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One Person, Two Hats: Combining the Roles of Chief Compliance Officer and Chief Legal Officer

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ONE PERSON, TWO HATS: COMBINING THE ROLES OF CHIEF COMPLIANCE OFFICER AND CHIEF LEGAL OFFICER

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I. INTRODUCTION

After several highly publicized incidents of corporate corruption, legislators shined a spotlight on the regulatory environment.[1] In addition to rising regulatory burdens, the compliance function has increased in prominence partially due to the government's heightened scrutiny of the effectiveness of a company's compliance program.[2] As a foundational measure, a company should first define the role of compliance and then determine the appropriate position for that function within the organization.[3] The latter is at the center of a growing debate about whether a company's Chief Legal Officer ("CLO") should also serve as the Chief Compliance Officer ("CCO") or if the compliance function should be led by a separate executive holding a stand-alone position.[4]

The better option will depend on the nature of the company's business, the regulatory environment in which it operates, and the characteristics and capabilities of the individual who might occupy both roles. Sub-regulatory interpretations issued by agencies have been particularly influential in the decision-making process, even though these interpretations do not formally have the force of law. For example, companies subject to oversight by the Department of Health and Human Services ("HHS") typically separate the CCO and CLO roles because HHS's Office of Inspector General ("OIG") has expressed this expectation on numerous occasions.[5]

The Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC") both maintain a "no one size fits all"

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1. Michele DeStefano, *Creating a Culture of Compliance: Why Departmentalization May Not Be the Answer*, 10 HASTINGS BUS. L.J. 71, 88 (2014) (explaining that Congress passed the Sarbanes-Oxley Act of 2002, intended to increase regulation of public companies, "in response to corporate scandals like Enron, Arthur Anderson, and Tyco . . .").

2. Paul Fiorelli, *Will U.S. Sentencing Commission Amendments Encourage A New Ethical Culture Within Organizations?*, 39 WAKE FOREST L. REV. 565, 567 (2004) (finding that companies with effective compliance programs can receive up to a ninety-five percent fine reduction under the U.S Sentencing Guidelines).

3. José A. Tabuena, *The Chief Compliance Officer vs the General Counsel: Friend or Foe?*, SOC'Y OF CORP. COMPLIANCE AND ETHICS, 3 (2006), www.corporatecompliance.org/Portals/1/PDF/Resources/past_handouts/CEI/2008/601-3.pdf.

4. Donna Boehme, *Making the CCO an Independent Voice in the C-Suite; The Compliance Strategist*, CORP. COUNSEL (Mar. 19, 2013), http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202592518804&Making_the_CCO_an_Independent_Voice_in_the_CSuite.

5. *See* OFFICE OF INSPECTOR GEN., DEP'T OF HEALTH AND HUMAN SERVS., AM. HEALTH LAWYERS ASS'N., THE HEALTH CARE DIRECTOR'S COMPLIANCE DUTIES: A CONTINUED FOCUS OF ATTENTION AND ENFORCEMENT 12 (2011), http://www.oig.hhs.gov/compliance/compliance-guidance/docs/health_care_directors_compliance_duties.pdf (stating that "[b]y separating the compliance function from the key management positions of [G]eneral [C]ounsel . . . a system of checks and balances is established to more effectively achieve the goals of the compliance program.").

position,[6] but this generalization is virtually useless without particulars. The contribution of this Note is to make this sweeping generalization more operable by describing the circumstances under which the dual role model, when CCO and CLO functions are combined into a single senior position, may be advantageous or disadvantageous to a company.

This Note is divided into six parts. Part II provides context for the rest of the Note, describing the historical events that shaped the roles traditionally performed by CCOs and CLOs. This history illustrates fluctuations over time in status and power within the corporate sector. Part III looks at several variables that influence a company's decision to implement the dual role model. Part III also examines the power of non-binding guidance documents and agency preferences, as they relate to adopting a compliance model.

Part IV outlines six advantages of consolidating the roles of CCO and CLO: 1) enhanced power, 2) early risk detection, 3) wider legal protection, 4) cost savings, 5) additional obligations, and 6) increased efficiency throughout the company. Through its overview of the arguments in favor of one unified approach, Part IV attempts to uncover why "those working as both [CLO] and [CCO] on average [run] more effective programs than the independent [CCOs]."[7]

Part V outlines possible disadvantages of adopting the dual role. Three leading arguments against the unified approach are that the dual practice: 1) results in a conflict of interest, 2) prevents proper supervision of compliance efforts, and 3) leads to improper assertions of attorney-client privilege. Part VI concludes with the suggestion that consolidating the roles is a more viable option if a company is resource constrained, its compliance program lacks effectiveness, or its regulatory environment is not burdensome. However, there is "no one size fits all" solution to the positioning of the compliance function. In addition to the factors outlined in Part III, the advantages and disadvantages of a dual role for an individual company should be given serious consideration before it decides on an approach. This Note proposes that absent a "best practices" standard, a rush to split the roles is premature and may result in negative effects that outweigh potential benefits.

II. TRADITIONAL ROLES AND FUNCTIONS OF THE CCO AND CLO

The historical events that shaped the corporate environment provide background to the evolving composition of the CCO and CLO roles. In general, both roles share the responsibility of maintaining

6. LRN CORP., THE 2015 ETHICS AND COMPLIANCE EFFECTIVENESS REPORT 8 (2015).

7. *Id.* at 38.

corporate compliance with applicable laws and regulations. The manner in which the functions of each role accomplish the objective of maintaining corporate compliance tends to be distinct.[8]

Traditionally, CLOs served primarily as advisors and company advocates.[9] As the organization's highest ranking legal counselor, a CLO must, among other duties, "vigorously defend the organization after potential violations of the law have been identified."[10] Over time, increases in regulation and business complexity have altered CLO responsibilities to include strategic planning, corporate governance, and deal-making.[11]

Since at least the late 1800s, compliance has been around in some form or another[12] until the early movements of the 1960s triggered federal intervention. For this reason, the role of CCOs, as opposed to that of CLOs, is less defined. The traditionally defined CCO role serves a management function primarily focused on preventing and addressing misconduct.[13] Historically, the CCO has been tasked with devising, implementing, and overseeing organizational processes to meet standards beyond those that are legally required.[14] This section describes the historical developments and evolution of both functions over the past several decades.

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8. Tabuena, *supra* note 3, at 3.

9. Sarah Helene Duggin, *The Pivotal Role of the General Counsel on Promoting Corporate Integrity and Professional Responsibility*, 51 ST. LOUIS L.J. 989, 1003-07 (2007).

10. J. REGINALD HILL, JENIFER C. PETERS & SHEILA W. SAWYER, THE RELATIONSHIP BETWEEN COMPLIANCE OFFICER, IN-HOUSE COUNSEL, AND OUTSIDE COUNSEL: AN ESSENTIAL PARTNERSHIP FOR MANAGING AND MITIGATING REGULATORY RISK, HEALTH LAWYERS ASS'N. FRAUD AND COMPLIANCE FORUM 5 (2014), https://www.healthlawyers.org/Events/Programs/Materials/Documents/FC14/ee_hill_peters_sawyer.pdf.

11. Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 FORDHAM L. REV. 955, 960 (2005) (highlighting that "by the 1970s, the general counsel's position in many large corporations grew in...scope of responsibility."); *see also* Duggin, *supra* note 9, at 1001; Robert C. Bird & Stephen K. Park, *The Domains of Corporate Counsel in an Era of Compliance*, 53 AM. BUS. L.J. 203, 208 (2016) (explaining that CLOs "perform dealmaker functions for corporate transactions.").

12. *See, e.g.*, Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (codified as amended in sections of 49 U.S.C.) (thought to be the origin of compliance, created an administrative agency to regulate railroads); Michele DeStefano, *Creating a Culture of Compliance: Why Departmentalization May Not Be the Answer*, 10 HASTINGS BUS. L.J. 71, 88 (2014).

