

MANAGING COMPLIANCE FUNCTIONS: CENTRALIZE, DECENTRALIZE, OR HYBRIDIZE?

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Everyone in a business today must be committed to the compliance strategy.¹ As compliance demands on business continue to grow, the placement of compliance management functions within an organization is a major issue. The rapidly increasing complexity of compliance demands suggests centralizing, or alternatively, decentralizing the compliance management functions throughout the enterprise. This paper explores the implications of this apparent dichotomy in the context of compliance trends.

I. INTRODUCTION

Historically, regulatory compliance in the typical American business can be summed up by the phrase, “Let’s run this past legal.” Compliance concerns were, for the most part, occasional diversions for in-house or outside counsel who spent far more of their effort on matters such as contracts or taxes. As compliance mandates began growing, the initial tendency was to retain the existing system. Attorneys spent more of their time addressing compliance issues, but these activities were not dealt with as issues integrated into the overall operation of the company. This entrenched a “silo” view of compliance activities. Compliance was essentially a segregated activity. The activity occurred mostly in one place in the organization, the legal department. The people in the organization involved in regulatory compliance activities were limited, again, mostly to the legal department. Finally, the degree to which compliance concerns were integrated into overall company organization and operation was very low.

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¹ Andrew Medal, *What Leaders Need to Know About Compliance*, ENTREPRENEUR (Jan. 16, 2018), <https://www.entrepreneur.com/article/307473>.

As compliance became more complex, the silo approach began to give way to a very different view of the role of compliance within the organization. Compliance began moving out of the legal department and into various corners of the enterprise. Growing compliance demands necessitated documentation that employees were aware of the compliance issues involved in their work. This was often reflected by the need for clear training programs that spelled out what regulations were to be followed and how the organization expected the employees to conduct their work within the constraints presented by the applicable regulations.

Over time, additional compliance regulations necessitated that some person in the organization be designated as the compliance officer. As the enforcement of various regulations evolved, this compliance officer came gradually to be viewed as a central point through which all things compliance passed. Sometimes this function remained in the legal department. Other times the function existed outside the legal department and was often managed by a non-attorney employee.

II. CENTRALIZE OR DECENTRALIZE?

Because of an ever increasing list of regulations that must be addressed, business began taking different approaches. Evolving alternative approaches depended on many factors, including the regulations that most impacted the enterprise, the ways in which the regulations affected business operations, the perceived “best practices” within industry groups, the degree to which a company viewed the regulations as a serious business risk, and often, the past history of the company with regard to adhering to or violating regulations.

As these differences surfaced, the overall approach of a company tended to fall into either a continuation of a centralized, silo approach, or into a more decentralized management of regulatory compliance spread throughout the organization. This paper shall use the term “centralized” to describe a compliance management function which is tightly contained in one operational part of a business. The term “decentralized” will describe a compliance management function that is spread throughout the enterprise. Finally, the term “hybrid” will be used where the compliance management function has both highly centralized and highly decentralized components.

The following discussion examines the advantages and disadvantages of the centralized, decentralized, and hybrid approaches. Particular attention will be directed to the viability of each approach as compliance continues to rapidly evolve.

III. FACTORS INFLUENCING COMPLIANCE MANAGEMENT STRUCTURE

A. A Changing Regulatory Environment

Compliance issues of some kind have always existed in every business venture. The scope and reach of modern compliance have quickly evolved and continue growing very rapidly. This becomes increasingly important as corporate directors and officers are being held responsible for illegal behavior at their companies.²

Whatever the rationale for the compliance regime, the mere existence of enforced compliance is a business reality that cannot be ignored. In the exploding world market, there is a belief that compliance is necessary for a healthy global economy.³ Most organizations have some kind of compliance committee,⁴ or some other management function to address the compliance required of business in that location, business line, or business structure. Compliance is more than just a set of rules, and has been described as needing to be a continuous daily conversation.⁵

