role who is likely to prove ineffective as a CECO.”⁵¹

Former federal prosecutor Michael Volkov says “Forward thinking companies are not relying on the general counsel to ensure compliance. They are empowering their [CECOs] by elevating them to senior management. When important business issues come up, the [CECO] is at the table.” The author’s views on this model are further discussed in “The Real Happy Marriage Between the GC and the Compliance Officer.”⁵²

Q: What about all the companies that seem to have a successful CECO-reporting-to-Legal model?

A: We’ve discussed the historical nature of this arrangement and the fact that all CECO positions should be fit-for-purpose. Many CECOs have commented on their good working relationship with their GC bosses. The problem is that this arrangement works until it doesn’t. In addition, if the CECO is not disagreeing with the GC from time to time (such as times of crisis when an independent voice is most needed), then either the CECO mandate is inadequately defined or she probably isn’t doing her job correctly. As noted above, both the GC and CECO have critical responsibilities and mandates for the company, and when a conflict occurs, both views should be heard in the C-Suite.⁵³ Recent headlines reflect

⁴⁹ See “Broader Perspectives; Higher Performance.”

⁵⁰ See Boehme, “Yes Virginia, Compliance.”

⁵¹ See Tabuena: “Fitting a Square Peg.”

⁵² See Boehme, “The Real Happy Marriage.”

⁵³ See Pfizer settlement, available at http://www.oig.hhs.gov/fraud/cia/agreements/pfizer_inc.pdf. See also Amy Miller, “Going With Plan B: Pfizer GC No Longer Oversees Compliance,” *Corporate Counsel* (September 10, 2009). Available at http://www.law.com/jsp/article.jsp?id=1202433692974&Going_With_Plan_B_Pfizer_GC_No_Longer_Oversees_Compliance&slreturn=20130229164233.

potential for failures when the GC can automatically veto or filter the CECO's recommendation. When considering the structure of the CECO position, boards would be well-advised to demand an institutional model that does not depend on the goodwill, personal working relationships, or temperament of an individual GC and CECO—but instead is created with sufficient checks and balances from the outset that structure the CECO position for success.

Q: Should the CECO report to the board?

A: There are some who champion this model, looking for the strongest source of independence for the CECO. The intent is correct, but some reservations about this reporting line include: (1) boards need to oversee the program and empower the CECO, but not necessarily supervise the CECO on a day-to-day basis; and (2) the CECO who reports to the board administratively runs a risk of being disconnected from the business and viewed as a pure policeman or monitor, rather than a vital function of the organization, trusted coach/advisor, and center of excellence for compliance and ethics. This could undermine the eagerness of the businesses to invite the CECO to key meetings—our essential feature of “seat-at-the-table.” Thus, as noted below, many companies have opted for an administrative reporting line to the CEO (for connectivity) with a “dotted line” to the board (to ensure independence and unfiltered access).

Q: Should the CECO report to the CEO?

A: The CECO model reporting to the CEO with direct, unfiltered, regular reporting to the board (combined with other mechanics for board access) is increasingly regarded as a best practice structure that is gathering momentum in many quarters, including with prosecutors who negotiate corporate integrity agreements.⁵⁴ In a 2009 survey conducted by the Society of Corporate Compliance and Ethics, 55% of CECOs surveyed reported to the CEO.⁵⁵ The CECO-reporting-to-CEO model carries with it automatic levers of independence and empowerment, and for this reason appears to be gaining in favor.

⁵⁴ See, for example, settlement with Tenet Healthcare, available at <http://oig.hhs.gov/fraud/cia/agreements/TenetCIAFinal.pdf>; Pfizer settlement, available at http://www.oig.hhs.gov/fraud/cia/agreements/pfizer_inc.pdf; Bayer Healthcare settlement, available at http://oig.hhs.gov/fraud/cia/agreements/fully_executed_bayer_cia_112508.pdf; Eli Lilly settlement, available at <http://www.lilly.com/Documents/CIA.pdf>.

⁵⁵Society of Corporate Compliance and Ethics, *Compliance and Ethics Officer Positioning: A Benchmarking Survey*. (Minneapolis: Society of Corporate Compliance and Ethics, 2009). Available at <http://www.corporatecompliance.org/Resources/View/ArticleId/262/Compliance-and-ethics-officerpositioning-A-benchmarking-survey.aspx>.

Q: An ex-SEC official has been quoted as saying that the CECO should not report to the CEO because that is insufficient autonomy from management. Is this a concern?

A: That would be true if there were not a dotted line to the board, direct unfiltered access (periodic and ad hoc) or other levers of independence. The advantage of a reporting line to the CEO is that a CECO gains a seat at the CEO's table and is elevated on par with other important voices such as Legal, the CFO and business heads. When the organization sees that the C&E program is valued highly enough to make the CECO a direct report to the CEO, the CECO gains in empowerment. Even with a reporting relationship to the CEO, the position still needs to be reviewed against all other essential features of an effective CECO role described in this chapter.

Q: What about the CECO position in small-to-medium size companies?

A: Small-to-medium size companies can make a more credible argument for a “double-hatted” CECO (where a senior officer takes on the CECO position in addition to his/her existing duties) than larger, more complex organizations with significantly more resources. That said, any company that employs this kind of structure must build it with a clear written mandate and levers of independence to strengthen the CECO position, in addition to leveraging scarce resources.⁵⁶ Much will depend upon the individual selected to discharge the CECO responsibilities. The part-time CECO must have sufficient time, commitment, intellectual curiosity, and competencies to do the job, and be willing to become educated in how to be an effective leader and advocate for the program. That said, just because a company is small does not mean that its legal and compliance risks are minimal. Small companies with complex risks should not assume that their compliance program needs can be adequately served by a part-time CECO.

Q: Doesn't the success of the CECO position, regardless of structure, depend on the personal qualities of the individual in the role? Are you suggesting that a best practice structure guarantees success?

A: There are no guarantees in life, and least of all in compliance and ethics! This chapter addresses the *structure* of the CECO role only. Equally important to the success of the CECO is what the individual brings to the table by way of meaningful compliance and ethics experience (the more demonstrated in-house track record the better), business savvy, gravitas, credibility, and critical “soft skills” such as problem-solving, project management,

⁵⁶ These mechanisms are discussed in greater detail in Donna Boehme, “Empowering the CECO in Small and Midsized Companies” *Ethikos* (January/February 2011) 10-12.

communication, collaboration and persuasion competencies, and of course, strong ethical leadership. This is an important topic for another paper.⁵⁷

Final thoughts

The above discussion is intended to support careful deliberation by the board and company decision-makers on the positioning of the CECO, and by extension, the overall compliance program within the organization. It is a decision which has enormous bearing on the potential effectiveness of the CECO position and the compliance program, and thus merits considerable strategic dialogue within the senior ranks. If a company is truly serious about culture, compliance, and ethics, and wants a program that is more than mere window-dressing, it will take careful steps to ensure that the CECO has empowerment, independence, seat at the table, line of sight and resources to properly discharge the responsibilities of this critical position.

⁵⁷ This topic was discussed in detail at the 2012 SCCE Compliance and Ethics Institute session “Building the Ship While Sailing” in Las Vegas, October 15, 2012.