13. Alexander Foster, *Where the CCO Fits In The C-Suite: A Corporation's Moral Compass*, 6 AM. U. BUS. L. REV. 175, 184 (2017).

14. DeStefano, *supra* note 12, at 73.

A. The 1930s-1960s

Following the Stock Market Crash of 1929, companies sought executives who would assist with the financing challenges of that era.[15] Known as the "golden age of power and prominence," CLO status became highly desirable in the 1930s due to consistent involvement with corporate management and the critical role of securing investment capital.[16] As a result, CLOs served both legal and business functions, analogous to their role today.[17] During the 1940s, however, the perceived value of CLOs steadily declined.[18] Partly due to an influx of Master of Business Administration degree holders, CLOs shifted from key players to "relatively minor management figure[s]."[19] In addition to a preference for business over legal education for senior management, large law firms became dominant in corporate representation.[20] Rather than managing outside firms, CLOs served as liaisons and primarily handled corporate housekeeping matters.[21] Once considered an indispensable business and legal asset, CLO status quickly diminished in value. It was not until the government's expanded role in the 1960s that CLOs took back the reins of the trusted legal and business advisor to the company.

B. The 1960s-1970s

The decade of corporate chaos also spawned the rise of compliance and resurgence of corporate counsel. The consumer, health, safety, and environmental movements of the 1960s and early 1970s triggered a vast expansion of federal government programs and agencies.[22] In the midst of federal intervention, the corporate sector faced an unprecedented increase in business regulations. The impact of increasing regulatory activity forced companies to reevaluate corporate compliance efforts and existing arrangements with outside firms.[23]

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15. Constance E. Bagley, Mark Roellig & Gianmarco Massameno, *Who Let The Lawyers Out?: Reconstructing the Role of the Chief Legal Officer and the Corporate Client in a Globalizing World*, 18 U. PA. J. BUS. L. 419, 428 (2016) (outlining numerous financial crises that ultimately led to CLOs being regularly sought for counsel by members of senior management).

16. *Id.* at 432.

17. *Id.*

18. *Id.* at 433.

19. Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277, 277 (1985).

20. Bagley, *supra* note 15, at 433.

21. Chayes & Chayes, *supra* note 19 (describing the CLO's role in the 1940s as liaison between members of senior management and outside counsel).

22. *Id.* at 434.

23. *See* Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 FORDHAM L. REV. 955, 960 (2005).

Prior to the expansion, corporations typically outsourced their legal matters to large law firms.[24] This practice was quickly reconsidered when the balance of power shifted in favor of utilizing outside counsel over the in-house counsel. Reaping the benefits of increasingly complex regulations, outside counsel experienced a surge in legal fees by utilizing their hourly billing model and resisted modifying fee arrangements to reflect the new regulatory scheme.[25] "[T]he high costs associated with switching to another firm resulted in corporate overreliance on one firm."[26] Subsequently, this dependency on outside firms coupled with high legal expenses, restored the value of corporate counsel during the 1960s. Rather than exclusively retaining outside counsel, companies chose to expand in-house legal department operations, reigniting the sought-after status of CLO.[27]

Through the American Corporate Counsel Association ("ACCA"), a professional association serving the business interests of attorneys who practice in the legal departments of corporations, a new identity for corporate attorneys emerged.[28] This restored value, however, came with vast responsibilities, comparable to a CLO's workload today. Responsibilities included providing legal advice to management, overseeing the bidding process of outside firms, and contributing to high-level strategic decisions.[29]

Growing regulation and demands for transparency during the 1960s also sparked an "era of compliance" for corporations.[30] Nationwide business reform forced companies to find more formal ways to deal with the federal regulatory infrastructure. Compliance professionals levered this market gap and soon fulfilled a corporate demand. In addition to a boost of personnel within the compliance industry, the compliance function's value was raised in corporate criminal prosecutions.

General Electric, one company prosecuted by the government for antitrust violations, highlighted the strength of its compliance program as a criminal defense.[31] The attempt to mitigate corporate

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24. Bagley, *supra* note 15, at 435.

25. Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479, 505 (1989).

26. *Id.* at 434-35.

27. *See* Carl D. Liggio, *The Randolph W. Thrower Symposium: The Role of the General Counsel: Perspective: The Changing Role of Corporate Counsel,* 46 EMORY L.J. 1201, 1203 (1997); *see also* Rosen, *supra* note 25, at 505.

28. *Our History*, ASS'N OF CORPORATE COUNSEL, http://www.acc.com/about/our-history.

29. Bagley, *supra* note 15, at 435.

30. *See* Richard S. Gruner, *General Counsel in an Era of Compliance Programs and Corporate Self-Policing*, 46 EMORY L.J. 1113, 1144 (1997) (noting the enhanced need for legal information about applicable regulations in heavily regulated industries).

31. Cristie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 689 (2009).

liability caused other companies to view compliance as a defensive measure.[32] The gesture was ultimately unsuccessful, but it foreshadowed considerations that federal courts take into account today. General Electric may be the pioneer of corporate compliance efforts, but regulators soon started to reach other, more heavily regulated industries. Internal reform quickly displaced the check-box approach to corporate compliance.

C. The 1980s-1990s

The 1990s, a moment of economic prosperity, marked the beginning of a new class of CLOs. Following the adoption of the internet, the "dot-com boom" consisted of optimistic investors, record stock prices, and increased valuations of merger and acquisition ("M&A") transactions.[33] In a span of only a few years, the role of CLO shifted from legal compliance expert to deal-maker. CLOs were "prototypical Wall Street or Silicon Valley M&A lawyers who had prior experience at the table with investment bankers."[34] Nelson and Neilson corroborated this shift in their 1990 survey comprised of corporate counsel from 46 large corporations and financial institutions.[35] Three types of CLO roles were recognized: cop, counsel, and entrepreneur.[36] It is no surprise that the entrepreneurial role prevailed during an era filled with frenzied deal-making activity. As entrepreneurs, CLOs gave "priority to business objectives rather than legal analysis."[37]

Although this change in approach may have been necessary at the time, it was not without cost. The M&A era concluded with corporate scandals, most notably those that led up to the collapse of Enron.[38] Presumably, failure to circumvent disastrous transactions was the by-product of caving into corporate demands to get the deal done. In 1991, while inside counsel found ways to cut corners, the United States

32. *Id.*

33. June Eichbaum, *Globalization and General Counsel,* MCCA (2008), https://www.mcca.com/mcca-article/globalization-and-general-counsel/ (explaining that the 1990s was "characterized by the dot-com boom and high flying markets involving mergers and acquisitions...and initial public offerings (IPOs).").

34. *Id.*

35. Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations,* 34 LAW & SOC'Y REV. 457, 460, 477 (2000) (concluding that in-house lawyers "Lawyers are now eager to be seen as part of the company, rather than as obstacles to getting things done. [I]nside counsel are themselves interested in discounting their gatekeeping function in corporate affairs.").

36. *Id.* at 463-66. Nelson and Nielson found that in-house counsel most frequently play the role of "counsel," but that they also acted from time to time as "cops" policing other corporate constituents or as "entrepreneurs" emphasizing business values and seeking to use law aggressively to generate profits.

37. *Id.* at 457.

38. *In re* Enron Corp. Sec., Derivative & ERISA Litig., 235 F. Supp. 2d 549, 549 (S.D. Tex. 2002).

Sentencing Guidelines ("Guidelines") had just been amended to include the existence of an effective compliance program as a factor that could mitigate punishment.[39]

The Guidelines were amended in 1991 to include Chapter 8, which imposed a determinate sentencing scheme upon corporations violating the law.[40] The Guidelines use a culpability score to determine the availability of credit, in the form of a penalty reduction, a convicted company may receive.[41] One factor used to determine this score is the effectiveness of the company's compliance program.[42] Through its sanctioning power and broad mandate, federal authorities incentivized companies to engage in compliance measures.[43] Corporations responded to the compliance-initiative and enlisted the help of compliance professionals.

