

IN-HOUSE LEGAL BEST PRACTICES

An abstract geometric artwork featuring a central red square frame. The background is composed of various colored triangles and polygons in shades of orange, purple, green, and brown. The red frame contains a dark, textured area with some faint lines.

THE COMMAND POST

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The position of in-house counsel is universally recognized as a pivotal ‘gatekeeper’ role, offering advice to the corporation while minimizing risk. But recently, there has been a blurring of the line between the functions of in-house counsel and that of the Chief Compliance Officer. As regulatory complexities render greater exposure to risk, the CCO and in-house counsel need to team up to protect against such vulnerabilities. Add into the mix the increasing problem of data protection against cyber-attacks—and even accidental data leaks—and you have a clearer picture as to why risk knows no title-specific nor functional boundaries.

CCO and General Counsel

The CCO and General Counsel are generally regarded as two separate advisory positions within an organization, with the CCO being responsible for ensuring compliance with laws and regulations and the General Counsel being charged with offering legal advice across a wide variety of transactions. But there is no question that in the current risk and compliance environment, there is substantial overlap between the two positions, despite the organizational mandate in most companies that the two roles remain separate.

So, once we have established where the two roles converge, we need to also understand where they diverge.

Disparate Areas of Expertise

The CCO and the General Counsel focus on different areas of expertise: The CCO generally looks to prevent noncompliance by maintaining a close watch over the rapidly changing regulatory landscape and crafting policies and procedures to avoid or at least minimize exposure to compliance risk, while the General Counsel deals more with the day-to-day transactional issues, contract management, dispute resolution and participation in litigation, IP monitoring and protection, and other matters where legal and operations intersect.

In terms of reporting, the CCO most often reports directly to the Board of Directors, and the General Counsel serves in a senior management position and is accountable to the CEO. Oversight as to compliance and legal affairs is therefore apportioned throughout corporate governance authority.

Combining the Roles—Pros and Cons

CCO regulatory monitoring might, in some cases, lead the CCO to advocate for operational and/or managerial changes that he or she sees as serving the best interests of the organization, against which the General Counsel might argue just as strongly that such changes could adversely impact marketplace standing or share value. Thus, a conflict of interest can arise between the two positions being advocated. An illustration of this conflict can be seen in the situation whereby the CCO might uncover certain unethical behavior implicating senior management, and there may consequently be pressure not to pursue enforcement action because of the likelihood of reputational or even financial loss. Or, if a senior executive seeks advice from the General Counsel regarding how to resolve a compliance issue without causing an adverse regulatory action, the two advisers may very well be at odds as to upholding the law versus unwanted consequences.

“THE FIRST THING TO BEAR IN MIND IS THAT EXECUTIVE TEAMS AND BOARDS NEED THEIR LEGAL TEAMS TO UNDERSTAND THE BROADER ORGANIZATIONAL RISKS AND TO ENSURE THEIR ADVICE REFLECTS THESE. RISK AND COMPLIANCE MANAGEMENT ISN’T JUST SOMETHING THAT ANOTHER TEAM DOES AND THE LEGAL TEAM DOESN’T NEED TO KNOW ABOUT.”

—Louise Unger, Head of Compliance for Lawyers on Demand (LOD) New Zealand

Tailoring the Structure to the Organization

Some experts view the inherent tension between the two roles as fundamentally healthy because of the checks-and-balances safeguards inherent in such tension. However, another point of view argues that it is specifically because of the internal conflicts of interest that the roles should be combined so that the organization can benefit from hearing one unified voice on difficult issues. Advocates for combining the roles note the element of improved organizational efficiency, a more coordinated flow of information to the stakeholders, and, last but not least, the lowering of costs should the positions be merged.

Despite arguments on both sides, the decision as to whether to merge the roles or not will often come down to a case-by-case analysis depending upon the nature of the organization and which legal/compliance structure best fits their needs. The size of the organization, its risk level under industry-specific regulatory regimes, as well as its exposure in dealing with IP infringement threats, ascending competition, and other factors all tend to dictate whether separation or merger between CCO and General Counsel is advisable.

Compliance, Risk, and Data

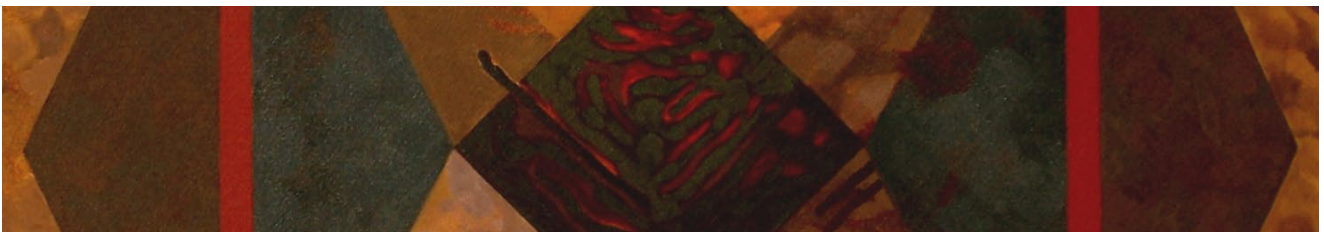
Perhaps one of the most hazardous areas of noncompliance and risk lies in the field of data security. In the U.S., data breaches that expose a patient's private health information in violation of HIPAA can result in criminal prosecution and penalties that include imprisonment. In Europe, the EU General Data Protection Regulation (GDPR) is viewed as one of the world's toughest data protection laws, which provides authority for imposing fines up to the equivalent of more than \$20 million or a whopping 4% of worldwide turnover for the preceding financial year – whichever is higher. Since the GDPR went into effect in 2018, over 900 fines have been issued, including an \$877 million fine against Amazon, \$275 million imposed on Facebook, \$255 million against WhatsApp, and several multi-million dollar fines against various Google entities.