The range and scope of modern compliance can be expansive. In some way or another, either formally or informally, there has to be consideration given to the structure of the compliance management function itself, compliance program goals and objectives, how compliance reports to the enterprise, the extent of compliance authority, and the sources and uses of compliance resources.⁶ Additionally, it is essential to have an understanding of the role of risk management, an understanding of the role of compliance in a particular industry, and a recognition of the inherent conflicts between different compliance regimes.⁷ Finally, the compliance management function must continuously deal with an array of tactical issues like codes of conduct, communication of codes of conduct, clear policies and procedures,

² Constance E. Bagley, et al., *How Boards Can Reduce Corporate Misbehavior*, HARV. BUS. REV. 2 (Dec. 21, 2017), <https://hbr.org/2017/12/how-boards-can-reduce-corporate-misbehavior>.

³ Sue Reisinger, *DOJ Compliance Chief's Boss Lays Out the Agency's Plans*, CORP. COUNS. (Nov. 4, 2015), <http://www.corpcounsel.com/printerfriendly/id=1202741499801>.

⁴ DONNA C. BOEHME, *Structuring the Chief Ethics and Compliance Officer and Compliance Function for Success*, THE COMPLETE COMPLIANCE AND ETHICS MANUAL 2.31, 2.43 (2d ed. 2010).

⁵ BEN W. HEINEMAN JR., MEMO TO THE CEO - HIGH PERFORMANCE WITH HIGH INTEGRITY 16 (2008).

⁶ *Corporate Responsibility and Corporate Compliance: A Resource for Health Care Boards of Directors*, OFF. INSPECTOR GEN. U.S. DEP'T HEALTH & HUM. SERV., AM. HEALTH LAW. ASS'N 6-8 (Apr. 2, 2003),

oig.hhs.gov/fraud/docs/complianceguidance/040203CorpRespRsceGuide.pdf.

⁷ *Id.*

compliance interface across the organization, processes for responding to violations, handling whistleblowers, the protection of all involved parties and the reporting of violations.⁸

Additionally, while regulatory compliance attracts the most attention, the compliance function increasingly includes what have been referred to as “soft laws”⁹ which are rules not directly binding on parties, but which often have *de facto* force and may have much more effect than hard laws.¹⁰ An example would be the non-governmental ISO certification standards, such as ISO 9001, which specify that the certified party has meet all relevant regulatory requirements.¹¹ ISO 19600 has detailed specifications for compliance management certification.¹² Compliance management often goes beyond the legal regulatory concerns to address an array of these soft law topics.

B. Regulators Look for Real Compliance Results

After years of encouraging/forcing companies to consider compliance, then provide training, and then have a designated compliance officer, regulators in general now view these as mere “window dressing” compliance.¹³ Through a variety of means, but often using the threat of sentencing guidelines, the government expects boards of directors and senior managers to provide strong, explicit, visible support for compliance.¹⁴ The Federal Sentencing Guidelines seek to prevent and detect crimes, and also promote a culture encouraging both ethical conduct and a commitment to compliance with law.¹⁵ When a crime has been found, the sentencing guidelines use a culpability score to determine corporate fines.¹⁶ Fines for the company can be reduced by having an effective compliance program, although it is interesting to note that if a breach of the regulations has been

⁸ *Id.*

⁹ Peter Steele & Irina Lock, *Instrumental and/or Deliberative? A Typology of CSR Communication Tools*, 131 J. BUS. ETHICS 401, 403 (2015), <http://link.springer.com/article/10.1007/s10551-014-2282-9>.

¹⁰ PETER KURER, LEGAL AND COMPLIANCE RISK - A STRATEGIC RESPONSE TO A RISING THREAT FOR GLOBAL BUSINESS 21 (2015).

¹¹ Standard 9001, INTERNATIONAL ORGANIZATION FOR STANDARDIZATION, <https://www.iso.org/iso-9001-quantity-management.html> (last visited Nov. 10, 2018).

¹² Standard 19600, INTERNATIONAL ORGANIZATION FOR STANDARDIZATION, <https://www.iso.org/obp/ui/#iso:std:iso:19600:ed-1:v1:en> (last visited Oct. 12, 2018).