Corporate executives may have viewed the promulgation of the Guidelines as a costly business expense, but the compliance industry took it as an opportunity to show its value. The Guidelines assigned high-level personnel, "individuals who have substantial control over the organization," with the "overall responsibility for the compliance and ethics program."[44] Thus, the CCO position emerged: an influential compliance professional who held an officer title within the organization. Membership in the Ethics Officer Association, which increased from 12 members in 1992 to 632 members by 2000, evidenced this newfound value and desirability of CCO status.[45]

The primary role of CCOs during the 1990s was to ensure that compliance programs met the elements in the Guidelines. Essentially, a compliance program lacks effectiveness if its value, purpose, and mission fail to reach employees. CCOs became corporate educators because it was, and still is, their responsibility to educate employees on what is expected of them, why it is important, and the consequences of non-compliance. "Compliance was no longer an FCPA problem or an antitrust matter, but a broad issue for organizations generally worthy

39. U.S Sentencing Comm'n, *U.S. Sentencing Guidelines Manual 1991*, U.S. SENTENCING COMM'N, §8, https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1991/manual-pdf/1991_Guidelines_Manual_Full.pdf [hereinafter Manual 1991].

40. *Id.* at § 8C (listing possible fines to be imposed on corporations for bad behavior).

41. *Id.* at § 8C2.5(f) (providing rules for the culpability of organizations with effective compliance and ethics programs).

42. *Id.* at § 8B2.1.

43. George C. McKann, *Recent Amendments to the Federal Sentencing Guidelines for Organizations* (DRINKERBIDDLE) (June 2010).

44. U.S Sentencing Comm'n, *U.S. Sentencing Guidelines Manual 2015*, U.S. SENTENCING COMM'N, § 8B2.1.(b)(2)(B), http://www.ussc.gov/guidelines/2015-guidelines-manual/2015-chapter-8; Manual 2018, *supra* note 39, at 8B2.1.(b)(2)(B).

45. MICHAEL D. GREENBERG, CORPORATE CULTURE AND ETHICAL LEADERSHIP UNDER THE FEDERAL SENTENCING GUIDELINES 7 (2012), https://www.rand.org/content/dam/rand/pubs/conf_proceedings/2012/RAND_CF305.pdf; Nelson & Nielsen, *supra* note 35, at 457.

of substantial attention."[46] Those that failed to broaden the scope of corporate compliance efforts reconsidered when Congress passed the Sarbanes-Oxley Act of 2002 ("SOX").[47]

D. The 1990s-2000s

The dot-com era did very little to improve the reputation of big businesses like Enron Corporation ("Enron"). Prior to its collapse, Enron was one of the world's largest energy traders, achieving a price of $90 per share at its peak.[48] Companies took note of Enron's visible success and ultimately followed, prompting increased competition and decreased profits.[49] Under growing pressure from its shareholders, executives resorted to using corrupt practices to make the company appear more profitable than it really was.[50] The fall of Enron was the result of suspect accounting schemes, understated debt, and an unwillingness to disclose its financial realities to investors.[51] There was also a significant conflict of interest that contributed to the fraud: individuals that served Enron as "independent" auditors, also acted as its consultants.[52]

In the wake of corporate scandals, Congress enacted SOX, which raised the statutory maximums for most fraud offenses.[53] The main purpose for the legislation was to protect investors from possible fraudulent accounting activities by corporations.[54] To fulfill this purpose, it created a board to oversee the accounting industry, banned company loans to executives, gave protection to whistleblowers, and made "CEOs personally responsible for errors in accounting audits."[55] Effectively, SOX ensured that CLOs acted as gatekeepers, or "cops" as Nelson calls it, rather than entrepreneurs.[56] During the 2000s, a new kind of CLO was in demand: "experience in Washington, D.C. and on Capitol Hill replaced experience... on Wall Street as 'must haves' for

46. Robert C. Bird & Stephen K. Park, *The Domains of Corporate Counsel in an Era of Compliance*, 53 AM. BUS. L.J. 203, 212 (2016).

47. *Id.*; *see* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

48. Troy Segal, *Enron Scandal: The Fall of a Wall Street Darling*, INVESTOPEDIA (May 29, 2019), https://www.investopedia.com/updates/enron-scandal-summary.

49. *Id.*

50. *Id.*

51. C. William Thomas, *The Rise and Fall of Enron*, J. OF ACCT. (Apr. 1, 2002), https://www.journalofaccountancy.com/issues/2002/apr/theriseandfallofenron.html.

52. *Id.*

53. U.S. Sentencing Comm'n, *Report to the Congress: Increased Penalties Under The Sarbanes-Oxley Act of 2002*, U.S SENTENCING COMM'N i (2003), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/corporate-crime-and-fraud/200301_RtC_Sarbanes_Oxley.pdf.

54. *Id.* at 1.

55. Kimberly Amadeo, *Sarbanes-Oxley Summary*, THE BALANCE (Oct. 27, 2019), http://www.thebalance.com/sarbanes-oxley-act-of-2002-3306254.

56. Nelson & Nielsen, *supra* note 35, at 463.

coveted general counsel positions."[57] Corporations needed CLOs who could proactively detect and defuse risk, and who knew how regulators thought and what they cared about. It was also crucial to understand Enron's mistakes to prevent similar unethical corporate behavior. Thus, CLOs adapted their lawyering styles and reverted back to fundamental gatekeeping functions.

The Guidelines set forth compliance program elements that if met by companies, will result in leniency and encourage self-policing.[58] Amendments were made to the Guidelines in 2010 to combat the recurrence of Enron-like misconduct.[59] A penalty reduction may be considered when the individual with operational responsibility for the compliance program has "direct reporting authority to the governing authority [the Board of Directors]."[60] By emphasizing direct access to the Board of Directors ("Board"), compliance heads should have little difficulty getting the Board's attention. This direct relationship elevates the compliance function to a corporate priority, gives CCOs the opportunity to be heard and build allies in the boardroom. The spotlight on ethical behavior during the 2000s gave CCOs increased clout and prestige.

III. CONSIDERATIONS OF CORPORATIONS

As of today, there is no universal "best practices" standard because there is a divide between the government and corporate industry as to whether CCOs should be independent from CLOs. Because it is not a case of one size fits all, replication of best practice may be unfitting. Thus, there is little uniformity as to how corporations deal with the complex job responsibilities of CCO.[61] However, a study by the Association of Corporate Counsel indicates that as of 2013, the number of companies that separated the roles of CCO and CLO rose slightly.[62]

Ultimately, each company will fill the CCO role and develop reporting lines based on its own circumstances, including the nature of its business and regulatory environment. Heavily regulated industries are more likely to base the structure of compliance according to governmental guidance, such as sub-regulatory interpretations, that

57. Eichbaum, *supra* note 34.

58. Greenberg, *supra* note 45, at 65.

59. McKann, George C., *Recent Amendments to the Federal Sentencing Guidelines for Organizations*, LEXOLOGY, https://www.lexology.com/library/detail.aspx?g=2a848ad7-4a07-4135-a28c-749a88e0462f (June 30, 2010).

60. *Id.*

61. Alexander Foster, *Where the CCO Fits In The C-Suite: A Corporation's Moral Compass*, 6 AM. U. BUS. L. REV. 175, 176 (2017).

