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Panel Introduction

PANEL INTRODUCTION

The following panels are modified transcriptions of the discussions that took place during this Symposium. The views expressed by the panelists are completely their own and do not represent the thoughts or views of their employers in any way. Additionally, redactions have been made to the transcripts to further ensure anonymity.

Participants in the Symposium included chief compliance officers from the nation's leading banks, securities institutions, and industrial corporations. To encourage a free and open exchange of views, it was decided that the names of the panel participants and the companies with which they are affiliated with would not be included in the trasncript of proceedings. The goal of these panels was to help define and clarify issues in the C-suites of many companies, and they face challenges in defining what is appropriately within the scope of their job descriptions. In the safety of an academic setting, panel participants sought to suggest areas which would benefit from a clearer definition of their roles and responsibilities, while not advocating for specific changes in laws or regulations.

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INTRODUCTORY REMARKS

M = Moderator

M1: I am an adjunct professor at the Law School. I teach a course in consumer financial service and sometimes a course outside of the Law School in other semesters with a colleague. It is a great school to be associated with and I am very happy that they agreed to do this program through the *Business Law Review*.

The reason we are here today is because a colleague of mine, Steven vonBerg, who was in my class, now works in my law firm, and was on the *American University Business Law Review*. So when I said "hey, let's do something in the academic setting in a safer environment he said let's do it through the Law Review."

I would also like to thank a couple of colleagues who have done a lot of work on this too. Tom Sporkin, who is my partner and an AU Law School Alumnus, was really instrumental in bringing this together and Lori Sommerfield who is counsel at our firm and helped to put the panel together, so thank you both.

The origin of the panel was from a meeting that took place earlier this year. **M2** and I were out in Palm Springs. **M2** gave a talk—it was a meeting of regulators, lawyers, and bank executives; probably about 40 people or so—and she gave a talk about the perils of being a Chief Compliance Officer. She talked about the fears that compliance officers have and particularly at that time, there was a regulation that was proposed by the New York Department of Financial Services that required compliance officers to certify to the adequacy of their AML policies and procedures at their firms and that was causing great concern, but it was not the only thing. There was an article in the Wall Street Journal at the time—*The Most Thankless Job on Wall Street Gets Tougher*[1] or something like that—so there is this sense that this profession which has grown up with not a lot of rules around it needed more thinking on what this role is, what responsibility it entails, and how the role should be carried out. In other words: what are the risks and what steps we can take to make the Chief Operating Officer ("COO") job safe for talented professionals that we want

1. Emily Glazer, *The Most Thankless Job on Wall Street Gets a New Worry*, WALL ST. J. (Feb. 11, 2016, 4:38 PM), https://www.wsj.com/articles/now–in–regulators–cross–hairs–bank–compliance–officers–1454495400.

to attract because it's such an important job? We were having breakfast after her talk and I said, "you really have to raise visibility to this issue." So, with her encouragement, I wrote an article titled *The Compliance Officer Bill of Rights* in American Banker.[2] It is a short article—it is in your handouts—and that did cause a stir. **M2** and other compliance officers got together and began talking about what can be done.

There is a sense that it is best not to go out there as a compliance officer and advocate for yourself but, at the same time, you do have to step up and say there is an issue here and something that has to be dealt with. So we decided that having an academic setting, somewhere we could think through what the issues are and then publish that thinking in a way that was useful to the dialogue.

When you think about how laws are made—they are made by judicial precedent, as people in this room very well know, because of the tradition of the law. They are made by legislation, by regulation, by enforcement actions, and examinations. The interpretation of the law is also influenced by legal professionals and academics who write and develop thinking in the academic setting. As a result, we do have some ability to set out the ideas that emerge from this meeting and maybe they will have some influence on those other sources of law.

I have written on the board here what I think the role and the responsibility of the COO, the risks associated with being a COO, and the steps to make COO job safer for talented professionals as I said before. We're going to have a series of panels [and we'd like to have plenty of audience participation]. We are all in this conversation together. This is not a lecture, this is a sharing of ideas.

I am not going to do traditional introduction of panel members and their backgrounds. I really think it is best to have them introduce themselves because it really is a question of how did they arrive at this profession? What was their career path and what were some of things that prepared them? What sort of background do they bring? So I think it is better for them to tell their own stories.

As we call on each person they can talk about how they wound up in the job that they are in and then we can talk about the subject of our first panel. Our first panel is going to really be a definitional panel. It will set the stage for all that comes after and so without further ado let me introduce—well first I want **M2** to say a few words.

M2: First, I want to thank everyone for being here to participate in the panel. We encourage you to ask questions about the profession and to

2. *See generally* Jeremiah Buckley, *The Compliance Officer Bill of Rights*, AM. BANKER (Feb. 22, 2016), https://www.americanbanker.com/opinion/the–compliance–officer–bill–of–rights?tag=00000156–32ee–d79b–a377–3efe1d240000.

challenge the thinking. For all of you who were instrumental in making this happen, I am quite grateful. As you know, other forums and universities are having the same dialogue so it will be interesting to see what comes out of this discussion. So thank you all for being here and I look forward to having a productive day.

M1: Just as a reminder, we are observing modified Chatham House rules here. No media and press are here and no regulators are here. We want to have a free discussion. This is for the purpose of having the students write up a summary of proceedings which I think will be very valuable. Students are assigned to each panel to take notes. Rather, what we are concerned with is helping to bring the ideas forward. In addition, we are asking that there not be a discussion of particular current events regarding any particular institution, but to keep remarks general on the subject and not focus in on any particular pending matter. When this is through, if there are people who would like to make a contribution to the law review in terms of a paper or comment, even if you are not on a panel, please feel free to do so. So let us get started.

PANEL I: EVOLUTION OF THE CCO ROLE & EXPECTATIONS OF CCOS IN TODAY'S REGULATORY ENVIRONMENT

M = Moderator
P = Panelist
A = Attendee *

P1: Hi, I am the global head of financial crime compliance at [Redacted]. I have been there since 2005 and, in a prior life, I was a federal prosecutor in Manhattan and before that, I was with the U.S. Treasury Department ("Treasury") as a senior policy advisor to the Undersecretary for Enforcement.

I got into compliance by accident. I became an expert on money laundering policy while I was at Treasury. I took that expertise to my role as a federal prosecutor and pursued cases against the heads of Mexican and Columbian narcotics cartels from a financial perspective. Great line of work—you meet a lot of nice people. I eventually graduated to white-collar crime and securities fraud.

Then when it came time to leave the U.S. Attorney's Office—that roughly coincided with September 11, 2001 and the PATRIOT Act passed the year after September 11th—broker-dealers needed anti-money laundering officers and Ray Kelly, who was a mentor of mine at the time, former Commissioner of the New York City police department, recommended that I consider doing a job like that. I really liked being a prosecutor. I did not really think I was cut out to be a defense attorney so I liked the idea of sort of being a policeman on the inside. And so, for the last twelve years that is what I have been doing. I loved wearing the white hat. Now I sort of wear the beige hat and I enjoy it greatly as well.

When **M1** asked me to talk about the evolving role of the compliance officer, the thing that stuck out to me more than anything else is the fact that compliance officers generally, and specifically in my industry, are facing the specter of personal liability in ways that they never have before,

* Special thanks to Chauna Pervis & Emily Wolfford for their tireless work in transcribing Panel I.

which is a daunting notion. I cannot go to jail; there are far too many people in there that know me there.

And this specter of personal liability trails a number of significant cases against compliance officers that have occurred within the last couple of years and a lot of policy announcements of the sort that **M1** and **M2** were referring to and a lot of rhetoric among members of Congress, the press, and the like. I have worked with people like Mary Joe White, Preet Bharara, Andrew Ceresney, George Canellos and I completely accept the representations they have made when they say they carefully weigh recommending cases against compliance officers and only do so when the evidence clearly supports such action. That typically occurs in one of two ways: (1) when compliance officers cross the line by engaging in affirmative misconduct or obstruction, or (2) when regulators have concluded that a compliance officer exhibited some "wholesale failure" to do their job. No one disputes the propriety of pursuing an enforcement action against a compliance officer who engaged in affirmative misconduct. The controversy therefore centers around the enforcement actions that allege in a wholesale failure to do their jobs. Within this category there have been a number of highly publicized cases. Some of them occurring in the Investment Advisers Act and some in the Bank Secrecy Act/anti–money laundering context. The facts of these cases are obviously different, but presumably they all gave rise to this conclusion that there was a wholesale failure to execute for which compliance officers were allegedly responsible.

What I have been struggling with is that if the evidence so clearly supported the conclusion that there was a "wholesale failure," why then is there this perception—and it absolutely exists—among compliance officers that they are being targeted or unduly singled out? There is also empirical evidence to support this perception. For example, a DLA Piper survey performed earlier this year indicated that eighty–one percent of respondents surveyed said they were at least "somewhat concerned" about their personal liability.[1] Sixty–five percent said that the recent statements by people in the Securities and Exchange Commission ("SEC") and the Department of Justice ("DOJ") had caused them to pause when considering their future roles as CCOs.[2] There was also the Wall Street Journal article that **M2** was referring to, which reported that three dozen senior compliance executives had left their jobs in 2015—three times the number from the year before. Anecdotally, I can confirm that a number of my colleagues are rethinking their roles in this industry due to the specter of

1. *See* DLA PIPER'S 2016 COMPLIANCE & RISK REPORT: CCO'S UNDER SCRUTINY (2016).

2. *See id.*

personal liability. So I take as a given that prosecutors and regulators are weighing carefully this idea of bringing cases against compliance officers, and that they only do so when there is clear evidence supporting it. I also take as a given that the perception that compliance officers are being targeted remains. Given that both conditions prevail, that there has to be some other explanation for the fact that the perception of targeting persists.

I came up with three or four theories as to why this may exist. The first is there is the multiplicity of enforcement actions. When the average CCO sees that enforcement cases against compliance officers are being brought by the SEC, the Financial Industry Regulatory Authority ("FINRA"), and Treasury then it is the aggregate effect of these actions that is causing them concern.

The second possible explanation is what I would call the "lowest common denominator" factor. When you read some of the statement of facts in the settlement documents relating to the actions against compliance officers, in many cases you think, "that was egregious; that was a 'wholesale failure.'" When you read others, however, you may not necessarily reach that conclusion. In many cases, it seems more like the compliance officer was being held personally responsible for nothing more than trying to do his or her job in a complex and challenging business environment and perhaps not executing that job flawlessly. I think that the idea of less than perfect execution is something that every compliance officer faces. When the average CCO reads these settlement documents, and it does not appear that the facts are as egregious as the allegation "wholesale failure" might suggest—then they start to wonder—I think—whether they could find themselves in similar circumstances.

The third possible explanation for the continued perception of targeting can be termed the "solitude factor." In most of these recent enforcement actions, the compliance officer was the only person whom was charged personally. In most businesses that I am familiar with, there are business people who are engaged in the commercial activity that drives those businesses. There are also control people in legal and in operations and the idea that the compliance officer is the only one being held personally accountable is perhaps contributing to this perception of being targeted as well.

The last possible explanation is recent trends in regulation and policy. On the one end of the spectrum, you have the DOJ's new policy requiring enhanced focus on the roles of individuals in cases of corporate misconduct. On the more disturbing end of the spectrum, you have a proposed rule by the New York Department of Financial Services. This rule actually requires CCOs to certify to the efficacy of their anti–money laundering controls and face criminal penalties for false or incorrect

certifications. Thankfully, the insane part of the rule was ultimately left out of the final version. But by that time, however, the damage in terms of the impact on the collective psyche of compliance officers could have been done.

So if we take regulators at their word that they are bringing cases when the evidence warrants, and that they are carefully considering those cases, but there remains a perception of targeting that is not going away, then something has to be done to shift that perception. Indeed, if something is not done shortly, the potential chilling effect on talented people who have been, or would be, compliance officers, could be significant.

M1: Thank you. Now getting a retail bank perspective, I think we would like to hear from **P2**.

P2: Good morning everyone. I work for [Redacted], I am the head of Fair Lending. I work in a social justice function and I love what I do.

I was fortunate to be in and out of the government and I would encourage all of you. You do not need to be wedded to being in the private sector or being in the government. Being in and out of the government is a good thing. You heard **P1** talk about how he was in the government and how you build relationships while there, which you can bring to the private sector. So do not focus on the money so much. I know many of you probably have loans coming out of school, but focus on where you want to be and what you want to do.

Piggybacking on some of the liability issues here, three things I want to talk about quickly are: (1) your relationships with business partners, (2) compliance versus legal, and (3) resources and capacity that can drive some of these compliance issues.

I will start off with the relationship with business partners. Historically, compliance has not always had a seat at the table. However, in my experience today, compliance does and should have a seat at the table. But from a regulatory expectations standpoint, there is this whole new kind of credible challenge. When you are sitting with your business partners, you are expected as a compliance professional to push back on them, ask them tough questions, and tell them "no" when the situation demands it. You have to make sure the compliance management systems are in place. And if they are not, do not sign off on things just because you are worried about your job, your bonus, your boss' job, or boss' bonus, and escalate, escalate, and escalate. I still think there are many people in the compliance world who have not fully realized that concept. Until folks really buy into that, we are going to continue to see these liability issues come up on the compliance space.

So when we think about Compliance versus Legal, it is not an either/or—both are integral to the process. The lawyers are interpreting the

law and telling you what you ought to do. But from a compliance perspective, sitting in a financial institution, you are looking at your entire compliance management system and you are thinking about what your business lines are doing, what you need to do to ensure you have coverage, and you are complying with the law. So it includes monitoring and testing—you know, these are all terms that you probably do not pick up on in law school. These processes take a lot of time. It is a quasi-edit type role.

The reporting lines for compliance, initially reported to legal. However, today Compliance and Legal are separate functions, which are co-equals. But that has moved now, from a best practices standpoint, it is no longer forced under legal—it's an independent function, a second–line function. It has raised visibility and the type of individual we need working in compliance. Many compliance officers have law degrees today. But, if you look back ten to fifteen years ago, many people in compliance did not have law degrees or did not even have master's degrees. So we are looking at a very different profile for the compliance professional today. When you think about it, the legal folks are still in the mindset of defending the company. But compliance needs to be there as well. We are the check on legal in many respects. To say this may be technically right, but from a regulatory standpoint and transparency standpoint, we need to be open. We need to be sure we are thinking longer term on these issues. I think many of our legal partners are getting that, but there is some way to go. I think there are some folks who have been institutionalized; who have been there twenty to thirty years and they still have not been brought into some of the new paradigm. We really need to be open and transparent when identifying issues—raise your hand quickly, remediate them, stop them. Get ahead of them because the reputational risks if you do not are just tremendous in this environment.

For you guys, you are all potentially looking for jobs. With the liability issues being abundant, the pressure from the regulators, we are all going to be needing lots of folks going forward. It is a growth area. You have the general compliance teams; you have the special compliance teams, like anti–money laundering ("AML"); fair lending; and some other horizontal functions. Think about where you want to be in that role—being a generalist can be good, being a specialist can be good—but I would sort of say compliance, overall as a profession, is a good place to be. So, with that, I am looking forward to having some questions.

M1: Thank you. Now we would like to hear from **P3**. We have a banking theme on this panel; we have a lot of securities represented here.

P3: Thanks **M1**. So first, off the bat, I have dreamed of becoming a compliance officer since I was about five years old. Actually when

thinking about what to say, I think **M1** and **M2** really covered the broad issues. The revolving door—there is a lot of criticism of the revolving door—but the revolving door is actually a really positive aspect to the way legal and compliance probably need to function in the finance industry. Meaning, we are a really complex industry at a time where the regulatory environment has ratcheted up to a point where you really need to have people who understand the complexities of what we are dealing with. I think that has really come to the fore with me.

First off, when I look at the path to the role that I have taken on at [Redacted]—I started as an attorney doing investment management and litigation. I was talking to **M2** before, toward the end I represented a CCO in a case against **M2**'s office where the CEO ended up in prison for years. I still have a lot of stress for remembering that. And that led me to want to join the government. So I went to the SEC. I was at the SEC for thirteen years. I have to say during that era, from the dotcom bubble, the financial crisis, etc. and the aftermath of the financial crisis—many of you have seen the Big Short and there is a narrative at the end and it discusses how people were promised, that people were going to jail and there would be an entire restructuring of the government.[3] [Redacted] and I are beneficiaries of that. There really was an entire reorganization at the SEC and it did actually involve bringing a lot of cases, reorganizing, being a truly much more efficient operation—thanks to people like [Redacted] and others who did that service. So when I think about what got me to compliance after the SEC where I had the position of running the Asset Management Unit—which was a newly formed division within enforcement to just look at investment advisors—it was very much about what I could do in the private sector that would most suit my skill set. Compliance is so directly related to what I did in government because I had knowledge of the investment advisory industry and then was really able to apply it in the private sector. When I think about my days back in the Asset Management Unit, it was about setting priorities; about setting how we would look at the industry. Really what I do today is setting strategic priorities about how we deal with the regulatory and enforcement efforts globally. So it is very much related.

A few other points I wanted to draw on. In terms of CCO liability, I do think that it is uncertain whether the political changes that are going to occur will actually affect personal liability. I do think it has quieted down significantly since there was a large outcry in 2014, 2015, at least from a securities perspective. If you look at how the SEC itself reacted, there was a lot of divisiveness within the SEC about charging CCOs. You saw some of that calm down.

3. THE BIG SHORT (Plan B Entertainment 2015).

I do think in terms of some of the theories why this is happening, if you look post–financial crisis, there was clearly an aggressiveness by regulators to want to go after individuals. That is one part of it and that is combined with the regulations themselves. If you look at the Investment Advisors Act,[4] it is such a low bar to bring a case against a compliance officer relative to senior executives at a corporation. So if you are looking to be aggressive and bring cases, especially difficult ones, you can surely bring a case against a compliance officer who simply has not executed on the policies and procedures in place. I do think though, there is a fairness element at the SEC. I do think it is a changing regulatory environment. I do have more discussion points, but I am sure we will get to that in the discussion.

M1: So I mentioned the next speaker will be **P4** who will bring you the view from his experience at a major industrial company and his career that led to there. When **P4** finishes, I would like to have a little discussion of the differences in what is expected of compliance officers in securities, banking, and the general corporate setting; but we will come back to that.

P4: Thank you. Good morning. It is always great to come to these panels and hear the perspectives of my colleagues, especially from other industries. I think that it is tremendously valuable. I was on the phone with our Chief Operating Officer ("COO"), she said, "it's great you are here to talk about the new generation of law students and what the climate is out there." So I would be really interested to hear from you all as we go through this.

So to tell my story about how I became the CCO, I think someone used the word "accidental," and well, I am an accidental CCO for sure. I started off as a government contracts lawyer working for a small firm here in Washington, D.C. But my career path really underwent a big transition when I went in–house in the late 1990s. I think a good thing about a compliance team is you bring a lot of different perspectives and experiences from your past. I have hired federal prosecutors, Federal Bureau of Investigation ("FBI") agents, and forensic accountants. They all bring tremendous experience and perspective to the role. But from my perspective, I did not have any of that. I was never a regulator; I did not work in government. So what did I do that was different? I did deals.

Okay, so in 2003 I moved to Texas and I was doing commercial deals with big banks, telecommunications companies, and other IT companies. I was the [Redacted] lawyer for [Redacted]. Somebody on your team needs to know how to do that deal at the end of the quarter. You're doing that billion-dollar software deal and there are 15 minutes left before midnight,

4. *See* 15 U.S.C. § 80b–1, et seq.

you understand what the pressure is and how decisions or calls are made in that moment, and that if they are picked apart years later, it's a completely different dynamic. That is something that I did. So, I was very involved with not only government, but also commercial deals.

How did I get into compliance? In May 2006, I get a call from the general counsel of the company I worked for at the time. He says, "I need you to go to Tokyo." And I said, "well that's in Japan isn't it?" He says you've got two weeks to decide. So I moved to Japan with my entire family. I walk into the office and they say, "**P4**, what can you tell us about American law?" I thought "this is going to be a very long three years. I needed to carve out a role." So in that job, I got into compliance. Why? Because that company had some serious compliance issues. I am not telling you anything secret because I have sat at my computer on a Tuesday morning and it is just a normal Tuesday—and this is the life of a compliance officer just a little—you sit down, it is a normal Tuesday and all of a sudden the Internet explodes. I am watching a continuous loop of fifty investigators in Japan, in dark suits, with briefcases, all walking into the branch office in Osaka. This loop is just running over and over again on TV with the company's logo in the background. I am like, well something has gone wrong. What happened was that the Japanese Securities and Exchange Surveillance Commission was investigating several companies and, long story short, there was a lot of revenue issues going on. In my world, it's really about the global perspective so you really need to know how business is done all across the world and how things play out differently. In Japan and many other places outside of the U.S. this relationship-based contracting or relationship-based business and people will tell you: I did this thing simply because I wanted to maintain this relationship. And I'm like "that's great, except that thing was illegal and is not consistent with how an American company is regulated."

That was my exposure to compliance—I hadn't really had experience with it, but I was thrown into the middle and then came back and did corporate litigation handling not only U.S. cases, but big international cases as well. And I think someone made the point about Legal versus Compliance and it is interesting because when you are the litigator, you are defending the company. Your goal is to create a narrative of the case. I am going to cabin the bad facts or manage them away and I am going to try for a good resolution whether it is settlement or at a contested proceeding. I am not going to worry so much about the systemic issues because maybe I am creating a bad record that screws up my litigation narrative. You are very focused on that specific case. But the compliance officer can come in and say, "we got to take a big step back, is this just an isolated incident, or do we have a systemic issue, do we need to look at our procedure, what kind of message are we going to send to the people that may have been

involved in this?" Do we need to discipline them? But then the compliance officer and legal can start being pulled in different directions. Legal says, "well that is my key witness, you have got to keep him warm, the regulators are asking a lot of questions of him." So these are the type of dilemmas you confront as a compliance officer.

My next step, after doing that litigation job, was I got a role with the [Redacted] corporation, which was growing. That company expanded from 2 people to a centralized global organization. This is another evolution that in the span of a few years the company went from something that was very small to something that spanned literally the planet. In that role, I ultimately wound up creating what was in effect a Foreign Corrupt Practices Act ("FCPA") unit inside of the company. We had prosecutors, forensic accounts, agents, and auditors. We would just pick up allegations and go off and investigate them, take appropriate actions, and deal with the regulators as needed. It was not a secret that the company was under scrutiny as there was a public federal court order. Now I am a CCO at [Redacted] and it is interesting to see the difference in the role.

I really wanted to talk about the "why" of my role right now and I'm interested in the reaction of my colleagues in financial services. For me, the "why" really starts with culture and values. I know that sounds soft, but it really is not. If you really think about the effective high performing companies, they are the ones with the strong values and the strong cultures, and those strong values and the strong cultures are baked into their operations, policies, and procedures. There is an article in the Wall Street Journal about just that—how culture is a product of how you operate your business. So I really feel like I have a seat at the table in terms of talking about organizational transformation: how we are going to have the best culture, how we are going to do business, and how we are going to compete with the best companies out there—whether it is Google, Facebook, other high tech companies, I am going to go compete with them. I think that is really the why for me.

Then there is the how, which is that you really need to be comfortable in this CCO role that has ambiguity, at least from my perspective, right. You usually come into an organization and you are not sure you fit, are you in legal, do you report directly to the board, what is your dotted line, what is your direct line, what are your resources? You really have to have a lot of comfort with ambiguity and you have to develop that network across the company to really build the wall and get the kind of seat at the table. You need that seat and that appropriate authority, and influence, you need to be able to manage risks, identify risks, mitigate risks, and drive the organization to deal with it.

I will just wrap up here so we can get into the discussion. The conversation about liability is actually really interesting. It is obvious in financial services there is a lot of anxiety about it because I think that area is the primary focus of where you see these enforcement actions. I am deeply troubled by the whole concept. I feel a little more distance from it in my corporate field, because maybe that does not apply to me because I am not a broker dealer; I am not in a financial services firm, but I don't think we should be so sanguine, actually. There is no reason why an enforcement action could not come after us as well. I would like to really talk today about the framework by which compliance programs are really starting to set. So what is it actually that a compliance officer is being held liable for? Is it really an operational failure or failure of the business? We mentioned that failure is the first line of defense. I absolutely agree with that. And so it is really, if you are building an effective compliance program and that program is working, you should be getting credit for that. If there are aberrations or rogue employees, or things—bad things happen—that in some respects is a function of any large organization. Period. End of sentence. There will be some degree of issues with any large company. There would be some degree of crime. So this kind of funny thing that goes on with this strict liability-ish standard and expectation of zero defects and no crime is not true. You are always going to have issues; it is just: how do you respond to them? It is how do your functions, how do your procedures, how do your controls, and management respond? Those are all fair questions. But the idea that nothing will ever go wrong is not something that should be the standard, nor should it be the standard that a compliance officer is held to. I really wonder whether we are having the level of conversation around that that we need to and I think actually that this forum and scholarly work around it would actually be very valuable.

P3: Just to play devil's advocate on the CCO liability front, post–financial crisis—when we were looking at a lot of the cases right—there is the notion that if you have a compliance program that is either complicit with the business or completely out to lunch, there ought to be some form of liability. I remember we brought a case against a compliance officer who went to Brazil on sabbatical for years, but was still in the compliance officer seat. So there are those kind of extreme cases and there has to be some form of accountability. I agree. But sitting in this seat—I feel this everyday—that some things are outside of your control. When an issue happens, say in Asia, you suddenly have accountability for what is in the environment and whether that should or should not be the case. It does create a forum on the positive side of accountability about compliance. Clearly things are a little off the rails in terms of just going after and targeting compliance officers.

P2: Isn't the issue really the response aspect of it, right? It is being able to identify issues and address them in a timely manner. But it is another thing when you have the right systems in place, you are doing your testing, identifying issues, and you have the right response, but then the business does not want to respond in the right way. Then you have to raise your hand, go around them, and do the best thing for the company. That is where I think the liability issue arises. How you insulate yourself from the liability issue is to have those systems in place to identify. We cannot be held accountable because of some rogue businessperson out there, but we can be held accountable if we did not put systems in place to identify the rogue people.

P1: I share **P4**'s view that, when something bad happens, the regulators are coming in after the fact and using the bad facts to leverage a firm's compliance program, and the conduct of its compliance officer's, to 20/20 hindsight. While the applicable legal standard is that a firm must have a risk–based, reasonable set of controls, mistakes or imperfections nevertheless become the pretext for enforcement actions. I think that is definitely something that we are witnessing in the securities industry and it is a *de facto* standard to which no one can adhere.

M1: What would be great is if we could try to articulate a standard that we could live up to.

P1: "Risk-based and reasonable." That is the standard, and for years the regulators applied that standard when they conducted their examinations. The problem, I think, was that in the wake of the financial crisis, many regulators were subject to severe criticism for being asleep at the switch. What has evolved in response to this criticism is an approach whereby the regulators seek to hold firms accountable for not having a perfect control environment. While not consistent with the applicable legal standard, the approach enables regulators to avoid being criticized in the future for being too soft.

M1: So is it a corollary to risk-based and reasonable, amplifying on reasonable, and in some way articulating something that serves as a shield against the "gotcha"? You've described the phenomena and you've described how regulations have changed and you're raising your hand and saying this is not right and is going to drive talented people away from the business, and so our best ally in the company is not going to be there. But is there a way that we can then as lawyers, how do we amplify risk based reasonable to add something and I get uncomfortable with a Yates memo or somebody who is temporarily in a position of deputy assistant whatever, and then they make a pronouncement and now that's where we have to go. We need something more, I think, and we need something that if it could

emerge from our thinking might be adopted by regulators, but it's not going to be easy to find. So **P3**, have at it.

P3: If you look at the regulatory scheme that we are in, you have all the active State Attorneys General who will aggressively pursue actions. Even when, in some cases, there is a lack of evidence. We have historically seen cases where they will compete with federal enforcement officers at the SEC or DOJ. The way I do my job is I judge my reasonableness in terms of all of the judgments I am making on a daily basis. Clearly, if you are within that range of reasonableness, there is safety in that. That is what I rely on. If there is reasonableness in what I am doing, I feel it falls into a range of reasonable conduct. If you are dealing with a fair regulator, then they are going to be looking at your conduct as a whole.

M1: The problem as described is that the regulator is also under pressure from Congress, the public, and the media. So they say, "we have to do something," and of course who is the easiest target? The compliance officer. There's gambling going on in this casino! And I think particularly to your point **P4**. In your village, you have a town and **M2** has a state. I think there's as many people employed by **P4**'s company as live in Vermont. Maybe that's not quite right, but it's close to it. They do have jails in Vermont. So, I guess the question is—if there is stuff that happens in your company and all of a sudden you do not feel as comfortable—even though you have done everything to a reasonable standard—when the overzealous prosecutor comes after you, is it enough to say, "look this is not fair, we do not have to go to district court to find out and have me have hire expensive defense counsel?" That is just a thought.

P1: I think **P3** put his finger on one of the biggest problems. If we were simply all managing to one regulator, I think it would be easier to manage his or her expectations. But last year my program was examined forty–nine times by twenty–seven regulators in twenty–two jurisdictions. Many of these regulators have overlapping jurisdictions and often they are not coordinating with one another. The standard that may have been set pursuant to the regulation is then translated into an independent version of policy and practice by each agency. So you do not have a common set of practice guidelines to govern how the examiners are conducting themselves on a day–to–day basis. This results in a range of definitions as to what constitutes "reasonableness." I think the idea of having some forum where the regulatory bodies themselves can come together and establish common standards would be ideal.

M1: Now in the banking space, there is something of that flavor.

P1: Absolutely, and that is a very, very positive step. We have a manual that sets common standards for AML compliance. We understand that the

issues set forth are what we will be tested on, which is extraordinarily helpful in that respect.

A1: I was just wondering what the panel thinks about whether the regulators themselves need to be educated a little bit about the function of a compliance officer in an institution. In looking at some of the enforcement actions that come out, sometimes I get the sense that as **M1** said; you are looking at the compliance officer as an easy target. But regulators do not really understand that it is the compliance office that builds the framework and it is the operators of the business who are performing the day–to–day jobs that have to make sure they are performing in a compliant way. A great example of this is the Ted Urban case, which I know we are going to talk about later, but I think the regulators just got it wrong there.[5] I think there is a limited understanding of the role of the compliance officer.

P4: Okay, so in the past senior corporate officers ("SCO") and CCO cases that we saw, there clearly was a commission debate at the time in addition to active lobbying. There clearly was an outpouring of people revolting to the notion that CCOs should be charged. I think the SEC would at least be fairly hard pressed to bring a case like the Black Rock case.[6] I am not suggesting it would not happen, but clearly there was such an outcry after that, that it would seem difficult now. Now how that applies to other regulators, I am not sure.

P2: I think that is an excellent question. As CCOs and Legal, we tend to have such deep knowledge of our businesses and as such, can be quick to respond directly to questions from regulators. However, one of the ways you insulate yourself, or at least start to address it, is to encourage your business people to respond first and explain how they implement compliance and what their role in it is. By showing that they own these issues, it will help us delineate the roles that we have as the second line of defense. At least it would help begin the conversation. That is how I manage it and how we manage it at [Redacted].

A2: I think **A1** makes a good point; that there is a value in educating regulators on the scope of the program. However, I really want to get back to that point that you were picking up on **M1**, because what I think is happening is, with the structure of our regulators, they have rulemaking, supervisory, and enforcement authority, so they are making all the decisions. They have a tremendous amount of power that is unchecked by any balancing power. Many of them have ombudsmen, but they are useless. They do not serve the function of balancing the extreme power that regulatory agencies have. It is very difficult to get regulatory action

5. Urban, SEC Rel. No. 402, 2010 WL 35009288 (ALJ Sept. 8. 2010).

6. Blackrock Advisors LLC, Investment Advisers Act Release No. 4065, Investment Company Act Release 31,558, 111 SEC Docket (Apr. 20, 2015).

into the federal court system. So if you believe that a regulatory agency is exceeding its authority, you basically have to commit harikari by taking it into the court system for redress. I think one of the big problems with the structure is, when you have regulators with that much authority in a highly politicized environment, they are compelled to exercise it. I mean [Redacted] and the other heads of the agencies, when they are called up to the Senate Banking Committee and yelled at by congressmen for not doing their job, what do they do? They go back and exercise their rulemaking, supervisory, and enforcement authority and they slap on a bunch more Memorandums of Understanding ("MOUs") on organizations in the industry, which have a constricting effect on economic development and growth. So I think the problem is a structural one with the regulatory agencies not having a built-in judiciary–like function where their power can be checked.

M1: I know [Redacted] and I have had this discussion. I am not optimistic about changing the law. My background is eight years on the Hill. I was the [Redacted] of the Senate Banking Committee back in the 1970s when the consumer financial services came about and all that stuff was created. Each of us have our backgrounds and mine is a legislative background where you could actually pass a law. Harder to do today, I grant you, but we should be thinking about what changes would be necessary and how could we build a consensus around the idea of some standard for compliance officer responsibility. This standard should build on the risks, current standards, and, if we can find it, some mechanism to appeal to reason. I do not know if this is possible, but what can we do?

Some of you are saying the ombudsmen are ineffective and that the regulators are under pressure and highly motivated to take action. A compliance officer—whose role has changed drastically over time—has much higher visibility and much more responsibility that is not yet clearly defined. He or she sometimes reports to the general counsel, sometimes to the chief risk officer, and sometimes to directly to the board. It is still evolving. How do you define the role and responsibility more clearly and have a place you can appeal if you are being challenged for something that was not reasonably within that role and responsibility? How would you do it? I am asking all of you.

A2: That is part of our discussion that is in the next panel, so I do not want to get into that totally, but I think that the only thing you can do in the current environment as a compliance officer, is make sure you find yourself in a company with a supportive manager and supportive board who really want to do the right thing. Then you can develop internal policies that they adopt to clearly delineate responsibility within the company. So, when something goes wrong in an area, it is clear who is accountable and responsible. In most cases, that will not be the CCO. However, in some

cases, it should be the CCO, if he or she goes off to Brazil for two years; in that case, it is appropriate. The scope of the CCO's responsibility, both from a subject matter and structural supervision perspective, within an organization needs to be defined. Right now, the only way to do this is to define it internally within your company, working with your management team and your board. You have to have enough authority within your company in order to create those positions. I think a lot of the struggle with compliance as an evolving issue, is that many compliance officers are too low in the organization to be able to exert that positional authority to be able to get their colleagues to accept that responsibility for certain things. When you are not a member of the management committee, it is a lot harder to get somebody who basically is your boss to agree that they are going to do something. When you are their peer and you say, "look, I cannot do this," then you are going to have a much better opportunity.

P1: I think that is the recipe for success within the enterprise. There are many examples within every industry of corporations that set the right tone from the top. But you still have the problem of multiple regulatory bodies pursing their own agendas. There may be questions about whether this duplicative or triplicative approach is really having the right impact on the efficacy of compliance programs. How much time are you spending responding to examinations as opposed to actually unearthing bad things or preventing bad things from happening?

A2: Yeah, repeat that statistic you said about how many exams you encountered.

P1: Well, that was last year. My compliance program had forty–nine exams by twenty–seven examiners in twenty–two jurisdictions.

A2: There are only fifty–two weeks in a year.

P1: That does not include investigations. Do not get me started.

A2: There are only fifty–two weeks in a year, so how much time did you have to spend on forty–nine exams? I am sure each one of them lasted at least a week.

P1: Well most of them are obviously occurring simultaneously.

M1: I am in awe of what you guys do. Honestly, I am.

P1: I think I was mentioning to **M2**, I used to chase international narcotics traffickers for a living, yet my hair got grey doing this job. Whether we agree that compliance officers are being unfairly targeted there is consensus among regulators that the chilling effect is real, sufficiently concerning, and that there needs to be something done about it. You can start in the securities industry where there is at least a common jurisdiction among multiple regulators. You can bring them together to come up with agreed upon guidelines that would govern each regulatory entity when it evaluates compliance officer conduct and assigns personal liability. You

could also convene a group of advisors who represent the industry as a whole and who could provide input to facilitate the development of guidance and standards. This would help cultivate a feeling among the regulated that they have had a say in the process. If you started in one industry where there is this phenomenon of overlapping jurisdictions and compliance officer liability is a very, very current issue, that might be a good place.