¹³ Reisinger, *supra* note 3.

¹⁴ *Id.* at 2.

¹⁵ *What the DOJ Expects of “Effective” Compliance Programs*, NAT’L L. REV. (Aug. 12, 2015), <http://www.natlawreview.com/article/what-doj-expects-effective-compliance-programs>.

¹⁶ *Id.*

found, then the company's compliance has clearly not been effective as to that breach.¹⁷

Many regulatory schemes mandate or nearly mandate the existence of a designated Chief Compliance Officer (hereafter CCO).¹⁸ The position can also be referred to as Chief Ethics and Compliance Officer (hereafter CEO)¹⁹ acknowledging the close relationship between corporate ethics and corporate compliance. The CCO sets the standard for effective compliance in all risk areas, even if programs themselves are developed and implemented within another company function.²⁰ It is important that the CCO function fits into the organization's structure by aligning with company size, scope, risk profile, structure and culture.²¹ As a result, it is not surprising that compliance positions have increased dramatically in recent years.²²

C. Relationship of Compliance Function and General Counsel Function

How well the CCO is positioned is the single most important indicator of whether the program will succeed or fail.²³ A generally accepted measure for CCO effectiveness is represented by five criteria that can be used for any CCO in any company, and they include empowerment, independence, seat-at-the-table, line of sight, and adequate resources.²⁴ Line of sight is the only term without an obvious meaning in this context, and it means that the CCO has ready access to everything needed to fulfill the CCO duties, including good access to all information and documents at every level and in corner of the organization.²⁵ The implication is that even if one compliance matter is effectively owned by another department, division, or subsidiary, it still needs to be inside the CCO line of sight.²⁶

Clearly, many of these functions, duties, and powers sound very much like the function of the company's General Counsel and legal department. In earlier days, the General Counsel often, either formally or informally, doubled as the CCO. Much of the shift from having the General Counsel also

¹⁷ *Id.*

¹⁸ Geoffrey P. Miller, *An Economic Analysis of Effective Compliance Programs*, N.Y.U. SCH. L., Paper No. 396, 1, 5 (Dec. 2014), lsr.nellco.org/cgi/viewcontent.cgi?article=1400&context=nyu_lewp.

¹⁹ BOEHME, *supra* note 4, at 2.31.

²⁰ *Id.* at 2.39.

²¹ *Id.* at 2.31.

²² *Id.*

²³ *Id.* at 2.32.

²⁴ *Id.* at 2.31.

²⁵ *Id.* at 2.35.

²⁶ *Id.* at 2.39.

serve as the CCO can be attributable to the fact that business legal departments can function in a wide range of modes, some of which might be consistent with the compliance management functions, but some which are not at all consistent with compliance program needs. Additionally, there is a growing consensus that forcing the compliance function into the legal function may limit the ability of compliance to positively influence employee behavior.²⁷

One such discussion depicts five possible legal department strategies.²⁸ Strategy one equates with avoidance and is characterized by a willful blindness to issues, a generally defensive stance, and little input into the business.²⁹ Strategy two equates compliance with a necessary cost of doing business and a watchdog role regarding business conduct.³⁰ Strategy three equates the legal function with prevention and is proactive, interactive with managers, and participates in ongoing risk management.³¹ Strategy four equates the legal function with value which is used to create new business value because managers understand law as a stakeholder and the legal function is a frequent partner involved in business strategy.³² Strategy five equates the legal function with transformation where the corporate legal strategy is incorporated into the overall business model so that legal strategy moves into chain of value activities with lawyers who are entrepreneurial strategy partners at the highest level.³³

Given these options, the trend is away from the General Counsel being in the compliance line of authority.³⁴ The CCO needs to have unfiltered board access. The growing solution is to make compliance more independent of the General Counsel. The days of compliance commonly dealt with as a captive, controlled arm of in-house legal are gone, with the result that structuring compliance as a mere subset of the legal function in a business is rapidly shrinking.³⁵ That is not to say that this has occurred without concern and objections, as one of the clear results of legal owning all things compliance is that legal wields more influence in the company.³⁶

²⁷ Hui Chen & Eugene Soltes, *Why Compliance Programs Fail – and How to Fix Them*, HARV. BUS. REV. 123, (Mar.-Apr. 2018), <https://hbr.org/2018/03/why-compliance-programs-fail>.