62. ACC & Corpedia, *2013 ACC/Corpedia Benchmarking Survey on Compliance Programs and Risk Assessments* (2013).

either expressly favor or infer a preferred practice.[63] In the absence of agency guidance, entities often refer to sources of corporate compliance, such as the Guidelines, when deciding whether to combine the roles.[64]

Besides industry type and the preference of regulators, practical considerations can shape a corporation's arrangement of the roles including company size and ownership structure.[65] The practices of other organizations within the same industry are also helpful sources to companies when contemplating a compliance model. Using studies conducted by relevant organizations, companies may refer to industry trends to make an informed decision. Most corporations voluntarily divorce the roles of CCO and CLO, while others are required to by entities like the Department of Justice ("DOJ") and Department of Health and Human Services ("HHS").[66]

Compared to the traditional role of CCO, the current practices of corporations, as they relate to the compliance function, reflect a new sense of importance and level of independence, beyond the shadow of CLOs. What might have been thought of thirty years ago as a box-checking exercise is now front and center as a corporate priority.[67]

63. For example, the Office of the Inspector General (OIG) of the Department of Health and Human Services recommends that the position of compliance officer be free standing and not combined with any other key management positions such as general counsel, comptroller, or chief financial officer. *See* OIG, *Compliance Guidance for Hospitals* (Feb. 1998), https://oig.hhs.gov/authorities/docs/cpghosp.pdf. As a result of HHS's position, and its consistent approach in corporate integrity agreements of requiring separate individuals to hold the positions of CCO and CLO, some healthcare companies *perceive this / believe this* practice as the new norm. *See, e.g.*, 2013 CORPORATE INTEGRITY AGREEMENT BETWEEN THE OIG OF HHS AND JOHNSON AND JOHNSON, https://www.policymed.com/2013/11/johnson-and-johnson-2013-settlement-and-corporate-integrity-agreement.html; *see also* Joint Publication from the OIG of HHS and the American Health Lawyers Association, *The Health Care Direction's Compliance Duties: A Continued Focus of Attention and Enforcement*, Health Lawyers' Public Information Series 1, 7 (2011).

64. If an agency has not provided guidance, the Sentencing Guidelines is the next best option because it is often used as the framework for an agency's best practices. *See* Deputy General Counsel Paula Desio, *An Overview of the Organizational Guidelines*, U.S SENTENCING COMM'N, https://www.ussc.gov/sites/default/files/pdf/training/organizational-guidelines/ORGOVERVIEW.pdf.

65. *See* OIG Supplemental Compliance Program Guidance for Hospital, 70 Fed. Reg. 4858, 4874 (Jan. 31, 2005).

66. Grant A. Ostlund, *Should We Separate the General Counsel & The Chief Compliance Officer?*, SETON HALL L. 10-11 (2017), https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1897&context=student_scholarship.

67. Greenberg, *supra* note 45, at 38.

A. Industry Type

In large publicly traded companies, a strict regulatory environment is another rationale for keeping the functions distinct. This section will focus on the highly regulated securities industry that presumably has a more acute need for separate roles.

The SEC is a governmental agency that oversees securities markets and the activities of financial professionals.[68] Investment companies, such as mutual funds, are primarily regulated under the Investment Company Act of 1940 ("Act").[69] In 2004, the SEC adopted a new rule under the Act that requires investment companies registered with the SEC to implement written policies and procedures to prevent violations of the federal securities laws.[70] Rule 38a-1 of the Act also requires investment companies to "[d]esignate one individual responsible for administering the [company's] policies and procedures..."[71] This individual typically holds the title of CCO. However, investment companies are not required to hire an additional, independent executive to serve as CCO.[72] The option of a dual role still exists, especially since the SEC explicitly advocates for a CCO to have "sufficient seniority and authority . . . to compel others to adhere to the compliance policies and procedures."[73] A CCO-CLO role not only meets rule 38-1 criteria but also embraces the SEC's description by establishing seniority and political power to compel compliance within a company.[74]

B. Preference of Regulators

Since the private sector has provided little to no guidance about the dual role, the natural inclination is for companies to overreact to agency interpretations, despite lacking the force of law. For example, the Department of Health and Human Services ("HHS"), through its Office of Inspector General ("OIG"), issued a notice of its views on the fundamental components of an effective compliance program.[75] The purpose of the guidance documents is to encourage the use of internal

68. U.S. Sec. Exch. Comm'n, *What We Do* (SEC) (last updated June 10, 2013), https://www.sec.gov/Article/whatwedo.html.

69. 17 C.F.R. § 270.38a-1 (2012).

70. *Id.*

71. *Id.*

72. Memorandum from Willkie Farr & Gallagher LLP on "SEC Adopts Final Rules on Compliance Programs for Investment Companies and Investment Advisors" to clients (Jan. 15, 2004) (on file with Willkie Farr & Gallagher LLP).

73. SEC Release No. IA-2204 (Dec. 17, 2003).

74. Large publicly traded companies, such as Pier 1 Imports, Cisco, Gap, and Travelers Insurance all have dual-hatted CLOs. *See* David Burgess, *GC Powerlist: United States 2019,* THE LEGAL 500 (MAY 10, 2019), http://www.legal500.com/assets/pages/cc100/2019/usa-19.

75. *See* OIG Supplemental Compliance Program Guidance for Hospital, *supra* note 65.

controls to monitor adherence to statutes and regulations.[76] Those within the health care community typically conform to the stance of the OIG, even when it is non-binding.

One of the OIG components to an effective program is "[d]esignating a compliance officer . . . to monitor compliance efforts and enforce practice standards."[77] The OIG acknowledges that "[t]he extent of implementation will depend on the size and resources of the practice."[78] Despite the non-binding status of these interpretations and their explicit caveats, health care companies continue to be overly influenced by this agency's pronouncements.

There is also a psychological dimension to deferring to agency guidance. Generally, a CCO would not lose his or her job for implementing excessive safeguards or for being conservative in their evaluations of industry guidance.[79] Instead, this occurs when CCOs engage in corporate misconduct or more specifically, when they make unjustified decisions.[80] In an effort to defend themselves against criticism and/or protect their own interests, CCOs often use sub-regulatory interpretations (*e.g.*, guidance documents) to justify their decisions.[81] If there is some agency preference that happens to align with a CCO's decision, an otherwise controversial or potentially unethical decision suddenly seems more reasonable. From a CCO's perspective, some guidance is better than no guidance, which is valid, but the extent of the application must be considered in light of other factors discussed in the following section.

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76. *See* OFFICE OF INSPECTOR GEN., PRACTICAL GUIDANCE FOR HEALTH CARE GOVERNING BOARDS ON COMPLIANCE OVERSIGHT 2 (2015), http://oig.hhs.gov/compliance/compliance-guidance/docs/Practical-Guidance-for-Health-Care-Boards-on-Compliance-Oversight.pdf.

77. OIG Compliance Program for Individual and Small Group Physician Practices, 65 Fed. Reg. 59434, 59436 (Oct. 5, 2000).

78. *Id.*

79. *See also* New York City Bar, *Report on Chief Compliance Officer Liability in the Financial Sector,* http://s3.amazonaws.com/documents.nycbar.org/files/Report_CCO_Liability_vF.pdf, at 18 ("...good faith efforts to achieve compliance should weigh against an enforcement action even if those efforts are ultimately unsuccessful"). Afterall, CCOs are "responsible not only for maintaining compliance, but also for safeguarding what is arguably an organization's most valuable asset: its reputation." https://www2.deloitte.com/content/dam/Deloitte/no/Documents/risk/Building-world-class-ethics-and-compliance-programs.pdf, at 18.

80. *See* Thaddeus J. North, Exchange Act Release No. 84500, 2018 WL 5433114, at *11 (Oct. 29, 2018) (stating that individual liability will typically attach when a CCO is "affirmatively involved in misconduct" or "engage[d] in efforts to obstruct or mislead..."); *see, e.g., In the Matter of Charles L. Rizzo and Gina M. Hornbogen,* Admin. (barring the CCO from associating in a supervisory capacity because she failed to investigate claims of possible fraud and forged client signatures).