A2: I do think we are on the cusp of political change, that a commission like the SEC that obviously has a different political bend, would be supportive to standards around compliance officers. If you look back at the dissents that happened as a result of the Blackrock case,[7] and I think the SFX Financial Advisory Management Enterprises case[8]—where they said you cannot hold compliance officers responsible for the actual implementation of policies and procedures—and like **P1** is saying, if you actually could build real standards around, what I think is this third prong, of what is reasonable in terms of having these policies and procedures at your firm. If you do this, then you are clearly in a position to set the norms of what is now clearly a hindsight review of people's activities as it relates to specific issues.

P3: Yeah, so I think this is really a fascinating discussion. I am still struggling with this idea of focusing on the role rather than the program. I mean, I would love to see guidance on what an effective program is and then maybe have legislation that is a defense in the U.S. based on an effective program.

P3: I come out of the FCPA world and there was that moment when they were pushing for compliance defense in an accident of incredibly poor timing—it was around the time that the Walmart case broke in the New York Times, right, so it is dead. As a result, the DOJ then has to work in conjunction with the SEC to issue FCPA guidance. But the problem then is, it is the curse of discretion. The thing is, the government will tell you that they will take care of you and give you credit for the compliance program. The government will not prosecute the corporation, just the bad actor that is responsible. But that turned out to be a bit of a one off and it just does not get there. I think we need to have some legislative standard that says, look, if you do this, this, and this, then that is an actual defense. As a result, you can start shaping regulator behavior and supporting a company's programs around that.

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7. *See* Blackrock Advisors LLC, Investment Advisers Act Release No. 4065, Investment Company Act Release 31,558, 111 SEC Docket (Apr. 20, 2015).

8. *See* SFX Fin. Advisory Mgmt. Enters., Inc., Investment Advisers Act Release No. 4116 (June 15, 2015).

P1: That is fantastic—you know, the United Kingdom version of the forum court practice is that there is an affirmative defense for adequate procedures.

A3: I was wondering if you could talk more about the new administration, their potential plans, and how you see that affecting the role of the compliance officer, especially in financial institutions.

A2: I can address that; it is going to be great.

M1: I think it is very hard to predict. I have been in Washington for a long time and I think that is always very hard to predict. But I think new people bring forth the opportunity to provide new ideas.

I think that we have actually covered more in this panel than we planned. I think that the suggestion of focusing on one agency is very interesting.

P1: But my idea is slightly different. I would focus on a few agencies and I would focus on one issue to start, which is compliance officer liability. I would try to herd the agencies in the securities industry with primary responsibilities. You know that would be interesting, the Commodity Futures Trading Commission ("CFTC"), SEC, FINRA, and New York State Department of Financial Services all working together.

M1: **A2**, you have been there, right? You were there for seventeen or eighteen years?

A2: Nineteen and a half.

M1: Nineteen and a half, okay. You got a little time off for good behavior. But what do you think? Do you think this approach will resonate or could resonate with the SEC?

A2: So in other words, suggest that an agency create . . .

M1: Well, I guess the SEC would be the primary agency to take the lead, but not alone.

M2: Let me ask the question differently, so **A2**, do you think there is value in us answering the question for the regulators, can we set reasonable boundaries for liability? Because they do not want us to take their tools away from them so they are going to say no.

A2: So, a couple of things. I know as it was mentioned earlier, the revolving door is great and I would love to come back and talk about that more. However, I think of regulators as a revolving door within these agencies. I do not think you are going to get a regulator who is close enough to the issue to believe that it is personal to them. It has got to come from you all: from the CCOs that put out those standards and basically say these are best practices and we are going to hold ourselves to these standards. I know that every year there is this CCO forum at the SEC and I have assumed you have talked there and probably also attended. I do not know if that is a forum in which these types of standards are discussed.

P4: I mean that is a good idea. Another one, is there are advisory boards at the SEC. Actually as this was all happening, I did call a senior person at the SEC to suggest more advisory boards—it was in the middle of all this debate and so many advisory boards—but I do think there will be a new opportunity in the new administration.

A2: Is it grassroots from you all or is it something that the regulators will take on their own?

P1: For many segments of the financial sector you will not accomplish anything if it is just one agency because there are so many agencies that have oversight responsibility. So I think if it is going to work, it has got to be a little more ambitious. I think you posed a very good question, **A2**, about whether this would need to come from the people being regulated first. But frankly, I think that, politically, there would be a perception that anything coming from the people being regulated would be too convenient, too self–serving, and as a result, I think it would need to come from . . .

M1: One thing, I do not know if it has to be so formal as to where it comes from. If we are able to develop something that seems to offer better protections and are able to advance the concept that is real—that unless you have protections, we are not going to have quality people wanting to be in this position. People are turning down seven figure incomes because they just do not want to take the risk and that point has to be made. Now I have always found that what you need is one person in a position of power to make it their cause. If one commissioner decides this is something that I am going to start to talk about all the time and is able to recruit people at sister agencies. You have more people believing this is really an issue. Now I do not know if there is some vacancy in the Commission at the present time. But I mean really, it is having someone who really is willing to speak out.

P4: I think it is important to also look at the current construct of lobbying by compliance officers. The National Society of Compliance Professionals ("NSCP") represent the compliance professionals, but when you compare it to, say for example, the American Bar Association ("ABA"), and this specific level of the ABA, I think there is probably a need to think about who is the organization that is representing the interests of compliance officers. I am active in the NSCP and believe that it is somewhat effective, but you really need organizations that these agencies are going to respond to.

The other thing I would say and that we have not talked about this as much, but when you look at the dissolution of Compliance versus Legal, you know there is still this perception that Legal drives really the function of Compliance. Not all across the board, but I would say that starting in the early 2000s—and this is really financial services driven—big organizations

began to move people from operations and from back offices into their compliance office. I have seen this happen, and so as compliance evolved from 2004, through those crises, and through the late financial crises through today, it is attracting a different set of people. But I do think we have evolved enough to be the advocates that we need to be for ourselves.

A4: I want to build on what you were saying earlier about having one person build or be the champion of a cause and the SEC, Chair [Redacted], announcing yesterday that she will be stepping down before the end of the current Administration. I think that she really pushed the SEC to adopt a policy of forcing companies and individuals to admit misconduct when they settled cases with the SEC. So what kind of changes do you see with her stepping down? She was sort of the champion with pursuing companies and individuals to admit misconduct. Do you see any change under the scope of the new SEC?

M1: I do not, myself, think that there is any real issue. It sets an environment, but I think there is a general view that individuals should be held to task. Our question is, what is the right thing to focus on in a compliance program. I think that the general consensus is still on individuals having to pay and I do not think that is going to change necessarily under a new administration.

P1: Nor should it if we are talking about affirmative misconduct or obstruction. The issue that we are hung up on is how you define a "wholesale failure" on the part of the compliance officer's compliance effort.

A5: Is there an analogy when we talk about who should take the lead and whether we can find a way toward an affirmative defense, if not all the way? Drawing from the international context where we have seen collective action and executive industries step up as a group. There, industry players sort of set their own standards. I think we could argue about how effective it has been in the international context especially when we look at [Redacted], but is there an analogy to be drawn, and if so, what are the lessons to be learned?

P3 Hmm . . . you ask a great question. I think there is real room to take what has been going on in the international space and [inaudible], which has a compliance defense and I do not see the issues as all that different, I mean there are different regulatory requirements in the different industries, but the fundamental premise of if you have an effective compliance program, how does that actually get recognized? We should actually be more like partners with the regulators than in this sort of quasi–adversarial, bizarre relationship where there is so much discretion on one side and a lack of understanding on the other side. I think—and I put the Brazil situation thing on the side because if some company really thinks it is a

good idea to have the CCO go away for two years and says [Redacted], then of course your management will fail and you will not have an effective compliance program—I think that is a different issue.

But if we really are committed to good compliance, then we really should be partnering and we should be talking about how to deal with aberrations. If there is true misconduct, there are many of laws and prosecutors to deal with that. But criminal wise, how we are doing this, I think, is the wrong direction and maybe the new world will take us there.

I really want to focus on the fact that enforcement is a good thing and we should not get back to the position where the public thinks that everyone is sort of getting a pass and companies are not having a grip on compliance. It always sort of starts from effective compliance. It is really the consequences of how companies and how management are dealing with things when they happen and whether they are doing so forthrightly, transparently, and in a way that actually supports their business and the general public policy.

P2: With regards to the young lady's question about what may come out of the Administration, it is to be determined, but one of the things I hope does not come out is the message that compliance is no longer important and that we should under–invest in compliance, as was the norm ten to fifteen years ago. As companies—regardless of what administrations do—we have to think this is crucial from the senior management down. We have to want to get it right because of the ethics, the culture, and what we want to say for our business.

M1: And that is a critical piece of it.

P1: That is precisely right. What we are focused on is not the propriety of information or the propriety of enforcement. What we are focused on is a set of circumstances where you may have misdirected enforcement and the perception that compliance officers are being unduly singled out [inaudible].

P1: That is the perception. Whether it is accurate or not does not really matter. It is the perception we need to combat.

M1: We have talked about defining the role more precisely: saying what is in, what is out, getting some description of what you would actually have responsibility for and that is going to be different where you have direct responsibility, and where you have roll up responsibility. We had a discussion about that at dinner last night and we are going to get to that. But I think that with this evolving role—the fact that the general counsel office is supposed to set the law and you are supposed to act as the compliance officer implementing it—a tension exists. One of my friends wrote an article that says the nine most dangerous words are "where does it say I cannot do that?" So if the Legal Department has the idea that the

business people want it, nothing says they cannot do it, and if the business people get charged, there will be minor fines, so why not go ahead with it? That is where the compliance officer comes in and tells them to wait a second. There are others who have responsibility—the CEO has responsibility—but the compliance officer is supposed to be sounding the alarm. Do you think that enough compliance officers have a seat at the table when the decisions are being made as to first instances of programs and do they have the ability to influence the way business customer facing programs and other programs are implemented? I do not know whether you feel they have sufficient voice in that process.

P1: I think it depends. There are plenty of businesses where that is not the case. But I think the industry leaders are taking that approach and have taken that approach for some time.

M1: So part of whatever pronouncement there might be from an agency could both offer a safe haven and also empowerment by saying that this is what is expected.

P4: I totally agree. I mean this goes back to the discussion around what is the role of Legal versus Compliance and it is still evolving. Clearly, it is different within different organizations, but compliance is a much different job than being the general counsel or the lawyer. It really is about insuring that you have the right processes to enable compliance with the law. I mean that is how I look at my job. There needs to be more empowerment of CCOs and articulation of the difference between Legal and Compliance.

P2: If you happen to have a good examination team and you have built a solid relationship with them, they can help you drive messages home when they speak to the Board of Directors—when they see certain things, making sure that the right resources are put into compliance so we can get where we need to be. A weak regulatory environment does not help any of us to do our job. We want a balanced regulatory environment. I think that is where the conversation should go.

M1: **P2**, to your point, I think what may happen now. I think no one can predict what will happen because on one hand, there has certainly been a finger pointed at Wall Street and business abuses by the candidate who won. On the other hand, there is certainly a business environment—generally as you said in certain areas, perhaps in fair lending—weighing how much enforcement activity there is. So I do not think there is an easy to predict what is going to happen moving forward, but I do not think a "populist" candidate would want to abandon the effort to make sure that corporations are held to standards. Again, I do not think, but I do not know.

P4: If you look at so far what has transpired with the transition team and Paul Atkins taking over that transition team, if you look back at the policies

you see in the mid–2000s it was very much about—the Republican side was very much about—not penalizing corporations and not being as aggressive as it relates to corporations. If that is a theme, that certainly will roll down to places like the SEC. That is my prediction. Obviously it is way too early to tell.

M1: This is all speculation; really it is hard to tell. I think that if we come back, first, there is a clear need for a definition of a CCO's responsibilities and role. Second, there is a need for clear articulation of the risks that are causing concern. Third, there is a need for some method of providing certainty and safeness for a compliance officer recognizing that the village will have some criminals. Thus, you have to have a police force that is trying to do the job. I think that is where we come up, but we have to find a way to try to get one area where people are leading the way for others. Any other thoughts?

P2: What does a good compliance management system look like? What is going to be an affirmative defense? So that is the starting point. How are all the different regulators going to be looking at and how are they going to be applying those standards uniformly? If they are all applying these standards uniformly, then we can figure out how to put it into the legal framework.

M1: **P3** there is going to be a significant burden on you to articulate this in various ways. We have here various industries, general corporate, securities, and banking. It is going to vary by industry. But from what I am hearing there are enough common themes that some general set of standards can be developed for the different industries and further tailored to the companies.

P3: I think you can have some general principles. I think there are some fundamentals to effective compliance. These fundamentals take different shapes—whether it is in financial services—and then you really have drill down to policy and procedure. However, when you are talking about values, culture, policy and procedure, and incentives—the bucket. Do we have commitment from management? Do we have the right policies and procedures? Do we have third parties? What are we doing about training and education? That means different things in different industries, but I think some fundamentals can be flushed out. I think that if you actually get some authoritative credit for managing an effective compliance system that would a start to creating some parameters around this individual liability issue we are talking about. It is like if you think of yourself as a chief of police, with a police force, in your little town and you have a one percent crime rate, you are a hero. You are doing your job. However, if the officers are on the take or violating people's civil rights under the table, that is a different issue. You do not get prosecuted just because there is a

spike in crime. This is the kind of issue that we are trying to wrestle with. I think that you need to give some form of credit, that there needs to be some degree of a safe harbor within the program, and that in no way should it be viewed as way to let people off the hook.

P1: You will incentivize them to have the best program.

P3: Exactly, it is not about letting people off the hook. It is about encouraging positive behavior and sophisticated risk management. Back to your point on empowerment. Any sophisticated company that wants to do well in the market is well advised to have a focus on a strong risk management program. Leave regulators aside. What is new? How are you managing it? How are you mitigating it? How are you complying with it? How are you building your culture? If you are doing that, you are going to be successful. Your people are going to be more invested in the purpose and the mission of the enterprise; rather, than: self–dealing, cheating, stealing, or whatever that undermines companies. We have so many examples of that, so there are incentives in there as well.

P2: But the risk appetite is a key piece too. Because people think about risk appetite differently, having that guidance around it is also extremely important.

P3: Very important.

P2: That becomes a key component to how you think about it.

M2: So we talk about a compliance program primarily preventing and detecting. A good compliance program will kick up issues and who knows where the root cause is going to take you. It can take you to bad programming, to bad software, it can take you to bounds of the organization; you have no way of knowing where it will go. I think it is important that we set some boundaries. We are sort of on the outcome side, but did we think through the process correctly? Most of us would argue yes, we did think through the process. What we learned was that the real debate concerning our principles was about how we thought through the process. If you think about banks, we have legacy systems. Who knows what we are going to find when we start digging deep, but you know if you start digging you're going to find something. I think we have to be really careful and educate the regulators about boundaries. Are the boundaries doing what they are supposed to do? You cannot stop a bad actor, right? People are making bad decisions every day and people are making good decisions every day. **P1** I think you had mentioned, that there is a healthy intellectual tension between Compliance and Legal. And the question really is how do you define what is legally permissible versus what is beneficial? That goes back to your risk appetite and your tolerance. It is not enough to say this is not beneficial for us you. You have to be able to prove that you thought through the impact vertically into the business

and horizontally across the entire enterprise. Again, it is demonstrating how you think, how you govern, and how you deal with discoveries that are uncomfortable—and that is going to vary based on everyone's scenario. I do not want us to be too prescriptive in terms of the boundaries because the scenarios are going to differ and the facts are going to differ. As a CCO you are making decisions every day based on the information you have at that moment.

M1: **M2,** so what standard?

P2: The answer is really that there are many things that are permissible and not to the benefit of your customer. If it is not to the benefit of your customer, even if it is legally permissible, you just do not do it.

M1: Sort of an Unfair, Deceptive, or Abusive Acts and Practices ("UDAP") standard?[9]

P2: Yes.

P4: That would be a very nice thing; except, in the financial services business that I am in, conflicts are present every day. I mean you make fees off of your customer base and I think to me it comes down to what is that threshold around conflicts that you are able to mitigate and that you should not have at all?

M1: Let us try to articulate a more precise standard along the lines that **P1** suggested. Where is the forum where that enhanced standard should be fleshed out so it can be presented?

A6: I think in the banking sector, it is the Federal Deposit Insurance Corporation ("FDIC") because the FDIC is a board that comprises [inaudible].

M1: I am not saying that. I am asking on the side of the compliance officers, where is a good place?

A1: How about the financial services round table?

[Head nods from panelists].

M1: In your case, the clearinghouse. The trouble is that when you look at this in any number of organizations, compliance officers are going to be far down the line in terms of what they are going to make important to them. I am not even thinking in terms of priorities. I am thinking of what is the best forum where this could be further developed after our panel. How does a dialogue develop?

P1: One way, to gain a little traction on the issue is to bring to the table former regulators and either current or former industry leaders with sufficient credentials, irrespective of their political inclinations, to begin the dialogue around the issue. This will generate some momentum and then, obviously, at the right time you can reach out to one agency with the hope

9. 15 U.S.C. § 45, et. seq.

of getting a buy in. This would hopefully lead to a buy in by another, and a sort of a domino effect would occur. I do not think for a minute that it would be easy to achieve coordination among a bunch of different regulatory agencies with competing jurisdiction. If it were not difficult, there would be one agency or several that would work very well together. But it is certainly an issue that is worth exploring. If you operate under the assumption that it is a bad idea to deter talented people from pursuing the critical role of a compliance officer, then something must be done to combat the perception of targeting.

P4: I guess your perspective can be clouded by the daily accountability that you are dealing with. I agree it is a fantastic job. But the discussion that we are having sometimes can really get in the way of having the right perspective around what a great job it is.

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PANEL II: A CCO'S APPROPRIATE SCOPE OF RESPONSIBILITIES

M = Moderator
P = Panelist
*A= Attendee**

M: Our next panel is going to turn more precisely to defining the Chief Compliance Officer's ("CCO") role. What I am going to do is let everyone introduce himself or herself and say how they got to where they are now. I think background is important. [**P1**], could you start us out?

P1: Sure, I started out as a lawyer. I worked as a commercial litigator and bankruptcy practitioner. More specifically, I worked with creditor's rights and with Article 9. I went on to become in–house counsel for a company because my wife told me I needed to spend a little more time at home because private practice was sending me around a lot. In 2005, my employer asked me to become the CCO. Like the people here, it was very much an accidental journey into compliance. But once I got here, it was the best job I have had. It was a very exciting role.

P2: As some of you may know, I am a Professor of [Redacted]. I have been teaching for over twenty years now—it is hard to believe. Before I became a professor, I worked as a community organizer and then went to law school.

You might wonder what I am doing on this panel—and I wonder that myself [laughter]—but there are two relevant areas to what I think about, to what I write about, and to what I teach that relate to this wonderful program. One of them is Labor and Employment Law and I believe that is why I was recruited here—even though the type of Labor and Employment Law that I do is probably different. But still, I am fascinated to hear this discussion about defining best practices and seeing the really important function of compliance officers and how do you do that—through employment contracts, through best practices documents, or whatever I am sure we will be talking a lot at this panel.

The second relevant area is from my legal ethics teaching. I had been thinking about and writing a little bit about the changing nature of the legal

* Special thanks to William Warmke & Seth Weintraub for their tireless work in transcribing Panel II.

profession and the work that legal professionals do. More specifically, I think, is the move towards more interdisciplinary–ness and the way in which many lawyers or people who have gone to law school will go on to have jobs that are not traditional legal jobs. I think in a compliance officer's space, you are working with business management and I know many come from business school. I hear a lot about compliance officers using organizational psychology, finance, accounting, investigating, auditing, testing, and data analytics. There are a lot of fascinating ways in which the law plus a bunch of other disciplines come together in the compliance officer's role. As a result, I think that it is going to be a really exciting area that many people—some of whom go through law school and some of whom go through other disciplinary doors—will go into. I am just really excited to be hearing how the role is evolving and its importance. I am also excited to hear about this concept of how legal is not really in touch with the organization, and then you have got the compliance officers who are actually working to make sure the organization complies with regulations.

M: I think they are both in touch with the organizations, but in different ways. You modestly did not mention that you were an editor on a law review. You did not mention your experience having grown up in East Pakistan, substantial periods of time in Romania, Australia, and Turkey. That is a fascinating background. But more importantly, we are in a recruitment effort here to get people with your caliber of interest to help us in this definitional process. We are hoping to recruit you to our cause.

P2: Well, I am already recruited, but how much time I have is another question [laughter].

M: So, with that, let us get started.

P1: The topic of this session is to try to define the role more particularly. I think from the discussion we had on the previous panel, it is pretty clear that trying to manage the scope of your responsibility is one way of limiting your liability. If the scope of your liability can be defined, you can put some corners around what your liability is.

So, having a law background, I started by asking what do the law and regulations say? There is not any law or regulation that defines the scope of a compliance officer. What there is, are the U.S. Sentencing Guidelines for how prosecutors can give credit to corporations if they have an effective compliance program.[1] Chapter eight of the Sentencing Guidelines provides some insights into what an effective compliance program is.[2] Additionally, within the financial services industry, in 2008, the Federal Reserve

1. *See generally* U.S. SENTENCING GUIDELINES MANUAL (U.S. SENTENCING COMM'N 2016).

2. *Id.* ch. 8.

published a document called the Compliance Function of Banks, which provides some definition of the role of compliance and what an effective program looks like.[3] Furthermore, the Office of the Comptroller of the Currency ("OCC") recently came out with standards for overall risk management, which provides some insights into what should be included in a compliance program.[4] Finally and most recently, on December 7, 2016, the Federal Financial Institutions Examination Council ("FFIEC") published an interagency compliance program rating system for consumer compliance programs.[5] While this system is limited to consumers, it still provides some framework into what is expected of a compliance program.[6]

So, why do I tell you about all those documents? Well, thinking about the role of the compliance officer, you have to think of it in terms of (1) what is the subject matter scope that you have responsibility for in your organization, and (2) what are some of the structural elements of a program over which, as a compliance officer, you are required to have oversight. I think of it in two ways. One is the oversight piece and the other is the management piece. As far as the program elements, let me start talking about subject matter scope first.

If you read the documents, particularly chapter eight of the U.S. Sentencing Guidelines, it basically says that a compliance program—in order to be effective—must provide coverage for all laws and regulations.[7] This even extends to the financial services space with guidance from your regulators.[8] So statically, all laws and regulations—that is your scope—is pretty broad. How do you peel that back? The answer goes back to our prior conversation; looking at officers with other responsibilities is really important and something that you can do if you have a board that understands. I will just give an example. In the financial services space, regulations came out after the financial crisis, requiring institutions to do a comprehensive capital adequacy review. There were prescribed methods by which that had to happen. Essentially, financial management institutions had to assume scenarios that were going to impact their organization and business model using economic modeling—i.e. whether

3. FED. RESERVE SYS., SR 08–8 / CA 08–11, COMPLIANCE RISK MANAGEMENT PROGRAMS AND OVERSIGHT AT LARGE BANKING ORGANIZATIONS WITH COMPLEX COMPLIANCE PROFILES (2008).

4. *See generally* OFFICE OF THE COMPTROLLER OF CURRENCY, M–CRG, CORPORATE AND RISK GOVERNANCE (2016).

5. *See generally* FED. FIN. INST. EXAMINATION COUNCIL, FFIEC–2016–0003, UNIFORM INTERAGENCY CONSUMER COMPLIANCE RATING SYSTEM (2016).

6. *Id.*

7. U.S. SENTENCING GUIDELINES MANUAL ch. 8 (U.S. SENTENCING COMM'N 2016).

8. *See id.*

you had enough capital on hand to weather the storm. They came up with these crazy scenarios with twenty percent unemployment lasting for three years, and a series of different scenarios you would come up with, and you would model that out. I do not know anything about modeling; I do not want to know anything about modeling. Our Chief Financial Officer ("CFO") has people within the Finance Division that do that work; so why should I, as the CCO, need to get into all of those weeds? The answer is I do not believe I need to. I think the CFO has responsibility for those aspects of the program—to the extent he has an obligation to comply with law or regulations that define how he does that. As a CCO, I just need to be aware that the CFO has an effective program in place that is following the most recent guidelines. As CCO, all you have to do is say, "ok, let me take all of that and break it down in my organization and let me get my board behind me to define who is going to be responsible for what." For example, in my organization, I am responsible for consumer protection laws and regulation. This means that I am responsible for anti–money laundering regulations and overseeing our ethics program. As a result, I think about things like insider trading and the Foreign Corrupt Practices Act[9] in my ethics program. Fortunately, I do not have the size of the company as some other panelists. Consequently, my concerns in that regard are not as great as others. But that is the scope of my program—basically, those three areas. If things go wrong in those program areas, I am going to be on the hook for that. However, if things go wrong in our labor and employment law, if we are not following the Fair Labor Standards Act,[10]—say we have employees wrongly categorized as between exempt or not exempt employees—our Human Resources ("HR") head is going to take the hit for that, not me. That is because our board has defined that as HR's responsibility. Consequently, I think one of the things that you have to do first when you consider the scope of your program, is to define the pieces that you are responsible for managing, recognizing that you have a responsibility of oversight over the whole program.

I have put on the white board a list of the elements that are identified in those documents that I talked about in the beginning. I think it is a little helpful to walk through and to talk through them a little bit. First, what the documents tell you is that compliance programs are required to educate board members on what the legal expectations are and the risks that exist within the company. Second, compliance programs have to provide effective reporting to the board and senior executive management so that the board can decide what risk tolerance they want to adopt. This means that the board has the obligation to adopt a risk tolerance and you, as a

9. *See generally* 15 U.S.C. § 78dd–1, et seq.

10. *See generally* 29 U.S.C. § 201, et seq.

compliance professional, need to help define that risk tolerance as it relates to compliance with rules and regulations. Then, there needs to be a clear tone from the top to create a culture of compliance within your organization. If your organization does not have the core value of doing the right thing, go and find another job as a CCO. Otherwise, you are going to have a really tough time in that job and you are going to be one of those people who is more likely to be prosecuted than not.

M: Could I stop you for one second? Just looking at the board, how do you educate the board? Additionally, when you talk about risk tolerance, are you talking about risk of violations or what type of risk are you referring to?

P1: It is the risk of violations at the end of the day. But you cannot have risk tolerance that says, "it is ok to violate the law so many times." You cannot set a tolerance like that. Rather, it is compliance's endeavor to be in compliance with all laws and regulations and we have to put in place programs that effectively manage the risk of us having systemic breakdowns. I love the analogy that was used earlier. We create a legal framework and an enforcement network for our village. We do not expect that we are going to have no crime, but we expect that we are going to have a small amount of crime and we are going to address that crime quickly.

M: In other words, we are not going to have a cop on every corner, but we are going to have a reasonable number of officers patrolling trying to prevent crime? It is not that we have no tolerance for criminal or improper behavior, but we can only spend so much in this area, so this is the risk we must take? That is the reasonable approach? But in your organization, how do you relate to the board?

P1: With respect to the board, what I tend to provide the board is information about the consumer protection laws and regulation with which our business units have to comply with. For example, I inform the board of the different issues that arise as we are offering those products, services, etc. When we are testing programs, we identify issues and then inform the board as to what they are.

M: How do you do that? Do you meet with them on a quarterly basis?

P1: I meet with the Audit Committee of our Public Company Board quarterly, and I meet with our Bank Board ten times a year. Our subsidiary Bank Board—a Bank Secrecy Act ("BSA")[11] committee—is meeting ten times a year and I report to that committee at every meeting. I report to the Board of the Public Company Audit Committee once a year and typically report once a year to the full Board.

M: Do you have to report through someone or do you go direct?

11. *See generally* 31 U.S.C. § 5311, et seq.

P1: I am speaking directly to the board. From a supervisory perspective, I report up to the Chief Risk Officer ("CRO") of our company.

M: Is that pretty much the common model at banks?

P1: I would say it is more common for the CCO to now report to a CRO rather than to a General Counsel ("GC") in the financial services space. There are some institutions where the CCO is a peer of the CRO. There are also some institutions where the CCO reports to the Chief Executive Officer ("CEO"). In our organization, I am not on the Management Committee, but the CRO is.

M: Just a few more questions. When you are reporting to the GC or to the CEO, is there this sense that the CEO is trying to make this company successful and you have to get on the team? Do you see reporting to the GC—who is generally on the CEO's team—or the CEO as having any risks for an institution?

P1: Not so much. At some point, you have to have a leader over everything; so I do not feel that at all. There has to be some person who is responsible for the workings of the company. That person has to have an appropriate balance between risk management, long term revenue generation, short term hitting targets, and so forth. I think you try to align in an organization where they take a longer view.

A1: When compliance officers report to the GC, it relies heavily on having the compliance officer having a great relationship with the GC. So, if you have a lawyer as GC, you can have a tension between the buck stopping at the compliance officer versus going over the compliance officer's head by going directly to the GC. I think that is a model that comes under pressure, obviously.

P1: No, I think that is true. In two of my past organizations, they started out reporting to the GC, but my program was moved to reporting to the CRO.

M: We have one question. I do not want to break your flow too much, but I think it is good to have dialogue.

A1: It is not just a risk of fines, it is a reputation risk and business risk because in some cases if we have too many violations, then we cannot do things like open branches, at least in the banking industry. So, when we are talking about risk appetite, we do have to characterize these other issues that are very tangential to compliance.

P1: That is a good point.

P1: That is a great point which leads to the second thing up there on the white board, which is the independence expectation of the compliance function. One of the things that the documents say, is that you have to have a compliance officer that has sufficient authority and sufficient resources, both human and technical. There has to be an organization structure with

clearly defined roles and delegation of day–to–day responsibilities. Finally, the organization structure has to be both independent from the business—particularly with respects to monitoring and supervision over practices—and yet, at the same time, highly integrated with the business—particularly with respect to the design, the implementation, and the monitoring of controls that exist within the businesses. As a result, designing that framework is pretty exciting; it is a pretty exciting challenge. You have to really become a system engineer or process engineer that understands how the business process works. You have to help design where the control points and where they should be in process. You have to help figure out if they should be systemic controls, automated controls, manual controls, a second review over the control, or a detective control. That is the example I like to give when I talk to my business managers. Look, when you have a high–risk situation, you are going to want to have a very strong and robust control system.

Let us think about it like an automobile. There is a high risk that if you crash in an automobile that is devoid of controls, that you will fly through the windshield of that automobile. There is a significant risk and you will probably die. But if there are automated controls—like airbags that sit there in front of you—and there are automated monitoring controls that you all see—like that annoying light or dashboard thing that goes off and tells you to buckle your seatbelt and that your passenger side airbag is on and working—this risk is significantly reduced. If you have a high–risk process, you want to build both these automated control and automated detection mechanisms into your process. Consequently, you have to work with businesses to help them understand what a control is and where they need to put it in. And that is where you are highly integrated. However, you also have to have a high degree of independence because you have to come around with your testing arm and say, "hey, are you really doing that right?" You have to take an independent sample and an independent look to figure out whether your controls are actually working.

M: Can you please talk more on the subject of testing and audit committee compliance relationships?

P1: The internal audit function has a broad responsibility to look over the entire control framework within an organization whereas compliance is a little more granular. Compliance is looking for specific controls within business processes to attack legal regulatory risks. Essentially, the audit function is a little broader.

P2: I have a question. When you sit down to negotiate to take a job as a CCO, you are talking as if your role designs a lot of this once you take the job. But something must have existed before and a part of your job is to actually design. So, how much of that is negotiated? Are you negotiating

with the employer about what exactly what your job is going to look like? Are you memorializing this in an employment contract?

P1: I have changed jobs in this role twice now and in it is a very delicate dance. On the one hand, when you are talking with the CEO and business partners, you want them to love you and to think you are going to be their partner and their best friend. But on the other hand, you are going to help them get through a weirdness that they have to deal with in their business. That is one of the exciting parts of the job, but you have to convince them of that. You have to feel that your CEO and your board are going to support you when you have to be the one to tell the business that they cannot do something, or that they cannot do it the way they want to do it. That is a very delicate dance and you have to judge based upon the responses that you get from the board. For example, when I interviewed with the Audit Committee Chair and the Board Committee, I got a high level of confidence that they would have my back. But you should go further and interview with the executives to see whether they are going to be willing to listen to you when you are trying to talk with them about the control environment. If you get the sense that you have got a whole bunch of cowboy business leaders that are not interested in collaborating and cooperating with you, your job is going to be miserable.

P3: You are starting to see the law firms getting happy drafting employment contracts because a lot of risk officers are being very explicit in their contract negotiations, especially because there is a shortage. So, you are basically playing musical chairs.

M: Do you think that if we began to have a little more definition around what the regulators expect, it would drive the negotiations process? Because then the CCO could say, "yeah, you have got to cover that and I cannot take the job until it is covered because the regulator expects you to cover that." A little more definition around it makes it a little easier to have that discussion, right?

P3: I think that is a good place to start. We keep speaking of things other industries do, but if you think about the banking industry—which is answering questions of financial soundness—the question is will it impact capital? That is a totally different question. That is why this is very important. Is it that you have a regulator who is only looking at the financial soundness? Or do you have new regulators who could care less about the impact on earnings or capital and are concerned exclusively with consumer protection? Is it possible that what satisfies some regulators does not satisfy a consumer protection regulator? To further complicate matters, you also have the securities regulators. They are an enforcement agency. It is a totally different question that they are answering. Finally, you have to be concerned with international regulators.

Consequently, compliance officers are being very specific about their authority to hire and their budgets. They are starting to negotiate how much they have in reserves if they take this fall because they know they have to have a successful execution. As a result, it is quite interesting hearing these CCO call to say, "hey, would you think about this provision?" We have never talked like that before. But since this CCO liability piece has not been solved, they are trying to get specific terms in their employment contracts to have at least some defense or boundaries around what they have the authority to do.

P1: I was not so specific in my negotiations; I wish I had maybe talked to you first [laughter].

M: What is the name of the compliance association you mentioned?

P1: I haven't heard of it.

A2: National Society of Compliance Professionals ("NSCP").

M: In my view, I thought what might emerge from this Panel is at least some suggestion as to what those items for discussion are that you should discuss with your employer before you take the job. But, we took off . . .

P1: No, that is all right. We should continue to have these thoughts.

The next part of the compliance program that is on the white board is having an effective risk assessment. Basically, I think the way this works in most organizations is that you identify all of the laws and regulations that apply to each of your respective business processes. In effect, you map the requirements of those laws and regulations and apply them to the processes and to the controls. Then through your testing, you determine whether those controls are effective. Finally, you determine what your residual risk is. Essentially, you assume what the risk is in the absence of control. Then you look at what the control framework is, how well you test it, and you get a residual risk. This helps management figure out where to place resources to create an effective control environment. Obviously, you have to have policies, procedures, and controls.

You also need to have awareness education and training. There are actually three levels of education. The first is you have to be aware of a risk. All employees within the company need to be aware of risks of compliance.

Second, you have the education piece, which is really what you want to do for your more senior executive management and maybe middle management of the firm because they are the ones who are designing the processes and designing the controls. As a result, they need to be really educated on the risk, what happens if it goes wrong, how you can control for it, and that kind of thing.

Third, you have training, which is for your employees to teach them how to react. You need to train soldiers that are in the military because you do

not want them to have to, when they are sitting in a firefight, take out their manual to figure out how to use their AK–47. They have to know how to use that and they have to be prepared by knowing exactly where to aim and how to shoot it. You want your employees to react and to react consistently all the time. It is that kind of training; it is very procedural. You want them to do the right thing and do it the right way.

Fourth, comes monitoring and testing. Compliance officers have functions that report up and are essentially audit functions. But they are targeted audit functions that look at the control framework for the controls that exist in the organization.

The fifth element you are supposed to have is an enforcement element, which I thought was interesting. I forgot which of the documents I read this in, but it said compliance programs need to provide incentives to comply and disciplinary action with the respect to noncompliance. And, so, we do a lot of the latter, most of the time. But I do not really have a lot of great incentives to comply. I do however have a lot of negative consequences. For example . . .