²⁸ Marcos Antonio Mendoza, *Finding the Right Legal Strategy to Compete*, CORP. COUNS. (Dec. 14, 2015), <http://www.corpcounsel.com/printerfriendly/id=1202744783412#>.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ BOEHME, *supra* note 4, at 2.36.

³⁵ Donna Boehme, *On Compliance, Read This, Not the Bloviators*, CORP. COUNS. (July 29, 2015), <http://www.corpcounsel.com/printerfriendly/id=1202733313175>.

³⁶ Mendoza, *supra* note 28.

Part of the impetus driving the move away from the General Counsel driven compliance program is that many prosecutors, monitors, and other outside parties impacting compliance agree that having compliance answer to the General Counsel is not a high enough level of independence.³⁷ Recent Department of Justice communications about the Foreign Corrupt Practices Act stress that a business ensure “that experienced compliance personnel have appropriate access to management and to the board.”³⁸ Consequently, many contend that the CCO should not be subordinated to the General Counsel or the Chief Financial Officer.³⁹ When there is disagreement, the board should have the separate opinion of both the General Counsel and CCO.⁴⁰ Others go further, arguing that the failure to have clear lines separating the General Counsel and the CCO can create waste, confusion, tension, jeopardize the protection of privilege, and draw false distinctions between organizational and legal risk.⁴¹ In Germany, less than ten percent of compliance officers say they report to the chief of the legal department.⁴² In some U.S. compliance settlements, the regulators insist that CCO be separated from the legal function.⁴³

D. Compliance Management Function in Relation to the Board of Directors

Today, compliance needs to reach into the boardroom. Generally, the board needs to have a compliance committee.⁴⁴ The CCO needs to meet directly with at least the compliance committee on a regular basis because if the CCO does not attend top meetings, then there is not enough “at the table” to show that compliance is highly supported in the boardroom.⁴⁵

³⁷ BOEHME, *supra* note 4, at 2.37.

³⁸ Rod J. Rosenstein, Deputy Att’y Gen., Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017), <https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign>.

³⁹ Boehme, *supra* note 4, at 2.35.

⁴⁰ *Id.* at 2.46.

⁴¹ Michael W. Peregrine, *New DOJ Actions Impact GC and Compliance Officer Roles – What Should the Board Do?*, CORP. COUNS. 2 (Oct. 20, 2015), <http://corpcounsel.com/printerfriendly/id=1202740253741>.

⁴² Lars Rademacher & Andreas Kohler, *More than a Legal Issue? Compliance Communication as a Tool for Reputation Management*, SINERGIE ITALIAN J. MGMT. 35, 47, <http://dx.doi.org/10.7433/S88.2012.04> (last visited Mar. 27, 2016).

⁴³ BOEHME, *supra* note 4, at 2.35.

⁴⁴ Michael Volkov, *The Importance of a Board Compliance Committee*, THE VOLKOV L. GRP. LLC BLOG (Apr. 15, 2013), <http://blog/volkovlaw.com/2013/04/the-importance-of-a-board-compliance-committee>.

⁴⁵ BOEHME, *supra* note 4, at 2.38.

Most current thinking is that the CCO reports to CEO, but has a dotted line to the board.⁴⁶ In part this is because there is a delicate balance where a CCO who administratively reports to the board for everything then is viewed organizationally as nothing but a cop for the board who actually ends up with less access to the organization at large.⁴⁷ There is a difference between having access to the board and being required to report to the board, and there is a clear need for the CCO to have a specific duty to report directly to board.⁴⁸ Some argue that rather than a job description, the CCO should operate under a board resolution.⁴⁹ Simply allowing the CCO to communicate directly with the board seems the weakest position because mandatory escalation of specified issues to the board is a much stronger compliance format.⁵⁰