81. New York City Bar, *supra* note 79, at 7.

C. The Organizational Sentencing Guidelines

Through the Sentencing Reform Act of 1984, Congress created the U.S. Sentencing Commission ("Commission") to reduce sentencing disparities.[82] The Guidelines, which were originally statutory and had the force of law, were articulated by the Commission for use by federal courts.[83] In the absence of agency guidance, the Guidelines are often used as a source for structuring corporate compliance programs.[84]

The Guidelines establish nine primary features of an effective compliance program, including appropriate oversight.[85] If a corporation has a compliance program, at the time of conviction, that meets the elements of the Guidelines, it is rewarded a lesser sentence in the form of a penalty reduction.[86] However, as a result of the Supreme Court's 2005 opinion in *United States v. Booker*, the Guidelines were ruled unconstitutional.[87] Now, a sentencing judge must consider the Guidelines but is not required to follow them. Though only a small number of companies are convicted of federal crimes, the Guidelines are taken into account as a proactive approach to address potential future misconduct.[88] It also provides direction as to what the government considers to be an effective compliance program.

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82. *See* Mistretta v. United States, 109 U.S. 647, 651 (1989) (noting that the Sentencing Reform Act of 1984 was enacted in response to serious disparities in sentences occurring under an existing indeterminate sentencing system).

83. Rosemary T. Cakmis, *The Role of the Federal Sentencing Guidelines in the Wake of United States v. Booker and United States v. Fanfan*, 56 MERCER L. REV. 1131, 1133 (2005).

84. *See* Leonard Orland, *The Transformation of Corporate Criminal Law*, 1 BROOK. J. CORP. FIN & COM. L. 45, 49-50 (2006) (explaining that even though the Guidelines were deemed unconstitutional and are no longer mandatory, the Guidelines have still been "a major factor in the development of the law and practice of corporate compliance . . .").

85. For a compliance and ethics program to be effective under § 8B2.1 of the Guidelines, it must have: (1) standards and procedures to prevent and detect criminal conduct, (2) active Board of Directors ("BOD") oversight of the content, operation and efficacy of the program, (3) high-level personnel responsible for overall operation of the program with designated individuals tasked with day-to-day operations, (4) periodic reporting of program operations and effectiveness to the BOD, (5) reasonable efforts to exclude individuals that a company knew or should have known had engaged in conduct not consistent with an effective program, (6) periodic monitoring and auditing to detect criminal conduct, (7) periodic evaluations and a system for anonymous employee reporting of potential criminal conduct, (8) consistent enforcement and promotion of compliance, and (9) reasonable response to criminal conduct and reasonable steps to prevent future criminal conduct.

86. H. Lowell Brown, *The Corporate Director's Compliance Oversight Responsibility in the Post Caremark Era*, 16 DEL. J. CORP. L. 1, 77 (2001).

87. United States v. Booker, 543 U.S. 220, 267 (2005).

88. The Guidelines did not merely react to inappropriate conduct or target specific illegal corporate behavior, but rather gave a broad mandate to all companies to engage in compliance measures.

D. Practical Considerations

Practical considerations, such as the size and structure of a company, are important to ensure that the CCO function is structured for success. When small to midsize companies do not have the resources to create an entirely independent CCO role, the dual function model is an effective solution. This practice is supported by the Guidelines: "a small organization may [rely on] less formality and fewer resources . . . ."[89] By contrast, large companies have separated CCO and CLO roles because they can afford to do so and may have to, given the volume and scale needed to monitor compliance.[90] "A large organization generally shall devote more formal operations and greater resources . . . than shall a small organization."[91] The dual role still exists within some large companies due to, among other things, technological advancements that are leveraged to scale compliance efforts.[92]

A stand-alone position may be unnecessary if a company finds an individual with the essential characteristics and capabilities to occupy both roles. CCOs employed by publicly traded companies must be knowledgeable in federal securities law, including SEC rules and regulations. On that basis alone, CLOs are capable of satisfying the demands of a CCO role. However, there is more to the role than being well-versed in the law. CCOs must also be subject matter experts. To effectively serve the dual role function, an individual must have a broad enough skill set to encompass both the legal expertise and proficiency in "designing and managing the organization's approach to compliance, ethics, culture, and reputation issues."[93]

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89. Commentary to U.S.S.G. § 8B2.1. note 2(c)(iii); *see also* Tabuena, *supra* note 3, at 4 (contending that the new guidelines "recognize that the small and mid-size organization often do not have the resources to create an entirely new officer-level position to manage the program . . . by offering an endorsement for utilizing existing officers rather than creating a new CCO position.").

90. *See* Edward T. Dartley, *The Combined Role of the General Counsel and the Chief Compliance Officer—Opportunities' and Challenges,* PRAC.PRACTICAL COMPLIANCE & RISK MGNT. FOR THE SEC. INDUS., May-June 2014, at 21, 22 https://www.pepperlaw.com/uploads/files/dartley_pcrm_03_14.pdf.

91. Commentary to U.S.S.G. § 8B2.1. note 2(c)(ii).

92. A governance, risk management, and compliance ("GRC") software may replace the need for two standalone positions in a large company. Automated programs, such as Compliance 360, Inc., enables an organization to monitor internal controls through one centralized system. For more information, see *Compliance 360 Inc,* BLOOMBERG, https://www.bloomberg.com/profile/company/3169917Z:US.

93. Donna C. Boehme, *Structuring the Chief Ethics and Compliance Officer and Compliance Function for Success: Six Essential Features of an Effective CECO Position and the Emergence of the Modern Compliance 2.0 Model,* COMPLIANCE COSMOS, https://compliancecosmos.org/structuring-chief-ethics-and-compliance-officer-and-compliance-function-success-six-essential.

E. Industry Trends

Other useful sources to the dual role assessment are studies conducted by organizations like LRN Corporation, known for its promotion of corporate compliance. According to LRN's 2015 Ethics and Compliance Effectiveness Report, when CCOs report to Chief Executive Officers ("CEO"), "half of [those CCOs] also serve as general counsels."[94]

However, the prevailing direction of corporations appears to be veering toward independence. This movement is reflected in Deloitte and *Compliance Week*'s survey comprised of respondents from a wide range of industries, executive titles, and workforce sizes.[95] The survey reveals that as of 2015, there is "a trend toward standalone compliance operations, with 59 percent of 2015 respondents indicating their top compliance job is a stand-alone position, up from 50 percent in 2014 and 37 percent in 2013."[96]

IV. ARGUMENTS IN FAVOR OF CONSOLIDATING THE ROLES

Advocates of the dual role argue that the compliance function ought to be within the purview of a CLO. This discussion outlines six advantages of adopting one unified approach: 1) enhanced power, 2) early risk detection, 3) wider legal protection, 4) cost savings, 5) additional obligations, and 6) an increase of efficiency throughout the company.

A. Enhanced Power

An advantage to the dual role is influential power. CLOs have the political power, status, and influence to effectively implement and enforce the compliance function within an organization. "Tone at the top" is crucial to the strength of a compliance program.[97] The "top" typically

94. LRN Corporation, *The 2015 Ethics and Compliance Effectiveness Report* 8 (2015), http://cdn2.hubspot.net/hubfs/319387/PEI_Report_2015.pdf?submissionGuid=adfff746-6ebe-4dcd-a01a-d0c298ae9c5d.

95. The 2015 Compliance Trends Survey produced 370 responses. A wide range of industries contributed to the survey such as financial services, health care, consumer & industrial products, technology, media, telecommunications, energy, and life sciences, among others. Respondents were asked 35 questions "grouped into four broad categories: the resources that compliance departments have; the responsibilities and activities with the compliance operations; the specific compliance risks within the extended organization; and the use of technology." *See* Deloitte Development LLC, *In Focus: 2015 Compliance Trends Survey* (2015), https://www2.deloitte.com/content/dam/Deloitte/co/Documents/risk/us-aers-reg-crs-2015-compliance-trends-survey-051515.pdf.

96. Deloitte Development LLC, *CLOs and CCOs: A New Era of Collaboration* (2017), http://www2.deloitte.com/us/en/pages/advisory/articles/clo-cco-new-era-of-collaboration.