M: You could use some gold stars [laughter].

P1: Yeah [laughter]. But, for example, if a company does not completely require training, they are subject to written warning and they can be terminated if they do not finish their required training. This is a very clear concept in some industries. They get a black mark on their public record, which is available for anyone to see if they are a registered representative. So that is one way in which we enforce compliance.

One of the other areas that they talk about in the programs, is having data analytics and reporting. This means being able to analyze data within your firms to be able to quantifiably determine what the amount of risk is in your processes, and then being able to report that up to your board. This is really hard stuff. Figuring out how to quantify the risks associated with non–compliance is difficult to do, but I am not making this stuff up. This is what the documents say our programs are responsible for doing.

Then, after we do all of this within our own organizations—we make sure we are compliant—we then have to figure out how we make sure all the third parties we engage with that provide services in support for us have effective compliance programs in their organizations as well. As a result, I have a whole third–party unit that works with our third–party vendors. This unit goes through and pesters the third–party vendors with questionnaires that ask them how effectively they are training their employees, how effectively they have policies and procedures, and whether they are testing. We get that information back and then we kind of say we have done our diligence and we can rely on the third party.

In respect to those third–parties, we also have to have change controls in place. This is one where the intersection of law and compliance is probably the most demonstrated. Here, change can happen through a couple of different ways. One way it happens is because the laws and regulations of the expectations change. When they change, what I do is I rely on my GC's office because they monitor the laws and regulations in our organization. The GC's office comes up with this memorandum that they send out. This memorandum says, "hey, the law changed, here are the new requirements." We take that and we work with the business partners to whom that law applies to help them make changes in their control framework if, and when, it is necessary. As a result, you would need to rely heavily on the law department to help you in that process.

Another way you have change is if your organization changes. If your business lines progress and begin to do something different, you have to be able to detect that. You have to be able to identify the body of existing law and regulations that may apply to that new process, product or service. You have to be able to effectively help build the control framework necessary for that change if they have changed their business.

Additionally, change occurs within the systems. This is where I think we probably lose most of our hair. That is when technology systems change. For example, when they make a code change. You have to have testing protocols in place to make sure that changing the code in that way does not negatively impact something else down the line. I have learned far more about regression testing of analytic models and regression testing of systems than I ever wanted to know. And they certainly did not teach me that in law school.

One of the other areas that they talk about in the programs is tracking issues and actions. When issues are identified—whether if it's from the regulators or from our auditors—from our compliance testing, we identify the issue, we identify things that are broken, and we have to fix them or management has to fix them. We are held accountable for making sure management fixes them.

Lastly—then I will stop talking and we can get into more discussion—is complaint response. Basically, the notion is listen to your customers. If your customers are complaining about something, there is probably something wrong with your process. Listen to the complaints and use that as data–mining. It works to a point. The problem is, I think, as consumers become more educated and they just want a better result, they can game the system. It is sort of like when I used to litigate, when writing pleadings, the plaintiff's lawyers would say the victim was rendered disabled. You will have consumers who will contact them and say I have been unfairly

treated, I have been deceived, and I have been abused. The lawyers threw all the acronyms because they are trained and they know what that means.

But we listen to complaints actually as part of our jobs. So, that is what the expectations are of a compliance program. A compliance officer is required to oversee all of that for all laws and regulations *and* manage that for whatever subset of regulations your board defines as your responsibility. Yours is going to be different than mine because we are in different industries.

M: So, you have said this is what the literature tells us and this is what we must do. Is there a consolidated presentation of that?

P1: No.

P2: He is going to write it [laughter].

P1: Before we talk about tools, I want to pick up on something you talked about because it is one of the things that concerns me—and I have the responsibly of overseeing ethics in our organization, as you do. Monitoring employees, I mean how much monitoring is really necessary in order to assure compliance space? You know, is more monitoring always better, or is there some point at which we are monitoring our employees too much? I mean we can do a lot by monitoring utilization of systems. I can tell you when employees badge in in the morning, I can tell you when they badge out at night. I could mine that data and tell you whether employees are cheating, or if they are working enough hours. I could mine data from their computers to see how many times they are going to—well, we can block websites and we do—but if I want to mine how many people are going on to websites other than the corporate websites, I can do that. There are lots of things we can do to data mine to monitor employees. How much is enough? Is it really ethical? Do we really need to do that? When is it enough so that we are doing our job, but not so much that we are infringing upon what most normal people would think of as general privacy?

P2: I think that is an area where the law is in flux and very variable depending on what state you are in and what statutes exist. So, there you have got both sides. On one side, it is too much monitoring where you may run into privacy problems and on the other side, too little could be dangerous.

P1: You are going to get me to go into a tirade here, but when you talk about big data, particularly . . . Yes, we have a question.

A3: How much of a role does the CCO have in company's data retention and destruction policy?

P1: I hate that policy; I try to run away from it [laughter]. It can be very technical. And there are actually people with certifications on how much stuff you should keep and retain—records management stuff. Honestly, I think we have a records retention policy that is overseen at our company by

our head of security. I am going to make sure it stays there and does not come to me [laughter]. So, I abide by it. I apply the policy to my program but I am not responsible for setting it.

P3: Some large firms have a Chief Data Officer as well. So you are starting to see a role of a data office. A lot of data security and record retention protocols are somewhat in that environment. Most of them are moving away from the CCO dealing with that.

I want to speak to the privacy issue. I think it really has to be driven by your ability to identify conduct and concentrate on areas where it is heavily manual and easily manipulated. If you are targeted, I think you are going to have to go deep enough to give yourself reasonable assurance. But where you can easily identify, I think you should, probably because we know it takes a long time . . . most of the time people's judgments change based on what is going on. So, think about it in that context.

P1: Right. For example . . . oh yes, question.

A4: As technology increases, will it be easier and easier to get more access to what your employees are doing? As a result, how much are you responsible for monitoring what your employees are actually doing?

P1: That's precisely the point I was getting at. Technology is going to allow us to do more and more monitoring. The example I was going to pick up on is, I could think of scenario where we get our employees to agree that we have the right to run a credit check on them to see how they are doing because we are in the financial services industry. In theory, I could do polls on people's credits and if you have a very negative and nasty credit score, I might put a higher scrutiny on you because you are a higher risk for stealing from the bank because you have a lower credit score. I mean it's like financial profiling of our customers. Should we be doing that? Is that ethical? Is that right?

P2: I think that is something you would want to talk to your legal counsels about because I do think there are benefits and risk on both sides. All kinds of bells go off in my head about the possible privacy violations and regulations. You would know better than me. I could just think of a handful of things that could be problematic. I can also see that you could run a risk of being sued for negligent hiring. For example, if you hired somebody that ended up being a bad apple and you could have detected it by using what people typically do and researching applicants. If you did not do those things, you could be sued. So, I think that's where a legal advisor would be key.

P1: It comes to the point that we are being charged as compliance officers with an increasing level of liability. As a result, we have to do our job more effectively and do more monitoring to make sure that there are fewer bad people running around our community. That there are less

people in jail. What does that do? It becomes an infringement—not that I am a card–carrying member of the ACLU—but it really does tend to infringe upon the personal rights and the liberties of individuals. If we do our job really effectively, we may totally run all over what people may think are individual civil liberties as employees of a company.

P2: I do not think there is a line. But there are things that are more clearly work-related and, therefore, appropriate for monitoring versus some things that are heading into an area where there is sort of a balancing, because even those common–law tests . . . the courts are still doing this balancing of individual rights versus business interests, so you are getting into an area where more things are problematic. But some things are obviously okay, right? That would be the advice I would give an employer.

A7: My question might push us right back towards saying we need a standard across the industry. But we talked a little about how when you are thinking about creating these analytical frameworks, you face an enforcement action that the desire to get that cooperation credit is going to be great. However, on the compliance side, do you think about those second order effects when the enforcer comes knocking and you have these robust monitoring frameworks? If the regulator or the prosecutor gives you cooperation credit, do you then hand it over? How does that influence your decision on the front end? Should it?

P1: I think that for most organizations that are faced with regulatory enforcement actions, there is not a lot of benefit in trying to fight. You typically lose a certain amount of control over what you are going to do. You typically cede control to the regulator who tells you what they want to see you investigate, and you do it because you want to get out from under whatever enforcement order you are facing.

A7: I am more talking about backwards-looking. So, in the employee–employer relationship, maybe it is easier to say you sign a contract so we can watch what you are doing. Then when the enforcement action comes down, we read the contract and the regulator or the prosecutor says, "ok, give me what you have got." You say it is okay for us to have it in this relationship, but how are we going to hand that over as a corporate entity going to the government?

P1: If you have it, you have to give it over.

P2: I do not think the law has even started to deal with all of the ways in which traditional protections apply in the data algorithms world.

A8: Going to the idea of monitoring and going to the basic level, as a CCO, what would you say is an effective application of all of these regulations and laws? What is an effective way of building this culture of ethics and, I guess, a beneficial and productive workforce at the lowest

level? Do you see those going hand in hand or do you consider them two different operations, just monitoring?

P1: That is a great question. What you are pointing out is that a highly controlled environment may actually result in a culture of compliant ethical behavior. I guess prisons are very highly controlled environments and the culture that exists within them tends to not be a very good culture where people care about each other and try to do the right thing. Yet, they are highly controlled. I do not know that I am convinced that increasing physical control over human beings in a social space is necessarily going to result in the kind of culture that most of us want to live in. I think we would all rather develop a culture where the goodness comes from within and is encouraged by those around us. I am not entirely cynical [laughter], but I think that is the sort of conundrum we are dealing with.

M: So, part of a compliance officer's role is to create and to explain why compliance with the given rules makes sense and is in the interest of the individual and the company. It is not necessarily giving out gold stars, but rather convincing people that this is the way that your behavior is in the interest of our company and this is why it is essential to you and our fellow employees. Is that part of . . . do you have an education training that has a cultural aspect to it too?

P1: Yeah, it is a little bit of indoctrination. We have a . . . it is almost a religious indoctrination into the culture of your company. You cannot hire enough compliance officers to watch every employee. You have to hope that you hire mostly good employees and that they will be your force multiplier to help you in your programs.

M: As you see new threats—we are certainly seeing significant threats in the cyber area—we see this pattern where the company is at fault for not having protected itself. You see this interesting conundrum where the government is telling the company that they are there to help you and they want to guide you. As a result, the company feels like they have to cooperate more with the government. However, there is also an evolving expectation that because the government is regulating these things, they are going to start tagging you. As in privacy, there is an evolving set of laws. How do you as a compliance officer decide where you are on the spectrum in terms of moving from (1) letting us all try to get this right to (2) "hey, we have an enforcement issue here?"

P1: I do not know that there is a magic formula for that; I am sure there is not. I think you have to evaluate it on case–by–case basis, looking at a variety of different factors. We are starting to think about that in the industry; about how do you measure good cultures? We do an employee opinion survey. On that survey are some questions about ethical behavior that are designed to illicit responses from employees to help us gauge

whether our employees are more ethical than not. We use that as measure, and it is kind of a bad measure.

P2: Do you hire psychologists to create those and validate those survey instruments?

P1: The third party that we hire does that.

P2: Ok.

P1: The third party that facilitates the survey creates those questions.

A9: Employee engagement culture is huge right now. How do we enable thinking and innovation when there are so many controls in place?

P1: One of the questions that came up around big data—I forgot who raised that—but we talked about it in the context of monitoring employee behavior. I do not know if the people—the common public—are aware how much we use that to monitor customer behavior in financial services. Because for our anti–money laundering programs, what we are required to do under this program, is when you come in our door and when you open an account at any financial institution—even a credit union—you are required to give information to us. We ask you questions about your anticipated activities, about who you are, about your citizenship, and about your occupation. In my case, we created models because we are a very large online bank. We have a model that creates scores of whether you are more likely to be a problem for us from a money laundering perspective. Then we monitor transactions in your account. We have very sophisticated transaction monitors that sit on top of every transaction that you do every day. When one of those alerts occurs, there is an individual—who probably earns compensation between, depending on where they are, $40,000 and $120,000 a year—who takes a look at the alerted transactions on you. They then do a bunch of things. First, they go out and look; they Google you to see if there is any type of negative news. They use some sophisticated big data aggregators to find out everything they can about you, such as: where you live, what you do, and everything else that they can. They pull that into a file. Then they make a decision about whether the activity they observed in your account was suspicious. Then they file a suspicious activity report, which unbeknownst to you, goes to the Financial Crimes Enforcement Network ("FinCEN"). If you are criminally prosecuted by one of our Department of Justice colleagues—and keep me honest on this—you are never entitled to ever receive that information. The scarier part is that we are required to keep all of the data we collect and law enforcement is entitled to get all of that information just by asking. They do not have to issue a subpoena. They just say, "hey, you filed Suspicious Activity Report ("SAR") on so–and–so, let me have your investigative file." The expectation on us as an industry, is that we are doing more and more to pull together the profile so that when law

enforcement asks us, we turn all of that over. The nature of that investigation—and it has always been bothersome to me—is that as a defendant in a criminal action, you are never entitled to get that information from law enforcement.

A9: But does that not get litigated?

P1: Well it was, but the Supreme Court upheld it.

M: So, back to . . .

P1: Sorry, I digressed a bit [laughter].

M: Back to our discussion, how do we create an overall expectation that is generic enough that it covers all compliance programs, but can also be tinkered down to specific companies?

P1: One of the suggestions we discussed last evening—and we can draw parallels with what has happened in the financial space—is that when financial records are created and financial statements are created, the CFO and CEO have to sign off on those statements. What happens is that in order for the CEO to do so, they get certifications from a variety of other officers within the organization who are responsible for monitoring those key financial controls. Those sub–certifications go up to the CFO who will look at them and then become responsible. The sub–certifications make it very clear who is responsible for what in the company. As a result, one of the things that I think would be useful is to define the scope of the management responsibility of the CCO as opposed to what is the management responsibility of other officers of the company. Having sub–certifications from those other officers would give the CCO some comfort. It would help define the role in a way that would not be confusing later on when the excrement does hit the blade, and there is an action brought against the organization.

M: So, that might be a part of that list of responsibilities of what is within the scope and what is outside of the scope. Is there any duty with respect to those things that are not direct responsibilities? For example, is there a duty to make an inquiry regarding something that should have raised a red flag with the compliance officer? Or would it be better to say, you report to the board for your issues and I will report to the board for my issues?

P1: I would like to do the latter if I could. But I think there is a benefit to the board in seeing the totality of compliance and risk across the organization horizontally. I think there is a value in collecting the data from the different disciplines on compliance and pulling that together so that the board can see it. I think that as a compliance officer—distinguishing between oversight and management—the duty of oversight is to not blindly pass forward the information from your colleagues who have that responsibility. I think you have a responsibility to call out

anything that is obviously wrong. As long as you are doing that, I think that is sort of the standard that should be applied.

M: Do you have the authority to call it out or to actually cause a remedy?

P1: I think that is a great question. Partly, I think your obligation needs to be reflected in the scope of authority that you have. If you are on the Management Committee—if you have that full seat at the table, and you are not at the kid's table—I think that you have more of an obligation to challenge the . . .

M: So you would have some definition around this. If I am at the CCO level and I report directly to the board, I am a peer of these other people. Maybe I then have the responsibility to call them out and say, "hey, I am going to the board if you do not solve this problem." Or, if you are not, then that would be one of those issues that would be negotiated in the employment agreement.

P3: What you are talking about is a general responsibility for the system. Every company can articulate this differently depending on its organization structures. Some CCOs have direct authority, where they are responsible for managing it. Some companies may have a first line of defense that actually has an independent compliance organization that is accountable with oversight. Some of those CCOs are distributed across multiple areas of the company. Even within these different organizational structures, there have to be explicit triggers on when certain matters need to be reported to the board and presented by the accountable executive. The CCO can clearly designate that if there are any high–risk issues, then account executives are accountable for reporting to the board. That is a reasonable approach because you want an expert articulating the risk to the board. This makes sense for areas not directly in your control because having clear rules of engagement on how certain triggers will be presented to the board is reasonable. I am of the view—to the extent that the culture supports doing what is best—that the reporting lines actually can set a strong argument if you have direct access. It does not matter where you sit on the organizational chart as long as you have direct access.

M: So, that is the issue, do you always have direct access?

P3: Yes, and that access goes both ways. Access to sufficient information to make good decisions and access to the challenges to the extent that you believe a matter is warranted for debate.

P1: I would agree with that. I do think though, it does not necessarily have to be a direct report to the CEO. I think organizational structures are going to be different and there are different subject matter scopes for the CCO. The CCO may sit at different places in the organization, but it has to be a consideration. You have to think that this person is going to have that scope of responsibility. Where, in our pyramid, does that role need to be in

order for it to be effective? You can define the role differently to make it effective at a lower level in the organization, but then you cannot hold that person to the same level of responsibility and accountability as somebody who has the seat at the executive committee.

P2: That would seem to be something to point out to regulators if there is an issue. If you do not have power other than reporting up, you should be held responsible only up until that level.

P1: That level should be based on the level of authority that the position has in the organization.

A10: I wonder what the answer would be from a regulatory perspective. Anybody had that exposure? How would you deal with that?

A11: I always like saying that is not my responsibility [laughter].

A10: But if you were an investigator, would you accept that answer?

A11: Handoff points are important. Where something gets handed off from the compliance officer—and I do not know if that is something that you can express to a regulator if it ever comes under inquiry—is the point where they should be no longer liable.

A12: If you are putting yourself in a position where you are vulnerable because you cannot execute the compliance function because you are not getting the ability to delegate, with all these responsibilities, then I think that is a problem. You have to be able to advocate to your organization to make it clear that you are either going to have those resources or there is going to be some real vulnerability. I do not think it is realistic that you can handoff. I am just saying if there are some serious issues and you think you can hand it off, you know you could really be subjecting yourself to some further action down the line. You really have to—I mean that is the really rough part about being a CCO—making sure there is follow–up on any serious issue that comes in your direction. I am not saying it is a reasonable standard, but I feel like if you are not showing up and having action plans in place, there is certainly potential for liability.

P1: I want us to use another example. Companies are separating out the Bank Secrecy Act ("BSA") function from the compliance function. How does that work within this framework? Well I would argue it would be just like the CFO, right? So, the BSA enacts a regulation and there are ways in which you need to manage it. From an oversight perspective, the compliance officer would have the responsibility to receive information from the BSA officer. To report on the effectiveness of compliance, that would be rolled into that function from the reporting perspective. But if something is going terribly wrong in that program, it would be the BSA officer's head that would be in the news, not the CCO. And I think to your point, it is about making that very clear. I do not know if you do so in a delegation memorandum, or if you do so in the way you define

responsibilities in the program with the board. But somehow you have to make it very clear. Because I think if a prosecutor comes in and sees that four years ago there was a board resolution that appointed the BSA officer and there are these four program documents that have been updated over the past four years, it makes it clear that it is the BSA officer's responsibility and not the CCO's. Even though the prosecutor may not like you, he is going to be bound by the evidence to follow the trail to the BSA officer's desk, I think.

P2: I think you could take a lesson from the American Bar Association ("ABA") in the way that it regulates lawyers.[12] Model Rule 5.1 says that the partners or directors of a law firm have to put reasonable procedures in place "to ensure" that everyone is conforming to the legal ethics rules, but they are not personally liable unless they know of a wrongdoing.[13] I think you could borrow their application because those lawyers know how to protect themselves.

P1: A young lawyer once said to me, "look, the basic principle you always have to remember is if anyone goes to jail, it is the client." [laughter].

M: How are we doing on time? I see our lunch speaker is here; so, let us try to wrap it up. We greatly appreciate your willingness to be with us today. Thanks. [Applause].

12. MODEL RULES OF PROF'L CONDUCT r. 5.1 (AM. BAR ASS'N 1983).

13. *Id.*

PANEL III: POTENTIAL COMPLAINCE OFFICER LIABILITY

M = Moderator
P = Panelist
*A= Attendee**

P1: My name is [Redacted]. I started my career back in the dark ages as an auditor with a national accounting firm.

M: I have a Public Accounting Oversight Board ("PCAOB") question for you.

P1: I hope not, because my work was before the PCAOB. I was also with the Securities and Exchange Commission ("SEC") for four years in Washington, D.C., in the Division of Corporation Finance and went to law school at night while I was there. I became a corporate lawyer shortly thereafter as an outside lawyer with Jones Day and other law firms, and as a general counsel and a Chief Compliance Officer ("CCO") of three New York Stock Exchange ("NYSE") listed companies—I basically practiced corporate, securities, M&A and commercial law. I want to thank [Redacted] for inviting me.

To follow up [Redacted], my views are my own because no one else will take responsibility for them, and I am too skeptical and sarcastic for anyone to want to. So, let me get on with it. As I reflect upon my colleagues' thoughts on earlier panels, I am concerned about whether the appropriate level of resources are being brought to bear in the area of compliance because management's focus is typically on the quarterly bottom line. I think in newer public companies the risk is greater and the idea of internal controls is relatively new because management is focused on meeting promised projections from the Initial Public Offering ("IPO"). However, in more established companies—where operational controls have always been a way of life—only having a few personnel dedicated to compliance issues is inadequate and does not meet regulator's or the public's expectations.

This is a result of corporate officers with MBA degrees seeing compliance as purely overhead costs that do not produce revenue. I wonder if they recognize the variable nature of the expenses involved with

* Special thanks to Brian Gauthier & Chris White for their tireless work in transcribing Panel III.

a lack of compliance standards across all departments as the company grows and expands worldwide. I also worry, on the other hand, whether the scope or at least the regulatory expectation of a corporate compliance program is too great based on the following factors: the breadth of the law subject to the CCO's supervision is too broad; the reticence of employees to come forward or even discuss potential violations for fear of internal retribution or public scorn; the attitude of regulators to produce convictions at all costs; the lack of coordination among regulators; the uncertainty of the negligence standard in terms of civil monetary penalties; and statutory prohibitions against indemnification and advancement of legal fees. As a result, I wonder if the CCO position has become untenable.

So, how do you handle the stresses of being the head of a corporate compliance program? You can take the advice of a former General Counsel ("GC") I worked with many years ago. The GC left three envelopes for his replacement in his desk drawer for when the job became too hectic or his boss became too overbearing. He instructed the new GC to open one envelope each time the job became too stressful. The first time the new GC became stressed he remembered the envelopes and opened the first envelope. It said, "blame the former GC for the current state of affairs." That note worked for the time being, but after a few more months past the new GC, yet again, became stressed and opted to open the next envelope. It read, "blame the prior administration for the lack of direction." Several months after reading the second envelope, the GC came to work to find an FBI agent waiting in his office to question him about a whistleblower complaint concerning payments to foreign officials. The GC thought to himself, "wait a minute . . . I did not sign up for this stuff and then he remembered the last envelope." He carefully removed the last envelope from his drawer, took a deep breath, and cut the envelope open. It said, "make three envelopes."

In the good old days, when I was brave enough to practice law and naïve enough to serve as CCO, I had many duties that fell under my purview: insider trading, "Saturday night specials," stock option backdating, revenue recognition irregularities by long–term contractors, off balance sheet accounting for Special Purpose Entities ("SPEs"), lease accounting issues, and run of the mill failures to supervise cases. However, now CCOs are responsible for: international corruption in all colors of the rainbow, flagrant insider trading by relatives and friends, questionable accounting and auditing standards by foreign affiliates, bribery in unheralded proportions, Ponzi schemes of enormous size, money laundering, cybersecurity breaches of international banking transfers, and investor advisory frauds. All of this is not to mention the operational compliance issues that arise dependent on the industry a CCO serves in.

By now, the audience is probably wondering why did this guy come to this Symposium? Rest assured that before you leave I am going to really throw some nuggets of gold your way, gleaned from my recent readings and personal scars. Under the Banking Secrecy Act ("BSA"), the Investment Advisor Act, the U.S. Sentencing Guidelines, and some of the insurance statutes there is guidance for creating and implementing corporate compliance policies and procedures.[1]

These programs need to be reviewed at least annually to assess their adequacy and effectiveness. Additionally, various enforcement memoranda and statements of best practices also mandate: widespread dissemination of compliance policies, training sessions with affected personnel, and reporting mechanisms to ensure violations are reported to the CCO. In many small to mid–size companies, the CCO function is usually delegated to the GC for economic reasons. However, I caution that this economic savings may lead to privilege issues and reluctance on the part of employees to speak freely when participating in internal investigations. This affects CCOs and GCs because ultimately charges are levied against these officers based upon their implementation of corporate compliance standards. These investigations by the government focus on the CCO's attention to detail, the rigor of his or her investigation, the reasonableness of his or her recommendations for corrective action, and his or her reports to senior management, the board and its committees.

I cannot emphasize enough the need for a CCO to be vigilant, inquisitive, and willing to ask the tough questions. The CCO must be attentive to facts and circumstances that could cause potential harm to the corporation. Furthermore, CCOs should be unpredictable by scheduling surprise visits and document reviews of different departments. If the CCO is negligent, grossly negligent, or reckless in performing his or her oversight responsibilities it can lead to civil and criminal penalties for the individual that the company may except from indemnification.

All of the concerns I have discussed are in addition to the reputational risk associated with the responsibilities of a CCO. As I see it, one of the significant issues of today is the standard of care that is required when evaluating a CCO's conduct. Is one or two isolated instances of inattention to his duties sufficient? Is disregarding reports of potential violations adequate? Is casting a blind eye to red flags actionable? Is active participation in a scheme to evade the company's policies required? I submit that leaving these decisions to the discretion of investigators and regulatory attorneys trying to make a name for themselves in front of an administrative law venue is unfair, unpredictable, and troubling from a

1. *See generally* 31 U.S.C. § 5211, et seq.; 15 U.S.C. §80b–6 (2012); *see* U.S. SENTENCING GUIDELINE MANUAL ch.8 (U.S. SENTENCING COMM'N 2016).

precedential standpoint. However, in all fairness, I should note that our agency law mandates that an agent or employee of a corporation that commits wrongdoing remains liable for individual damages despite the principle of *respondeat superior*. Additionally, Delaware corporate law, to the extent it may be instructive, acknowledges that the due care element of the business judgment rule is met if: (1) due care was used to ascertain all available relevant information before making a decision, and (2) the decision was made after reasonable deliberation, in the best interests of the corporation. The only exceptions to using the due care standard would be in the circumstances that bad faith or egregious conduct has occurred. However, there is no telling if such a standard would apply to a regulator's assessment of a corporate officer's individual negligent conduct.

Now just to add a little fun to the proceedings, **P2** and I have decided to throw out a hypothetical for discussion among all of you.

In this scenario, the GC and CCO are one person of a public mid–size international manufacturing company. The GC is asked by his CEO to obtain a permit in Mexico to develop and construct a facility to produce coils and chokes for export and final completion in southern California. The GC is told that this type of permit takes several months to obtain. The CEO instructed the GC to contact the in–house counsel of the company's Mexican subsidiary to obtain the necessary permit. The CEO is a tough, hard–charging European–style CEO concerned only with results, and not necessarily the means of producing them. He was reputed to have several CIA agents on his payroll that knew the ropes of retrieving corporate documents in several foreign countries. After a week passed, the Mexican in–house counsel called the GC and informed him that he had obtained the necessary permit and that the company was authorized to move forward. Being a young, inexperienced counsel at the time, the GC asked, "how did you get the permit so quickly?" The response, although welcomed, was somewhat disquieting, in that the Mexican in–house counsel said, "do not ask." The young, impetuous GC was grateful for the result accomplished and quickly reported the results to the CEO.

After work that night, the GC started to think that as a CCO, he may want to explore Mexican in–house counsel's quick retort to his question. The GC wanted to know if anything had transpired in the Mexican transaction to obtain the permit that could be construed as corporate misconduct. I will open the floor to your comments—what might you do, what might you suspect, and how might you go about it? Have at it!

M: I think we have to call on people.

P1: Do I have to embarrass these people? I do not know these people! They are not on my roster.

A2: You should never get to a point where the Mexican in–house counsel says do not ask. This is because you have vetted the counsel, trained them, and set out their role. If you are placed in a situation where he or she responds by saying, "do not ask," it is because he or she has already completed the dumb act. You have already received the bad facts. At that point you must investigate the situation before somebody whistle blows on the conduct.

P1: However, in this scenario, the Mexican in–house counsel was hired before the GC came on board, and he never got a chance to vet the guy.

A2: If I was brand new in a job like that, the first thing I would look at all of my third parties because I would not be able to rely on them.

P2: What if you learned passively that a license was obtained in Mexico in record time and you as the CCO determined that an investigation was necessary. You made your first phone call down to the Mexican subsidiary to start lining up people to discuss the matter. Later that evening as you are sitting in your office all excited to crack this "case," you get a knock on the door from your CEO who says, "I understand that you are looking into the fact that we have obtained the Mexican permit in record time. I just want to tell you that the old consultant we used down there was lazy and took too much time to complete the simplest of tasks. However, this new consultant that we hired actually completed the job in a timely fashion and that is why we're getting it done much quicker. So, it is unnecessary to waste resources to investigate, you have too much to do." What do you do then?

P3: Keep digging in anyway!

M: Yeah.

A2: Resign.

[Laughter]

P3: You have to keep going.

A3: I think you have to put yourself in the situation. As the CCO, you will think, "is he telling me that I may not look at this transaction further?" Consequently, I would ask the CEO if he was directing me to not look into the transaction. If the CEO's intent is to halt the investigation then we need to have a different discussion because I would have to resign. Because it is my job to look into these types of transactions and if I find that there is nothing there, then there is nothing to worry about.

P3: Yes, I do not think you have to be confrontational, you can say, "thank you for helping me manage my time, but I am going to allocate time to this inquiry and I will let you know what I find." Yeah, you cannot force them to say no, but once you open your inquiry you cannot abandon it.

P2: Is anyone safe to discuss this matter within the organization? For example, the Chairman of the Audit Committee or the Chairman of the

Board or someone else that you should feel comfortable going to if you feel like you are being compromised by, say, the CEO?

A3: Yes, that is why you have the Chair of the Audit Committee.

P2: Do all the CCOs have that reporting line, or that ability to access such parties?

A3: For public companies that is pretty typical.

P2: Typical? Is it absolute?

A3: I do not know if it is absolute, but I have that ability. It is one of those rights that you typically do not use for that kind of scenario. But you do have access to it, if necessary.

P3: You are always reporting to them routinely.

A2: Going to the Audit Committee Chair is sort of like going nuclear. It is the nuclear option that is available to you.

A3: However, in this context I would work really hard to persuade the CEO that you need to do some fact–finding about this transaction. I always attempt to use my regulator or prosecutor lens when looking at these types of situations. It is always easy to rationalize late at night, sitting in the office that it all seems fine, I trust these guys, we trust our people, but then I have to use my regulator lens to recognize that the narrative just does not stand up. I would explain to my CEO that if there were bad facts it would look as though he had covered them up. The CCO needs to persuade the CEO that to protect the corporation, as a shareholder, a CCO should look into the transaction.

P2: I am going to break this hypothetical out a little bit. What if you are a CCO that reports to the GC? The GC has complete control over your budget or has input into resources that you can utilize. What if the GC deprived you of gathering the individuals that you needed for this investigation? For example, the GC restricted your access to employees from the company's Internal Audit Department or a Chief Financial Officer's ("CFO") department. What would you do? What happens then? [Pause] Is this not realistic?

A3: In today's environment that situation does not seem extremely realistic because then you, as the CCO, would be taking on sole liability. In those situations, you have no choice, but to get the resources you need. Do what you need to do.

A2: First, you have to try to convince the GC that it is in his or her best interest to provide you with the resources needed to complete the investigation. It is not going to bode well for the GC if it looks like he or she was causing you to be unable to complete the job properly. It is best to try and prevail upon their better wisdom, but if that does not work, you go outside of the corporation and hire the resources needed. You can beg for forgiveness later when you are over budget.

A3: What is somewhat more realistic is when it is a matter of how far the CCO is going to expend resources? Is it a forensic accounting firm or a law firm? Do you know, how many countries? The CCO position is similar to running a business; you have to be conscious of costs and resources.

A2: I would like to work off of that point. To me, it is not so much just as blatant as I am cutting off resources, it is determining the scope of the investigation and that is extremely tricky. The CCO has to balance the predilection of looking too hard for evidence that is not there versus completing a thorough investigation that does not result in personal liability. There is also an element of empathy for the business guys that become a subject in the investigation because everyone finds out about it and they will become paralyzed.

A4: Is there a middle road? What if you do find that the worst case scenario has happened? What would you recommend? Should the CCO go back to the drawing board and apply for the permit again in the proper way?

A3: Is there a need for self–disclosure?

P2: There is, yes.

A3: If you find an improper payment . . . you have to disclose.

A2: As a CCO, you are in a position to know enough and the question of self–reporting and disclosure often comes up. Additionally, a secondary question that is typically asked is, whether that is really in the best interest of the corporation you work for?

P2: As a CCO you learn about this situation that has been proposed. However, the CCO eases some of your suspicions, but still you feel that the facts do not add up. Do most of you feel that the standard a regulator or prosecutor would use to assess your conduct would be: was your suspicion of the circumstances a large enough red flag that you should have looked into it? Is that kind of what we are getting at?

A2: Yes, I think if you are faced with that scenario, as a CCO, and you believe that there is a big enough red flag, then you need to investigate the transaction even if the investigation does alienate you from the CEO. A CCO would complete this investigation to the best of your ability, but ultimately if the investigation is fruitless, you will be held accountable for that waste of corporate resources.

A3: The vast majority of cases that the CCO suspects to be corrupt, end up being correct.

P3: I think you are ruling things out until you have comfort. For example, when assessing the transaction or receiving the building permit in Mexico, a CCO would go through each step of the payment process and see if the step is satisfied. Once the CCO identifies a gap, he or she digs a little

deeper and when he or she comes up empty he or she moves to the next step and the process continues until the payments are corroborated.

On the other hand, I have heard in other CCO forums that CCOs of smaller institutions do not have direct access to the board and they were unsure of how to handle escalation of an investigation if they were constrained in terms of resources. I have heard some smaller firms say they would file a Suspicious Activity Report ("SAR") on their management. I have heard that they are putting these types of concerns in SARs and alerting regulators, in essence these CCOs are acting as whistleblowers.

A5: Using the SAR as a whistleblower?

M: In this scenario, the CCO cannot tell his manager about the SAR because you cannot tell the person who is the object of the SAR about the filing.

A2: You are required to report the SAR filings to your board, if the SAR is about your CEO.

M: I would like to pose a hypothetical based off of the Ted Urban case.[2] As a CCO, you have identified a reoccurring issue that is in need of investigation. However, the CEO is not allowing you to conduct the investigation and he will not give you the resources you need. Are you, as the CCO, obligated to report up to the board about what has happened? Does the CCO's duty stop after reporting the CEO's conduct to the board or does the CCO's duty extend to reporting the conduct to the proper legal authorities?

A2: I guess you can always contact the whistleblower hotline.

M: Now let's step away from the SARs hypothetical. The CCO has been told by the CEO to "stop looking at this." Therefore, as a CCO I have an obligation to fulfill my responsibility, but I do not have any resources. I report the CEO's conduct to the board. Does anyone believe I have fulfilled my obligation, or as the CCO do I have a duty to go to law enforcement?

A2: I suppose you could say to the board, "my recommendation is that we investigate this. I have not been provided with the resources to do so, therefore no investigation has commenced and I still have unanswered questions here.

M: I got that. I understand that. I am asking does the CCO then have to go to law enforcement?

P1: You cannot, if you are a lawyer.

A3: Would you get disbarred?

2. Urban, SEC Rel. No. 402, 2010 WL 35009288 (ALJ Sept. 8, 2010).

A6: On an issue like this, a CCO is vulnerable. A CCO is going to have somebody from the outside, whether it is somebody in your position or, another person that gives the CCO wise counsel on his or her disclosure obligations as it relates to this issue. After seeking this guidance the CCO will report up to the board and they are probably in a better place to decide on those issues. As a CCO I would never, in a troubling situation, rely on my own judgment because it can only lead to people questioning your objectivity and when later facts come to light that are indicative of further red flags, the conduct will be pinned on the CCO.