The relationship between the CCO, the management generally, the CEO, the General Counsel, and the board of directors has changed greatly over time, mostly in the direction of greater access to the board, distance from General Counsel, and wider access across all business units. Internationally, the Organization for Cooperation and Economic Development (OECD hereafter) standards include mandating an adequate level of autonomy from management.⁵¹ The OECD standards also include a requirement of “a solid understanding of what is taking place within the business.”⁵² Other places, like the country of Chile, call for the compliance function to have full autonomy and independence within the company, providing for reporting directly to the board, and providing that removal of the CCO can occur only for specified conditions.⁵³

In the U.S., the recent hiring by the Department of Justice of a highly qualified “compliance expert” has been interpreted by some to mean that after a relatively stable period of predictability, the government plans to look even more closely at how the compliance management function is handled within a regulated company, or a company facing sentencing penalties or agreements in lieu of sentencing.⁵⁴

⁴⁶ *Id.* at 2.48.

⁴⁷ *Id.* at 2.47.

⁴⁸ Volkov, *supra* note 44.

⁴⁹ BOEHME, *supra* note 4, at 2.37.

⁵⁰ *Id.* at 2.44.

⁵¹ *Id.* at 2.33

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Ryan McConnell, *Do DOJ Fraud Section Prosecutors Need Compliance Help?*, CORP. COUNS. 1 (Aug. 12, 2015), <http://www.corpcounsel.com/printerfriendly/id=1202734460576>.

E. Implications of the Search for Transparency

Transparency has become synonymous with good governance.⁵⁵ We continue moving forward in an era of growing transparency.⁵⁶ Transparency is becoming a social value that goes beyond other boundaries.⁵⁷ Transparency and accountability tend to be viewed as closely related.⁵⁸ Transparency is believed to be closely tied to being able to make informed decisions,⁵⁹ and as communicating the perception of trustworthiness to stakeholders.⁶⁰ Never just neutral, transparency dramatically influences social behavior with both positive and negative effects, impacting manipulation, control, and perception.⁶¹

While transparency has grown to be an extremely positive factor generally, within an organizational structure, the role and handling of transparency can be less than attractive. Transparency communications tend toward a classic, linear communication process.⁶² Transparency forces can result in the pursuit of uniformity in every communication and action.⁶³ Transparency tends toward the simplistic as real details tend to confuse and frustrate.⁶⁴ The stress on transparency can unintentionally produce a simplistic communication model overlay across the entire enterprise.⁶⁵ The current view of transparency is to make all legally releasable information available.⁶⁶

The system of compliance within an organization must be viewed as a tool.⁶⁷ To achieve this, compliance efforts need to be more visible to the entire operation.⁶⁸ The compliance function must be empowered to be a more integral part of operations at every level.⁶⁹ This includes being part of the forward-looking aspects of the business to identify problems before they

⁵⁵ Lars Thøger Christensen & George Cheney, *Peering into Transparency: Challenging Ideals, Proxies, and Organizational Practices*, COMM. THEORY 70, 70 (2015), onlinelibrary.wiley.com/doi/10.1111/comt.12052/epdf.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 71.

⁵⁹ *Id.*

⁶⁰ *Id.* at 74.

⁶¹ *Id.* at 85.

⁶² *Id.* at 74.

⁶³ *Id.* at 81.

⁶⁴ *Id.* at 74.

⁶⁵ *Id.* at 73.

⁶⁶ *Id.*

⁶⁷ Maurizio Rija & Franco Ernesto Rubino, *The Internal Control Systems Integrated into the Various Profiles of Governance, Audit, Risk and Compliance*, 13 INT'L J. BUS. & MGMT. 21, 27 (Mar. 30, 2018), www.ccsenet.org/journal/index.php/ijbm/article/view/73039.

⁶⁸ Medal, *supra* note 1.

⁶⁹ *Id.*

actually happen.⁷⁰ Forecasting is an underused compliance tool that needs to become a key part of the compliance function and which requires careful consideration as the organizational structure of compliance is considered.⁷¹

Certainly, the factors that go into establishing the level of centralization or decentralization for the compliance management function are broad and vary with each organization. The following discussion examines specific attributes of the centralized, decentralized, and hybrid approaches to handling these compliance management functions.