97. Nicole Sandford, *Building Word-Class Ethics and Compliance Programs: Making A Good Program Great—Five ingredients for your program*, DELOITTE DEVELOPMENT LLC (2015), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/risk/us-aers-g2g-compendium.pdf.

refers to corporate leaders like a Board or executive management.[98] The "tone" sets the company's values, culture, and ethical climate.[99] If the "top" does not deem compliance as a corporate priority, that will be the tone throughout the organization, and unethical behavior is likely to follow. Hence, it is crucial to have a compliance advocate at the top so that the tone is used to strengthen compliance efforts.

Advocates of the dual role argue that a CLO is best suited to set the tone of compliance because CCOs lack political power within a company.[100] Additional resources and personnel may be necessary to accomplish compliance initiatives. In all likelihood, such requests require a budget increase which demands executive management approval. Without political power, CCOs may be hesitant to speak up and make these requests in fear of losing their seat at the executive table. Therefore, a CCO may not be willing to "do what it takes to ensure that legality and ethics are not sacrificed at the altar of short-term profits."[101] CLOs, on the other hand, have an established seat at the table and in turn, are more willing to speak freely.[102]

Executives also need to understand their individual role in enforcing compliance throughout the organization. CLOs have the power and cooperation of management to achieve both of these initiatives because they are regularly included in high-level decision-making, have a consistent relationship with the Board, and are part of the executive management team. With the cooperation of management, compliance efforts will not only be supported but promoted by corporate leaders, sending a signal of importance throughout the company. For these reasons, a dual role lends power to a compliance program, on a management level using its seat at the table and on an employee level using its political power to influence the tone at the top.

B. Early Risk Detection

Another unique advantage to adopting the dual role is the early involvement of CLOs in corporate matters. Typically, when an important decision, transaction, or issue surfaces, the CLO is one of the first individuals brought to the table. This is because "the later a lawyer is brought into the planning of a transaction, the more likely it is that the lawyer will have to say 'no.'"[103] Employees who anticipate this push-back often provide CLOs with preliminary information to

98. *Id.*
99. *Id.*
100. DeStefano, *supra* note 12, at 125.
101. Bagley, *supra* note 15, at 458.
102. *Id.*
103. *Id.* at 452.

increase the probability of approval.[104] Rather than wait for risks to materialize into issues, the combined role ensures early involvement, where risks can be detected and resolved without delay or repercussions.[105]

CCOs, on the other hand, are not always involved in preliminary executive discussions. Without this window of opportunity, CCOs cannot raise legitimate concerns about high-level decisions. Unable to take a proactive approach, a minor risk may easily transform into a serious crisis by the time it gets to compliance. There are consequences to the absence of risk assessments, one mistake may result in a deal falling through or even worse, corporate malfeasance. There is a higher chance of preventing risks from materializing under a dual-hatted CLO because of his or her involvement in corporate decision-making.

C. The Power of Legal Tools

Wider legal protection is extremely useful when companies are confronted with regulatory matters, litigation, and other sensitive situations. A significant advantage to the dual role is the powerful weapons that are available to attorneys: attorney-client privilege and the work-product doctrine.[106]

The case of *Upjohn Co. v. United States* became a national lightning rod for litigation involving the scope and applicability of corporate privilege.[107] *Upjohn* gives broad protection to the confidential communications of corporate employees who provide relevant information to in-house counsel during a legal investigation.[108] In addition to employees, the client for corporate privilege purposes may also be outside counsel and top management.[109] Materials prepared by in-house counsel in anticipation of litigation are generally protected by the work-product doctrine.[110] Both legal tools are unique to the dual role and allow for frank discussions within a company.

The dual role has an edge over non-lawyer CCOs because the latter is incapable of invoking legal privilege and discovery protections to

104. *Id.*

105. *See* Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277, 281 (1985) (discussing the CLO's "right and responsibility to insist upon early legal involvement in major transactions that will raise significant legal issues").

106. The attorney-client privilege preserves the confidentiality of communications between attorneys and clients, whereas the work-product doctrine protects materials made specifically to prepare for a pending or possible lawsuit.

107. United States v. Upjohn Co., 449 U.S. 383, 386 (1981).

108. *Id.* at 397.

109. Bufkin Alyse King, *Preserving the Attorney-Client Privilege in the Corporate Environment*, 53 ALA. L. REV. 621, 623 (2002).

110. *See* FED. R. CIV. P. 26(b)(3).

shield the company from adversaries. Particularly in the case of routine compliance monitoring, attorney-client privilege, directly and indirectly, promotes open, internal dialogue with employees.[111] Employees may not be as forthcoming with CCOs, knowing that disclosed information may be revealed without his or her consent.[112] The assurance of confidentiality, through corporate privilege, supports the contention that employees are more likely to engage in full and frank discussions when led by CCO-CLOs. Failure to obtain relevant information from company employees could hinder the possibility of diffusing an issue before litigation unfolds.

It is not uncommon for compliance matters to have legal elements, particularly when it comes to regulatory issues. For example, if a potential compliance issue arises pursuant to a new regulation, the company will most likely ask the CLO to interpret and analyze its application to the issue at hand. In order to determine the effect of a new regulation, counsel will presumably request more information from company employees about the potential compliance issue. This information may contain communication that the company would not want an adversary to discover. In the event an investigation unfolds, the company is now at risk because the information may be discoverable, unless counsel has been involved.

Upon an internal investigation, a company may voluntarily submit its findings to the government and shield potentially harmful communications by citing attorney-client privilege and/or the work product doctrine.[113] A dual role not only provides extra protection to the company when litigation occurs, but also promotes a candid dialogue at the earliest stages of consideration.[114] Rather than advising against the dissemination of such communication because of the threat of discovery (in the case of a non-lawyer CCO), a CCO-CLO may effectively perform its duties by requesting and in turn, investigating any relevant communications.

111. Just as the privilege "encourages the client to be open and honest with his or her attorney," employees that speak with dual-hatted CCOs may be comforted by the fact that they can divulge "without fear that others will be able to pry into those conversation." http://www.americanbar.org/groups/business_law/publications/blt/2013/10/01_unger/

112. *Id.* When attorney-client privilege applies, in most cases, only the holder of the privilege can authorize disclosure. However, if the employee communicates with a CCO, who is not an attorney, that information may be disclosed to third-parties, with or without the employee's consent. An employee may not be willing to disclose information to a non-attorney CCO without having the assurance of attorney-client privilege.

113. *See, e.g., Provider Self-Disclosure Protocol,* 63 Fed. Reg. 58399, 58403 (Oct. 30, 1998).

114. Dartley, *supra* note 90, at 23.

D. Cost Savings

There is a strong financial incentive to implementing the dual role.[115] Operating expenses are reduced because there is one only executive salary, as opposed to two. In 2018, the Association of Corporate Counsel surveyed over 5,000 in-house counsel across 65 countries to track compensation trends in the marketplace.[116] The report indicates that the median base salary for CCOs was $290,000 in 2018, while CLOs earned a median base salary of $243,000.[117] Factors such as seniority, tenure, company ownership structure, and industry type are likely to influence these figures.[118] Regardless, the salary for a dual-hatted role will presumably be higher than both of these figures because of the workload, expertise, and responsibility the role requires.

However, proponents of the combined role argue that it is a more cost-efficient strategy to pay for a single, more expensive compensation package, as opposed to paying two six-figure salaries.[119] This is especially true in organizations that are small in size, not-for-profit, or those that simply do not have the financial means to employ both officers. In this case, economics alone drives the decision to consolidate the functions.

On that same note, CCO and CLO responsibilities tend to overlap, especially in the corporate setting.[120] Supporters of the dual role argue against compensating two large salaries because of these overlapping responsibilities. This is especially true if the scope of work can be managed by a single, dual-hatted individual, rather than two. From a cost-savings perspective, the dual role is highly beneficial, particularly when there is a light workload and/or significant overlapping responsibilities between the two functions.

E. Additional Professional Obligations

Every corporate officer has fiduciary duties to its corporation. CLOs, on the other hand, have additional obligations that go beyond those required of non-lawyer CCOs. Proponents argue that because attorneys are subject to a heightened ethical standard, it is less likely that CLOs will engage in unethical, opportunistic behavior.[121]

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115. *Id.* at 22.