But it is not just the high-tech sector that has run afoul of the GDPR, but also such clothing giants as H & M (\$41 million fine) and Italian communications company TIM, which was fined \$31.45 million for bombarding millions of potential customers with sales calls and other unsolicited communications, despite many of the individuals being listed on no-contact lists.

Could the GDPR Fines Have Been Prevented?

Many observers point to a lack of rather basic adherence to data security and privacy laws as the reason so many companies got caught up in GDPR noncompliance. The failures entailed everything from a lack of obtaining cookie consent or a compliant refusal mechanism to a lack of transparency as to how personal data would be processed and collecting data for use in making employment decisions. However, the common denominator underlying the huge fines was a misfeasance as to the gatekeeper function by those responsible for protecting the companies against such exposure.

Regardless of whether these failures occurred due to internal conflicts within the organizations, the placing of market competition concerns over compliance, or otherwise, the organizations overall failed to maintain a company-wide holistic approach towards risk and compliance that might have prevented these fiascos.



Not Just a Consumer Issue

Although many professionals tend to emphasize the impact of regulatory compliance—or noncompliance—on the consumer, an organization's risk and compliance professionals must also be mindful of their responsibilities toward their employees. A 2021 Forbes investigation discovered that employee lawsuits over data privacy breaches were on the rise, with companies falling out of compliance with such data privacy statutes as Illinois' Biometric Information Privacy Act (BIPA). The article underscored the willingness of courts to punish employers who fail to protect employees' personal information.

The compliance, risk, and data pressures on organizations are enormous and require full-time professionals to maintain compliance and reduce or eliminate exposure to risk. The only question is: is the solution best addressed by two legal heads—CCO and General Counsel—or one? And that can only be answered on a company-by-company basis.

Executive Summary

1. The Issue

What are the challenges facing companies as they grapple with compliance and risk issues?

2. The Gravamen

CCOs and General Counsels fulfill different roles, yet their individual areas of expertise tend to converge when it comes to compliance and risk.

3. The Path Forward

Which are the best compliance and risk practices for your company depends on many factors, including size, type of industry, and in which regulatory environment your organization is operating.



Action Items:

1 3 Rs: Regulatory Risk Review:

Do a comprehensive review of what regulatory risks expose your company to potential liability.

2 Internal Analysis:

The next step is to determine whether or not your current legal structure is the proper one for addressing the compliance risks facing your organization.

3 Not Just Financial Loss:

In evaluating exposure to risk, consider reputational harm as well as what noncompliance might mean for your company's bottom line.

4 A New Dynamic:

The world of regulatory complexity is an ever-changing one, both domestically as well as globally, and therefore at minimum, your monitoring systems must be par excellence, regardless of how structured.

Further Readings

1. Dr. Sanjay Sharma, *Data Privacy and GDPR Handbook*, Wiley Publishing (ISBN-13: 978-1119594246, ISBN-10: 1119594243)
2. <https://docket.acc.com/how-house-lawyers-enable-privacy-and-data-protection>
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After receiving his Juris Doctor degree from The John Marshall Law School in Chicago, Mr. Brochin served as an Administrative Law Judge with the Illinois Department of Labor for six years where he presided over cases dealing with job separation issues and matters pertaining to contested Unemployment Insurance claims. He also co-wrote the agency's administrative rules, and periodically served as a 'ghost writer' for Board of Review decisions. Following that position, he was Director of Development for a Chicago-area non-profit college where he was responsible for High Net Worth donations to the institution. For the next eighteen years he practiced as a solo practitioner attorney with an emphasis in the fields of Real Estate law and Commercial Contracts transactions, and was an agent for several national title insurance agencies.

In 2003 he was recruited to head up a U.S. title insurance research office in Israel, a position he held for four years, and between 2007-2017 he participated in litigation support for several high-profile cases. He has taught Business Law as a faculty member of the Jerusalem College of Technology, and has authored a wide variety of legal White Papers and timely legal articles as a professional legal content writer for GPL clients. Separate from his legal writing, he has co-authored academic articles on Middle East security topics that have been published in peer-reviewed publications.



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William Anderson is Managing Director and Head of Law & Compliance. He leads the GreenPoint practice in providing regulatory, legal, and technology solutions to law firms, legal publishers, and in-house law departments around the world, overseeing our team of experienced US attorneys and data and technology experts. Will has over 25 years' experience working with corporations to improve the management of their legal and corporate compliance functions. Will began his legal career as a litigator with a predecessor firm to Drinker, Biddle LLP. He then served as in-house counsel to Andersen Consulting LLP, managing risk and working with outside counsel on active litigation involving the firm.

Will has leveraged his legal experience interpreting regulations and appearing before federal (DOJ, SEC, FTC) and state agencies (NYAG) to oversee research and other areas at Bear Stearns. In this capacity, he counseled analysts on regulatory risk and evolving compliance requirements. Will also consulted on the development of a proprietary tool to ensure effective documentation of compliance clearance of research reports. Will then went on to work in product development and content creation for a global online compliance development firm pioneering the dynamic updating of regulated firms' policies and procedures from online updates and resources. Will holds a Juris Doctorate with High Honors from the Washington University School of Law in Saint Louis and is admitted to state and federal bars. He lives in Pawling, NY, with his wife and daughter.



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