IV. CENTRALIZED COMPLIANCE MANAGEMENT FUNCTIONS

There are certainly ways in which integrated compliance operations can be valuable in dealing with risks, issues, and sensitivity to variations across locations and activities.⁷² A key responsibility of the compliance function is the development of a compliance management strategy.⁷³ There is no one-size-fits-all regarding centralized compliance.⁷⁴ Facilitation of internal information sharing about compliance risk is one of the functions of a centralized compliance function.⁷⁵ In trying to strengthen the role of compliance into the overall business strategy, some organizations have explored the idea of a chief legal strategist who can communicate legal into overall strategy.⁷⁶ However, at present, the days of completely “siloe” compliance departments appear to be numbered.⁷⁷

As regulatory approaches have evolved, problems can arise in a number of specific topic areas where the concentration of compliance and legal issues can generate problems. A good example of this type of conflict is the matter of attorney-client privilege. An in-house attorney has a privilege problem with the question of where the legal advice ends and the business advice begins.⁷⁸ At the same time, internal investigations can result in overlaps

⁷⁰ *Id.*

⁷¹ Tom Fox, *An Underutilized Tool in Compliance – Forecasting*, SOC’Y CORP. COUNS. ETHICS (Feb. 9, 2017), complianceandethics.org/?s=an+underutilized+tool+in+compliance++forecasting.

⁷² Lanny Breuer & Peter Lichtenbaum, *Your International Compliance Playbook*, CORP. COUNS. 34-35 (Jan. 2015).

⁷³ R.M. Foorthuis, *Tactics for Internal Compliance: A Literature Review*, UTRECHT U. 153, 187 (2012).

⁷⁴ Breuer, *supra* note 72.

⁷⁵ *Id.* at 35.

⁷⁶ Mendoza, *supra* note 28, at 4.

⁷⁷ Medal, *supra* note 1.

⁷⁸ Randy C. Gepp, *Executive Investigations: Best Practices for Mitigating Risk and Liability*, CORP. COUNS. 2 (Sept. 4, 2015), <http://www.corpcounsel.com/printerfriendly/id=1202736482676>).

between the General Counsel and the CCO.⁷⁹ In some cases, if you wish to protect attorney-client privilege, you may have more success with an outside attorney.⁸⁰

V. DECENTRALIZED COMPLIANCE MANAGEMENT FUNCTIONS

A control based approach to compliance is giving way to a trust based system because the control approach has not worked well.⁸¹ There is a need to separate duties to guarantee independent and objective assessments.⁸² Some companies have been developing compliance leaders in various functions throughout the company who act as the interface with the CCO for compliance issues, and this is becoming a best practice.⁸³

The decentralized structure can provide advantageous options. One example is the case of internal investigations. Attorney-client privilege can be threatened depending on the organizational role of the person running the investigation.⁸⁴ An inside investigator might understand corporate culture,⁸⁵ while an outside investigator could be more impartial and an expert in the field.⁸⁶ In each case, there will need to be an early decision about the need for privilege or work product protection.⁸⁷ Current thinking on the party that should run investigations leans toward the General Counsel, or outside counsel, rather than the CCO.⁸⁸ This is especially true since preserving evidence in an investigation is critical.⁸⁹ One alternative occasionally considered is a parallel set of investigations to get around these issues.⁹⁰

The large concern with extensive decentralization is that delegation and stretched responsibility can lead to organized irresponsibility.⁹¹ In many smaller companies, compliance is only talked about when necessary.⁹² In the smaller company, the compliance office is often seen as a disruptive force.⁹³

⁷⁹ Peregrine, *supra* note 41, at 1.

⁸⁰ Gepp, *supra* note 78, at 1.

⁸¹ Rademacher, *supra* note 42, at 49.

⁸² Foorthuis, *supra* note 73, at 186.