A3: In this kind of aggravated scenario that we are discussing I would reach out to privileged counsel—I would not ask for permission. The privileged counsel and I would look through the options because it is a very fraught situation and my bar admission, current position, and many other variables all come into play. A CCO's emotions will not be on their side in this situation, therefore the CCO needs a lawyer for an objective opinion.

This is a very delicate question and obviously a CCO has to be credible and transparent, but also have to be mindful that there are limits to what a CCO can disclose.

P2: If a CCO does have resources, would this be a matter that the CCO would want to hire an outside law firm to handle instead of the CCO looking at it or even having some impartial legal advice? Alternatively, would the CCO want to ask their staff to do this?

A2: In this particular case, I think outside counsel's investigation would be necessary because you are basically looking at internal corruption within your own firm. I do not happily have a lot of instances of Foreign Corrupt Practices Act ("FCPA") situations arise, but if they did, I would say we have to have outside counsel perform the investigation.

A3: The type of investigation you conduct as a CCO is guided by the violation you might be dealing with. Everything you see in the FCPA context is very hard for a CCO to get their hands around sitting at a desk in the United States.

A6: It depends on the nature of the issue and also who outside counsel is taking direction from. In my experience, I have seen some outside firms who are very interested in pleasing the client, and they will start to drift down the path of compromise between the corporation's interest and the conduct that occurred leading up to the internal investigation. However, the corporation's goal is to find out the facts, be appropriately aggressive towards the conduct, and fix the issue so that it does not occur again.

M: Any questions?

P1: How does the CCO find the corporation's Mexican, in–house counsel? What if the in–house counsel did not file an expense report

claiming any unusual payments because the CEO pays him under the table? Now what?

A2: As a CCO, if you know for a fact that an employee committed illegal misconduct, the CCO is duty bound to exercise the "nuclear option" by going to the board and requesting an executive session. After reporting to the board, I believe that the CCO also has a duty to report the conduct to law enforcement because the CEO has now committed a crime.

P1: I remember the discussion when they expanded the disclosure requirements and tried to get lawyers to blow the whistle. If you are the GC as well as the CCO, I do not think you can go outside the corporation when reporting misconduct. If a CCO talks to the board and does not get satisfaction, then his or her only other choice, as a lawyer, is to resign.

A2: Yes, you are right under the ethical rules as a lawyer you have to resign at that point.

P1: Another question I have is that if you are not the GC, but you are a lawyer as the CCO, are you bound by the same ethical standards?

A2: As a CCO I do not believe I am bound by the same ethical standards. I am not personally responsible for representing the company, that is the GC's role. My job as CCO is to notify law enforcement agencies after illegal misconduct has occurred within the company.

P2: As a CCO, do you give employees the *Upjohn* warnings[3] when conducting an interview during a compliance investigation?

A2: It depends. So what we do in investigations if there is risk of external third–party litigation that may result, then we would go to the in–house counsel and use them as though they were outside counsel . . . and so that is typically the way that most fair lending investigations are conducted.

P2: So what if you do conduct an investigation in a manner where you administer the *Upjohn* warnings to employees? An *Upjohn* warning is a statement made before you interview an employee which explains to the employee that you are a lawyer, that you are representing the company, and that the company may intend to and will likely assert privilege over this communication as part of the interview, and that the privilege belongs to the company, not the individual. So, you are setting the stage for keeping the information provided in the interview in a privileged context. What if you do conduct the investigation in this way and later on you get a subpoena from a regulator asking you to come and testify? As the CCO, do you feel like you can go to the regulator with everything you learned in that investigation?

A7: It depends on whether or not the counsel shares everything with me.

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3. Upjohn v. United States, 449 U.S. 383 (1981).

P2: [Redacted], you are a lawyer, right? Suppose you are conducting this investigation, not counsel, do you ever give *Upjohn* warnings?

A7: If we are going to conduct an investigation, we are under attorney–client privilege which is directed through the GC.

P2: Have you ever taken those interviews? Have you ever conducted those interviews as a CCO?

A7: They go to the GC.

P2: Has any CCO here conducted *Upjohn* interviews?

P3: Even attorneys who are in the compliance department?

P2: Yeah.

P3: The GC explains that in the role of a compliance officer, you are not considered counsel. Only the GC can administer *Upjohn* warnings.

P1: According to the ethics standards you are still subject to the ethics rules as a lawyer, whether you are acting in that capacity or not.

A7: While you are in the GC's office and your boss tells you that you are being promoted to CCO; however, as you assume the new role there seems to be a struggle with that transition. I have been in a business for seven years and I am the third deputy general counsel moving to a compliance role, but I am really struggling with that transition in my role. The business is also having a hard time figuring out how to define my role within the company.

A3: There is a debate about a compliance officer's reporting and corporate governance role, especially when the person in the position is an attorney. The CCO is supposed to disclose issues within the corporation, but because the CCO is admitted to the bar, he or she has a duty of confidentiality. As a CCO, in many cases you are acting as a legal representative of a company, in my case, I still consider myself the representative of the company from a legal perspective. However, I would not necessarily concede that I cannot administer *Upjohn* warnings, but I understand that there is another view?

A2: I would just say that when I reported to the GC, I had more of a legal role. Now that I do not report to the GC, I would say that I do not have a legal role. I would say I am no longer representing the firm; I am the compliance officer for the firm. I bring a matter to the GC's attention that I believe needs to be investigated under the attorney–client privilege because doing otherwise would be putting the company at undue risk. However, after I alert the GC's office it becomes their responsibility to run the investigation.

A6: I think in financial services where examiners come in, you are the compliance officer and it is very hard to assert privilege over your day–to–day activities. Therefore, if you are going to take on both roles of compliance officer and GC, it is easier to do so in the context where there

are specific parameters around certain legal issues and where you should have other in–house counsel involved.

A2: I have had the Federal Deposit Insurance Corporation ("FDIC") request all correspondence with counsel.

M: There may still be something of a difference between examiners in other industries and examiners in the banking context who have almost unfettered power. Banking examiners who claim the right to look at everything.

P2: [Redacted] let me ask you this follow up. If you do hand something over, are you done with it? If you receive a matter that you think is a compliance issue and you hand it off to the litigation side to look into, how do you make sure that it gets dealt with properly?

A2: That is a much more nuanced and difficult question. Let us use the example from this panel, in this Mexican scenario, as the compliance officer; I learn that they got a permit in a record amount of time. The CCO got a rather obfuscated answer from the gentleman from Mexico that procured the permit and that raises suspicions with me. My alarm bells go off and tell me this is something that needs to be investigated, and for the protection of the company, should be investigated under attorney–client privilege because there could be third parties involved. While I cannot protect anything from my regulator, I can protect it from other third parties. There could be shareholder litigation or derivative litigation that could come against the firm. Thus, I would go to the counsel and say, "hey, I think this is something you need to investigate and you need to do so under *Upjohn*." They do the investigation; presumably, they only bring me back in if I need to be involved in the strengthening of control of the compliance environment somewhere down the road.

Now, if I think the GC does not do a good job, if I think they are dirty, and they have not done a good job investigating it, well that is a whole other kettle of fish. As the CCO, I think I am entitled to rely upon the GC to do his or her job. After his or her investigation is complete and I do not have enough facts or evidence to conclude that there was a FCPA violation, then I do not have the duty to disclose. Because at that time, all I know is that we got a permit a little quicker than normal. It is my obligation to get it to the GC to investigate the issue, not to manage the way that GC investigates. Now, if a regulator asks me about that situation in an exam, I am going to say, "we obtained a permit in Mexico. Here is when it was requested and here is when it was granted." If they ask me if I thought it was obtained kind of fast, I would repeat my prior sentence. I am going to give the examiner the facts; I am not going to draw conclusions from them. That is not my responsibility. If the examiner thinks the permit process was fast, then maybe the examiner needs to look into that. I brought the

issue to the attention of my GC and, therefore, my obligation as a CCO has been met.

P2: In trying to come away from this Symposium with some takeaways as to the difference in reporting structures, are there things that compliance officers toss and turn at night about in their specific role? Are there things that compliance officers know toss with one quick fix could be made better?

M: If we could spend a few more minutes, I cannot recall during remarks how much we touched on the corporate director's liability issue according to Delaware law and whether that offers any wisdom here in the context of what level of care is expected of compliance officers.

P1: The director's duty is more one of oversight responsibility and whether the Board has established reporting procedures that enable it to receive relevant info, explore pertinent facts, and deliberate adequately to reach and rationale business decisions. The Board will have to be found grossly negligent to be liable if it is not otherwise exempted.

M: Is there any learning that we could port over in terms of duties and a standard of care for CCOs? Should CCOs be subject to a negligence, gross negligence, or willfulness standard? Is there anything that we can take, away from the Delaware director's standards and apply them to compliance officers?

A3: I think the CCO's standards will probably turn on a "reasonable person" test given the general duties and responsibilities of like officers that develop over time.

A2: What has appealed to me, thinking about Delaware's due care standard is that it is more general in nature for a CCO, even though I have not fully thought about this concept. This standard would allow for a reporting driven process guided by a reasonableness standard.

M: The ability to point to an already established legal precedent might give us some ammunition in making that case, but that does not deal with the direct reports.

A2: But at least this is a standard to build from as opposed to trying to create a brand new standard of care for CCOs from scratch.

A8: I think you also have to look at was the process adequate? Was it a reasonable process? Instead of relying on the due care standard.

M: Well, any further questions?

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PANEL IV: COMPLIANCE OFFICER EMPOWERMENT

M = Moderator
P = Panelist
*A= Attendee**

M1: Now we move to our final panel, the look of compliance officer empowerment. We have four panelists today. So first, we will have **P1** who is the Chief Compliance Officer ("CCO") of [Redacted]. You can talk about your career and introduce yourself in terms of how you got to where you are. We have **P2**, whom you have met before. We have **P3** who is Senior Counsel at [Redacted], but who has had a legal and compliance career in both government and the public sector and did fair lending compliance at [Redacted] before she joined us. At the far end is **P4** who has had a career in many different places. I could almost let him tell you, but the rest of the panel would be taken up with his resume. He is a partner at [Redacted]. He and I have worked on a lot of things together over the years, including [Redacted], which explores the role of State Attorney Generals and other officials who participate in the regulation of the financial service industry. **P4** has a long career in [Redacted] and in law, and brings a lot to the table here. Now we turn to the panelists. **P1**, I think you were going to start off.

P1: Thank you **M1**. So I will just give you a little background on how I got here. I started out as a government attorney in [Redacted] and then [Redacted] which is part of [Redacted], located here in the District of Columbia ("DC"). After [Redacted], I had the opportunity to go into private practice. I went to the law firm of [Redacted], which is a Los Angeles ("LA") based firm, but I was in the DC office. I spent nine years there first as an associate and then became a partner. After that I started to think about going on in–house, and I realized that I loved the practice of law, but I did not really love the business of law. I was not really interested in developing business and going out and being a rainmaker, so I thought going in–house would be a good place for me. I really wanted to be close to the business and advise the business. I did not want to be an outside

* Special thanks to Chauna Pervis & Emily Wolfford for their tireless work in transcribing Panel IV.

attorney on the other end of a phone call on a Friday afternoon where the client says we just took this action or we just entered into a contract; can you help us get out of it? To me, it was much more creative to be on the floor with the business, helping them to make decisions along the way. One of the partners in the LA office went to be the General Counsel of a mortgage company in southern California and she asked me if I would like to join her. Of course moving from humidity and ice to sunny southern California seemed like a great deal to me. I went to LA and was the Associate General Counsel for this mortgage company. I learned pretty quickly that this industry and this company were not really my cup of tea. I was starting to think about my next move when I got another call from another partner at my former law firm and he said we have a client, a bank in northern California that is looking for its first General Counsel. Is this something you would be interested in? Of course this was the next or natural progression for my career, so I jumped at the opportunity and spent nine years as General Counsel of that bank. I was also responsible for compliance at that time and the Compliance Department reported to me. Nine years later, along came [Redacted] and it decided to acquire the bank I was working for. After the merger was complete I left, took some time off, and then started with [Redacted] as Managing Counsel in the Legal Department where I was head of the Corporate Transactions Team. My background, I should have said, is really in securities, banking regulations, mergers and acquisitions, general corporate, and corporate governance. At that time, the Compliance Department was just beginning and the company had hired its first CCO. After a couple of years, the CCO job opened up again, and I expressed an interest in it. The General Counsel expressed an interest in me taking on the role, and I have now been the CCO for three years. I have always loved practicing law and did not imagine that I would leave the practice of law, but here I am immensely enjoying the role of a CCO.

Okay so as **M1** said, the topic here is the empowerment of CCOs so I wanted to talk about three aspects of empowerment as I see it for the CCO. I will give you the three aspects and then I will talk about each one separately. First is a strong compliance culture, second is a seat at the table, and third is access to budget, resources, and tools.

We have heard compliance culture mentioned a few times today. No one has really defined it so I am going to give you my definition of it. Other people may have different views, but I think in a compliance culture there is a heightened awareness of the importance of compliance and respect for legal and compliance requirements as well as the regulatory process. There is also recognition that compliance is everyone's job and everyone should be held accountable. It is a situation where compliance is actually embedded into business processes, systems, and products. It is not an

afterthought, nor is it an extra thing. It is actually built in—the controls are built in to those processes. In a compliance culture, you usually have resources dedicated to compliance in a Compliance Department. You also might have the compliance resources embedded in the business line, which could either be a solid line or dotted line to the CCO. Of course the tone for compliance is set from the top. I think everyone knows what that is and we have heard about it today. But what I think is equally important—maybe more important—is tone from the middle. I think it is really important for employees to have good leadership from managers to whom they report. Those are the people who your employees deal with on a day–to–day basis and it is a manager's behavior that the employees will emulate. It is important to have business leaders live and breathe compliance and walk the walk and talk the talk. I think the CCO should also have a platform for communicating the importance of compliance clearly and often to all employees. One of the ways to do that—we do it at [Redacted] and I am sure some of the other compliance officers here do the same thing—is that we have an annual compliance week and it is a chance to put a spotlight on compliance and combine both an educational component with something fun during the week. I think it is really important for people to see the compliance team in a different venue. Compliance is a very serious topic, but to see the Compliance Department have some fun and make people laugh, I think is a really important part of compliance week. Last week we held our annual compliance and ethics week and we actually had a regulator come and talk to our company. His name is [Redacted] he is the Western Regional Director of [Redacted], our primary federal regulator. We asked him to come to our headquarters to talk about the [Redacted] priorities, recommendations, and how he conducts an examination. We had his talk streamed out to our entire company, to all of our field locations and it was very effective. It was very rewarding to me because afterwards, people would come up to me and say well [Redacted] said this [Redacted] said that. So, obviously they were listening and got some great takeaways from it. We also had a compliance Family Feud game where we had the Sales Department versus the Legal Department and much to everyone's surprise, the Sales Department won. Obviously they were listening and are paying attention to compliance.

The second aspect of empowerment is the seat at the table. I think the CCO has to have sufficient stature and visibility within the organization so that she is consulted regularly and her voice is heard. I do not know if any of you remember the old E.F. Hutton commercials—I am really going to date myself—but E.F. Hutton was a brokerage firm and they always did a commercial that said "when E.F. Hutton talks, people listen." That is how people should view the compliance officer. It is a role where there should be a lot of respect and people should really listen when the CCO speaks.

You have heard a lot today about access to the board—that is very important. You have also heard about other relevant committees such as audit committees, and some companies may have an enterprise risk committee. At [Redacted] we actually have a Board Compliance Oversight Committee. It meets quarterly. I make regular reports to that committee at every meeting, and we also have an executive session of that committee at every meeting. Since I report to the General Counsel, this was a control and safeguard we added to make sure I have independence, and unfettered access to the Board Compliance Oversight Committee. So we just make those regular executive sessions a regular practice. At the end of every meeting the General Counsel and all other attendees leave and I have an opportunity to share with the board anything that I think is important for the board members to hear. They also have the opportunity to ask me any questions that they might want to ask without others present. I think it is a very effective mechanism. Another aspect of seat at the table is that the CCO or compliance staff is in business discussions regarding strategic next steps, changes in the business model, and new products or services. It is very important for the compliance team to be present when those kinds of decisions and product development discussions are happening. Because the worst thing is to have something that is complete, the system is built, and the compliance team comes in at the end and points out some compliance issues. It is much harder to get the compliance controls implemented after everything else is set in motion. Alongside this communication is also reaching out to other parts of the company. I do what I call road shows—I will go to our different field offices, I will talk to people, learn what their concerns are, and give presentations. Some of our business units have monthly or quarterly forums and they will invite me to come and I will talk about compliance. So, communication is a very important part of the CCO job.

Third are resources, budget, and tools. Of course, the Compliance Department needs adequate resources and budget commensurate with the size, scope, complexity, and risk profile of the organization. There really is no one size fits all. You really have to establish the resources and budget based on the needs of the company. I think the CCO also has to have access to benchmarking information and best practices information. Going to training and symposiums like this, I think, is a very important aspect of the CCO job. The CCO needs to engage consultants whenever she deems it necessary to either augment her staff or take on special projects. In terms of augmenting legal counsel, I have to go through the Legal Department if I feel we need counsel. Of course, if I thought there was a conflict and I felt the need to not involve the Legal Department, I certainly have the freedom to do so. I would probably consult with the Chief Executive Officer about that, but I do have the ability to request outside counsel to the Legal

Department and sometimes weigh in on the firm that is selected to do the work. Technology is definitely a plus, I would not say it is a necessity—you can do a lot with an Excel spreadsheet, but we have a Government Risk and Compliance system ("GRC"). It is a system where we track our compliance issues, we build out mediation plans, and we also have our change management process in there which includes the Legal Department tracking the laws and regulations as they change. They will then do an analysis of the change, and they will submit it through the GRC platform. There is a workflow involved in that platform and it comes to the Compliance Department. Then we do an impact analysis to see how the change affects the business and we work with the business to create an action plan on how to implement whatever changes are necessary. The last are I will comment on is the importance of compliance initiatives such as process changes or systems changes, being given priority treatment within the company. You have to guard against the danger that all of a sudden everything becomes a compliance initiative. It is important for the CCO to have some insight into what projects are being prioritized, what are potential compliance projects, and then if it truly is a necessary compliance project, that it gets priority over something else that might be a nice to have.

M1: That is great and nicely organized presentation, really well done. **P4**, we will move to you.

P4: Terrific, that is a tough act to follow. That is an outstanding list and group. First of all thank you for having me here. I am honored and as **M2** mentioned I am a lawyer in private practice. I am a partner at [Redacted] both here in Washington and New York ("NY") so I am frequently on the Amtrak back and forth. Much of my practice is actually dealing with when things go wrong, when companies get into trouble, or when there has been a serious compliance lapse that usually involves the Securities Exchange Commission ("SEC") or the Department of Justice ("DOJ"). I am oftentimes looking at what went wrong. Thus, my outlook on compliance is from a different perspective than **P1**, because **P1** gets it right on the first step. I am dealing with companies that oftentimes get it wrong and from that I have developed a bit of a list—that is very similar to **P1**'s—in terms of how compliance officers should be empowered. But, I feel a little hesitant in speaking to a group as distinguished as this, with **M2** and [Redacted] because you guys are the pros out there and much of what I have to say you guys are going to say, "that is obvious." Maybe I will say something new and novel, but I am not going to bank on it. But nonetheless, I think that there are six areas that I have seen that are necessary. Some of these areas are very similar to **P1**'s. First, are clear and unencumbered reporting lines. Second, is true independence from the business lines. Third, picking up from what **P1** said about tone at the top

and tone at the middle, is implied tone at the top. Fourth, would be an overall budget and economy related to that budget. Fifth, which will probably be the most interesting part is the regulatory environment that facilitates, not hinders, the jobs of CCOs. Sixth, would be a separation of roles between the CCO and the General Counsel.

Reporting lines are so critical and the CCO in my view should report through either a direct line or a dotted line to a committee of the board or to the board itself or to an independent committee of the board, preferably an audit committee of the Board of Directors. Picking up on what **P1** said about how she had an opportunity to meet with the board one on one—that is so critical. I have seen instances where boards did not hear about a compliance problem at the company despite the fact that the CCO knew about the problem and had created regular reports about it. The reason why, as it turns out, either those reports got reviewed by someone else when they went up to the board, so the CCO was hesitant to put them in written materials that could be potentially vetted or scrubbed by someone else before getting to the board, or the CCO was never alone with the board to tell the board of the compliance problems afoot. The fact that the CEO or Chief Financial Officer ("CFO") were present in those communications might have been part of the problem. So having that clear unencumbered reporting line to an independent committee of the board I think is absolutely critical and it is where I have seen so many pitfalls when things go wrong. Having that CCO that is in the same car as everyone else in the C–suite is also critical. I would prefer that the CCO be even within the hierarchy with the General Counsel. Not higher, not lower, and not reporting to. So, there will be this sort of separation of the General Counsel and the CCO.

The second point is independence from the business line. Many times I have seen hierarchies where the CCO reports through either a direct line or dotted line to the President of a particular business. If there is any reporting up to the President of the business there is not that independence that is necessary for the CCO to give and receive information to form a true view of the situation.

Third is tone at the top, but that is really implied tone at the top and implied tone at the middle. Many times CEOs will send out e–mails that will say this is important, do this compliance training and then you will see or hear stories of the CCOs rolling their eyes about things or saying oh my gosh this is such a pain. That implied tone speaks louder than the words themselves. I do not care if the CEO sends out a great e–mail that someone drafts for him or her. I care more about how the CEO is acting outside of that e–mail, what their attitudes are in meetings, around other employees, around their inner circle, and around others because that gets picked up. Little things make a difference whether it is body language, tone, or

implied tone they are all so important. You can always tell a great compliant company by the way the CEO chats or talks in e–mails. Much of what my team and I do is review e–mails from CEOs, CFOs, and other employees. You would not believe sometimes what the executive team is saying about the CCO, "oh he or she is a pain in the butt" or "oh no let us get compliance off our backs." Those sorts of attitudes resonate and people pick up on that, so I mean true implied tone at the top in addition to explicit tone is very important.

Fourth, having an overall budget that is meaningful and having some autonomy over that budget I think is very empowering to a CCO. Many times I have heard and seen companies that have the right hierarchy, seem to have the right tone and independence, but when I ask the CCO, "well what happened?" He or she says, "well I only have one person on my staff. If only I could have hired five or six more people." Or "I need people, I need this, I need that." So making sure CCOs are empowered with a budget or the autonomy to hire some great people around them is critical for them to be successful at their jobs. What I have seen in so many independent investigations that I have been a part of in the 2010 post–financial crisis is a real cut back on compliance and compliance expenditures. To give you one example, I saw one instance where the CCO's travel budget was cut significantly following the financial crisis. All companies were suffering at this time in the aftermath of the financial crisis and, therefore, his budget was cut. In interviewing him in the independent investigation, we learned that all of the different offices that that he had not visited in the company in years because of the fact that his travel budget was cut. Web conferences and everything will only get you so far. Everything looked right on paper, but the problem was the lack of a budget and the lack of an ability to dispend the necessary money to get the job done. There should also be some ability to design and be the architect of the compliance program. Having the autonomy to build a compliance program, not to just be put in it and told this is the program and you are stuck in it, so make the best of it. Instead, the CCO should have the ability to think creatively, and to make some changes and suggestions within that group. Fifth, which I should preface my remarks by saying if there is any press in the room. **M1**, is there any press in the room?

M1: There is not supposed to be.

P4: Good. Raise your hand if you are a member of the press. Fifth is the regulatory environment. Interestingly, we had a couple of prep calls as a panel before the election and so I think what we were thinking about and talking about might be very different post-election. The regulatory environment, there has been a tremendous debate at the SEC brewing over the role and function of CCOs, particularly in a situation where the SEC has been pursuing a theory called broken windows. Broken windows was

something Mayor Giuliani did in NY to go after every type of crime. The theory is, if you stop all of the little stuff it will resonate up. A street merchant violating the law, would not graduate up to being a murderer, for instance. And I think there is some real truth and value to that in a criminal law context where things are a lot simpler and the rules are a lot clearer. In a situation particularly in financial services firms it is not so clear. These rules are amazingly complicated for us, and all of our firms, to decipher sometimes, and certainly difficult for those in the CCO position to figure out. There is a lot of gray area and uncertainty in the interpretation of certain provisions. Not to mention, a situation where CCOs themselves become caught in the cross for what amounts to be a negligent violation of a paperwork–type provision of certain rules and regulations. This really raises serious questions about focus at least from a regulatory standpoint. I recommend to you all a reading of the various speeches by former Commissioners Dan Gallagher and Lewis Aguilar on the role of the CCO. There was a debate between the Commissioners about this. I think it is a healthy debate to have and I think that debate will probably continue up to and into next year, about whether we want to from a regulatory standpoint, empower you to make decisions. Part of the debate was whether the CCO should be the first one to run into a burning building and to make very tough decisions on the fly or should there be a regulatory system where the CCO runs from the burning building to avoid personal liability? That is a very serious question that is going to have to be dealt with in the coming months and years. But the point being that CCOs sometimes have to make very difficult, what I would call battlefield decisions, and the CCOs do not have the luxury or time to say, "let me sit back and analyze the law, let me call up a law firm like [Redacted] and have them do a memo to analyze this." CCOs have to make decisions on the fly, sometimes with incomplete information in an environment where sometimes the rules are as clear as mud. So that is the point I think on the regulatory environment. I think that the regulatory environment can be improved to facilitate a CCOs job and make sure that CCOs are not hesitating to run into a burning building. I equate this to the obstetrics and gynecology ("OBGYN") community. You hear and you read about how few people are going into the career of delivering babies because of the risk of liability being so high and severe. We do not want to scare people away from the very tough job of being a CCO. We want to have the very best and brightest and continue to have the best and brightest get into these roles and be the CCO.

Sixth, is the separation of the CCO and the legal function. To me, I see this again from problem a standpoint where the CCO is wearing a few hats—a legal function and a compliance function. There really becomes a question from a legal standpoint as to whether the CCO functions like lawyer having his or her communications covered under the attorney–client

privilege, or is the CCO functioning in a compliance role where the communications might not be covered by the attorney–client privilege. If a compliance officer is also wearing a role that looks like a legal hat, it is often a fight with regulators, plaintiffs' lawyers, and others if it becomes a problem later on. So I will tell this story—**M1** always likes to say I have had a bunch of different roles in my life and hopefully I do not look too much like a journey man—but when I was leaving government, I was approached to be a CCO and a General Counsel of a fund and I said I was not going to do both. The fund was rather small and could not afford to hire two people, so I would have had to do both. I told them I was not going to do it just because I think there is a tremendous risk to wearing both hats. That pretty much summarizes my thoughts on the matter and I will turn things back over to **M1** and **M2**.

However, I want to summarize Luis Aguilar and Commissioner Gallagher. Commissioner Gallagher talks about the number of enforcement actions by the SEC against CCOs and there have been a number of high profile ones in the last years. There was one involving a gentleman named Ted Urban, that is public, and one involving BlackRock and a few others out of the SEC.[1] Commissioner Gallagher says that these enforcement actions chill CCOs from wanting to be more proactive and running into the burning building. On the other hand, Commissioner Aguilar says look at the number of CCOs we have and the number of enforcement actions we have.[2] The number of enforcement cases is actually really small here and you are making a mountain out of a molehill.[3] I think it is not about the number of cases you bring, but the chilling effect one case might bring in the industry.

M1: You know [Redacted] from [Redacted] was here. He was the first speaker and he very nicely laid out that issue and a number of reasons why there is this chilling effect. I think everybody on this—who is here—can speak to how making people comfortable and attracting people to the business and to this role is hard and people are walking away from it. There are many good people in this role, but still, this is a growing area and more are needed.

P4: I rarely see an enforcement investigation, particularly in the financial space, but I have been involved in public issues of work or non–financial work. But I rarely see an enforcement investigation that does not involve

1. *See* Urban, SEC Rel. No. 402, 2010 WL 35009288 (ALJ Sept. 8, 2010); Blackrock Advisors LLC, Investment Advisers Act Release No. 4065, Investment Company Act Release 31,558, 111 SEC Docket (Apr. 20, 2015).

2. *See* Public Statement, Luis A. Aguilar, Comm'r, Sec. & Exch. Comm'n, The Role of Chief Compliance Officers Must be Supported (June 29, 2015).

3. *See id.*

the CCO having to give testimony to the SEC. I appreciate that the SEC has to do their job and need the listed information, but getting that through some of the testimony is really disconcerting—there is a lot of scrutiny of the CCO if something goes wrong. As a practical matter, a CCO cannot guarantee that no one in the organization will violate the regulation. There is always going to be someone that will circumvent the controls—someone who sat through your training year after year and signed certifications stating that, "yeah I get this, of course I will say something if something goes wrong and then they go around and circumvent it." There is always going to be that person out there in the organization and you cannot guarantee as a CCO that there will be complete and total compliance from everyone. You just have to do your very best and I think that's the point.

M1: I know you were not here at the earlier panel, but there was a great point made by [Redacted]. He said they have 60,000 people at his company and that it is a small town—and small towns have to have jails—and if you take a small town that is not a small town, and there are 300,000 people, that is like a small county and they have jails too.[4] People go awry. I think we should move on to **P3**.

P3: Alright. Thank you **M1**. For the second half of our panel, **P2** and I are going to switch gears a little bit and talk about protections for the CCO because that is obviously a critically important aspect of the CCO role. So as **P4** was just mentioning in light of the personal liability that is presented by the SEC enforcement actions that have been occurring as of late, it is important to understand what avenues are available to the CCO to protect him or herself. Some of the issues we are going to be looking at are questions like, is the CCO protected by their company through either permissive or mandatory indemnification? If not, what other alternatives exist for self–protection? For example, directors and officers liability insurance, or other types of insurance that might be coming on to the market. Do any laws or regulations exist that would limit indemnification payments on behalf of CCOs? Those are some of the issues we are going to be looking at and we thought we would start with a discussion of Delaware law for several reasons. First of all, Delaware is an appropriate source of law to review because of course so many companies are incorporated in Delaware. Also, many states model their own laws on Delaware law. Many states also follow Delaware judicial decisions on corporate law matters, so it is really a model law in many respects. With regard to indemnification, Delaware law permits, but does not require, broad indemnification for directors and officers provided that they act in good faith and are serving the best interest of the company. Generally,

4. *See Panel I*, 6 AM. U. BUS. L. REV.173, 195 (2017).

Delaware law is pretty permissive on this point concerning indemnification. By including language that a corporation has the power to indemnify "any person," it basically reflects that a corporation has the ability to choose whom to indemnify as part of its internal procedures, provided again that the individual acts in good faith and believes their conduct was in the best interest of the company. So based on that perspective, the Delaware law is permissive in nature—there is a bit of a limited opportunity for protection for directors and officers if the corporation decides not to include the CCO within the ambit of a covered employee. Delaware does mandate indemnification in one particular circumstance, and that is where either a present or former director of an operation has been successful on the merits in defense of any type of enforcement action or proceeding. But then it only covers expenses, which would include attorneys' fees that are incurred in connection with a successful defense. But one way that a corporation can get around this issue in trying to find a broader authority for indemnification is to actually amend its bylaws. So that is what some companies do to make sure they can indemnify directors and officers to the maximum extent provided by law. In that regard, for companies that take that approach, it affords a higher level of protection for directors, officers, and CCOs.

With that said, there is still a regulatory overlay to all of this. In particular, there is one regulation we are going to talk about today and that is the Federal Deposit Insurance Corporation's ("FDIC") rule on golden parachute and indemnification payments.[5] That came about when the Financial Institutions Reform Recovery and Enforcement Act ("FIRREA") was enacted in 1989, which was designed to address some of the problems that arose in the late 1980s when a lot of savings and loan associations ("SNL") failed. Part of the problem that occurred during that era was many SNLs were failing, the officers of these SNLs were offered very lucrative golden parachute payments. So as their institutions were failing, they severed their employment with the SNL. FIRREA addressed this by requiring the FDIC to promulgate a rule making that regulated the golden parachute payments as well as indemnification payments to directors and officers. That legislation and the FDIC's indemnification rule, which is found in 12 C.F.R. Part 359, basically prohibits any sort of indemnification payment to an institution affiliated party ("IAP") in certain circumstances.[6] An IAP is defined as a director, officer, employee, or controlling stockholder. The thrust of that rule is that a bank is prohibited from paying or reimbursing any person in a civil money penalty or a judgment that

5. *See* FDIC, Financial Institution Letter on Guidance on Golden Parachute Applications (Oct. 14, 2010).

6. *See generally* 12 C.F.R. pt. 359 (2016).

results from a civil or administrative action.[7] Basically, a bank is prohibited from paying a civil money penalty on behalf of a director or officer or employee. The way that that has been interpreted is that banks are permitted to pay legal fees for directors and officers up until a point where he or she is formally charged. So at that point, then the prohibition would kick in. So let us say a CCO was charged with a violation—he or she would be required to pay that money penalty him or herself, as well as legal defense fees.

M1: Now what if they are exonerated, but they have not been indemnified, would they have to pay their own fees?

P3: Yes, that is an exception. So in that case, if they prevailed on the merits, the bank would be allowed to reimburse them. It is notable, I think, that the Consumer Financial Protection Bureau ("CFPB") also seems to disfavor payment of penalty to IAPs. In a lot of the CFPB consent orders that we have seen, it often states that "the respondent shall not seek or accept directly or indirectly any reimbursement or indemnification from any source with regard to any civil money penalty that the respondent is ordered to be paid under this order." That seems to be the CFPB's general approach—that civil money penalties should not be reimbursable in any event.

M1: What about if the CFPB is trying to claw back the legal fees being paid for each person? Let us say you have not paid your legal bill and you signed the agreement, you are covered by the director and officer indemnification policy.

A1: So let us say a director or CCO settles in either a civil or criminal matter.

P3: No, that would not be considered prevailing on the merits. That would be a situation where the CCO and director could not be reimbursed for their legal fees. There have actually been some enforcement actions to that effect and some case law.

A1: So is there compulsion to settle then because you are going to have to settle or pay for it all out of pocket?

M1: No, but it sounds like they not allow settling a matter that results in an order or something like that.

P3: They do not allow that. Right.

M1: So actually it is an incentive to keep fighting.

P3: Yes, an incentive to keep fighting and contesting it.

M1: Well, this is the CFPB context. So if you are charged in CFPB context, they do not have the FDIC's golden parachute rule.

7. 12 C.F.R. § 359.1(h)(1) (2016).

P3: Right. I do not believe they could avail themselves of that, but the Federal Deposit Insurance Act would specify how that applies or does not apply to the CFPB. But we have not seen that play out yet, where they would try to claw back the legal fees. So with that, I am going to turn it over to **P2** to talk about a couple of recent enforcement actions where it has been difficult for the director or officer to get his legal fees back.

P2: Thank you, **P3**. The matters I believe have already been touched upon. One was the Ted Urban matter. He did eventually get his reimbursement, but it took a long time and he had to incur that risk that he would not.

M1: Knowing that he might have hired different counsel, albeit a more expensive counsel.

P2: He did hire [Redacted] I believe. And that is why he probably ultimately prevailed—he had a good defense.

M1: Ted Olson?

P2: It was not Ted. Imagine the case where you are CCO, not one of the indemnified officers. You leave the employment with your company and shortly thereafter, you receive a subpoena and you have to rely on either the company on its own to agree to reimburse the expenses to comply with that subpoena, or you have to ultimately pay out of pocket. In the Ted Urban case, he was still at the company for a large part of his defense where he was mounting his challenge. The bottom line is if CCOs do not have a good defense fund, they are more likely to settle cases in the cheaper expedient way, rather than to risk bankrupting their family and not mounting that type of a fight. As we have heard throughout the day, their careers are on the line here. If you do ultimately have to settle a matter with the SEC, you are likely unemployable as a CCO because the risk tolerance or parameters of your corporation would not allow for a government–sanctioned individual to serve in such a role. That is true also for auditors or CFOs. Auditor firms will not accept CFOs that have settled SEC actions, so once you find yourself on the other side of a government action it is very hard to be employed anymore in this area. So it is very important to be able to mount a defense and have competent counsel. Which brings me to the concept of, is there insurance? Is there an insurance policy out there or one that can be developed for CCOs? While **M1** and **M2** were coming up with the idea to have this conference, we started talking about the idea of insurance and if there is insurance. In some instances, we started talking about whether there are some insurance policies for in–house counsel that are offered from insurance companies. But other than that, there are not really any analogues to what we kind of thought might be a good idea. **P4**, I do not know if you remember this, but there was a professional liability insurance company when we were at the

SEC, that got sent around and said if you are a manager at the SEC you can on your own contact this company and get professional insurance. If somebody says that you did something wrong outside the scope of your employment, maybe harassment or something, you would be able to have a lawyer through this policy that would defend you. So, even if the agency's own lawyer would not defend you or you wanted your own lawyer because you thought that was a better option, you can have that through this policy. We started talking about what would a policy look like for a CCO. **M1** got some insurance brokers and some underwriters, and we have had a number of conversations with some London underwriters, some United States brokers. It is interesting because I have learned a lot about insurance brokers and director and officer insurance ("D&O") and other types of insurance than I ever thought I would. Clearly there are tensions with putting the CCO in the typical tower that indemnified officers and other officers have under the bylaws and the various types of insurance that comes with that tower. There are various policies that attach to that tower.