116. ASS'N OF CORPORATE COUNSEL, 2018 GLOBAL COMPENSATION REPORT 2 (2018).

117. *Id.* at 10.

118. *Id.*

119. Dartley, *supra* note 90, at 22.

120. DeStefano, *supra* note 12, at 130.

121. MODEL RULES OF PROF'L CONDUCT r. 1.13(a) (AM. BAR ASS'N 2016) (stating that lawyers who represent corporations and other organizations must place allegiance to the entity over loyalty to constituents).

Corporate counsel must comply with the American Bar Association's Model Rules of Professional Conduct. When representing a client, Rule 2.1 requires that "a lawyer shall . . . render candid advice."[122] This still applies even to advice that goes against company objectives. CCOs may be reluctant to speak out against questionable company initiatives in fear of being removed from the executive table. However, CLOs are obligated to do so and if they choose not to, could be subject to much harsher penalties such as losing their license to practice law.

Furthermore, Rule 3.1 of the Model Rules is relevant when corporate officers are faced with increasing pressure to participate or abet fraudulent activity. "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous . . . ."[123] In addition to discipline by the bar, a violation of this rule is likely to result in another significant consequence: a damaged reputation. As an attorney, reputation is the key to success. CCOs may be more inclined to participate in frivolous activity because the benefits of assisting the corporation may outweigh the cost of doing so. On the other hand, the costs of engaging in such behavior as an attorney, in the form of discipline and reputational harm, clearly outweighs the potential benefits. Thus, it is more likely that an individual holding the dual role will resist unethical corporate conduct. Even if additional obligations do not have a significant impact on behavior, the Model Rules disincentive attorneys from engaging in unethical behavior to which non-lawyer CCOs may be susceptible.

F. One Unified Voice

The overall efficiency of a company is increased when its operations and communications are streamlined. In a corporation, cross-functional initiatives are inevitable, especially in the legal and compliance departments because they often intertwine. Ideally, both functions would work together toward the same goal. Realistically, employees must navigate through corporate turf wars and office politics. These rivalries occur when corporate functions compete for power, influence, and limited resources.

Turf wars are more likely to occur if the roles of CCO and CLO are kept distinct because the functions naturally overlap, causing territorial competition between the departments.[124] A silo mentality, or a

122. *Id.* r. 2.1.

123. *Id.* r. 3.1.

124. Donald C. Langevoort, *Getting (Too) Comfortable: In-House Lawyers, Enterprise Risk, and the Financial Crisis*, 2012 WIS. L. REV. 495, 500 (discussing the "strong scent of professional competition" between lawyers and compliance officers); *see also*

reluctance to share information, is likely to ensue. Thus, organizational silos will impede communication flow and interactions that are necessary for effective compliance. The company's culture of ethics and compliance may also be damaged when information sharing between functions becomes scarce, as information is power in the silo game. The dual role enhances a company's efficiency because it consolidates the legal and compliance functions, thereby portraying one streamlined, unified voice.

V. ARGUMENTS AGAINST CONSOLIDATING THE ROLES

Despite the advantages of a hybrid position, the current trend reflects a shift toward an independent CCO function. Among other reasons, companies may separate the roles at the direction of the government as a compromise to accountability[125] or voluntarily, to avoid a recurrence of corporate misconduct. By way of example, in the midst of a government investigation, WellCare Health Plans, a health care company, acknowledged the existence of "accounting errors" in relation to its Medicaid obligations.[126] After the government attributed partial responsibility to the dual role model, the company defended its structure stating it was necessary to "ensure that compliance [was] always represented at the senior management level."[127] Yet, two months after the investigation became public, the company ousted its top executives and separated the position of CLO and CCO.[128]

There are three leading arguments against consolidating the roles of CCO and CLO. Opponents of the dual model argue that it 1) prevents proper supervision of compliance efforts, 2) results in a conflict

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> [I]t makes no sense for the chief compliance officer to be 'independent' and to hire the various substantive experts who must work on compliance but also on business problems for the GC and CFO. That doesn't amount to appropriate 'checks and balances,' but is a source of bureaucratic waste, confusion, and possible turf-fighting.

Ben W. Heineman, Jr., *Don't Divorce the GC and Compliance Officer*, 12 CORP. COUN. 48, 49 (Jan. 1, 2011).

125. *See, e.g.*, OFFICE OF INSPECTOR GEN. OF THE DEP'T OF HEALTH & HUMAN SERVS. & PFIZER INC., CORPORATE INTEGRITY AGREEMENT (2009), http://www.oig.hhs.gov/fraud/cia/agreements/pfizer_inc.pdf.

126. Ethisphere & Corpedia, *The Business Case for Creating a Standalone Chief Compliance Officer Position, http://www.fairfaxgroup.us/docs/separation_of_gc_and_cco.pdf; see also* Melissa Davis, *WellCare, Tenet Have More Than Probes in Common*, THESTREET (Nov. 19, 2007), http://www.thestreet.com/story/10390693/1/wellcare-tenet-have-more-than-probes-in-common.html.

127. Davis, *supra* note 126.

128. Ethisphere & Corpedia, *supra* note 126, at 5.

of interest, and 3) leads to an excessive and/or improper application of attorney-client privilege. Each disadvantage is discussed at length in the following sections.

A. Inadequate Supervision of Compliance Efforts

As the most senior legal officer in the company, a CLO serves as an advisor, strategist, and business partner, among other quasi-legal roles that have been assumed over the years. Theoretical debates about the dual role have focused on the question of whether a CLO has the work capacity to effectively perform CCO duties.[129] Because of the time, effort, and commitment demanded of the functions, opponents argue that even the most equipped CLO will not be able to properly supervise both compliance and legal efforts.[130] Another issue may arise when urgent matters distract the CLO from long-term initiatives.

Effective delegation can remediate these issues. Organizations should hire a competent deputy, solely dedicated to the compliance function. Direct access to the dual-hatted CLO is essential to obtain advice when there are questions or concerns and to provide high-level updates. This solution solves the danger of distraction. While the deputy focuses on long-term compliance goals, the CCO-CLO can attend to problems that require immediate attention. By delegating tasks to subordinates and thus, improving work capacity, it is more likely that an individual can successfully perform the responsibilities of a dual role.

Still, there is a caveat to the possible solution. If a CCO-CLO were to delegate a range of responsibilities, the individual runs the risk of diluting his or her effectiveness in one or more areas.[131] It follows that adequate supervision of legal and compliance efforts may be best achieved by separating the two functions, rather than implementing a dual role. Though there is merit to the claim of possible delegation risks, it is not unique to the dual role. For instance, the CEO of a company cannot be personally involved in every decision. Certain CEO responsibilities are delegated to other officers. This exercise of delegation does not render the CEO less effective. It is quite the contrary. Delegating tasks not only provides a CEO with the opportunity to develop other officers, but allows for more pressing, pertinent matters to be attended to.

129. Bird & Park, *supra* note 46, at 210.

130. *Id.*

131. *Id.*

B. *Conflicts of Interest*

The second risk to a dual role model relates to the distinct fiduciary duties of CCOs and CLOs. Attorneys have a duty of zealous representation, while CCOs have a duty to investigate. Herein lies the tension in one individual acting as both an advocate and a watchdog. This potential conflict of interest leads some to believe that corporations should preclude the use of a dual role because the clashing duties hinder effective performance of either function and may result in disclosure concerns.