⁸³ BOEHME, *supra* note 4, at 2.40.

⁸⁴ Peregrine, *supra* note 41, at 2.

⁸⁵ Gepp, *supra* note 78, at 1.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Peregrine, *supra* note 41, at 2.

⁸⁹ Gepp, *supra* note 78, at 2.

⁹⁰ *Id.*

⁹¹ Rademacher, *supra* note 42, at 39.

⁹² *Id.* at 50.

⁹³ *Id.*

At the same time, it has become more difficult to prevent the blurring of the roles of the General Counsel and the CCO.⁹⁴

VI. HYBRID APPROACH TO COMPLIANCE MANAGEMENT FUNCTIONS

Some contend that compliance is becoming concurrently more centralized and more decentralized.⁹⁵ Most German companies use centralized management of compliance, but localized implementation.⁹⁶ In such a setting, there is often both subject matter compliance and location based compliance.⁹⁷ From the mid-1990s to 2007 more or less, compliance centralized, but the financial crisis led to a rethinking with the result that some decentralizing occurred, and the outcome is a balanced integration of the decentralization resulting in something hybrid between centralized and decentralized.⁹⁸

Much of the hybrid approach has resulted from the demands of so many regulations in so many places. There is a growing consensus that four factors influence an individual's non-compliance: (1) clear expectations, (2) credible expectations, (3) positive consequences for compliance, and (4) negative consequences for non-compliance.⁹⁹ This very broad mandate has enhanced a multi-pronged compliance management response. To deal with this necessity for complex, somewhat contradictory management, the modern compliance team is made up of a diverse collection of professionals.¹⁰⁰ For example, as a result of a significant push to reorganize the Walmart compliance management function, a far reaching set of changes has been announced.¹⁰¹ The new compliance structure has characteristics which could be considered hybrid in the sense used here.¹⁰² Interestingly, Walmart's compliance management changes include changes to their compensation system which provide compensation for meeting compliance objectives.¹⁰³

⁹⁴ Peregrine, *supra* note 44, at 2.

⁹⁵ Ryan McConnell, *On Compliance: A Chat With ADM's Ben Bard*, CORP. COUNS. 1 (Aug. 27, 2015), <http://www.corpcounsel.com/printerfriendly/id=1202735827259>.

⁹⁶ Rademacher, *supra* note 42, at 42.

⁹⁷ McConnell, *supra* note 95.

⁹⁸ CHARTIS RESEARCH LTD., ENTERPRISE GRC SOLUTIONS 2014: TIME FOR GFRC?, 5, 7 (2014).

⁹⁹ Mike Barry & Jeff Grimshaw, *Communicating Legal Compliance Effectively*, STRATEGIC COMM. MGMT. (2006), 10, 30, accessed in ABI/INFORM Complete.

¹⁰⁰ McConnell, *supra* note 95, at 2.

¹⁰¹ *Building a World-Class Compliance Program*, WALMART GLOBAL COMPLIANCE PROGRAM REP. ON FISCAL YEAR 2014, <http://corporate.walmart.com/global-responsibility/global-compliance-program-report-on-fiscal-year-2014> (last visited Oct. 11, 2018) [hereinafter *Building*].

¹⁰² *Id.*

¹⁰³ *Id.*

VII. COMPLIANCE MANAGEMENT FUNCTIONS STRUCTURE AND THE FUTURE

As the future unfolds, even modest regulatory changes can have unanticipated results. Speculating on compliance management functions in the future is difficult as each organization will face a unique context. Any discussion about the future inherently simplifies that which is a complex set of interactions having different implications in different organizations.

One example is that of the recent expansion of significant enticements to whistleblowers. The issues there are significant enough, but now, within the context of whistleblowing, we have intervening side issues such as how privilege could get “tricky” as lawyers become whistleblowers,¹⁰⁴ or the looming issue of CCO whistleblowers. One CCO recently received more than \$1 million for informing on his own company,¹⁰⁵ and a General Counsel received \$14.5 million,¹⁰⁶ both a result of whistleblowing.