A2: Why is it and why doesn't it fit well within that realm of insurance?

P2: Why doesn't it? I think that a lot of the companies spread the limits of the policy.

M1: Sometimes the rank and justification does not go down far enough to get to the CCO. It is officers, but only up to a certain point so you would have to amend the bylaws to extend it further. It might go down to the vice president and the general counsel, but not to the CCO.

P4: I was going to say, all the more reason why you want to be in the executive suite if you are a CCO.

P2: Typically, companies cover all employees for matters within the scope of employment. If you are acting within the scope and you get some process from a government agency, typically the company is going to use its resources to help you through that process. But if you find yourself in situation let us say—there were a couple of instances we had with the hand–off issue. If you as a CCO find a compliance issue and you do hand it off to the right person in the organization to take it from there and let us say they do not take it from there. If the government starts an inquiry and fingers start getting pointed, you as a CCO, if there was a policy, might want some type of comfort that you could employ a great lawyer like [Redacted] to represent you if it is a life and death case. Again, your career could be on the line. That brings us to the point—what are the underwriters saying? What are the brokers saying?

M1: The other thing is, and this was mentioned during the discussion we had last night, it may be that the CCO is in the executive suite and is covered; however, the employee who is handling BSA/AML—a very important compliance job—is not in the suite and is in the cross hairs. But

the insurance brokers say that this tower only extends down so far and sometimes it catches the CCO because of the policy of corporate decisions and sometimes it does not. Certainly, it does not cover, in large organizations, all of the compliance officers. We had a conversation through an American broker with London underwriters and brokers and they understand that this is a rapidly growing area of employment in the U.S. But they research and do not find any policies that cover compliance officers.

A2: In actual everyday practice, in terms of the CCO investigations, I assume that the companies are paying for legal fees and things like that.

P2: I am happy to share this example and **P4** can share an example, I represent a former CCO who did not come under the mandatory indemnification, was not entitled under the bylaws, it was not clear, and was not necessarily entitled to having legal fees paid in a manner similar to the stories we have touched upon. In that case, I called the company up and they said we are not required to do this, but in this case we will.

A2: It is in the interest of the company.

P2: In that case, it was in the interest of the company. I think it is in the interest of the company. But, if there is a real clash—let us say you leave your company because you have a crisis of conscious and you say you left because they were not handling it the right way and a year later you get a subpoena to explain your side of the story. How are you going to pay for that? Maybe you do want to go to the company and say you guys need to pay for my lawyer. This is from when I was working there. But maybe you do not want to do that. Maybe you want your own lawyer.

P4: I think as a practical matter, it is good business to advance legal fees for employees under an investigation unless they are the root cause of the investigation. But if it is a situation where they have done some wrongdoing, it is good business to advance their fees and I think a lot of sophisticated companies do. I think there is some space there where maybe you are not in the cross hairs, or maybe your company makes a bad decision. I mean let us face it, sometimes management makes bad decisions.

P2: So what is the answer **M1**?

M1: I think we have a lot more to do, and this has been a useful discussion in that is there a market for this? I would be interested in hearing any other CCO describe this. In conversations with CCOs before we organized this symposium, there was an expression of interest in this type of product. They thought it would be of interest.

P2: And does it empower? Would having that comfort empower the compliance officer to feel more bullet proof if they felt that if something

went wrong they would absolutely have a lawyer and someone of their choosing?

A2: I think that helps, but it certainly does not solve the liability issue. I mean once you are in that position, your career prospects and things like that are certainly affected greater than any indemnification provisions can [inaudible].

A3: Question: [inaudible]

M1: Well that is an interesting question, whether you would be able to negotiate an extra or add–on to your regular compensation so that you could buy it. The CCO candidate says: I am willing to take the job, but I would have to have some comfort and I would have to make another $10,000 per year, or whatever it is, $5,000 after taxes, that I am going to use to buy my own policy.

P3: Some companies also provide executive allowances so it could be covered in that way, too. You could just take your executive allowance and use it to cover your insurance premium.

M1: **A2**, what do you think? Do you think insurance—you are obviously at a pretty prestigious company so it is not really an issue for you.

A2: I mean well I think that if it is cost effective, it makes sense.

P2: And what about the folks—the level right beneath you, including the anti-money laundering person, they would probably like something like that too?

A2: Yeah, I mean it is interesting. I wonder if maybe companies would sign up, especially financial services type companies you know who are in the cross hairs all the time as an added benefit.

M1: A little more comfort. I do not expect my house to burn down, but I would have to be paid over the course of my life well over $100,000 and maybe have $250,000 worth of insurance. I have never had to file a claim thank goodness, but I think I feel better and I know I need insurance even if I do not have a mortgage and a requirement to have insurance to protect my creditors.

P1: It could actually be a recruiting tool to bring on talent.

M1: We started out with role and responsibility. We spent some time on that. Then we talked about risks. Then what steps could we take to make it safer. We have talked about more assurances in the law, indemnification, insurance. We are trying to find ways to make this a safe place for strong talent that is needed in these jobs.

P4: On the insurance front, a lot of the insurers have policies that cover regulatory investigations. American International Group ("AIG") has Edge policy. Nationwide has a policy. I have been dealing with both.

M1: For individuals?

P4: It will go down pretty low. You can negotiate riders and everything else on those policies. The question oftentimes becomes though costs on the premiums. First of all, if your company has ever had some enforcement problems, the cost on the premium is going to be relatively high. Second of all, if you are in a high risk, high regulatory environment like many of you are doing, premiums are going to be high. So sometimes companies opt against the insurance and they make a business judgment and say it is not worth the cost of the premiums alone, but there are policies out there. One point I wanted to highlight, is so often if you are a CCO, in financial services or any regulated industry, you really cannot afford, and I am not talking about dollars and cents, I am talking about your livelihood, to settle a compliance matter if you are in the cross hairs. Sometimes you are forced to really battle it out with the SEC. A recent example I had, and I will change the names and roles to protect the innocent, but the SEC wanted our client to agree to some lesser offense and it would have put the person out of business. The individual would have never worked in the industry in her life again. Fortunately, they had insurance by the way, and her fees were also advanced by her employer. So, when the SEC asked for our offer, we said zero, we are going to go to trial. Our offer is you drop the charges, say sorry, and we walk away. And [Redacted] was there for the meeting and it was sort of like a scene from the Godfather, we were meeting with the Senator. Senator you do not have to wait for my offer, my offer is nothing. So we are waiting any moment to hear that they filed the lawsuit and they filed a lawsuit against her employer and against the principal at her employer. We were waiting any day to get the call and they reluctantly called up and said that they were closing the matter against our person. But it was one of those things where she had to fight because her recourse was—whatever fine she wrote or check she wrote, she would have been out of the industry and that is what she did her whole livelihood. I mean think about it, if you are in your career, you know no other. And the sad part about it, and this sort of goes full circle to this whole broken windows concept and everything else and how aggressive the SEC has been. They are going after this little stuff, but little stuff is not that little to the people in the cross hairs because it is career ending no matter how little it is.

M1: And to the earlier point, the chilling effect on others who might not have been the one who broke the window, they are afraid that when they turn around over their shoulder, something will hit the window.

P4: That is right.

M1: I wish we had more CCOs and compliance officers here.

P4: Uh oh, **A4** has a tough question. He is getting me back by the way because **A4** was at the SEC in a senior position in the NY office. **A4** was a

terrific member of the NY staff and I worked for the Commissioner at the time, so I got to ask **A4** tough questions and give my boss tough questions so this is payback.

A4: I honestly wish I could pay you back. Earlier today we were talking about the regulatory environment. Obviously it seems like we could be in for a lot of change on the CCO aspect of things assuming there is either commissioners or chairmen supportive of Gallagher's views. Do you see there being more of, whether on the regulatory front or policy making, that being a possibility as it relates CCOs?

P4: I think that, I have given a lot of thought since the climate changes last Tuesday, a week ago, and you know I think that, and these are of course my views and do not reflect anyone else's views. First of all, I do not think that the next Administration will somehow be weak on anything or weak on violations. There is going to be tough enforcement when people break the law. Candidly, I think it is going to be smarter enforcement. By that I mean really going after the individual wrongdoers and intentional misconduct hard and full force. I think that one thing that was eye opening to me when I worked in government is, there are limited resources in government believe it or not. You know you always think I have unlimited resources and with the SEC's budget of $2 billion. You think gosh they could do anything, but they cannot. You have limited resources; you are constrained by the number of people and hours in the day. I think there is going to be a rethinking about focusing and perhaps refocusing away from what I call the unintentional negligent paperwork type violations that sometimes can snare CCOs and more focused on intentional wrongdoing. The other area where I think you are going to hopefully see some changes is—the SEC has been real hardcore focused on staff. Everything has been about the number of cases they have, the number of penalties, and every year the number gets higher and higher. This year the SEC announces a record. I am tired of hearing record every single year. I live in Arlington, and a couple of years ago the Arlington police department issued an announcement that said they were at a twenty–three record year low on the arrest for violent crimes and it was the same year the SEC had hit another record. I sort of scratch my head saying imagine if the Arlington police department said we are at a record high for number of arrests, this is great.

P4: If there are record penalties and a record number of enforcement actions, it probably means that the system is not working. I will tell you, that I deal a lot with funds, hedge funds and financial services firms on questions about insider trading. You want to talk about deterrence that is happened in the last six years, such as the Preet Bharara case and other prosecuting issues of insider trade violations. When I walk in for training or to meet with people about insider trading or compliance issues, I mean

people are literally afraid, and very much focused. Bharara had a very strong effect on deterring—I think—insider trading. I question whether the SEC has had very much of a deterrence effect on what it's been doing and its focus for some time and for some time I think its focus has been a little out of whack. Going back to it, I think that I would anticipate that the new SEC faced with limited resources and also with an understanding and focus on deterrence, I think there is going to be more incentive, hopefully, for companies and funds, and financial services firms, land public companies, you name it, to actually self-report. To do internal investigations, to find wrongdoers, and to say here is the problem we fixed it. The SEC nominally says we credit self–policing, self–reporting, and remediation, but as a practical matter, they use more of the stick than the carrot to say well you did not self–report so the penalty is going to be even higher. There is really a question about what are the incentives for self–reporting and doing that. I would hope that that conversation gets into play in the next Administration where people say do we really want to incentivize and do more to incentivize CCOs, public companies, and funds to come forward and self–report. Where we give them real credit and where they say look we have a bad apple here, a wrongdoer, this is the person. Right now, you go in and say hey SEC, we have a wrong–doer, this is the bad person. Sometimes the SEC, it reminds me of the scene from the Airplane—the guy walks through the metal detector with a bazooka and a bomb and then the little old lady walks through and her hair pin sets off the metal detector and they throw her against the wall. Sometimes it is a bit of that. Throw everyone else against the wall and you come in and you are just like no that is the bad guy that we have self–reported here. I think there needs to be some real focusing and prioritization. The last point on this, and not to knock the current Enforcement Officer, but I have heard a speech from him not long ago and he gave a list of priorities the SEC was doing. It was a very good speech, a terrific speech. He listed a bunch of priorities and I sort of said to him if all of those are a priority, what is not a priority then? It was a tough question; I did not get an answer. But if everything is a priority, then nothing really is a priority. I mean you have to pick and choose what is really a priority and I think you have to prioritize some things. There is always going to be some debate over what is a priority, but if everything is a priority, then there really is no priority. Sorry that was a longwinded answer.

M1: Does anyone else have a question they would like to ask?

A5: Yeah, I would like to hear generally from the CCOs what were some of the big takeaways from this discussion or from some of the other discussions you have had?

M1: We have one on the panel. I do not know if she wants to answer. And of course we have our gallery over here.

P1: I think the liability question here is a really interesting and certainly I am going to go back to my company and look at our D&O and errors and omissions ("E&O") policies. That is another area to look at, E&O policies might have coverage, and also indemnification by agreement or state law.

A3: I enjoyed the discussion in terms of what standards need to be set to get us out of this vague area of compliance officer liability.

P4: In all seriousness, all of the CCOs in the room, you guys are the good guys, and do not forget that. Whether regulators sometimes, whatever the policies are and focus on CCOs—at the end of the day, you guys are the good guys and that is what is important to keep in mind.

M1: **P4** do you think that in the earlier discussions we have said maybe we can develop some learning around CCOs that would establish a standard both in terms of the definition of the role and ways of cabining the risks and presenting some of this that needs regulatory approval to regulators? In fact there was something said by [Redacted] because perhaps that is the area he has experience in. The SEC and other agencies that have securities jurisdiction and I think that you would have to find one commissioner, one person in a position of authority who was willing to take this cause up to work on it to make it happen. I mean I have always thought that you need somebody who is the champion. If everyone is the champion, as you have said with priorities, no one is the champion. You need someone who says I believe in this and I am willing to take it on. Would that be your take or what would you think? You have worked for a couple of commissioners.

P4: Yes I think, but I think these issues are going to be debated and contemplated by the next chairmen and his or her fellow commissioners. There are only going to be, after January 20th, two existing commissioners staying on, so three of the five commissioners will be brand new from January so you do not know what the future holds with respect to their views and what they are going to do. One thing I will just say for all of you in the audience is that would I never want anyone to walk away thinking I have a negative impression of the SEC. It is an agency I love, it is the best job I have ever had and the SEC has a CCO summit that is put on here in Washington. It is a terrific summit where there is really a discussion between peers and SEC staff and the like. I think it is hosted by the Office of Compliance and Examinations ("OC"), which I think is terrific. It is what you want from a regulator, which is an interaction with regulator and discussions like this. I can tell you those CCO summits have these debates going on about what we can do to assure us. The other thing I will say too is, one question maybe you did not raise today and maybe it was raised is, what are the mechanics of going through and being a really good CCO? Do you memorialize everything? Do you put a lot of things in writing? Do

you not put a lot of things in writing? I mean, there are different views on this, which is why I think it is an interesting question. Personally, I am the type that saves all of my e–mails and I put as much as possible in writing. I have always had the mentality that if you are doing the right thing then memorializing it is going to help you later on. You may not realize it at the time, but there are other lawyers I have encountered that say do not put anything in writing or do not memorialize anything. But that is a question. I think what are the mechanics in this environment? What do you want to be doing to protect yourself as a CCO—memos to file, notes to file, that sort of thing. I hate to say it—the colloquial is "CYA," but what type of "CYA" do you need to do this job.

A3: That is an interesting topic for discussion and I think there is not a one size fits all answer. I will give a good example of that. When you bring in a consultant firm to provide you with ideas, and I have done this, when you are starting in a new role, in a new place, you want to sort of get some perspective. The worst thing I believe you can do is to have in your engagement letter that you shall provide me with a detailed report with all of your recommendations because invariably what you will get is the good idea boss and the sound will be "boom" running over you. You are going to have to implement every one of those recommendations because as soon as you get that report from a consultant, the regulators are going to get that report and they are going to use it and beat you with it until you complete every one of them. So that is an instance where the documentation can kill you. My recommendation and advice to people is that if you are going to be hiring a consultant from another organization to find out what you need to do, do not ask for documentation. Ask them to evaluate your firm and to have a meeting with you, and then you document in the meeting, the things you are going to do as a takeaway from their observations. That way you remain in control. In the situation when you are in somewhat of a stickier ethical dilemma, then I think the documents probably help you more than it can hurt you. I think that is my perspective.

P2: Quick question for **P4**. Can I ask him a question?

M1: Please.

P2: **P4**, as you know when we were at the SEC we saw the prosecutorialization of the agency we love so much and the financial crisis of fraud. Today there is a prosecutor that is the chair of the agency, I am not sure we have seen that before. Is the pendulum going to swing back into this becoming a regulatory agency with an enforcement staff that has a history at the agency that as you said brings more impactful cases that have a deterrence effect? Do you think that is something we can count on?

P4: I do not know. I would say that there is going to be smarter enforcement. I think it is going to be tough enforcement. There are a lot of

bad actors in the financial market. There are a lot of great actors out there. But wherever you go, there are bad actors. I think the quote was great. Every town has a jail. There are bad actors out there. You need a vigorous SEC. One of my heroes by the way was the longstanding Enforcement Director, [Redacted]. And [Redacted] talked about the importance of being sort of the cop. You want to ensure that there is a level playing field out there for investors. That people cannot commit fraud or cheat or steal. I think that is a bipartisan view. I do not think that is going to change whatsoever, but it is probably going to be a bit smarter and more focused to look to see where you can deter the wrongdoers, and empower the gatekeepers too. [Redacted] was very famous for focusing on gatekeepers. In the Lincoln's Savings case [Redacted] said where are the accountants? But CCOs are also gatekeepers, and you want to make sure you are also empowering gatekeepers. You want to make sure you are empowering auditors, including lawyers. In the last few years, there have been a number of cases against lawyers. There have been cases against independent directors that the SEC brought where they have failed in their duties. You want to enforce that and make sure that the gatekeepers are not only doing their job, but also that they are empowered to do their job, which I think is a good segway back to the topic of the panel.

M1: I think we have had a pretty robust discussion. We are going to have a publication by the *American University Business Law Review*, which includes a chart that will bring together a summary of the laws that relate to CCO liability.

WHERE DO WE GO FROM HERE? PROSECUTORIAL CONCERNS OF CHIEF COMPLIANCE OFFICERS

INDIA MCGEE*

INTRODUCTION

Following the 2008 financial crisis, the United States government prioritized the deterrence of corporate misconduct.[1] Consequently, over

* Staff Member, American University Business Law Review, Volume 6; J.D. Candidate, American University, Washington College of Law, 2018.

1. *See generally Enron Scandal: The Fall of a Wall Street Darling*,

the years, the U.S. Department of Justice ("DOJ") addressed corporate misconduct in a variety of DOJ memoranda.[2] These memoranda sought to ensure justice, fairness, and accountability for high-level corporate officials.[3]

However, each new administration brings a unique perspective. Thus, under the Trump Administration, there will likely be a shift in how the DOJ determines and prosecutes corporate misconduct. Because the Trump Administration appears unpredictable to much of the American public, it is as-yet unclear what stance the DOJ will take with respect to ongoing and future corporate misconduct.

This Comment attempts to predict what can be expected by the Trump Administration in relation to prosecutorial efforts to punish corporate misconduct. Section Two provides a detailed description of each DOJ memorandum, the context in which each memorandum was written, and the cases that arose as a result of each memorandum. Furthermore, Section Two will demonstrate how other administrative agencies, such as the U.S. Securities and Exchange Commission ("SEC"), have followed the DOJ's lead, holding individuals accountable for corporate misconduct. Section Three compares and contrasts the development of DOJ memorandas, discusses the memorandas' impact on case law, and explains how cases are brought against Chief Compliance Officers ("CCOs"). Section Four makes suggestions about what should be included in a new DOJ memorandum and explains why deregulating the financial services industry would harm the economy. Specifically, this Comment suggests that the Trump Administration should continue to focus on individual accountability for corporate misconduct. In particular, the Trump Administration should provide for consequences to high-ranking corporate officials and Board members that play a role in corporate misconduct. Finally, this Comment

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INVESTOPEDIA, http://www.investopedia.com/updates/enron-scandal-summary/ (last visited Jan. 28, 2017); *see also The origins of the financial crisis: Crash course*, ECONOMIST, http://www.economist.com/news/schoolsbrief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article (last visited Jan. 28, 2017).

2. *See* Memorandum from the Deputy Attorney Gen. Eric Holder to All Component Heads and United States Attorneys (June 16, 1999) [hereinafter Holder Memo] (on file with author); Memorandum from Deputy Attorney Gen. Larry D. Thompson to Heads of Dep't Components United States Attorneys (Jan. 20, 2003) [hereinafter Thompson Memo] (on file with author); Memorandum from Deputy Attorney Gen. Paul J. McNulty to Heads of Dep't Components United States Attorneys (Dec. 12, 2006) [hereinafter McNulty Memo] (on file with author); Memorandum from Deputy Attorney Gen. Mark Filip to Heads of Dep't Components United States Attorneys (Aug. 28, 2008) [hereinafter Filip Memo] (on file with author); Memorandum from Sally Quillian Yates, Deputy Attorney Gen., to all United States Attorneys (Sept. 9, 2015) [hereinafter Yates Memo] (on file with author).

3. Yates Memo, *supra* note 2.

concludes with an explanation of why these proposed changes will benefit corporate CCOs, the business sector, and the economy as a whole.

II. BACKGROUND

A. DOJ Memoranda

In an effort to demonstrate a tough stance against corporations and the individuals who engage in misconduct, the DOJ has, throughout the years, issued memoranda guiding federal prosecutors on when to bring criminal charges against corporations, corporate officials, or both.[4] The DOJ memoranda are meant to serve two purposes: (1) to combat corporate fraud and misbehavior[5] and (2) to hold both corporations and individuals who engage in misconduct accountable.[6] These memoranda possess substantial weight (although they are not binding within the legal community), because they set the tone for the DOJ's prosecutorial priorities, methods, and strategies.[7] The following sections describe in more detail each DOJ memorandum and provide the social context in which each was adopted.

1. The Holder Memorandum

The Holder Memorandum ("Holder Memo") was the first memorandum of its kind.[8] The Holder Memo's objective was to deter corporate fraud and ensure accountability from corporations and culpable individuals.[9] The Holder Memo predominantly focused on the federal prosecution of corporations as a means of deterring corporate misconduct.[10] Pursuant to the Holder Memo, corporations should be held responsible for their employees' behavior because employees act on behalf of the corporation.[11] In bringing charges against corporations, prosecutors were encouraged to consider the following factors:

> 1) the nature and seriousness of the offense, including the impact on the public; 2) the pervasiveness of wrongdoing within the corporation,

4. *See id*.
5. *See id.*
6. *See id.*
7. *See* Frederick T. Davis, *The DOJ "Yates Memorandum" – What is it, and Why does it Matter?*, ETHIC INTELLIGENCE (Sept. 2015), http://www.ethic-intelligence.com/experts/9759-doj-yates-memorandum-matter/ ("[legal memoranda are] not legally binding and create no enforceable rights . . . [but DOJ memos are taken] seriously and counsel often make very explicit reference to them in discussions and negotiations with prosecutors.").
8. *See* Holder Memo, *supra* note 2.
9. *Id.*
10. *Id.*
11. *Id.*

> including any wrongdoing committed by corporate management; 3) the corporation's prior history of misconduct; 4) the corporation's timely and voluntary disclosure of wrongdoing and willingness to cooperate in investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges; 5) whether the corporation has a compliance program and whether that program is effective; 6) the corporation's remedial actions to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies; 7) collateral consequences, including disproportionate harm to shareholders and employees not proven personally culpable; and 8) the adequacy of non-criminal remedies, such as civil or regulatory enforcement actions.[12]

While the primary goal of the Holder Memo was to pursue corporations, it also took the first steps to initiate the DOJ's commitment to "prosecute culpable individuals."[13]

An example of the Holder Memo's use by federal prosecutors is seen in the 2001 indictment of TAP Pharmaceutical Products Inc. ("TAP Pharmaceutical") and the indictments of seven TAP Pharmaceutical officers.[14] TAP Pharmaceutical was indicted for fraudulent drug pricing and marketing conduct. Additionally, seven TAP officers were charged with "conspiring to pay kickbacks to doctors and other customers."[15] As a result of these indictments, TAP Pharmaceutical and its officers elected to settle the case.[16] The officers were able to evade civil penalties; however, TAP Pharmaceuticals was ordered to pay a $290 million criminal fine to the DOJ's Crime Victim Fund.[17]

Cases such as TAP Pharmaceutical demonstrate the impact that the DOJ's Holder Memo created on corporate conduct. The Holder Memo increased corporate awareness that the government would monitor corporate conduct. The Holder Memo guided DOJ prosecutors for two years on when to engage in prosecutions of corporate misconduct until 2003 when the Thompson Memorandum ("Thompson Memo") was issued.

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12. *Id.*

13. *Id.*

14. Press Release, Dep't of Justice, TAP Pharmaceutical Products Inc., and Seven Others Charged with Health Care Crimes; Company Agrees to Pay $875 Million to Settle Charges (Oct. 3, 2001), https://www.justice.gov/archive/opa/pr/2001/October/513civ.htm [hereinafter TAP Pharmaceutical Products Inc., and Seven Others Charged with Health Care Crimes].

15. *Id.*

16. *See id.* (noting a large reimbursement payment to the victims of the misconduct).

17. *See id.* (observing that some of the money went to the victims).

2. The Thompson, McNulty, and Filip Memoranda

In 2001, the Enron scandal further emphasized the need to address corporate misconduct.[18] Enron was one of America's largest and most powerful corporations.[19] Enron focused on energy trading and supplying as well as the creation of Enron Online, a commodities trading website.[20] At Enron's apex, its shares were worth ninety dollars.[21] Enron engaged in fraudulent mark-to-market practices, which hid its losses and made it appear to be far more profitable than it actually was.[22] The mark-to-market practice allowed Enron to build assets and claim profits from those assets even though no profit was actually made.[23] As a result of Enron's fraud, its stock spiraled into a free fall, which shook Wall Street.[24] Enron collapsed, and the resulting fallout pushed the Bush administration to address corporate misconduct, leading directly to the Thompson Memo.[25]

The Thompson Memo's stated purpose was to revise the principles for federal prosecution of business organizations. However, the Memo also emphasized the need to hold corporations accountable for their employees' actions.[26] Under the Thompson Memo, prosecutors were directed to weigh the thoroughness of a corporation's disclosure of wrongdoing.[27] Specifically, when determining whether to bring charges, prosecutors were encouraged to consider the willingness of a corporation to waive attorney-

18. *See generally Enron Scandal: The Fall of a Wall Street Darling*, *supra* note 1 ("At Enron's peak, its shares were worth $90.75, but after the company declared bankruptcy on December 2, 2001, they plummeted to $0.67 by January 2002. To this day, many wonder how such a powerful business disintegrated almost overnight and how it managed to fool the regulators with fake, off-the-books corporations for so long.").

19. *Id.*

20. *Id.*

21. *Id.*

22. *See id.; Mark To Market – MTM*, INVESTOPEDIA, http://www.investopedia.com/terms/m/marktomarket.asp?lgl=rira-baseline-vertical (last visited July 24, 2017) ("Mark to market (MTM) is a measure of the fair value of accounts that can change over time, such as assets and liabilities. Mark to market aims to provide a realistic appraisal of an institution's or company's current financial situation.").

23. *Id.*

24. *Id.*

25. *See* Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1097 (2006).

26. *See* Thompson Memo, *supra* note 2 (referencing the same guidelines as put forth in the Holder Memo).

27. *Id.*

client privilege and the work product doctrine.[28] Waivers allowed the government to obtain otherwise protected documents.[29]

Additional factors that the Thompson Memo recommended to prosecutors were: 1) whether the corporation guarded its culpable employees and provided support through the payment of legal fees; and 2) whether the corporation acted in a manner that hindered the government's investigation.[30] Similar to the Holder Memo, the Thompson Memo briefly acknowledged that "prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals."[31] The Thompson Memo emphasized that holding corporations accountable would deter future corporate misconduct.[32]

The Thompson Memo was criticized in the legal community, which claimed that it eroded the attorney-client and work-product privileges.[33] As a result, the Bush administration issued the McNulty Memorandum ("McNulty Memo") to revise the Thompson Memo's shortcomings.[34] The McNulty Memo continued to advise prosecutors to follow the guidelines in the Holder Memo and the Thompson Memo, but the McNulty Memo clarified waiver of attorney-client and work product doctrine privileges.[35] The McNulty Memo stated that prosecutors were to request waiver of attorney-client and work product privileges only if there was a "legitimate need" for the information.[36] Like the Holder and Thompson Memos, the McNulty Memo briefly addressed individual accountability, stating that individual directors, officers, employers, and shareholders would also be charged if they were criminally culpable for the corporation's misconduct.[37]

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28. *Id.* at 6.

29. *Id.*

30. *Id.* at 7, 8.

31. *Id.* at 1.

32. *Id.*

33. *See generally* Letter from Former Attorneys Gen., Deputy Attorneys Gen., and Solicitor Gen.'s to Attorney Gen. Alberto Gonzalez (Sept. 5, 2006), http://federalevidence.com/pdf/Corp_Prosec/Former_DOJ_Lttr_9_5_06.pdf (purporting that the Thompson memorandum was eroding attorney-client and work product privileges); *see also* McNulty Memo, *supra* note 2 (expressing that the corporate legal community was concerned over the practices implemented by the DOJ, which impacted the communications between the corporate legal counsel and the corporate employees).

34. *See generally* Letter from Former Attorneys Gen., Deputy Attorneys Gen., and Solicitor Gen.'s to Attorney Gen. Alberto Gonzalez, (Sept. 5, 2006), http://federalevidence.com/pdf/Corp_Prosec/Former_DOJ_Lttr_9_5_06.pdf; *see also* McNulty Memo, *supra* note 2.

35. McNulty Memo, *supra* note 2.

36. *Id.* at 8.

37. *Id.* at 2.

The final memorandum issued under the Bush administration was the Filip Memorandum ("Filip Memo"), which continued the trend of revising the previous memoranda on corporate prosecutions.[38] While the Filip Memo noted that corporate individuals should face criminal accountability for their misconduct, it primarily revised the principles on cooperation credit, payment of attorney's fees, and corporate participation in a joint defense agreement.[39]

Ultimately, the Bush administration memoranda encouraged corporations to be held responsible for their actions while individual liability would be resolved through the corporation's option to waive privileges and hand over incriminating information.[40]

3. The Yates Memorandum

The Yates Memorandum ("Yates Memo") was created in response to complaints that after the 2008 recession, senior banking officials were not held accountable for their part in the housing market crash.[41] The 2008 recession was in large part a result of the real estate market collapse, which was driven by financial institutions offering subprime and other risky mortgages to homebuyers.[42] Financial institutions then securitized these risky mortgages and sold them via mortgage-backed securities, spreading the toxic assets across the country.[43] Although prosecutors collected billions in civil monetary penalties from the largest financial institutions stemming from lending practices, none of their top executives were sentenced to prison.[44] The DOJ then began focusing on individual accountability, prompting the issuance of the Yates Memo..[45]

The Yates Memo's purpose was to encourage the prosecution of high-level corporate officials for corporate wrongdoing.[46] The Yates Memo has been implemented in both civil and criminal provisions of the United States

38. *See* Filip Memo, *supra* note 2.

39. *Id.*

40. *Id.*

41. *See also* Benjamin B. Coulter, *The Yates Memo: Its Impact on the Prosecution of Corporations and Individual Defendants*, INSIDE COUNSEL (Mar. 11, 2016), http://www.insidecounsel.com/2016/03/11/the-yates-memo-its-impact-on-the-prosecution-of-co?slreturn=1502047746.

42. R. Christopher Small, *The Role of Accounting in the Financial Crisis*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REGS (Mar. 2, 2012), https://corpgov.law.harvard.edu/2012/03/02/the-role-of-accounting-in-the-financial-crisis/.

43. *Id.*

44. Matt Apuzzo & Ben Protess, *Justice Department Sets Sights on Wall Street Executives*, N.Y. TIMES (Sept. 9, 2015) https://www.nytimes.com/2015/09/10/us/politics/new-justice-dept-rules-aimed-at-prosecuting-corporate-executives.html.

45. *See id.*

46. *See* Yates Memo, *supra* note 2.

Attorney's Manual, for example, the Principles of Federal Prosecution of Business Organizations ("PFPBO").[47]

The Yates Memo lays out "six key steps" that prosecutors should follow when investigating corporate wrongdoing. The first is the most controversial amongst corporate legal practitioners and compliance officers.[48] It states, "to qualify for any cooperation credit, corporations must provide all relevant facts relating to the individuals responsible for the misconduct."[49] Under this guideline, the corporation must identify all culpable individuals who engaged in misconduct, regardless of their position in the company.[50] Deputy Attorney General Sally Yates emphasized that this first step is an "all or nothing" provision, and that corporations are no longer able to cherry-pick which facts will be disclosed.[51] Essentially, if a corporation wants cooperation credit, it must hand over all relevant facts relating to the misconduct and identify all of the individuals who participated.[52]

Individuals felt the impact of individual accountability, as reflected in the 2015 indictment against W. Carl Reichel.[53] Carl Reichel was the president of healthcare provider Warner Chilcott; he was arrested and charged with conspiring to pay kickbacks to physicians to incentivize them to purchase the healthcare services offered by the company.[54] "Prosecutors had said Reichel oversaw stunning levels of bribery at Warner Chilcott: 200,000 dinner tabs, $25 million in speaking fees for health care providers, and sailing trips in Rhode Island, all in service, they said, of the company's bottom line."[55] Warner Chilcott was ordered to pay a criminal fine of

47. *Id*.

48. *See id.* at 2-6.

49. *Id.* at 3.

50. *Id.*

51. Sally Quillian Yates, Deputy Attorney Gen., Dep't of Justice, Address at N.Y.U. Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing (Sept. 10, 2015), https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school.

52. *See id.* ("[I]f a company wants any consideration for its cooperation, it must give up the individuals no matter where they sit within the company.").

53. *See* Indictment, *United States v. Reichel*, Case No. 1:15-cr-10324-DPW at 1, 4-6 (Mass. Dist. Ct.), *available at:* https://www.justice.gov/usao-ma/file/789116/download; *see also* Jonathan Sack, *Recent Trials Highlight DOJ's Challenges in Prosecuting Individuals for Corporate Misconduct*, FORBES, http://www.forbes.com/sites/insider/2016/07/11/recent-trials-highlight-dojs-challenges-in-prosecuting-individuals-for-corporate-misconduct/2/#c966dbe61048 (last updated July 11, 2016).

54. *See* Indictment, *United States v. Reichel*, *supra* note 53.

55. *See* Brian Amaral, *Ex-Warner Chilcott Exec Acquitted In Doctor Bribery Scheme*, LAW 360 (June 17, 2016, 11:37 AM), https://www.law360.com/lifesciences/articles/807944?nl_pk=a5670392-c6d7-4422-30113c1697b2378&utm_source=newsletter&utm_medium=email&utm_campaign=lifesciences.

$22.4 million and a civil settlement of $102.06 million.[56] However, Carl Reichel was ultimately acquitted of anti-kickback charges.[57]

Another case involved the prosecution of Deborah Duffy, the CCO of WG Trading Company, LG.[58] Duffy maintained the books for the trading company and knew of the fraudulent scheme conducted by WG Trading principals, Stephen Walsh and Paul Greenwood.[59] Duffy was sentenced to prison for securities fraud, conspiracy, and money laundering.[60] In addition, she was ordered to pay $1,272,841 in restitution.[61]

The DOJ's move towards individual accountability was also prominent in the cases of *United States v. Cioff & Tannii*[62]*, United States v. Meyer*[63], and *United States v. Madoff*.[64] In *United States v. Cioffi* , Ralph Cioffi and Matthew Tannin were both portfolio managers of hedge funds for Bear Stearns.[65] Both were also charged as individuals with "conspiracy, securities fraud, and wire fraud."[66] Cioffi was also charged with insider trading.[67] A jury acquitted both men of all charges.[68] Furthermore, in *United States v. Meyer*, James Meyer, Chief Executive Officer ("CEO") of Preferred Merchants LLC, was charged and sentenced to fifteen months in prison for obstruction of justice.[69] Meyer purposefully misinformed the

56. *See* Press Release, Dep't of Justice, Warner Chilcott Agrees to Plead Guilty to Felony Health Care Fraud Scheme and Pay $125 Million to Resolve Criminal Liability and False Claims Act Allegations (Oct. 29, 2015) [hereinafter Warner Chilcott Agrees to Plead Guilty] (on file with author).