These potential conflicts are undoubtedly valid, with respect to the possibility of having to break attorney-client privilege in order to comply with CCO duties, but the question remains as to whether CLOs are able to prevent such risks from transpiring. However, CLOs can and do prevent these risks because they are "accustomed to managing conflicts of interest between their role as an advocate and their role as a keeper of the public trust."[132]

A conflict of interest may also manifest when a material violation is discovered by an attorney and reported to the CCO-CLO. The SEC often attributes inadequate compliance programs to the dual role model.[133] Internal and outside attorneys representing SEC registered companies, like public corporations, have an affirmative duty to escalate material violations.[134] When an attorney becomes aware of "evidence of a material violation" by any officer, director, employee, or agent of the company, SEC Rule 205.3(b) triggers reporting obligations.[135] The attorney is required to report the evidence of a material violation to the CLO or the CLO and CEO.[136] If a violation does exist, the CLO must either ensure the company adopts an appropriate response or in the alternative, refer to a compliance committee.[137]

Under the dual role model, if the attorney who discovered the violation is also the CLO, technically the inquiry can stop here if the CLO determines that no material violation occurred. There is a risk that the CCO-CLO may not respond appropriately. Specifically, the dual-hatted individual may conclude there is no violation or deliberately withhold the violation because it adversely affects and/or implicates him or her. This contention is not entirely valid. If the CLO does not respond

132. DeStefano, *supra* note 12, at 79.

133. *See, e.g.*, Luis A. Aguilar, *The Role of Chief Compliance Officers Must be Supported*, (June 29, 2015) https://www.sec.gov/news/statement/supporting-role-of-chief-compliance-officers.html#_edn5 (Commissioner explains that the vast majority of SEC enforcement actions involved "CCOs who 'wore more than one hat'").

134. 17 C.F.R. § 205.3(b) (2015). SEC rule 205 was issued pursuant to section 307 of SOX (codified as 15 U.S.C. § 7245 (2012)).

135. 17 C.F.R. § 205.3(b).

136. *Id.*

137. *Id.* at § 205.3(b)(2).

appropriately, the violation must be reported to the CEO.[138] The SEC goes further in stating that when both the CLO and CEO do not take appropriate action, the attorney reporting the violation must report "up the ladder" to an audit committee, a committee of independent directors, or the Board.[139]

It is also worth noting that CLOs housed in entities that are not public corporations are still subject to reporting duties under Model Rule 1.13(b).[140] Unlike the Part 205 rules, which only apply to SEC-registered companies, the obligations of 1.13 pertain to attorneys employed by any corporate entity. Rule 1.13 imposes a duty on in-house attorneys to report material violations to a higher authority within the organization.[141] However, this does not remediate all risks in connection with a conflict of interest because there is no duty to report a material violation outside the organization. Rather, the decision to report is discretionary.

C. Application of Attorney-Client Privilege

There is a risk that accompanies dual-hatted CLOs when invoking attorney-client privilege. When a CLO wears more than one hat and performs tasks that are outside the traditional scope of an attorney,[142] it may be unclear as to which "hat" the CLO wore at the time communication was made. If a CLO provides purely compliance advice, it is not protected just because the advice was given by an attorney. Hence, it is crucial to distinguish when CLOs are providing privileged legal advice and when they are acting in the compliance role. Failure to designate a communication as legal advice, as opposed to non-legal advice, may render it unprotected or dilute the claim of privilege for other related communications within the matter. "Blanketing every communication as privileged runs the risk that such determination will be challenged by, for instance, examiners in an SEC regulatory exam."[143]

It is even more difficult to discern where legal ends and compliance begins when a dual-hatted CLO provides advice via e-mail. The general rule is that attorney-client privilege covers "dual-purpose" e-mails so long as they are sufficiently legal-based.[144] There are two standards

138. *See id.* § 205.3(b).

139. *Id.*

140. MODEL RULES OF PROF'L CONDUCT r. 1.13(b) (AM. BAR ASS'N 2016).

141. *Id.*

142. *See* Upjohn Co. v. United States, 449 U.S. 383, 392 (1981) (expanding the scope of the work-product doctrine in holding that companies can invoke attorney-client privilege for communications between company lawyers and non-management employees).

143. Dartley, *supra* note 89, at 27.

144. Todd Presnell, *The In-House Attorney-Client Privilege,* IN-HOUSE DEFENSE Q., Winter 2014, at 10, https://presnellonprivileges.com/wp-content/uploads/2012/09/faqs-about-the-in-house-privilege.pdf.

that are used to determine whether a dual-purpose e-mail receives legal protection: the "primary purpose" standard and the "predominant purpose" standard. Under the former standard, in-house communications are protected if the "primary purpose of the communication is to obtain or give legal advice."[145] However, the court in *In re Kellogg* emphasized that it is impractical to discern "one primary purpose in cases where a given communication plainly has multiple purposes."[146] In rejecting the traditional primary purpose test, the D.C. Circuit formulated a refined standard known as the "predominant purpose" standard.[147] The standard asks whether "obtaining or providing legal advice was one of the significant purposes of the attorney-client communication."[148] Opponents of the dual role may argue that the risks associated with a CLO providing both legal and compliance advice outweighs the possible benefits.[149]

The risk of mislabeling non-legal advice as privileged communications and the possibility of weakening the overall claim of privilege exists whether or not it is done by a CCO-CLO. For example, CLOs typically provide business advice as the company's trusted advisor. CLOs are vulnerable to improper application of attorney-client privilege when giving purely business advice, just like a dual-hatted individual is vulnerable when giving purely compliance advice. Preemptively separating CCO and CLO functions because of risks associated with legal privilege will not render the company more risk averse. Absent attorney-client privilege, employees of the company may actually be reluctant to disclose pertinent information because there is virtually no guarantee that the information revealed will not be disclosed. Thus, a CCO without the privilege could impede an internal investigation, rather than facilitate it.

VI. CONCLUSION

The dual role currently sits at an evolutionary crossroads: the model can either succumb to regulatory pressure and recent trends or prove its value and effectiveness by utilizing CLO stature to develop and maintain world-class compliance programs. There is no inherently right or wrong way to staff and position the CCO role, but the decision must not be made in haste.

145. *Id.*; *see also* United States v. Chevron Corp., 1996 WL 264769, *4 (N.D. Cal. 1996) (explaining that the primary purpose of a communication must be to secure legal advice or assistance in order for it to be privileged).

146. *In re* Kellogg Brown & Root, Inc. 756 F.3d 754, 760 (D.C. Cir. 2014) (holding that the attorney-client privilege applied because one of the primary and significant purposes of the internal investigation was to obtain legal advice).

147. *Id.* at 759.

148. *Id.* at 760.

149. Dartley, *supra* note 90, at 26-27.

This Note suggests three circumstances in which consolidating the roles can have a particularly positive impact. CLOs are ideally situated to serve as leaders of corporate compliance when a company's program lacks effectiveness, when resources are limited, or when its regulatory environment is not burdensome. Still, the function must be positioned in a manner that is fit-for-purpose, in accordance with a company's industry, size, resources, and regulatory environment.

The language of the Guidelines seems to favor the dual role model and has been influential in the corporate sector. Some organizations follow industry trends, as if they were formally deemed "best practices." The most influential factor in the decision of whether to combine the CCO role with that of the CLO is the voice of the government. Lewis Morris, former Chief Counsel for the Inspector General of the HHS once said "lawyers tell you whether you can do something, and compliance tells you whether you should" when he advocated for two distinct roles.[150] In the absence of formal guidance, companies tend to overplay the preference of agencies. Companies often defer to sub-regulatory interpretations, usually in the form of guidance documents, although they lack the force of law.

The structure of compliance is an important indicator of whether a compliance program will succeed or fail. The organization will be best served when a considerable amount of time and effort is dedicated to the discussion. Executive management and the company's Board ought to assess the highlighted advantages and disadvantages of adopting the dual role, as there is "no one size fits all"[151] solution to the debate. At the very least, decision-makers of a company must keep in mind that the ideal CLO is not always the ideal CCO, and vice versa.

150. Donna Boehme, *Compliance Strategists Newsflash*, COMPLIANCE STRATEGISTS LLC (Sept. 11, 2009), http://www.compliancestrategists.org/wp-content/uploads/2012/09/September-11-2009-CS-Newsflash-PDF-Download.pdf.

151. LRN CORP., *supra* note 6, at 8.