The future of the centralized, decentralized, hybrid compliance management discussion becomes blurred in the context of the Yates Memo announcing the major thrust to go after individuals, and the expectation that the organization will provide the government with factual information about individual wrongdoers.¹⁰⁷ One writer suggests that the General Counsel will necessarily be back in the lead as to turning over individual wrongdoers, but that the General Counsel will work together with the CCO as a “valued organizational partner.”¹⁰⁸ It is hard to believe that all of the issues discussed here will not be revisited many times as this initiative moves forward. It could be in the near future that everyone will have two bosses, one a line boss and the other the compliance boss.

An even more ominous set of issues on the horizon concerns the topic of certifications. A proposal in February, 2016 called for the General Counsel or another high ranking executive to certify all information about an individual’s wrongdoings.¹⁰⁹ This already occurs in some form in New York where in certain situations, the CCO certifies to the quality of compliance

¹⁰⁴ Sue Reisinger, *Bio-Rad Fired GC Case a Perfect Storm of Whistleblowing, Eroding Privilege*, CORP. COUNS. 1 (Nov. 2, 2015), <http://corpcounsel.com/printerfriendly/id=1202741400191>.

¹⁰⁵ U.S. Sec. and Exchange Commission, *SEC Announces Million-Dollar Whistleblower Award to Compliance Officer*, News Release 2015-73, Apr. 22, 2015, <https://www.sec.gov/news/pressrelease/2015-73.html>.

¹⁰⁶ Sue Reisinger, *Ride the Whistleblower Wave*, CORP. COUNS. 55 (Aug. 2017), <https://www.law.com/sites/almstaff/2017/08/07/ride-the-whistleblower-wave/>.

¹⁰⁷ Peregrine, *supra* note 41, at 2.

¹⁰⁸ *Id.*

¹⁰⁹ Sue Reisinger, *With DOJ Changing Its Policies, It’s Time to Rethink Investigations*, CORP. COUNS.,1 (Feb. 10, 2016), <http://www.corpcounsel.com/printerfriendly/id=1202749436434>.

and veracity of certifications regarding wrongdoing.¹¹⁰ Interestingly, New York creates the possibility of criminal liability on CCOs.¹¹¹ They will have to certify a compliance capability to interdict wrongdoing, rather than simply using formula risk based approaches.¹¹²

At the federal level, some Corporate Integrity Agreements, in health care for example, require senior managers to certify that all rules are being followed, and in one hospital, this required twenty-five signers, including the CEO, the General Counsel, the Chief Medical Officer, and so on.¹¹³ The certificate that they all signed reads much like the one that follows:

I have been trained on and understand the compliance requirements and responsibilities as they relate to [insert name of department], an area under my supervision. My job responsibilities include ensuring compliance with regard to the [insert name of department] with all applicable Federal health care program requirements, obligations of the Corporate Responsibility Agreement, and [organization] policies, and I have taken steps to promote such compliance. To the best of my knowledge, except as otherwise described herein, the [inset name of department] of [organization] is in compliance with all applicable Federal health care program requirements and the obligations of the Corporate Integrity Agreement. I understand that this certification is being provided to and relied upon by the United States.¹¹⁴

As one source concluded, a business needs to structure the CCO function for success before it is restructured for the business by someone else, like a prosecutor, judge, or an installed monitor.¹¹⁵ As the regulated and the regulators continue to act and react to each other's strategies, one thing is certain: the compliance management function will continue to evolve.

¹¹⁰ Laura Martino, *AML Alert: New York Rule Would Require Certification by Compliance Chiefs, Impose Criminal Liability*, FCPA BLOG (Mar. 23, 2016, 9:28AM), <http://www.fcablog.com/2016/3/23/aml-alert-new-york-rule-would-require-certification-by-compl.html>.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Meghana Joshi, *DOJ and OIG Increasing Focus on Personal Executive and Board Accountability*, J. HEALTH CARE COMPLIANCE 23-24 (Jan.-Feb. 2016).

¹¹⁴ *Id.*

¹¹⁵ BOEHME, *supra* note 4, at 2.31.