57. *See* Gary F. Giampetruzzi & Terra L. Reynolds, *Not Guilty, Again: Individual Corporate Liability After Reichel*, LAW360 (June 20, 2016, 10:38 PM), https://www.law360.com/articles/808278/not-guilty-again-individual-corporate-liability-after-reichel.

58. Press Release, Dep't of Justice, Chief Compliance Officer of WG Trading Company, LP, Sentenced in Manhattan Federal Court for Several Hundred Million-Dollar Fraud Scheme (Jan. 12, 2015) [hereinafter WG Trading Press Release] (on file with author).

59. *Id.*

60. *Id.*

61. *Id.*

62. *See* Indictment*, United States v. Cioffi*, Case No. 08-CR-415 (FB) (E.D.N.Y.) [hereinafter Indictment, *United States v. Cioffi*].

63. Press Release, Dep't of Justice, Office of Pub. Affairs, Financial Services Company Executive Sentenced to 15 Months for Obstruction of Justice (Aug. 23, 2016), https://www.justice.gov/opa/pr/financial-services-company-executive-sentenced-15-months-obstruction-justice [hereinafter Press Release Office of Pub. Affairs].

64. *See* Indictment, *United States v. Madoff*, Criminal No. S7 10 Cr. 228 (LTS) (S.D.N.Y.) [hereinafter Indictment, *United States v. Madoff*].

65. Indictment*, United States v. Cioffi, supra* note 62, at 1.

66. *Id.*

67. *Id.*

68. *See* Sack, *supra* note 53.

69. Press Release Office of Pub. Affairs, *supra* note 63.

SEC of his company's asset holdings in Rex Ventures Group LLC, which was engaged in a Ponzi scheme.[70] In *United States v. Madoff*, Peter Madoff was the Chief Compliance Officer and director of Bernard L. Madoff Investment Securities.[71] Madoff was charged with securities fraud, falsifying records of an investment advisor, falsifying records of a broker-dealer, and making false statements to the SEC.[72] Ultimately, Madoff was sentenced to 150 years in prison.[73]

B. Administrative Agencies Following DOJ's Lead

Since the release of the Yates Memo, many administrative agencies have followed the DOJ's lead in prosecuting individuals. Although DOJ memoranda are not binding on administrative agencies, they are persuasive authority.[74] This section discusses several administrative agencies' methods of pursuing corporate misconduct, including the Securities and Exchange Commission, Financial Crimes Enforcement Network, and Financial Industry Regulatory Authority.

1. Securities and Exchange Commission ("SEC")

The mission of the SEC is to "protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."[75] The SEC accomplishes its mission by overseeing the United States securities markets and ensuring that securities brokers, publicly traded corporations, investment advisors, and mutual funds properly disclose material information.[76] The SEC also protects investors from fraud.[77] The SEC's

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70. *Id.*

71. Indictment, *United States v. Madoff*, *supra* note 64.

72. *Id.*

73. *See id.*; Press Release, U.S. Attorney's Office, Bernard Madoff Sentenced to 150 Years in Prison (June 29 2009), https://archives.fbi.gov/archives/newyork/press-releases/2009/nyfo062909.htm; *see also* Press Release, U.S. Attorney's Office, Peter Madoff, Former Chief Compliance Officer and Senior Managing Director At Bernard L. Madoff Investment Securities LLC, Pleads Guilty To Securities Fraud And Tax Fraud Conspiracy In Manhattan Federal Court (June 29, 2012), https://archives.fbi.gov/archives/newyork/press-releases/2012/peter-madoff-former-chief-compliance-officer-and-senior-managing-director-at-bernard-l.-madoff-investment-securities-llc-pleads-guilty-to-securities-fraud-and-tax-fraud-conspiracy-in-manhattan-federal-court [hereinafter Peter Madoff Press Release].

74. *See DOJ Issues New Guidance on Pursuing Individual Accountability for Corporate Wrongdoing* 3, COVINGTON (Sept. 11, 2015), https://www.cov.com/-/media/files/corporate/publications/2015/09/doj_memo_individual_corporate_wrongdoing.pdf (noting that DOJ memorandum is not binding on DOJ attorneys and law enforcement agents).

75. *See What We Do*, S.E.C., https://www.sec.gov/about/whatwedo.shtml (last updated June 10, 2013).

76. *Id.*

Division of Enforcement brings civil actions against individuals and corporations that engage in securities fraud.[78] Often, the SEC works in tandem with the DOJ, which pursues criminal actions against individuals who participate in securities fraud.[79]

Following in the footsteps of the DOJ, the SEC has committed to maintain corporate individual accountability.[80] The SEC brings most of its cases against CCOs under § 15(b)(4)(e) of the Securities and Exchange Act of 1934 ("SEA") and Rule 206(4)-7 of the Investment Advisors Act of 1940.[81]

Under § 15(b)(4)(e) of SEA, CCOs may be held personally liable for failure to supervise, and under Rule 206(4)-7, they may be held personally responsible for failed compliance policies and procedures.[82] The SEC's move toward individual accountability is highlighted in the cases *In re SFX Financial Advisory Management Enterprises, Inc. and Eugene Mason*[83] and *BlackRock Advisors, LLC*.[84] In *In re SFX Financial Advisory Management Enterprises, Inc.* ("SFX"), Mason, the CCO for SFX, was charged with: (1) failing to implement SFX's compliance policies, (2) failing to conduct annual reviews, and (3) making a material misstatement on a filing.[85] The SEC filed its complaint against Mason after SFX's president, Brian Ourand and another individual misappropriated funds.[86] The SEC filed its complaint even though Mason timely conducted an internal investigation after discovering Ourand was misappropriating funds.[87] It was not enough that SFX terminated Ourand and reported his actions to the DOJ.[88] Rather, the SEC found that SFX's compliance

77. *Id.*

78. *Id.*

79. *Id.*

80. Press Release, Comm'r Luis A. Aguilar, S.E.C., The Role of Chief Compliance Officers Must be Supported (June 29, 2015) [hereinafter The Role of Chief Compliance Officers] (on file with author).

81. Andrew Ceresney, Dir., S.E.C. Div. of Enf't, Keynote Address at the 2015 National Society of Compliance Professional, National Conference (Nov. 4, 2015).

82. *Id.* (stating that Rule 206(4)-7 emphasizes that the CCO should have a position of seniority and authority, which would allow CCOs to have an influential voice within a corporation).

83. SFX Fin. Advisory Mgmt. Enters., Inc., Investment Advisers Act Release No. 4116 (June 15, 2015).

84. BlackRock Advisors LLC, Investment Advisers Act Release No. 4065, Investment Company Act Release 31,558, 111 SEC Docket (Apr. 20, 2015).

85. SFX Fin. Advisory Mgmt. Enters., Inc., Investment Advisers Act Release No. 4116 (June 15, 2015).

86. *Id.* at 2.

87. *Id.* at 3.

88. *Id.*

policies and procedures were not reasonably designed to detect the misappropriation.[89] As a result, the SEC ordered Mason to pay a civil penalty of $25,000.[90]

Additionally, in an administrative proceeding against Blackrock Advisors, LLC and its then-CCO, Bartholomew A. Battista, the SEC charged the CCO with fostering compliance failures. Specifically, Battista was charged with failing to adopt and implement written compliance policies and procedures for outside activities of employees.[91] This case arose after a senior portfolio manager engaged in misconduct with his own personal investment vehicles, which violated Blackrock's private investment policy and created conflicts of interest.[92] Because the CCO failed to oversee Rice's outside business activities and the attendant conflicts of interests with Blackrock, the SEC ordered the CCO to pay $60,000.[93] These cases reflect the SEC's vision of CCOs as gatekeepers, who are supposed to actively monitor and control corporate compliance.[94]

2. *Financial Crimes Enforcement and Financial Industry Regulatory Authority*

The Financial Crimes Enforcement Network ("FinCEN") and the Financial Industry Regulatory Authority ("FINRA") have each followed the lead of the DOJ in pursuing corporate individual liability. The mission of FinCEN is to protect the financial system by preventing money laundering and "[promoting] national security through the collection, analysis, and dissemination of financial intelligence and strategic use of financial authorities."[95] FinCEN's approach to pursuing corporate individual liability is displayed in *Department of Treasury v. Haider*. Thomas Haider was the CCO for MoneyGram International Inc., in charge of ensuring that MoneyGram complied with the Bank Secrecy Act.[96] Haider was also responsible for implementing an anti-money laundering program and filing suspicious activity reports ("SARs") to FinCEN.[97]

89. *Id.*

90. *Id.* at 5.

91. BlackRock Advisors LLC, Investment Advisers Act Release No. 4065, Investment Company Act Release 31,558, 111 SEC Docket 1 (Apr. 20, 2015).

92. *Id*. at 3.

93. *Id.* at 12.

94. Kara M. Stein, Comm'r, S.E.C., Keynote Address at Compliance Week 2014 (May 19, 2014).

95. *See Mission*, FINCEN, https://www.fincen.gov/about/mission (last visited Aug. 1, 2017).

96. United States Dep't of the Treasury v. Haider, No. 15-1518 (DSD/HB), 2016 WL 107940, at *1, *1 (D. Minn. Jan. 8, 2016).

97. *Id.* at *1-4.

Haider's alleged failure to implement an anti-money laundering program and file SARS resulted in a civil penalty of $1 million.[98]

Additionally, FINRA may hold CCOs culpable for failing to implement a "culture that consistently places ethical considerations and client interests at the center of business decisions."[99] Similar to the SEC's mission and purpose, FINRA also regulates the securities market to protect investors against fraud.[100] FINRA has the ability to enforce its rules and regulations against all of its registered members, including firms and individual brokers.[101]

FINRA defines "firm culture" as "the set of explicit and implicit norms, practices, and expected behaviors that influence how employees make and carry out decisions in the course of conducting the firm's business."[102] If a firm fails to implement a positive firm culture, the firm could face steep penalties and CCOs can suffer consequences such as civil penalties.[103]

FINRA's imposition of harsh consequences to CCOs who fail to ensure that their corporations have a positive firm culture is reflected in *Department of Enforcement v. Meyers Assoc.'s*, *Inc.*, where Bruce Meyers, was the CEO of Meyers Associates, L.P.[104] Meyers was charged with failing to supervise, sending misleading advertising materials, and failing to maintain accurate books and records.[105] Meyers was fined $75,000 and the firm was fined $700,000.[106] Although the consequences were issued to the CEO, FINRA does not discriminate when holding higher-level officials accountable, meaning that consequences can equally be distributed to

98. *Id.* at *3.

99. *See Establishing, Communicating and Implementing Cultural Values*, FINRA (Feb. 2016), http://www.finra.org/industry/establishing-communicating-and-implementing-cultural-values [hereinafter *Implementing Cultural Values*].

100. *See What We Do*, FINRA, http://www.finra.org/about/what-we-do (last visited Aug. 16, 2017).

101. *Id.*

102. *See Implementing Cultural Values*, *supra* note 99.

103. *Id.*

104. Dep't of Enf't v. Meyers Assoc.'s, Inc., Disciplinary Proceeding No. 2010020954501 (Apr. 27, 2016), http://www.bdlawcorner.com/wp-content/ uploads/ sites/523/2016/05/Meyers-Associates.pdf; *see also* Press Release, FINRA, FINRA Fines Brown Brothers Harriman A Record $8 Million for Substantial Anti-Money Laundering Compliance Failures (Feb. 5, 2014), http://www.finra.org/newsroom/2014/finra-fines-brown-brothers-harriman-record-8-million-substantial-anti-money-laundering (explaining *FINRA v. Crawford*).

105. Alan Wolper, *According To FINRA, "Culture Of Compliance" Is Not Only Definable, It's Enforceable*, BROKER-DEALER (May 18, 2016), http://www.bdlawcorner.com/2016/05/according-to-finra-culture-of-compliance-is-not-only-definable-its-enforceable/.

106. *Id.*

CCOs.[107] This case is looked at as a leading example of FINRA's no-nonsense attitude on building and maintaining a positive firm culture, and its willingness to pursue individual actors such as CCOs.[108]

C. The Trump Administration

The Trump Administration has already begun to shift DOJ policies implemented under the Obama Administration. Recently, President Trump announced plans to "cut a lot out of" the Dodd-Frank Act.[109] Dodd-Frank was passed in 2010 as a result of the 2008 financial crisis.[110] Dodd-Frank created the Financial Stability Oversight Council, which identifies risks and threats to financial stability.[111] Dodd-Frank "has had a profound effect on the financial industry, forcing banks to submit to yearly 'stress tests' to prove they could withstand economic turbulence and draw up 'living wills' that lay out how the banks could be dismantled without harming the rest of the financial system."[112] President Trump's recent SEC Chair appointment suggests that the Trump Administration may be laxer than the Obama Administration on corporate regulations.[113] Trump's pick for SEC Commissioner, Jay Clayton, is known for being a "Wall Street lawyer," and he has represented Goldman Sachs for decades.[114] It is believed that

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107. *See* Hardy Callcott & Emily Culbertson, *FINRA Is Concerned About Firm Culture: What Does It Mean?* 1, 2, LAW360 (Feb. 29, 2016, 12:03 PM), http://www.sidley.com/~/media/publications/law360_finra-is-concerned-about-firm-culture_what-does-it-mean.pdf.

108. *Id.*; *see also See FINRA Fines Brown Brothers Harriman a Record $8 Million for Substantial Anti-Money Laundering Compliance Failures*, FINRA (Feb. 5, 2014), http://www.finra.org/newsroom/2014/finra-fines-brown-brothers-harriman-record-8-million-substantial-anti-money-laundering (noting *FINRA v. Crawford*, where the CCO notified his superiors of corporate misconduct, but he was still held personally accountable for failing to take action).

109. Ben Protess & Julie Hirschfeld Davis, *Trump Moves to Roll Back Obama-Era Financial Regulations*, N.Y. TIMES (Feb. 3, 2017), https://www.nytimes.com/2017/02/03/business/dealbook/trump-congress-financial-regulations.html?_r=0.

110. *Dodd-Frank Wall Street Reform and Consumer Protection Act,* INVESTOPEDIA, http://www.investopedia.com/terms/d/dodd-frank-financial-regulatory-reform-bill.asp (last visited Sept. 1, 2017).

111. *Id.*

112. *See* Renae Merle & Steven Mufson, *Trump Signs Order to Begin Rolling Back Wall Street Regulations*, WASH. POST (Feb. 3, 2017), https://www.washingtonpost.com/business/economy/trump-signs-order-to-begin-rolling-back-wall-street-regulations/2017/02/03/650668d8-ea30-11e6-80c2-30e57e57e05d_story.html?utm_term=.2e84edfa6080.

113. Leslie Picker, *Donald Trump Nominates Wall Street Lawyer to Head S.E.C.*, N.Y. TIMES (Jan. 4, 2017), https://www.nytimes.com/2017/01/04/business/dealbook/donald-trump-sec-jay-clayton.html?mcubz=1.

114. Chris Arnold, *Can an SEC Nominee with Ties to Goldman Regulate Wall Street Impartially?*, NPR (Jan. 5, 2017, 4:27 PM), http://www.npr.org/2017/01/05/508408455/can-an-sec-nominee-with-ties-to-goldman-regulate-wall-street-impartially (noting

Clayton's representation of Goldman Sachs is an indicator that he may be lenient towards Wall Street firms; however, presently there is no information on Clayton's view towards business regulations.[115]

D. Chief Compliance Officers

Since the release of the Yates Memo, CCOs have been in the crosshairs of regulatory and DOJ prosecution. CCOs are targeted because agencies view CCOs as corporate compliance gatekeepers and a means to keep the corporation and its officers in check.[116] Further, CCOs are seen as instrumental in implementing the "tone at the top."[117]

CCOs generally ensure that a corporation meets regulatory standards.[118] A CCO has the responsibility of creating and implementing corporate compliance programs to (1) prevent and detect corporate misconduct and (2) promote ethical conduct and compliance with the law.[119] Further, a CCO must ensure that a compliance program is effective, efficient, well-known, and respected within the corporation.[120] If misconduct occurs, CCOs have a duty to report it to the CEO and Board of Directors.[121]

Challenges of the CCO profession include: undefined roles within the corporation; lack of authority and independence; lack of resources to carry out CCO functions; and ostracization from major decisions which could potentially impact compliance.[122]

III. THE IMPACT OF DOJ MEMORANDA

A. Development of DOJ Memoranda

The common thread between the Holder Memo and the Bush era memoranda is their primary focus on prosecuting corporate misconduct.[123]

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that Mary Jo White, Obama's pick for SEC commissioner was also previously a "Wall Street Lawyer").

115. *See* Picker, *supra* note 113.

116. *See* Stein, *supra* note 94.

117. *Id.*

118. The Role of Chief Compliance Officers Must be Supported, *supra* note 80.

119. *See* U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a) (U.S. SENTENCING COMM'N 2015).

120. *Chief Compliance Officer (CCO),* MEMBER OF THE IARCP, http://www.chief-compliance-officer.org (last visited Aug. 16, 2017).

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

122. *See Chief Compliance Officer*, *supra* note 120.

123. *See generally* Holder Memo*, supra* note 2; Thompson Memo, *supra* note 2; McNulty Memo, *supra* note 2; Filip Memo, *supra* note 2.

The guidelines for the memoranda are focused on a corporation's prosecution;[124] they are only dedicated to individual accountability in a minimal way.[125] These memoranda lack emphasis on individual accountability to deter corporate misconduct.[126]

As a result of certain conduct that contributed to the 2008 recession, the issue of individual accountability came under the spotlight.[127] The Yates Memo is the only memorandum issued by the DOJ that explicitly emphasizes individual accountability for corporate directors, officers, shareholders, and employees.[128] Contrary to the Clinton and Bush memoranda, the Yates Memo's charging factors focus on individual accountability for corporate wrongdoing.[129] The first guideline of the Yates Memo states, "to qualify for any cooperation credit, corporations must provide all relevant facts relating to the individuals responsible for the misconduct."[130] Under this guideline, the corporation must identify all culpable individuals who engaged in misconduct, regardless of their position.[131]

B. Good Intentions, Difficult to Implement

While the Yates Memo emphasizes individual accountability for corporate officers, in practice the DOJ has been unsuccessful in criminal prosecutions against individuals.[132] Most corporate criminal cases are settled before trial, or at trial, the officers are often acquitted.[133] For example, in TAP Pharmaceuticals, the DOJ brought anti-kickback violation charges against eight officers, directors, and employees.[134] The jury

124. *See generally* Holder Memo, *supra* note 2; Thompson Memo, *supra* note 2; McNulty Memo, *supra* note 2; Filip Memo, *supra* note 2.

125. *See generally* Holder Memo, *supra* note 2; Thompson Memo, *supra* note 2; McNulty Memo, *supra* note 2; Filip Memo, *supra* note 2.

126. *See generally* Holder Memo, *supra* note 2; Thompson Memo, *supra* note 2; McNulty Memo, *supra* note 2; Filip Memo, *supra* note 2.

127. *See* Yates Memo, *supra* note 2; *see also The Financial Crisis Response in Charts*, DEP'T OF THE TREASURY (Apr. 2012), https://www.treasury.gov/resource-center/data-chart-center/Documents/20120413_FinancialCrisisResponse.pdf.

128. *See* Yates Memo, *supra* note 2, at 2.

129. *See id*.

130. *See id.* at 3.

131. *See id*.

132. *See* Sack, *supra* note 53, at 1.

133. TAP Pharmaceutical Products Inc., and Seven Others Charged with Health Care Crimes, *supra* note 14; *see also* Indictment, *United States v. Reichel*, *supra* note 53; Warner Chilcott Agrees to Plead Guilty, *supra* note 56.

134. TAP Pharmaceutical Products Inc., and Seven Others Charged with Health Care Crimes, *supra* note 14.

acquitted all eight individuals.[135] Also, as noted above, although healthcare provider Warner Chilcott plead guilty to multiple counts of fraud and agreed to pay $125 million, it's CEO Carl Reichel was ultimately acquitted of all charges.[136] Reichel's case happened after the issuance of the Yates Memo, and Reichel's acquittal dealt a blow to the Yates Memo's objective.[137] Reichel's case demonstrated the government's difficulty in proving beyond a reasonable doubt that a corporate individual engaged in misconduct.[138]

Similarly, the DOJ was successful in bringing a civil action against TAP Pharmaceuticals for $875 million to redress the criminal actions done by its employees.[139] Despite the monetary penalty against the company, Tap Pharmaceuticals' officials were acquitted, demonstrating another failure by the DOJ to hold individuals responsible.

Additionally, in *United States v. Cioffi*, Raplh Cioffi and Matthew Tannin were acquitted of securities fraud, leaving two more high-ranking corporate officials unscathed by government action.[140]

The cases above highlight the government's difficulty in pursuing individual prosecutions.[141] In part, the difficulty stems from the challenge of demonstrating that corporate executives, employees, or officers "knowingly and intentionally" committed misconduct.[142] The burden of proving that an individual knowingly and intentionally committed misconduct is high, due to the wide-ranging authority for decision-making in a corporate setting.[143] There are two types of corporate decision making,

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135. Shelley Murphy & Alice Dembner, *All Acquitted in Drug Kickbacks Case Jury Deals a Blow to US Prosecutors*, BOSTON GLOBE (July 15, 2004), http://archive.boston.com/news/local/articles/2004/07/15/all_acquitted_in_drug_kickbacks_case/.

136. *See* Giampetruzzi et al., *supra* note 57.

137. Thomas Sullivan, *Carl Reichel Warner Chilcott Executive Acquittal Deals Blow to Yates* Memo, POL'Y AND MED. (June 20, 2016, 5:12 AM), http://www.policymed.com/2016/06/carl-reichel-warner-chilcott-executive-acquittal-deals-blow-to-yates-memo.html.

138. *Id.*

139. *Id.*

140. *See* Sack, *supra* note 53, at 1.

141. *See* Gary Giampetruzzi, Terra Reynolds & Jahmila Williams, *Not Guilty, Again: Individual Corporate Liability in the Wake of the Reichel Acquittal*, PAUL HASTINGS (June 22, 2016), https://www.paulhastings.com/publications-items/details/?id=6cc9e969-2334-6428-811c-ff00004cbded.

142. *Id.*

143. *Id.*; *see also* Michael S. Schmidt & Edward Wyatt, *Corporate Fraud Cases Often Spare Individuals*, N.Y. TIMES (Aug. 7, 2012), http://www.nytimes.com/2012/08/08/business/more-fraud-settlements-for-companies-but-rarely-individuals.html (stating that "senior executives are often insulated from the day-to-day duties of the corporation," which makes prosecuting on the basis of intent difficult).

top down or bottom up, but both result in dispersed decision-making.[144] The top down approach consists of high-level officers and directors making decisions which are passed down for implementation.[145] The bottom up approach gives authority to middle level officers to make decisions, which are then dispersed to the rest of the corporation's employees, up or down.[146] Most corporations implement the top down approach, which leaves officers at the top of the company more open to liability under the Yates Memo.[147]

Another problem with the government's pursuit of criminal actions against corporate individuals is that under many anti-fraud statutes, is that the term "willfully" has different meanings.[148] The various definitions of willfully includes: 1) "proof that the individual intentionally violated a known legal duty; 2) proof that the individual knowingly committed the criminal act, regardless of whether she also knew that her actions were illegal; and 3) requires that the individual acted with the intent to violate the law."[149] Depending on the particular statute, the culpability the government must prove may hinder prosecution.[150] Further, in defense, defendants often claim they acted in good faith, which excuses mistakes.[151] Facing claims good faith, it is difficult for prosecutors to prove that an individual knowingly and intentionally engaged in misconduct.[152] For example, the defense of good faith was used in *United States v. Cioffi*,[153] and is part of the reason the DOJ was unsuccessful in criminally prosecuting the defendants.[154] Based on these indictments by the DOJ, pursuing individual accountability has posed a challenge for the DOJ.

144. *See The Process of Corporate Decision Making*, MGMT STUDY GUIDE, http://www.managementstudyguide.com/corporate-decision-making.htm (last visited Aug. 16, 2017).

145. *Id.*

146. *Id.*

147. *Id.*

148. Carol A. Poindexter, Norton Rose Fulbright & Timothy M. Moore, *Trends in Federal White Collar Prosecutions*, PRACTICAL L. 1, 8 (2016), http://www.nortonrose fulbright.com/files/20160101-trends-in-federal-white-collar-prosecutions-135964.pdf.

149. *Id.*

150. *Id.*

151. *Id.* at 9.

152. *Id.*

153. *United States v. Ciof & Tannin,* 08-cr-0415 (E.D.N.Y. June 18, 2008) (indictment given on June 18, 2008).

154. *See* Poindexter et al., *supra* note 148, at 9 (explaining that the defendant used the defense of good faith to claim that the defendant made an "honest misunderstanding of her legal duties").

C. Successful Civil Actions Brought by Administrative Agencies

While successfully pursuing criminal actions has been difficult for the DOJ, administrative agencies have been more successful against corporate individuals, especially CCOs.

For the SEC, the concern with § 15(b)(4)(E) of SEA is that the regulation fails to acknowledge that CCOs often do not hold supervisory positions within a company.[155] CCOs are subordinate to the board of directors and the CEO, but nevertheless, under § 15(b)(4)(E), CCOs may be held accountable for misconduct regardless of whether they hold a sufficiently supervisory position.[156]

Rule 206(4)-7 of the Investment Advisors Act is as controversial as § 15(b)(4)(E) of SEA. On its face, Rule 206(4)-7 implies that the SEC should charge the firm's Registered Investment Adviser ("RIA"), who is tasked with enforcing compliance policies and procedures, and not charge the CCO.[157] This implication is further advanced by the statutory background released by the SEC, which states that investment advisors adopt compliance policies and procedures and review the adequacy of the procedures annually.[158] Under Rule 206(4)-7, CCOs are responsible for administering the procedures.[159] The SEC ignores the plain reading of the Rule and continuously holds CCOs personally liable for any misconduct that occurs.[160] This is demonstrated in the case Blackrock Advisors, in which the SEC charged the CCO, Batista, for failure to implement adequate policies and procedures that would have prevented the securities violations.[161]

Further, FinCEN pursues civil actions against CCOs for "any violations of reporting, recordkeeping, or other requirements of the Bank Secrecy Act."[162] As for FINRA, civil penalties are imposed against CCOs if

155. *See* Dawn Causey, *Who Should Have Personal Liability for Compliance Failures?*, A.B.A. BANKING J. (Aug. 17, 2015), http://bankingjournal.aba.com/2015/08/who-should-have-personal-liability-for-compliance-failures/ (noting that CCOs are not at the top of the corporate organizational chart); *see also* Susan Lorde Martin, *Compliance Officers: More Jobs, More Responsibility, More Liability,* 29 NOTRE DAME J.L. ETHICS & PUB. POL'Y 169, 173, 189 (2015).

156. *See* Martin, *supra* note 155, at 189.

157. *See Information for Newly-Registered Investment Advisers*, S.E.C. (Nov. 23, 2010), https://www.sec.gov/divisions/investment/advoverview.htm.

158. 17 C.F.R. §§ 270, 275 (2004).

159. *Id.*

160. *See Information for Newly-Registered Investment Advisers*, *supra* note 157 (purporting that Chair White holds the CCOs responsible for ensuring that the RIA firm has adopted sufficient procedures and policies that would not violate Rule 206(4)-(7)).

161. *See id*.

162. *Enforcement Actions*, FINCEN, https://www.fincen.gov/news-room/enforcement-actions (last visited Aug. 16, 2017).

compliance mechanisms fail, the corporation lacks good firm culture, the CCO aids and abets recordkeeping violations, or the CCO holds a lack of proper qualifications.[163]

The success of imposing civil penalties against corporate individuals is reflected in the cases brought by the SEC, FinCEN, and FINRA.[164] Both of the SEC cases, *SFX* and *BlackRock,* resulted in CCOs paying civil monetary penalties of $25,000 and $60,000, respectively.[165] Additionally, both FinCEN and FINRA's cases, *Haider* and *Meyers* resulted in CCOs paying a civil penalty.[166] In *Haider*, defendant Haider paid a $1 million civil penalty.[167] In *Meyers*, FINRA simply fined Meyers $75,000.[168] However, none of the individuals were sentenced to time in jail.

There are several reasons why civil penalties have been a more successful way to punish corporate misconduct than criminal actions with the potential for jail time. First, there is a lower burden of proof for civil charges than criminal charges, in which prosecutors must prove beyond a reasonable doubt that the individual engaged in a crime.[169] Civil cases require prosecutors to prove guilt based on a preponderance of evidence.[170] Second, there is a greater opportunity to secure a large sum for damages.[171] In civil cases, the burden lies with the prosecution to prove that an individual knowingly and intentionally violated the law.[172] Furthermore, it is easier and more cost effective for agencies to bring civil actions instead

163. *See* Callcott et al., *supra* note 107, at 2; *see also* Brian L. Rubin & Katherine L. Kelly, *While You Were Complying: SEC and FINRA Disciplinary Actions Taken Against Chief Compliance Officers* 39, REG. REFORM TASKFORCE (Sept.-Oct. 2010), http://www.regulatoryreformtaskforce.com/portalresource/While%20You%20 Were%20Complying-%20SEC%20and%20FINRA.pdf.

164. *See generally* BlackRock Advisors LLC, Investment Advisers Act Release No. 4065, Investment Company Act Release 31,558, 111 SEC Docket (Apr. 20, 2015).; United States Dep't of the Treasury v. Haider, No. 15-1518 (DSD/HB), 2016 WL 107940, at *1 (D. Minn. Jan. 8, 2016); *Dep't of Enf't v. Meyers Assoc.'s, Inc.*, Disciplinary Proceeding No. 2010020954501 (Apr. 27, 2016), http://www.bdlawcorner.com/wpcontent/uploads/sites/523/2016/05/MeyersAssociates.pdf.

165. *See* BlackRock Advisors LLC, Investment Advisers Act Release No. 4065, Investment Company Act Release 31,558, 111 SEC Docket (Apr. 20, 2015).

166. *See Haider*, 2016 WL 107940 at *1; *see also Dep't of Enf't v. Meyers Assoc.'s, Inc.*, *supra* note 164.

167. *Haider*, 2016 WL 107940 at *1.

168. *Dep't of Enf't v. Meyers Assoc.'s, Inc.*, *supra* note 164.

169. *The Differences between a Criminal Case and a Civil Case*, FINDLAW, http://criminal.findlaw.com/criminal-law-basics/the-differences-between-a-criminal-case-and-a-civil-case.html (last visited Aug. 16, 2017).

170. *Id.*

171. *See* Schmidt et al., *supra* note 143.

172. *Id.*

of DOJ bringing a criminal suit.[173] For every "one dollar spent on a criminal case, the government receives fifteen dollars for a civil case."[174]

D. Individual Accountability a Concern for CCOs

In 2016, a survey conducted by the law firm DLA Piper found that "8 out of 10 Chief Compliance Officers said they were at least somewhat concerned about the change in tone and tactics from Washington."[175]

The DOJ encourages increased prosecutorial attention on high-level corporate officers to deter corporate wrongdoing.[176] DOJ prosecutors seek criminal actions alongside civil suits against CCOs. The DOJ's predominant focus is to ensure that CCOs engaged in or aware of misconduct is punished, to deter corporations from injuring the American people.[177] WR Trading Company's Deborah Duffy maintained the books of the company while knowing of the fraudulent scheme conducted by its principals.[178] She was sentenced to prison for securities fraud, conspiracy, and money laundering and ordered to pay $1,272,841 in restitution.[179]

While the DOJ's prosecutions of CCOs are infrequent, like other corporate executives, they could be held liable for corporate misconduct. Similar to Carl Reichel, then president of Warner Chilcott, a CCO could be held liable for personally engaging in kickbacks or being aware of the kickbacks, but failing to stop them.[180] Like other officers, CCOs face the possibility of being held accountable.[181] CCOs can also be held accountable for obstructing justice, which was the case in the DOJ prosecution of Jaymes Meyer, CEO of Preferred Merchants LLC, a financial services company.[182] Meyers concealed millions of dollars from

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173. *Id.*

174. *Id.*

175. DLA PIPER'S 2016 COMPLIANCE & RISK REPORT: CCOS UNDER SCRUTINY (2016).

176. *Id.*

177. *See USAM 9-28.210*, DEP'T OF JUSTICE, https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations#9-28.210 (last visited Sept. 7, 2017); *see also* Giampetruzzi et al., *supra* note 57.

178. *See* Warner Chilcott Agrees to Plead Guilty*, supra* note 56.

179. *Id.*

180. Indictment, *United States v. Reichel*, *supra* note 53.

181. *See What is the Difference Between a President and a Chief Executive Officer? Can There Be More than One of Each?,* INVESTOPEDIA (Aug. 2, 2017), http://www.investopedia.com/ask/answers/04/062504.asp (explaining that Chief Executive Officers' role within a corporation consists of "integrating policy into the daily operations of the corporation, and the responsibility of the president is to implement the day-to-day operations of the corporation").

182. *See* Press Release Office of Pub. Affairs, *supra* note 69.

the government.[183] Under a CCO scenario, the CCO would be held accountable along with other executives, for not only being aware and taking part in the misappropriation of funds, but also for failure to supervise and implement proper compliance mechanisms.[184] This was the case in the sentencing of Peter Madoff, who was a CCO for Bernard L. Madoff Investment Securities LLC (BLMIS).[185] Peter Madoff was aware of, and enabled Bernie Madoff's Ponzi scheme, and he was sentenced to prison.[186]

The DOJ and administrative agencies attempts at reeling in corporate misconduct have had a chilling effect on the compliance community.[187] Sixty-five percent of CCOs said that "increased scrutiny would cause them to reconsider their positions as CCOs due to the mounting fear of being personally liable for corporate misconduct."[188] Increased enforcement actions have led to CCOs paying large fines as seen in SFX, forced resignations, and the tying of compensation to successful compliance programs.[189] Further, CCOs now suffer reputational damage because of the recent spotlight.[190] The overall concern is that CCOs are being targeted and held accountable for individual misconduct of others.[191]

IV. THE NEW TRUMP MEMORANDUM

Although the Yates Memo is a commendable initial effort to deter corporate misconduct, improvements can be made. The discussion above highlights the challenges that developed under the Yates Memo such as the DOJ's inability to prove that corporate individuals' possess the requisite *mens rea.* The DOJ is partially unsuccessful with criminal prosecutions because corporations disperse their work among officers, making it difficult for the DOJ to prove intent.[192] Further, it is hard for the DOJ to prove intent because the DOJ cannot prove it beyond a reasonable doubt, the standard for criminal prosecutions. Thus, the next memorandum issued under the Trump Administration should be to focus on corporate individual

183. *Id.*

184. *Id.*

185. Peter Madoff Press Release, *supra* note 73.

186. *Id.*

187. *See* DLA PIPER, *supra* note 175.

188. *Id.*

189. *Id.*

190. *See Information for Newly-Registered Investment Advisers*, *supra* note 157.

191. Scott Killingsworth, *CCO Liability: Winds of Change at the SEC?*, COMPLIANCE & ETHICS (June 19, 2015), http://complianceandethics.org/cco-liability-winds-of-change-at-the-sec/.

192. *See* Schmidt et al., *supra* note 143.

accountability, but the consequences should be distributed to the Board of Directors as well as the individual who engaged in misconduct. The Board of Directors ("the Board") should be held accountable because it approves CCO and higher level executive actions.[193]

The basic corporate structure consists of shareholders at the top.[194] Shareholders elect Directors.[195] The duty of the Board is to oversee the managers of the company and support the shareholders.[196] Every subsequent level of managers, which includes the CCO, report to the Board.[197] The CCO has to report to the Board and assure that all compliance mechanisms are effective and efficient.[198] Prior to reporting to the Board, the CCO has to initially report to the Chief Executive Officer regarding material regulatory issues.[199]

Because the CCO essentially has two reporting channels, consequences should flow to the Board of Directors and the CEO. Additionally, an issue that many CCOs face pertains to upper level officials disregarding CCOs advice and ignoring suspect activity that CCOs bring to their attention.[200] Although targeting CCOs may cause corporations to increase attention to compliance efforts, the most effective means to curb corporate misconduct is to focus on the Board and CEOs. Government agencies should abandon the approach of simply targeting CCOs and focus on the Board and CEO.

193. *See The Basics of Corporate Structure,* INVESTOPEDIA (Oct. 8, 2015, 9:22 PM), http://www.investopedia.com/articles/basics/03/022803.asp.

194. *Id.*

195. *Id.*

196. *Id.*

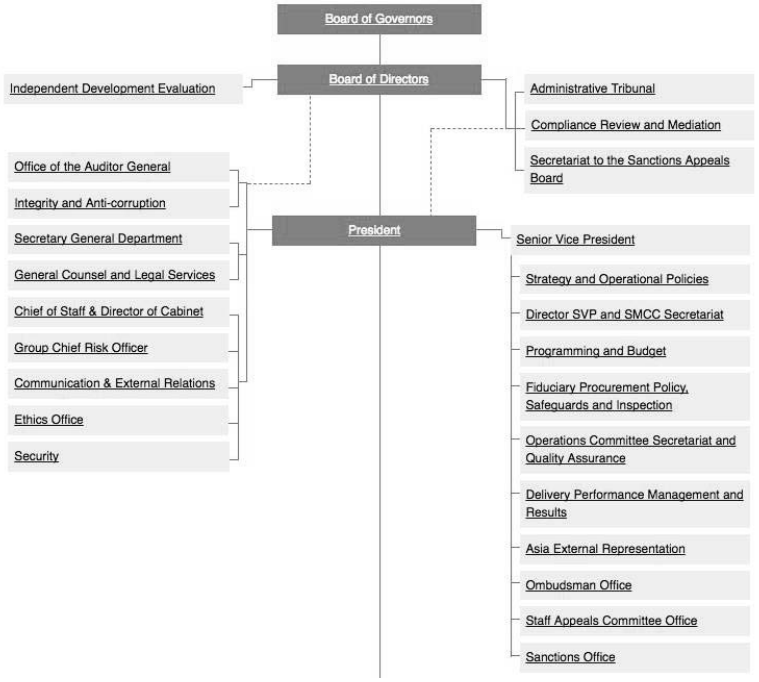
197. *See Chief Compliance Officer (CCO)*, *supra* note 120.

198. *Id.*

199. *Id.*

200. *See* Martin, *supra* note 155, at 182.

Figure 1[201]



A. Using the Past as an Example of What Not to do in the Future

Recently, President Trump signed an executive order to review the current regulations imposed on Wall Street in an effort to jump-start revising the Dodd-Frank Act.[202] Dodd-Frank created the Financial Stability Oversight Council, which oversees the financial services sector.[203] Dodd-Frank also assures that the financial services sector is stable in case of "economic turbulence."[204] President Trump has stated he wants to upend Dodd-Frank regulations to increase the flow of credit.[205]

History proves that relaxed regulation can harm the economy. The rolling back of regulation partially led to both Enron's collapse and the 2008 financial crisis.[206] For Enron, the Federal Regulatory Energy Commission ("FERC") "[failed] to address the . . . inadequacies in the regulatory structure that [permitted] Enron's most questionable business

201. *Governance Structure*, AFRICAN DEV. BANK GRP., https://www.afdb.org/en/about-us/organisational-structure/ (last visited Sept. 7, 2017).

202. *See* Merle et al., *supra* note 112.

203. *Id.*

204. *See id*.

205. *Id.*

206. *Id.*

practices to go without scrutiny."[207] As a result, "FERC . . . [allowed Enron to engage in] market abuse, . . . [which was] uncorrected and unchallenged for many months."[208]

Specifically, for the 2008 financial crisis, there was widespread minimum oversight over the financial industry.[209] In part, relaxed oversight resulted from the financial sector's influence on Congress.[210] For example, Freddie Mac and Fannie Mae lobbied Congressional members for decreased capital reserve requirements for mortgage lenders.[211] If the DOJ issues a new memorandum, it should factor in the societal as well as business sector effects of lax corporate regulation. Examining historical events would provide insight regarding the impact of lax regulations for corporations.

CONCLUSION

The proposed recommendations would be best for CCOs, business, and the economy. The Yates Memo had a chilling effect on the compliance community. Most CCOs said that increased scrutiny would cause them to reconsider their positions due to a mounting fear of personal liability for corporate misconduct. To perform most efficiently, CCOs should not have a target on their backs. Consequences for corporate misconduct should be distributed equally to all higher level corporate officials to create fairness for CCOs.

The second recommendation would benefit because investors are willing to invest when there is transparency and accountability. Investment fuels the growth of the economy. Regulation, and its counterpart – enforcement – in tandem, benefit the economy.

207. *Asleep at the Switch: FERC'S Oversight of Enron Corporation—Vol. I*: *Hearing Before the S. Comm. on Governmental Affairs*, 107th Cong. 3 (2002) (statement of Joseph I. Lieberman, Chairman, S. Comm. on Governmental Affairs).

208. *Id.*

209. Daniel Kaufmann, *Corruption and the Global Financial Crisis*, FORBES (Jan. 27, 2009, 2:58 PM), http://www.forbes.com/2009/01/27/corruption-financial-crisis-business-corruption09_0127corruption.html.

210. *Id.*

211. *Id.*

* * *

DEFINING THE CHIEF COMPLIANCE OFFICER ROLE

JOHN C. KRENITSKY*

INTRODUCTION

The role of Chief Compliance Officer ("CCO") is relatively new in the evolution of Corporate Governance.[1] Concepts about the role, including —

(i) The subject matter scope of the program for which the CCO is responsible;

(ii) The compliance program elements and functions that CCO's manage within corporations;

(iii) The appropriate stature of the CCO and reporting line within corporate governance structures; and

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* Mr. Krenitsky is the Chief Compliance Officer of Discover Financial Services, Riverwoods, IL. To the extent that this article expresses any views or opinions, however, they are entirely Mr. Krenitsky's own views and do not reflect the position of Discover Financial Services.

1. *See* Caroline Nolan, *Defining the Evolving Role of Chief Compliance Officer is Essential According to PwC's State of Compliance 2014 Survey*, PWC 1, 2 (2014), https://www.pwc.com/mx/es/riesgos/archivo/2015-03-challenges.pdf (stating that:

> Today's Chief Compliance Officers (CCOs) are in a position similar to that of Chief Financial Officers (CFOs) 15 years ago, and they face a comparable opportunity and challenge: how to become a more strategic partner in the organization; a vital member of the C–suite. Survey findings show the role of the CCO has gained more prominence over the last decade and is evolving rapidly.).

(iv) The extent to which the CCO can, or should, be individually liable when corporations fail to comply —

have evolved over time within the different industries and governmental organizations that oversee them.[2] As this evolution unfolded, a convergence of views and common understanding of the CCO's role gradually emerged.[3]

This Article explores the convergence of these views and synthesizes the current perspective of the role by exploring authoritative primary source materials—i.e., official expressions of such organizations as the U.S. Sentencing Commission and U.S. financial industry regulators. It also explores the current perspective on the role from the industry by exploring influential secondary source materials—i.e., respected industry associations such as the Securities Industry and Financial Markets Association ("SIFMA") and the American Bankers Association ("ABA"). The examples and details in this article focus on the CCO's role within financial services firms (e.g., Banks); but the principles enunciated would apply to a CCO of any corporation in any industry. This Article should not be read as a blueprint or prescription for the role, but rather as a synthesized description of the current state of the role's evolution.

II. SUBJECT MATTER SCOPE

Determining the subject matter scope of the CCO's role requires contemplation of the questions, "with what requirements must corporations comply" and "who are the ranking officers in the company responsible for compliance with those requirements?"[4] These questions must be considered from a governmental perspective as well as an industry perspective.

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2. *See generally* Nilisha Patel, *A Chief Compliance Officer's Role in Risk Management*, ENTERPRISE RISK MGMT. INITIATIVE (Oct. 26, 2015), https://erm.ncsu.edu/library/article/chief-compliance-officer-risk-management (explaining the evolving role of CCOs).

3. *See* Matt Podowitz, *Fulfilling the New Compliance Mandate — The Compliance Convergence Journey*, CORP. COMPLIANCE INSIGHTS 4 (Sept. 16, 2010), http://www.corporatecomplianceinsights.com/fulfilling-the-new-compliance-mandate-through-compliance-convergence/ (describing the new critical roles of the CCO, such as: change agent, lead architect, quality inspector, that are necessary to lead a company to fulfill the new compliance mandate).

4. *The Chief Compliance Officer: The Fourth Ingredient in a World–Class Ethics and Compliance Program*, DELOITTE 1, 2, 4 (2015) [hereinafter *The Chief Compliance Officer*], https://www2.deloitte.com/content/dam/Deloitte/us/Documents/risk/us-aers-download-the-full-report-the-chief-compliance-officer-05012015.pdf.

A. Governmental Perspective

The U.S. Sentencing Guidelines[5] suggest actions for courts to take upon finding organizations guilty of violating laws.[6] Courts may be more lenient if an organization can prove that it has an effective compliance program.[7] In describing what would be considered an effective compliance program, the U.S. Sentencing Guidelines state:

> [A]n organization shall —
>
> (1) exercise due diligence to prevent and detect criminal conduct; and
>
> (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.
>
> Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct.[8]

This language implies that the subject matter scope of an effective compliance program overseen by a CCO is very broad.[9] While the first element is focused on detecting and preventing criminal law violations, the second element is not so limited.[10] It simply references "the law."[11] The U.S. Sentencing Guidelines are not limited to statutory law, so the second element was presumably intended to capture regulatory requirements and expectations as well as common law.[12] By referencing "ethical conduct," the scope expands further to cover accepted standards of conduct for an industry in which a corporation operates.[13] The non–criminal statutes, regulations and regulatory expectations, common law, and standards of ethical conduct (collectively "Compliance Requirements") applicable to

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5. *See generally* U.S. SENTENCING GUIDELINES MANUAL § 8B1–B2 (U.S. SENTENCING COMM'N 2015) (remedying Harm from Criminal Conduct, and Effective Compliance and Ethics Programs, effective Nov. 1, 1991 & 2004).

6. *See id. (*"First a court must, whenever practicable, order the organization to remedy any harm caused by the offense. The resources expended to remedy the harm should not be viewed as punishment, but rather as a means of making victims whole for the harm caused.").

7. *See Corporate Compliance Programs Under the Organizational Sentencing Guidelines*, *in* WHITE COLLAR DESKBOOK § 7:4 ("The 2004 Amendments require that organizations seeking fine leniency based on a compliance program must meet two overarching standards.").

8. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (U.S. SENTENCING COMM'N 2015).

9. *Id.*

10. *Id.*

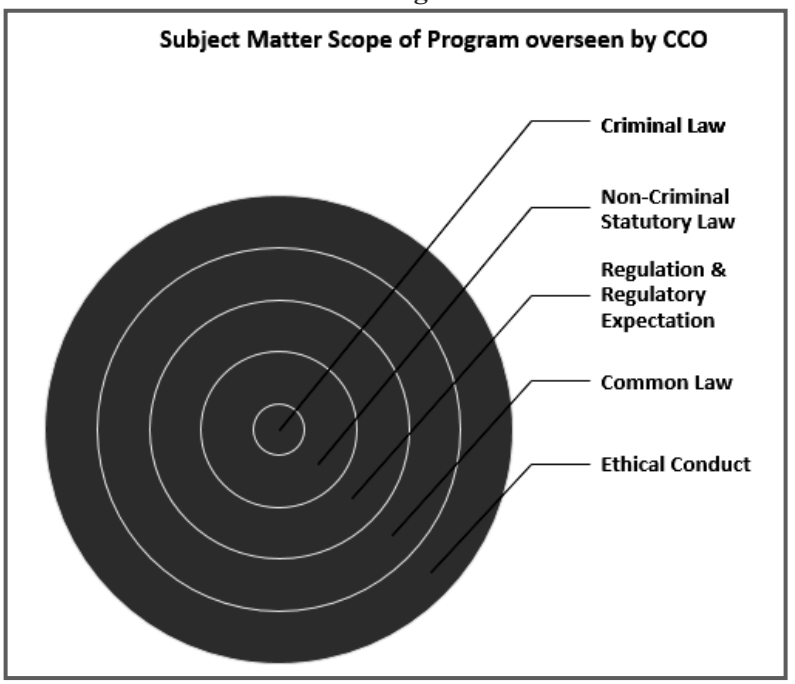
11. *Id.*

12. *See id.*

13. *Id*.

any particular corporation will differ based on the industry in which it operates.[14] Image 1 below demonstrates the expansive scope of an effective compliance program necessary under the U.S. Sentencing Guidelines.

Image 1



For several years, the Federal Reserve has emphasized the need for a "firm–wide" approach to compliance risk management.[15] The Federal Reserve defined "firm–wide compliance risk management" as, "the processes established to manage compliance risk across an entire organization, both within and across business lines, support units, legal entities, and jurisdictions of operation."[16]

14. Maurice E. Stucke, *In Search of Effective Ethics & Compliance Programs*, 39 J. CORP. L. 769, 770–71 (2014) (explaining how different corporations will end up with different ethics codes).

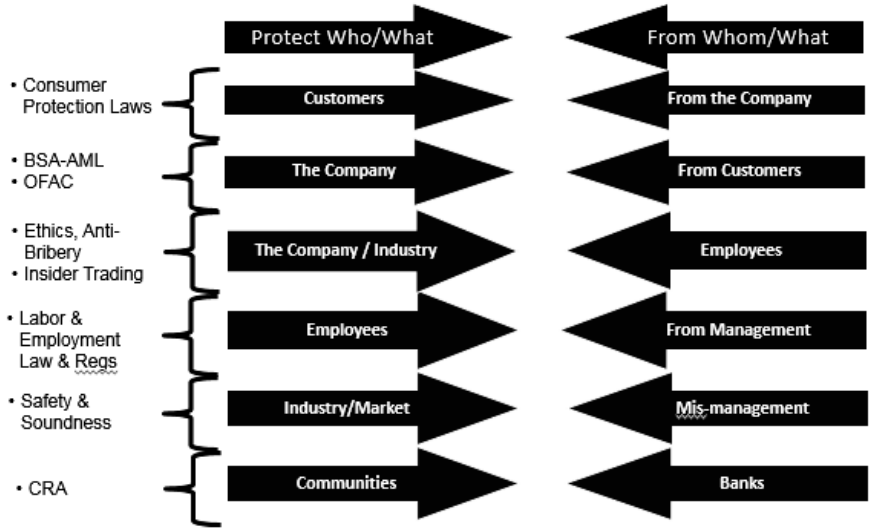
15. FED. RESERVE SYS., BD. OF GOVERNORS, SR 08–8/CA 08–11, COMPLIANCE RISK MANAGEMENT PROGRAMS AND OVERSIGHT AT LARGE BANKING ORGANIZATIONS WITH COMPLEX COMPLIANCE PROFILES (Oct. 16, 2008) [hereinafter COMPLIANCE RISK MANAGEMENT].

16. *Id.*

In highly regulated industries, such as banking or healthcare, the number of applicable Compliance Requirements is exceptionally large.[17] Many of the Compliance Requirements are very complex and require highly specialized knowledge and experience to understand and manage the risks.[18] In fact, the federal government has itself created the Consumer Financial Protection Bureau ("CFPB") to focus only on consumer financial protection laws and regulations.[19] However, consumer financial protection regulations are only one type of category requirements with which corporations that provide banking services must comply.[20]

A more manageable categorization of Compliance Requirements emerges when one considers all laws, including regulations and regulatory expectations, common law, and ethical conduct. As an example, Image 2, below, provides a means of categorizing Compliance Requirements for a corporation engaged in banking:

Image 2



17. *Top Sectors for Regulatory Change*, IBISWORLD (Sept. 17, 2013), https://www.ibisworld.com/media/2013/09/17/10-increasingly-regulated-industries/.

18. *See In Focus: 2015 Compliance Trends Survey*, DELOITTE 1, 3 (2015), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/regulatory/us-aers-reg-crs-2015-compliance-trends-survey-051515.pdf.

19. *Consumer Financial Protection Bureau Strategic Plan FY 2013 — FY 2017*, CFPB 4 (Aug. 2013), https://s3.amazonaws.com/files.consumerfinance.gov/f/strategic-plan.pdf ("To create a single point of accountability in the federal government for consumer financial protection, the Dodd–Frank Act consolidated many of the consumer financial protection authorities previously shared by seven federal agencies into the CFPB . . . .").

20. J. Virgil Mattingly & Keiran J. Fallon, *Understanding the Issues Raised by Financial Modernization*, 2 N.C. BANKING INST. 25, 28 (1998).

not all programs that oversee and ensure compliance with laws within these categories are managed by CCOs in Banks—particularly the Labor & Employment Laws and Regulations and the Safety & Soundness laws and regulations.[21] Moreover, bank regulatory agencies do not routinely examine all of these categories that supervise the banking industry.[22] For example, bank regulatory agencies generally do not conduct examinations that encompass banking corporations' compliance with Ethics, Anti–Bribery, Insider Trading requirements, or Labor and Employment Laws and Regulations.[23] Nor do bank regulatory agencies routinely examine whether banks are complying with the requirements of highly important state laws, such as the Uniform Commercial Code ("UCC") or other state laws relating to securing collateral (even though compliance with the UCC and these other state laws is very important to the safety and soundness of a bank).[24] So does the supervisory scope of bank regulatory agencies define the scope of a bank corporation's compliance program? That cannot be the case because, as any corporation, banks are required to meet the minimum expectations set forth by the U.S. Sentencing Commission.[25] The inexorable conclusion is that to meet expectations articulated by the U.S. Sentencing Commission, a Compliance and Ethics program must be designed to broadly cover ***all*** Compliance Requirements.[26]

So what does that mean for the role of the CCO? It is hard to comprehend that one individual can possibly know, much less oversee or manage programs that ensure compliance with ***all*** Compliance Requirements.[27] Many of the Compliance Requirement categories noted above are not typically managed directly by CCOs in financial

21. *But see* COMPLIANCE RISK MANAGEMENT, *supra* note 15.

22. Edward V. Murphy, CONG. RESEARCH. SERV., R43087, WHO REGULATES WHOM AND HOW? AN OVERVIEW OF U.S. FINANCIAL REGULATORY POLICY FOR BANKING AND SECURITIES MARKETS 7 (2015).

23. FDIC, Compliance Examination Manual II–1.1 (Dec. 2015), https://www.fdic.gov/regulations/compliance/manual/2/II-1.1.pdf; COMPLIANCE RISK MANAGEMENT, *supra* note 15.

24. *Supervising and Regulating Financial Institutions and Activities*, FED. RESERVE, 74, 87, 89, https://www.federalreserve.gov/pf/pdf/pf_5.pdf (last visited Jan. 18, 2017) (demonstrating the process the Federal Reserve takes when examining compliance, with no reference to state law or the uniform commercial code).

25. *See* U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (U.S. SENTENCING COMM'N 2015).

26. *See id.* (suggesting requirements for an effective compliance and ethics program).

27. *See, e.g.*, Jeremiah Buckley, *The Compliance Officer Bill of Rights*, AM. BANKER (Feb. 22, 2016), https://www.americanbanker.com/opinion/the-compliance-officer-bill-of-rights?tag=00000156-32ee-d79b-a377-3efe1d240000 ("A compliance officer cannot rationally be responsible for assuring that thousands of employees follow compliance requirements.").

institutions.[28] So is the role of a CCO a hopelessly over–broad, impossible task that places CCOs in the untenable position of being held accountable whenever instances of non–compliance occur? This should not be the case. Corporations need to clearly define the scope of their corporate compliance program, the CCO's responsibilities in overseeing that program, and the roles and responsibilities of other critical corporate officers who play significant roles within the organization's compliance program.[29]

B. The Industry Perspective

Industry publications have not largely focused on the subject matter scope of compliance, but instead focus on the functions that compliance departments are asked to perform.[30] For this reason, industry literature is not particularly instructive on defining the subject matter scope of a compliance program and the best manner to address the U.S. Sentencing Guideline mandate to cover ***all*** Compliance Requirements.

C. Managing a Compliance Program with Broad Scope

How can corporations approach the hard mission of managing a compliance program that covers broadly defined Compliance Requirements? It is noteworthy that many Compliance Requirements overlap with other risk management disciplines that have their own experts who oversee them.[31] Take, for example, a Chief Financial Officer ("CFO"). In the absence of finance–related laws, regulations, and accounting standards, there would be a need to accurately measure, from a financial perspective, how well (or how poorly) a business enterprise was performing.[32] The absence of a financial performance measurement

28. Luis A. Aguilar, *The Role of Chief Compliance Officers Must Be Supported*, SEC 18 (June 29, 2015), https://www.sec.gov/news/statement/supporting-role-of-chief-compliance-officers.html).

29. *Id*. at 1.

30. CAROLE BASRI ET AL., 1–5 CORPORATE COMPLIANCE PRACTICE GUIDE § 5.02 (2015).

31. *See* J. Secrist, *The Link Between Risk Management and Compliance*, LEXOLOGY (Oct. 30, 2013), http://www.lexology.com/library/detail.aspx?g=0f4cec83-ffdf-41c2-92ac-7567bd09401f ("Risk management and compliance are interrelated and must also be considered together. While risk management and compliance are often appropriately handled by two separate groups within an organization, the pitfall is that this separation can lead to a fragmented approach whereby compliance risk is isolated from other enterprise risks.").

32. *See Financial Leadership in Challenging Times: Challenges and Opportunities for Today's CFO,* PWC 1, 2 (Nov. 2009), https://www.pwc.com/us/en/increasing-finance-function-effectiveness/assets/financial-leadership-in-challenging-times.pdf ("Financial executives must play a leading role in accelerating strategic growth across the enterprise. CFOs are uniquely qualified to provide meaningful input to their organizations' current and future investments, participate in the broader corporate

function would result in an increased risk that financial distress would not be timely identified or reported, thus increasing the risk of financial failure.[33] A CFO provides this necessary risk management function for a business enterprise.[34] Over time, the layering of Compliance Requirements[35] on top of the risk management function has resulted in the development of a highly skilled, financial and accounting profession (with sub–specializations). In addition to performing basic financial performance measurement and risk management, a CFO also manages a firm's day–to–day compliance with tax law and financial reporting rules. Compliance risk is created by (i) the existence of, and changes to, laws or regulations over financial reporting, as well as (ii) changes within the business that impact the sources of financial data, financial controls and how they are measured.[36] The CFO routinely manages these compliance risks on a day–to–day basis.[37]

Depending on the industry, other similar overlaps may exist with, for example: (i) the head of human resources (who manages day–to–day compliance with labor and employment laws, regulation and regulatory expectations); (ii) the head of liquidity management (typically a corporate Treasurer who ensures that the Corporation has the means to continue to pay debts as they become due); (iii) the head of capital adequacy management (who manages certain of the safety and soundness regulations relating to minimum capital requirements);[38] (iv) the head of credit and

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vision, and advocate and produce strategic transformation.").

33. *See Compliance Risks: What You Don't Contain Can Hurt You*, DELOITTE 1, 1 (2015), https://www2.deloitte.com/content/dam/Deloitte/tr/Documents/finance-transformation/Global%20Yayınlar/cfo-insights-compliance-risks.pdf ("[C]ompliance risk is the threat posed to a company's financial, organizational, or reputational standing resulting from violations of laws, regulations, codes of conduct, or standards of practice.").

34. *Id.* (explaining how CFOs work with Chief Risk Officers or CCOs to own and manage the enterprise risk function).

35. For example: compliance requirements relating to the filing of tax returns, public financial disclosures, and/or regulatory financial reporting.

36. Julia Black et al., *Legal and Compliance Risk in Financial Institutions*, 2 LAW & FIN. MKT. REV. 481, 481 (Nov. 2008).

37. *See generally* Robert Barba, *Swamped by Compliance, CFOs Would Rather Focus on Future*, BLOOMBERG BLOG (May 12, 2015), https://www.bloomberg.com/enterprise/blog/swamped-by-compliance-cfos-would-rather-focus-on-future/ (discussing how after the 2008 financial crisis, the daily tasks of CFOs are being taken over by compliance matters).

38. In banking this is the Comprehensive Capital Adequacy Review ("CCAR") or Dodd–Frank Act Stress Test ("DFAST"). *See Dodd–Frank Act Stress Test (Company–Run)*, OFF. OF THE COMPTROLLER OF THE CURRENCY, https://www.occ.treas. gov/tools-forms/forms/bank-operations/stress-test-reporting.html (last visited Jan. 2017) (explaining the Dodd–Frank Act Stress Test and the reasoning behind its implementation).

counter–party risk management (also managing certain safety & soundness requirements); (v) the head of operational risk management, etc.[39] In the absence of laws, regulations, and regulatory guidance, these other areas require skilled management to perform the functions that address the underlying risks.[40] Over time, the layering of legal and regulatory requirements over managerial control functions results in these officers having to manage compliance risks on a day–to–day basis, which they know better than anyone else in the organization.[41]

Because of the existence of these other professionals, who manage day–to–day compliance risks, corporations could define their compliance programs in a way that CCOs could rely on these other professionals as an integral part of overseeing the compliance program.[42] In identifying these other professionals, their characteristics need to be: (i) that they have sufficient rank to exercise control (e.g., officers on the Executive Management Committee), (ii) that they oversee day–to–day compliance over the respective subject area, and (iii) that they perform this oversight within an independent, risk management control function (i.e., not tainted by responsibility for revenue generation or specific financial goals for the firm).[43] If each criterion is satisfied, day–to–day compliance responsibility could reasonably be assigned to such officers and they could accept the responsibility and accountability for these Compliance Requirements.[44] These officers could then provide the CCO with periodic assurance that they are managing the risks that they oversee in accordance with applicable Compliance Requirements. Such assurance could possibly be evidenced in a form similar to the common practice of corporations today under

39. *See CCAR/DFAST: Incorporating Stress Testing Into Everyday Banking Operations and Strategic Planning Processes*, GRANT THORNTON LLP 1 (2016), https://www.grantthornton.com/~/media/content-page-files/financial-services/pdfs/2016/GARP/CCAR-DFAST-Article-Incorporating-stress-testing-into-everyday-banking-operations.ashx (discussing how regulatory stress–testing requires inputs from most bank functions, officers, and directors).

40. *See, e.g.*, JPMORGAN CHASE & CO., HOW WE DO BUSINESS — THE REPORT 6, 18, 27 (Dec. 19, 2014) (discussing the importance of investing in high–quality independent control staff to manage risk at the front line of the business).

41. *See Building World–Class Ethics and Compliance Programs: Making a Good Program Great; Five Ingredients for Your Program,* DELOITTE 8–10 (2015), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/risk/us-aers-g2g-compendium.pdf (explaining various risks CCOs encounter and how to mitigate them).

42. *See* LOUIS M. BROWN ET. AL., THE LEGAL AUDIT: CORPORATE INTERNAL INVESTIGATION § 7:3 (2016).

43. *See* COMPLIANCE RISK MANAGEMENT, *supra* note 15.

44. Office of Inspector Gen., U.S. Dep't of Health and Human Serv. & Am. Health Lawyers Ass'n, *Corporate Responsibility and Corporate Compliance: A Resource for Health Care Boards of Directors*, 1, 5–6 , https://oig.hhs.gov/fraud/docs/complianceguidance/040203CorpRespRsceGuide.pdf (last visited Jan. 19, 2017).

Sarbanes–Oxley, which requires corporations to gather "sub–certifications" from owners of key financial controls.[45] By defining the scope of compliance programs and clearly ascribing responsibilities in this way, corporations could empower CCOs to effectively oversee holistic compliance programs while realistically dividing responsibility and accountability to the different components of the program.[46]

Corporations could, by approval of the scope of the compliance program, ascribe to certain high–ranking officers (other than the CCO) the responsibility for "functional compliance management"[47] of certain categories of specified Compliance Requirements (hereinafter referred to as "Independent Control Function Officers" or "ICFOs"). The CCO would thus be responsible for:

> ***(i) Aggregation and Reporting.*** The duty to (a) aggregate information from the ICFOs and (b) report to the Board broadly on all Compliance Requirements and how they are being managed throughout the firm (similar to the way a CFO aggregates data on key financial controls and reports to the Board under Sarbanes– Oxley) and
>
> ***(ii) Direct Functional Compliance Management.*** The duty to directly manage those programs that oversee and ensure compliance with certain other categories of laws and regulations, such as Consumer Protection, Ethics, possibly also Community Reinvestment Act ("CRA") and Bank Secrecy Act ("BSA"), Anti–Money Laundering ("AML"), and U.S. Sanctions requirements administered by the Office of Foreign Assets Control ("OFAC"). These are categories of Compliance Requirements most often directly managed by CCOs in the banking and financial services industry today.

By not taking this approach, corporations—particularly those in highly regulated industries—risk having regulatory agencies develop for them a

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45. Houman B. Shadab, *Innovation and Corporate Governance: The Impact of Sarbanes–Oxley*, 955, 994–995 (2008), http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1315&context=jbl.

46. Office of Inspector Gen., U.S. Dep't of Health and Human Serv. & Am. Health Lawyers Ass'n, *supra* note 44, at 1, 4–5.

47. *See infra* Section III. This Article uses the term "functional compliance management" to refer to the programmatic elements and functions that are expected for a sound compliance management program — e.g., (i) ownership over the drafting of policies and procedures, (ii) design and implementation of an effective system of internal controls integrated within business processes, (iii) a means of monitoring and testing to ensure that internal controls are functioning as designed on an ongoing or periodic basis, (iv) training employees to respect and follow procedures and not circumvent the system of internal controls, (v) updating all of the foregoing if, as and when laws or regulations or processes change, and (vi) analyzing feedback (whether in the form of customer complaints, employee "whistleblowing" hotline calls, employee exit interviews, etc. *See Compliance Management System,* FDIC, https://www.fdic.gov/news/news/financial/2006/2cep_compliance.pdf (last visited Jan. 23, 2017).

"one–size fits all" approach that defines the CCO role.[48] By taking an active approach in defining roles and responsibilities relating to a compliance program and specifying roles of ICFOs and the CCO, corporations may retain greater control over their futures and avoid the need for regulatory agencies to fill the void.[49]

III. COMPLIANCE PROGRAM ELEMENTS AND FUNCTIONS

Government and industry literature is replete with explications of program elements and functions for an effective compliance program.[50] The program elements and functions are synthesized from the government and industry sources into Table 1 below. Table 1 also summarizes how a compliance program approved by a Board could choose to allocate responsibilities between ICFOs and CCOs. In this regard, the obligations on the CCO would be dual:

(i) Oversight to ensure that the ICFOs are appropriately incorporating expected program elements into their management of their compliance risks and are properly performing the compliance functions as ascribed to the ICFOs by the Board; and

(ii) Direct ***functional compliance management*** for subject areas assigned by the Board to the CCO.

In some cases, it may be sensible to centralize certain ***functional compliance management*** under the CCO rather than have it distributed among the ICFOs.

48. *See* Joe Murphy, *One Size Fits All: A Flawed Approach to Company Compliance Programs*, COMPETITION POL'Y INT'L 4–5 (2012) [hereinafter Murphy, *One Size*] (discussing the difficulties of the "one size fits all" compliance regulation).

49. *See* Suzanne Folsom, *One Size Does Not Fit All When It Comes to Compliance Strategies*, INSIDE COUNCIL (Jan. 1, 2014), http://www.insidecounsel.com/2014/01/01/one-size-does-not-fit-all-when-it-comes-to-complia (explaining that companies are tailoring their compliance programs to their own risk cultures and their beneficial effects).

50. *See, e.g.*, OFFICE OF THE DIR. OF COMPLIANCE, ESSENTIAL ELEMENTS OF A COMPLIANCE PROGRAM, NSA (June 24, 2016), https://www.nsa.gov/about/civil-liberties/resources/assets/files/essential-elements-of-a-compliance-program.pdf.

Table 1

Program Elements ("PE") & Functions ("PF")	**Description of Expectation**	**ICFOs**	**CCO**
Board Oversight, Risk Appetite & Tone from the Top (PE)	Compliance programs need to (i) educate board members and Senior Executive Management on the legal / regulatory expectations and compliance risks of the company and (ii) provide effective reporting so the Board can oversee and Senior Executive Management can manage risk–taking and allocations of resources according to a risk appetite.[51] The Board of Directors should approve a risk appetite for compliance risk and an enterprise–wide compliance policy.[52] Through the risk appetite, Compliance Policy, and other actions and communications, the Board and Senior Executive Management should provide a clear tone from the top in support of a culture of compliance.[53]	**N/A**	**Yes**
Executive Leadership, Authority, Resources, Independence & Integration (PE)	Compliance programs need to be led by executive–level leadership (i.e., a CCO) with sufficient authority (to influence other Executive Officers) and resources (both human and otherwise) in an organization structure with clearly defined roles and delegation of day–to–day operational responsibilities. The organization structure has to be independent from the business (with respect to supervision, hiring, and compensation), but yet highly integrated, with the business (with respect to design, implementation, monitoring, and testing of controls).[54] The	**N/A**	**Yes**

51. *See generally* COMPLIANCE RISK MANAGEMENT, *supra* note 15.

52. *Id*.; *see also* Gov. Daniel K. Tarullo, Speech at Fed. Reserve Bank of NY Conf: Good Compliance, Not Mere Compliance (Oct. 20, 2014); *see generally* Gov. Mark W. Olson, Speech at Am. Bankers Ass'n Regulatory Compliance Conf.: What Are Examiners Looking for When they Examine Banks for Compliance? (Jun. 12, 2006) [hereinafter Speech by Gov. Olson].

53. *See generally* COMPLIANCE RISK MANAGEMENT, *supra* note 15; *see also* Cynthia A. Glassman, Comm'r, Speech by SEC Commissioner: Sarbanes–Oxley and the Idea of "Good" Governance, (Sept. 27, 2002); Speech by Gov. Olson, *supra* note 52 (describing the role that directors play in the compliance culture within a company).

54. *See* Basel Comm. on Banking Supervision, *Compliance and the Compliance Function in Banks*, BANK FOR INT'L SETTLEMENTS (2005) [hereinafter *Compliance and the Compliance Function*], http://www.bis.org/publ/bcbs113.pdf (explaining the scope and breadth of activities of the compliances function should be subject to independent

Program Elements ("PE") & Functions ("PF")	**Description of Expectation**	**ICFOs**	**CCO**
	program should be organized such that the CCO's chain of supervision supports the independent nature of the function [e.g., to the Chair of the Audit Committee, to a Chief Executive Officer ("CEO"), or to a Chief Risk Officer ("CRO")].[55] Additionally the program should be aligned (i) vertically to integrate within business structures to support and ensure adherence with requirements that apply within business processes and (ii) horizontally where requirements apply across businesses, legal entities or jurisdictional boundaries.[56]		
Risk Assessment (PF)	Compliance programs need to provide for assessment of risk arising from law, regulation and regulatory guidance on an inherent (prior to consideration of control) and residual (after consideration of control effectiveness) basis.[57] The risk assessment needs to account for emerging risks and foster self–assessment within business line management.[58]	**Yes**	**Yes**

review); Basel Comm. on Banking Supervision, *Guidelines: Corporate Governance Principles for Banks*, BANK FOR INT'L SETTLEMENTS (July 2015) [hereinafter *Corporate Governance Principles*], http://www.bis.org/bcbs/publ/d328.pdf (providing guidelines for corporate governance principles for banks).

55. *See generally Compliance and the Compliance Function*, *supra* note 54 (describing the roles and responsibilities of the officers within the chain of supervision).

56. Examples of such horizontal focus include: financial key controls and reporting, Anti–money laundering, Sanctions and List Screening, Fair Lending, Privacy, and Conflicts of Interest/Ethics.

57. On a highly coordinated basis to be a component that fits within an overall, enterprise–wide compliance risk assessment. *Corporate Governance Principles*, *supra* note 54; *see also White Paper: The Evolving Role of Compliance*, SEC. INDUS. & FIN. MKTS. ASS'N (Mar. 2013), http://www.sifma.org/issues/item.aspx?id=8589942363 [hereinafter *White Paper Evolving Role*].

58. *See Corporate Governance Principles*, *supra* note 54.

Program Elements ("PE") & Functions ("PF")	**Description of Expectation**	**ICFOs**	**CCO**
Policies, Procedures & Controls (PE)	Compliance programs need to oversee corporation's policies, procedures and internal controls as they relate to law, regulation and regulatory expectation with the goal of preventing, detecting, promptly escalating, and self–reporting instances of non–compliance.[59]	**Yes**[60]	**Yes**
Awareness, Education and Training (PF)	Compliance programs need to effectively communicate and train to ensure that as appropriate for each role in the company, legal and regulatory requirements or expectations and policies, procedures, and internal controls are understood.[61] Such communication and training should foster a culture of ethical behavior in compliance with law, regulation and regulatory guidance.[62]	**Yes**[63]	**Yes**
Monitoring and Testing (PF)	Compliance programs need to include effective monitoring and testing to ensure compliance with laws, regulations, regulatory expectations, and	**Yes**[66]	**Yes**

59. *Id.*

60. While ICFOs and CCOs would own the drafting of their respective policies and procedures, it may be useful, particularly for larger, complex firms, to have a policy and procedure administration function (that could report to a CCO or CRO) to ensure consistency in format, storage, accessibility to employees (e.g., via an internal intranet), and appropriate governance over approvals and changes (e.g., in management or board–level committees).

61. *See generally* Daniel K. Tarullo, Bd. of Governors of the Fed. Reserve Sys., Speech at the Federal Reserve Bank of New York Conference: Reforming Culture and Behavior in the Financial Services Industry, *Good Compliance, Not Mere Compliance*, (Oct. 20, 2014), https://www.federalreserve.gov/newsevents/speech/tarullo20141020a.htm; *see also White Paper on the Role of Compliance*, SEC. INDUS. & FIN. MKTS. ASS'N (Oct. 2005), https://www.sifma.org/wp-content/uploads/2017/08/2005RoleofComplianceWhitePaper.pdf.

62. *See* Tarullo, *supra* note 61; *see generally White Paper on the Role of Compliance*, *supra* note 61.

63. An ICFO's role in training may be limited to serving as a subject matter expert for the content of, and determining the required audience for, training while the CCO or a Human Resources Training and Development function may have broader responsibilities for incorporating all required training into an overall, efficient, effective, learner–centric, program (i.e., determining frequency of training, determining the means of delivering training (e.g., in person/classroom or computer–based, etc.), designing the training curriculum and individual courses, creating effective tracking of successful completion by the required audience, *etc.*).

Program Elements ("PE") & Functions ("PF")	**Description of Expectation**	**ICFOs**	**CCO**
	company policies and procedures. Furthermore, effective monitoring ensures internal controls properly function.[64] A "three lines of defense" organization model should include oversight mechanisms that set standards and report receipts over First line quality control, continuous quality assurance functions, and independent execution of Second line's periodic testing.[65]		
Enforcement (PF)	Compliance programs need to incorporate incentives to prevent non–compliance.[67]	**N/A**	**Yes**
Data Analytics and Reporting for Management and Board (PF)	Compliance programs need data analytics and quantitative measurement of risks emanating from Compliance Requirements (e.g., key risk indicators or KRIs) and program functioning (e.g., key performance indicators or KPIs) to create effective management and board reporting.	**N/A**[68]	**Yes**

66. ICFOs role in monitoring and testing may be limited to day–to–day monitoring. It may make sense for Second line, periodic, independent testing over Compliance Requirements to be centralized under a specialized Control Testing Team reporting to the CCO.

64. *See* Treas. Reg. § 30, 170 (as amended in 2014); Uniform Interagency Consumer Compliance Rating System, 81 Fed. Reg. 79,473, 79,476 (proposed Nov. 14, 2016); *see also* Aguilar, *supra* note 28 (noting that a CCO's role is to comply with the rules that apply to their operations and to work with corporate leadership to achieve the company's goals); Gov. Mark Olson, Speech to Financial Services Roundtable: Compliance Risk Management in a Diversified Environment (May 16, 2006); WHITE PAPER COMPLIANCE, *supra* note 61.

65. *See* Treas. Reg. § 30, 170; Michael Volkov, *5 Ways to Ensure Board Support for Compliance*, CORP. COMPLIANCE INSIGHTS (Nov. 9, 2015) [hereinafter Volkov, *5 Ways*], http://www.corporatecomplianceinsights.com/5-ways-to-ensure-board-support-for-compliance/ ("A CCO's direct contact with the Board gives the CCO an important tool that should be used in rare situations to ensure that senior management properly attends to the ethics and compliance function.").

67. *See* FDIC, COMPLIANCE EXAMINATION MANUAL II–2.1–2.2 (2016), https://www.fdic.gov/regulations/compliance/manual/ComplianceExaminationManual (explaining how compliance programs may mitigate consumer harm); *see also* Stephanie Gallagher, *Who's the Boss? The Importance of the Chief Compliance Officer's Independence,* COMPLIANCE & ETHICS BLOG (Feb. 19, 2015), http://complianceandethics.org/whos-boss-importance-chief-compliance-officers-independence/ (criticizing the practice of having CCOs report to the GC or the CFO).

68. *See Compliance and the Compliance Function*, *supra* note 54, at 14–15 ("[T]he compliance programme should be risk–based and subject to oversight by the head of compliance to ensure appropriate coverage *across businesses* and co–ordination among risk management functions.") (emphasis added).

Program Elements ("PE") & Functions ("PF")	**Description of Expectation**	**ICFOs**	**CCO**
Application of Compliance Program to Third Parties (PF)	Compliance programs need to be engaged in third–party oversight to ensure that compliance risks within processes performed by third parties are appropriately managed and subjected to compliance program management.	**Yes**	**Yes**
Change Management Controls (PF)	Compliance programs need to engage with the business' operations to anticipate and ensure the organization is promptly addressing changes in applicable laws, regulations, market conditions, and products and services offered.[69] Additionally, compliance programs need to engage with the business's operating lines with due diligence and in advance of product and system changes to consider the entire life cycle of a product or service in reviewing and implementing changes after determining whether actions achieved planned results.[70]	**Yes**	**Yes**
Tracking of Issues and Corrective Actions (PF)	Compliance programs need to track issues related to compliance risks to ensure proactive and prompt responses that address deficiencies and violations of laws or regulations including remediation.[71]	**Yes**	**Yes**
Complaint Analysis (PF)	Compliance programs need to have a means of identifying complaints that may be indicative of	**Yes**	**Yes**

69. *See* Gov. Susan Schmidt Bies, Remarks at the Bond Market Association's Legal and Compliance Conference: Enterprise–wide Compliance Programs (Feb. 4, 2004); *see also* Cynthia Dow & Jason Lim, *A Function in Transition: How the Chief Compliance Officer Role Is Transforming Across Financial Services,* RUSSELL REYNOLDS ASSOC., 3–4 (Apr. 28, 2016), http://www.russellreynolds.com/en/Insights/thought-leadership/Documents/R605016-rr0063-%20CCO%20in%20FS%20v16.pdf (suggesting that financial companies are unsatisfied with their own compliance tools).

70. *See* Bies, *supra* note 69; *see also* Susan Lorde Martin, *Compliance Officers, More Jobs, More Responsibility, More Liability,* 29 NOTRE DAME J.L. ETHICS & PUB. POL'Y 169, 181 (2015) (explaining that CCOs are required to be involved in compliance programs).

71. *See* Tod Reichert, *The Roles of General Counsel and Chief Compliance Officers,* CORP. COMPLIANCE INSIGHTS (Jan. 8, 2011), http://www.corporatecomplianceinsights.com/the-roles-of-general-counsel-and-chief-compliance-officers/; *White Paper Evolving Role, supra* note 57.

Program Elements ("PE") & Functions ("PF")	Description of Expectation	ICFOs	CCO
	increasing compliance risk or weakness and/or lack of policies, procedures, or internal controls.[72] (This should include both customer and consumer complaints as well as matters arising from other internal sources such as integrity hotlines, exit interviews for separating employees, etc.)		

IV. CCO STATURE AND REPORTING LINES

The literature and published speeches of financial service industry officials clearly indicate that CCOs should be independent and have sufficient stature and authority.[73] If independence is taken to its logical extreme, one possibility would be for CCOs to report to an independent member of the Board of Directors (such as the Chair of the Audit Committee).[74] This type of structure is rather common for Heads of Internal Audit who are charged with detecting control weaknesses within a corporation's control environment, but is less common for CCOs who are charged with aiding in the design and implementation of controls aimed at preventing (or very quickly detecting and self–correcting) instances of non–adherence with Compliance Requirements.[75] While having a CCO report directly to an independent member of the Board of Directors (such as the Chair of the Audit Committee) would certainly underscore independence, a direct reporting line may not strike the right, delicate balance between independence, on the one hand, and integration with business practice and controls, on the other.[76] Accordingly, a dotted line could be considered and may be appropriate for some institutions.

72. *White Paper Evolving Role, supra* note 57.

73. *See* Lori Richard, Dir. of Office of Compliance Inspections and Examinations, SEC, Speech at the National Regulatory Service's Twentieth Annual Spring Compliance/Risk Management Conference (Apr. 20, 2005) (stating that the Commission wishes CCOs be independent and have authority to enforce compliance).

74. Stephanie Tsacoumis, et al., *The Sarbanes–Oxley Act: Rewriting Audit Committee Governance,* 3 BUS. L. INT'L 212, 215–17 (2003) (explaining the requirements for establishing an independent member of the Audit Committee).

75. *See* CIPFA, THE ROLE OF THE HEAD OF THE INTERNAL AUDIT 1, 5–7 (2010) [hereinafter THE ROLE OF THE HEAD], for a description of the role of the head of audit in an organization.

76. *See generally* Gallagher, *supra* note 67 (explaining that the independence of the CCO is key and the CCO should have no managerial responsibilities and should have a direct line of communication to the CEO or board of directors).

Industry practice widely varies and the concepts of sufficient independence and sufficient authority have been interpreted differently at different organizations.[77] In most financial institutions, CCOs are responsible for providing regular reports to the Board of Directors or to key Board–level committees.[78] As such, CCOs likely have frequent direct contact with Board members including executive sessions.[79] In some large, complex international banking organizations as well as domestic institutions, the CCO is a member of the Executive Committee (e.g., BNP Paribas, Ally Financial, Inc.) and may report directly to the CEO. In other institutions, the CCO is not a member of an Executive Committee and may report to the CRO or the General Counsel.[80]

What is clear from the discussion of the subject matter scope and the review of the elements and functions, is that CCOs need to have the stature and support within the corporation to be capable of effectively overseeing the entire program, including portions managed by ICFOs.[81] In the financial industry, many corporations have not clearly defined ICFO and CCO roles and responsibilities for ***compliance functional management***.[82] Where corporations have done so, CCOs are responsible for oversight over the entire compliance program.[83] As such, CCOs need the stature, authority, and support to fulfill this responsibility.[84] If the CCO does not have sufficient stature, authority, or support, the CCO is placed in the more difficult position of relying on alternate leadership attributes (unique knowledge and abilities, relationship building, etc.) to get the job done.[85]

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77. *See generally* THE ROLE OF THE HEAD, *supra* note 75, at 11 (noting that it is important that the CCO is independent and that although it is important to be objective, he must understand organizations differ, and must take a practical approach to reach independence in his particular organization).

78. *See generally* Aguilar, *supra* note 28 (noting that the role of CCO's is to comply with the rules that apply to their operations, and CCO's typically work with corporate leadership to achieve this).

79. *See* Volkov, *5 Ways*, *supra* note 65 ("A CCO's direct contact with the Board gives the CCO an important tool that should be used in rare situations to ensure that senior management properly attends to the ethics and compliance function.").

80. *See* Gallagher, *supra* note 76 (criticizing the practice of having CCOs report to the GC or CFO).

81. Basel Comm. on Banking Supervision, *supra* note 54, at 14 (explaining that "[t]he compliance program should be risk–based and subject to oversight by the head of compliance to ensure appropriate coverage across businesses and coordination among risk management functions.").

82. *See* Dow et al., *supra* note 69, at 4 (suggesting that financial companies are unsatisfied with their own compliance tools).

83. *See* Martin, *supra* note 70 (explaining that CCOs are required to be involved in compliance programs).

84. *See* Reichert, *supra* note 71.

85. Deborah A. DeMott, *The Crucial But (Potentially) Precarious Position of the*

Regardless of the position to which the CCO reports, the CCO needs to have a seat at the decision–making table to influence decisions and outcomes.[86]

V. INDIVIDUAL LIABILITY OF CCOS

A number of recent events have created discussion over personal liability of CCOs, such as:

- The proposed rule in New York (ultimately not adopted in its proposed form) to require CCOs to annually certify that their anti–money laundering compliance programs are effective at identifying and preventing illicit transactions which, if later demonstrated false, would subject the CCO to criminal liability;[87]
- Although not specifically focused on CCOs, the September 9, 2015 Memorandum of U.S. Department of Justice Deputy Attorney General Sally Quillian Yates, extending DOJ's policy to hold individual wrongdoers accountable in the course of corporate investigations, which places significant burdens on CCOs because of the unique role they play in overseeing compliance programs designed to satisfy U.S. Sentencing Guidelines;[88]
- The SEC fine of Bartholomew Battista at Black Rock Advisors, LLC on April 2015;[89] and
- The FinCEN fine of Thomas Haider of MoneyGram upheld by the US District Court in Minnesota, *U.S. Dep't of Treasury v. Haider*.[90]

Chief Compliance Officer, 8 BROOK. J. CORP. FIN. & COM. L. 56, 60–61 (2013) (explaining the weakness of having a CCO without the authority to actually compel compliance).

86. Donna Boehme, *A Seat at the Table for the Compliance Officer*, CORP. COMPLIANCE INSIGHTS (Mar. 11, 2014), http://www.corporatecomplianceinsights.com/a-seat-at-the-table-for-the-compliance-officer/.

87. Franca Harris Gutierrez, *NYDFS Proposes to Require Chief Compliance Officers to Certify Effectiveness of AML and Sanctions Programs*, WILMERHALE (Dec. 4, 2015), https://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=17179880055.

88. Memorandum from Sally Quillian Yates, Deputy Attorney Gen., to all United States Attorneys (Sept. 9, 2015).

89. Ed Beeson, *SEC Sends Warning to Compliance Chiefs with Blackrock Fine*, LAW360 (Apr. 22, 2015), https://www.law360.com/assetmanagement/articles/646172/sec-sends-warning-to-compliance-chiefs-with-blackrock-fine.

90. No. 15–CV–01518, 2016 WL 107940 (D. Minn. Dec. 18, 2014); *see also First–Ever Case Against Chief Compliance Officer For Failure To Implement Anti–Money Laundering Program at MoneyGram*, GRAND JURY TARGET (Mar. 3, 2015), https://grandjurytarget.com/2015/03/03/first-ever-case-against-chief-compliance-office

Furthermore, several articles written on the topic of CCO personal liability raise concerns about whether overly aggressive actions that hold CCOs liable for corporate misconduct may result in the lack of qualified individuals willing to assume the role.[91]

There are certainly legitimate points to be made on both sides of the argument and this article does not seek to resolve this developing issue.[92] Having roles of CCOs and ICFOs clearly defined in compliance program documents approved by Boards of Directors, however, will certainly help to direct the focus of those seeking to hold individuals within corporations accountable.[93]

Moreover, clarity around the difference between effective compliance programs and individual points of failure to comply is needed. Compliance programs need to be evaluated as a whole.[94] CCOs should expect to be held accountable according to some appropriate standard (e.g., gross negligence), if the programs over which they have responsibility are determined, as a whole, to be ineffective.[95] CCOs should not be held accountable when individuals fail to comply. Rather, every individual in every company has a duty to comply with the law and should therefore be held individually liable.[96]

Clarity is also needed with respect to the standard that should be applied

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r-for-failure-to-implement-anti-money-laundering-program-at-moneygram/.

91. *See, e.g.*, Emily Glazer, *The Most Thankless Job on Wall Street Gets a New Worry*, WALL ST. J. (Feb. 11, 2016, 4:38 PM), http://www.wsj.com/articles/now-in-regulators-cross-hairs-bank-compliance-officers-1454495400; Rachel Louise Ensign, *How Compliance Officers Can Limit Personal Liability*, WALL ST. J. (Jan. 30, 2015, 1:43 PM), http://blogs.wsj.com/riskandcompliance/2015/01/30/how-compliance-officers-can-limit-personal-liability/; Buckley, *supra* note 27.

92. Ben Dipietro, *SEC Actions Stir Concerns Over Compliance Officer Liability*, WALL ST. J. (June 24, 2015), http://blogs.wsj.com/riskandcompliance/2015/06/24/sec-actions-stir-concerns-over-compliance-officer-liability/.

93. DeMott, *supra* note 85 ("Further maturation in the compliance professions would also strengthen the quality of internal compliance systems and the individuals responsible for their operation . . . .").

94. Martin, *supra* note 70 (separating the duties a compliance officer has for the company from the fear of individual supervisory liability is important for the furtherance of the compliance goals of the company).

95. *Id.* (suggesting a values–based approach, rather than a compliance based approach, is the best way to evaluate a compliance program because it generally yields a better return for allocation of resources).

96. *See* Ogea v. Merritt, 130 So. 3d 888, 895 (La. 2013) ("[W]hen individual member(s) of a juridical entity such as an LLC mismanage the entity or otherwise thwart the public policies justifying treating the entity as a separate juridical person, the individual member(s) have been subjected to personal liability for obligations for which the LLC would otherwise be solely liable.").

when reaching through a corporate structure to hold a CCO criminally liable.[97] For criminal liability to adhere, some measure of intent or, at a minimum, willful disregard needs to be demonstrated.[98] However, in order to demonstrate that, it should be required that the CCO has authority over corporate functions and resources.[99] Thus, in determining whether a CCO should be liable, the defined roles and responsibilities and stature of the CCO in the organization should be considered.[100] If a CCO does not have a seat at the decision–making table within the corporation, the CCO should not be personally liable.[101]

CONCLUSION

The expectations on compliance programs are broad and require skilled executive level management.[102] Compliance programs and the CCOs that oversee them, if properly structured, can be very beneficial in corporate governance by helping corporations compete fairly in the market within the boundaries of the law.[103] Corporations have an opportunity to carefully define the roles of CCOs and ICFOs in their organizations and should do so before the regulatory agencies that oversee them do.[104] Doing so will fill the current void that exists with regard to clarity regarding the scope of compliance programs and the scope, responsibility and accountability of CCOs and ICFOs. Filling this void may preempt the need for regulatory agencies to act and would allow corporations the ability to more highly customize their approaches to better suit their individual needs.

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97. Martin, *supra* note 70 (noting that federal agencies have failed to establish a "clear affirmative legal decision or rule protecting CCOs from secondary liability").

98. H. Lowell Brown, *The Corporate Director's Compliance Oversight Responsibility in the Post Caremark Era*, 26 DEL. J. CORP. L. 1, 75–76 (2001) ("Corporations are also subject to criminal conviction for willful violation of a statute . . . [and for] an employee's willful intent in violating the law . . . .").

99. Heather Badami, et. al, ACC Panel Discussion at Fourth Annual Corporate Counsel University: Structuring a Corporate Compliance Function (May 2006).

100. Jose Tabuena, *Escalation Processes to Avoid Personal CCO Liability*, COMPLIANCE WEEK (Feb. 24, 2015), https://www.complianceweek.com/blogs/jose-tabuena/escalation-processes-to-avoid-personal-cco-liability#.WIkN0bGZM_M.

101. Michael Volkov, *Making Sure Business Ethics Has a Seat at the Table*, CORP. COMPLIANCE INSIGHTS (Nov. 11, 2016) [hereinafter Volkov, *Making Sure*], http://www.corporatecomplianceinsights.com/making-sure-business-ethics-seat-table/.

102. *See Compliance Risks*, *supra* note 34; see also *supra* note 36 and accompanying text.

103. Maurice E. Stuck, *In Search of Effective Ethics & Compliance Programs*, 39 J. CORP. L. 769, 777–778 (2014).

104. *See, e.g.*, Folsom, *supra* note 49 and accompanying text.

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TO INDEMNIFY OR NOT TO INDEMNIFY? WHEN CCO INSURANCE IS THE ANSWER

ALEXANDRA MCLEOD*

INTRODUCTION

A recent survey by the American Association of Bank Directors found that over the prior five years, 24.5% of banks had directors or prospective directors resign, refuse to serve on committee, or refuse to become a director for fear of personal liability.[1] This fear is something that Chief

* Editor–in–Chief, *American University Business Law Review*, Volume 6; J.D. 2017, American University Washington College of Law, May 2017; B.A. *magna cum laude*, Economics and Political Science, Sonoma State University, 2014. I would like to thank the wonderful team at Buckley Sandler for their assistance in researching and creating this piece. I would also like to thank my Executive Editor, Catriona Coppler, for her tireless efforts editing this piece and the rest of the Symposium Edition. Additionally, I would like to thank the *American University Business Law Review* for all their hard work to make this Symposium a success. Finally, thank you to my family who has always provided me with love, support, and encouragement.

1. Jon Eisenburg, *Surviving an Age of Individual Accountability: How Much Protection Do Indemnification and D&O Insurance Provide?*, K&L GATES (May 21, 2014), http://www.klgates.com/surviving-in-an-age-of-individual-accountability-how-

Compliance Officers ("CCOs") live with on a daily basis; particularly due to the government's recently increased interest in holding individuals accountable for corporate misconduct.[2] Most corporations indemnify high-level officers and directors, which provides these individuals with legal and financial security when investigations against the corporation arise.[3] While it seems logical that a CCO would be a member of this high–level group, that is simply not always the case. Instead, CCOs are often leveraged by the corporation at the request of the government for a more lenient punishment for the corporation or its other high–ranking officials.[4] Thus, the CCO becomes an easy scapegoat for the corporation to offer to the government when things go wrong.[5] So where does this leave CCOs when they are left holding the bag for the corporation's actions? How can CCOs be expected to mount a successful defense when the corporation has decided to abandon their cause?

This Article examines those instances in which corporations refused to indemnify CCOs and explores the remaining options for CCOs facing individual liability. There are three options for CCOs to consider when negotiating with their employers to reduce their risk of individual liability. First, the CCO can be added to the C–Suite due to the inherent risks and responsibilities associated with the CCO's role. Inclusion in the C–Suite would then allow the CCO to make use of the corporation's indemnification policies to mount his or her defense. Second, if corporate

much-protection-do-indemnification-and-do-insurance-provide-05-21-2014/; Yaron Nili, *How Much Protection Do Indemnification and D&O Insurance Provide?*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (May 28, 2014), https://corpgov.law.harvard.edu/2014/05/28/how-much-protection-do-indemnification-and-do-insurance-provide/.

2. Memorandum from Deputy Attorney Gen. Sally Quillian Yates to Assistant Attorney Gens.' (Sept. 9, 2015) [hereinafter Yates Memo].

3. *See, e.g.*, Stifel Fin. Corp. v. Cochran, 809 A.2d 555, 561 (Del. 2002) (explaining that Delaware legislation on indemnification is meant to provide a sense of comfort for corporate officers and directors that they will be reasonably compensated for expenses if suits arise in their positions); *see also* Alexander M. Szeto & David Washburn, *Indemnification of Directors and Officers: A Different Side to the Problem of Corrupt Corruption*, ANDREW KURTH (June 1, 2004), http://www.andrewskurth.com/insights-IndemnificationofDirectorsandOfficersADif.html (noting that "[i]n order to attract and retain highly qualified individuals to serve as directors and officers, corporations must ensure that directors and officers can defend themselves if sued, and if successful, can recover the costs of that defense").

4. *See* United States v. Stein, 435 F. Supp. 2d 330, 372 (S.D.N.Y. 2006) (demonstrating KPMG's willingness to not pay their indicted executives legal fees in order to minimize the corporation's liability).

5. *See* Julie Dimauro, *The State of the Chief Compliance Officer in 2016*, CORP. COMPLIANCE INSIGHTS (May 25, 2016), http://www.corporatecomplianceinsights.com/state-chief-compliance-officer-2016/ (explaining that a lack of corporate compliance culture of a company can lead to the CCO being the scapegoat for corporate lapses and violations of regulations).

indemnification is not an option, the CCO should be able to negotiate his or her employment agreement to include personal insurance that would cover the costs associated with defending the CCO if suit arises. Finally, insurance providers should create a package for CCOs to purchase that is specifically tailored to the needs of CCOs for when the corporation refuses or is unable to pay for the CCO's legal defense. Ultimately, the CCO's role is becoming an essential part of a corporation's operation; therefore, these individuals should be treated with the respect and legal insurance that they deserve.

II. WHAT IS INDEMNIFICATION?

Corporate indemnification is "the act of a corporation compensating one or more of its directors, officers, employees, or agents for liability they have personally incurred due to actions they took in their official capacities with the corporation."[6] Typically, employees must meet three conditions before becoming indemnified.[7] First, the employee must be named as a defendant in the lawsuit "by reason of" his or her employment title at the corporation.[8] Second, the employee or officer must have been acting in good faith when the action alleged in the lawsuit was performed.[9] Finally, the corporation must reasonably believe that the employee or officer was acting in the best interest of the corporation when the actions alleged in the suit took place.[10] While most states permit corporations to indemnify their directors and officers, a small number of states explicitly require that certain officers be indemnified.[11] Therefore, the decision to indemnify an officer or employee largely rests with the individual corporation and is generally prescribed in each corporation's governing documents.[12]

A. Delaware Indemnification Law

Over a million businesses are incorporated in Delaware and this includes more than fifty percent of all publicly traded companies in the United

6. NEAL T. BUETHE & MICHAEL C. WILHELM, CORPORATE INDEMNIFICATION: A STEP–BY–STEP GUIDE FOR HR PROFESSIONALS 132 (2008).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *See, e.g.*, Margaret E. Barrett, *Mandatory Indemnification of Corporate Officers and Directors*, 29 SW. L.J. 727, 727 (1975) (discussing New York being the first state to enact indemnification legislation).

12. *See* Memorandum from Gibson Dunn to Clients (July 15, 2013) [hereinafter Gibson Dunn Memo] (alerting clients that serve as directors and officers about what to consider when looking at a public company's insurance and indemnification policy).

States and more than sixty percent of all fortune five hundred companies.[13] Therefore, when assessing indemnification protocol, it is best to look at the Delaware Code for analysis because it is the leading home for American corporations and most states follow the corporate laws that Delaware sets forth. According to the Delaware Code:

> [A] corporation shall have the power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil criminal, administrative or investigative by reason of fact that the person is or was a director, officer, employee or agent of the corporation, or was serving at the request of the corporation . . . .[14]

Once a corporate officer believes that he or she can be indemnified, the officer must consider when he or she will receive payment from the corporation to mount his or her defense. Under Delaware law, a corporation is permitted, but not required, to advance legal fees to the officer or director currently facing civil, criminal, administrative, or investigative charges or proceedings.[15] However, if the corporation chooses to advance these legal fees, Delaware law requires that the corporation and the officer enter into an agreement in which "[the] director or officer" agrees to pay back any money he or she received for legal fees if it is "ultimately . . . determined that [the officer] is not entitled to indemnif[ication]."[16]

Additionally, Delaware law also permits the corporation to dictate "terms and conditions" for the legal fees it provides.[17] These "terms and conditions" include: (1) collateral, (2) right to select counsel, (3) reasonableness of the fees, and (4) the right to be informed of all developments in the investigation.[18] Some argue that Delaware's pro–corporate laws are merely put in place to generate revenue for the state by ensuring that companies continue to incorporate in Delaware.[19] However,

13. *See* Suzanne Raga, *Why Are the Majority of U.S. Companies Incorporated in Delaware?*, MENTAL FLOSS (Mar. 11, 2016, 9:30 AM), http://mentalfloss.com/article/76951/why-are-so-many-us-companies-incorporated-delaware (noting three reasons why companies choose to incorporate in Delaware: (1) Delaware Court of Chancery allows companies to resolve disputes quickly with a judge rather than a jury; (2) Delaware's tax systems give businesses several ways to legally minimize their tax bills; and (3) Delaware's laws and policies make it easy for businesses to incorporate, avoid liability, and retain privacy).

14. 8 Del. Code § 145(a) (2016).

15. *Id.* §145(e).

16. *See id.* (noting that the same rules apply to former directors and officers if suit arises after the departure from the corporation).

17. Eisenburg, *supra* note 1.

18. *Id.*

19. *See* David Kocieniewski, *Delaware's $1 Billion Incorporation Machine*, BLOOMBERG (Apr. 27, 2016, 5:00 AM), https://www.bloomberg.com/news/articles/

while this may be true, Delaware's broad indemnification statutes also allow individual corporate officers and directors to be held personally accountable for their actions, which in turn can reduce the incentive to misbehave.[20]

A setback for directors and officers that work for companies incorporated in Delaware is that Delaware's broad indemnification statutory language merely *permits* as opposed to *requires* corporations to advance legal fees to their officers.[21] This broad language often times can lead to directors and officers having to personally fund their own legal defense without any help from their corporation. Thus, it is imperative for officers and directors of large corporations to contract around these corporate–biased laws. These contracts should include specific terms of indemnification such as amount, time period, and immediacy to be provided under Directors and Officers Insurance ("D&O Insurance").[22] Additionally, when making an indemnification contract, directors, officers, and other high–ranking officials, should take into consideration whether their job currently falls under their corporation's C–Suite indemnification umbrella.[23] For CCOs this is where the heart of the issue lies; it is rare that a CCO's position is ever categorized as a C–Suite position. Thus, CCOs are subject to all of the risk that a high–level position entails without any of the protections that a C–Suite employee enjoys.[24]

B. The CCO and Indemnification

The role of a CCO encompasses many different tasks to ensure that the company stays informed and complies with current statutes and regulations that monitor the industry.[25] The CCO is required to develop a compliance

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2016-04-27/delaware-s-1-billion-opacity-industry-gives-u-s-onshore-haven (noting that corporations' registration fees provide more than $1 billion in annual state revenue).

20. Eisenburg, *supra* note 1.

21. 8 Del. Code § 145(a) (2016).

22. *See* Gibson Dunn Memo, *supra* note 12 (providing tips for directors and officers when looking at their D&O Insurance policies in the wake of the 2007–2009 financial crisis).

23. *See* Boris Groysberg et al., *The New Path To the C-Suite*, HARV. BUS. REV., Mar. 2011 (explaining the typical positions within C–Suite, including: Chief Information Officer, Chief Marketing and Sales Officer, Chief Financial Officer, General Counsel, Chief Supply–Chain–Management Officer, Chief Human Resource Officer, and Chief Executive Officer).

24. *But see* Edward T. Dartley, *The Combined Role of the General Counsel and the Chief Compliance Officer — Opportunities and Challenges*, PRAC. COMPLIANCE & RISK MGMT. FOR THE SEC. INDUSTRY, May–June 2014 (discussing the roles of a joint General Counsel and CCO position).

25. 15 U.S.C § 80b–3(e)(6) (2017) (explaining the defenses a CCO can assert when a suit is filed against them: (1) that the CCO adopted "procedures reasonably designed to prevent and detect violations"; (2) the CCO had "a system in place for applying the

program to which the corporation must adhere and to create an atmosphere of corporate compliance and awareness throughout the company.[26] It is the CCO's job to distribute the compliance standards and administer compliance trainings to confirm all employees, including high–level officers, understand and follow the compliance rules.[27] When a CCO implements compliance policies, he or she must continually assess and monitor that these compliance standards are being met and are effective.[28]

A way that CCOs assess the effectiveness of the corporation's compliance program is to perform random department or site checks to make sure that compliance protocols are being followed at all times.[29] If the CCO at any point feels that there is a red flag of suspicion about a transaction the corporation performed, it is the CCO's duty to investigate and report his or her findings to his or her direct supervisor, which is often the Board of Directors.[30] Upon the CCO reporting to his or her supervisor, he or she must recommend penalties for misconduct via the corporation and also consider whether the misconduct needs to be reported to the regulating body of the industry.[31]

As a result of the 2007 to 2009 financial crisis, senior executives, such as the CCO, have become targets for public outrage.[32] The CCO, as the officer that handles compliance, has the responsibility of creating and administering the compliance plan for the entire corporation, but more often than not, they are left off the list for C–Suite indemnification. This leaves CCOs—especially in the banking industry—wide open to public criticism and exposes them to personal liability without any line of defense provided by the corporation.[33]

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procedures"; and (3) the CCO reasonably "discharged his supervisory responsibilities in accordance with the procedures and had no reason to believe that the person was not complying with the procedures).

26. *See* Barbara Barrett et al., CCO of Reliant Care Management Co. LLC, Presentation at the 2015 ACC Annual Meeting in Boston, MA: Role and Responsibility of the Chief Compliance Officer (Oct. 18–21, 2015) [hereinafter The Role of a CCO Speech] (explaining the duties and challenges of the role of a CCO).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *See Panel III*, 6 AM. U. BUS. L. REV. 241 (2017) (discussing the conflict that arises when a CCO, who is also a lawyer, needs to report misconduct to law enforcement).

32. *See* Jesse Eisinger, *Why Only One Top Banker Went to Jail for the Financial Crisis*, N.Y. TIMES (April 30, 2014), https://www.nytimes.com/2014/05/04/magazine/only-one-top-banker-jail-financial-crisis.html (expressing the public's discontent with the lack of white collar prosecutions regarding the financial crisis).

33. *See generally* Groysberg et al., *supra* note 23.

However, under Delaware law, corporations have two potential solutions.[34] First, the corporation can choose to add the CCO position to the C–Suite, which most likely will permit the CCO to become eligible for protections that allow the individual to mount a defense funded or reimbursed, to a certain extent, by the corporation.[35] Alternatively, the corporation can make such determinations on a case–by–case basis.[36] The corporation can make this decision when a suit or proceeding arises against the officer through: (1) a majority vote of the directors who are not themselves parties to the proceeding; (2) a committee of such directors designated by majority vote; (3) by independent legal counsel directed to make such a determination by the directors; or (4) by stockholder vote.[37]

C. Advantages and Disadvantages of Indemnification

The primary advantage of indemnification and D&O Insurance agreements is that both provide security for the officers and directors at issue, which in turn leads to corporate growth.[38] By allowing these kinds of agreements to exist, the corporation can be led by vibrant, energetic, and competent officers and directors that are not constantly looking over their shoulder when they take a risk to benefit the company.[39] By having the corporation indemnify senior executives, the executive still has a sense of fiduciary duty to the corporation, but there is also a protection in place if one day the executive's name is included at the top of an indictment.[40] D&O Insurance or indemnification agreements allow for these high–level officers in a time of crisis to avoid personal liability as long as the individual was performing his or her corporate duties in good faith and with the best interests of the corporation in mind.[41]

However, there are some disadvantages to indemnification agreements and D&O Insurance plans. These disadvantages generally crop up in the "terms and conditions" that corporations attach to such indemnification agreements.[42] Specifically, corporations can impose "terms and conditions" that impede the officer from acquiring the type of legal representation that he or she believes to be the best fit to defend against the

34. 8 Del. Code § 145(a) (2016).
35. *Id.* at § 145(c).
36. *Id.*
37. *Id.*
38. Szeto et al., *supra* note 3.
39. Eisenberg, *supra* note 1.
40. *Id.*
41. 8 Del. Code § 145(c) (2016).
42. *Id.*

charges at issue.[43] Some corporations have also implemented a cap on the amount of money that they will pay towards their executive officers' defenses.[44] Therefore, if the officer uses up the corporation's allotted money for their defense prior to the proceeding's conclusion, the officer must either personally pick up the rest of the bill or seek other representation.[45]

Another disadvantage of indemnification agreements or D&O Insurance plans that has been brought up in more recent years is that these agreements are a shield for corporate officers to not face individual accountability for their actions.[46] The public looks at the events following the 2007 to 2009 financial crisis and wonders why more corporate officers of banks such as JPMorgan, Citigroup, Bear Sterns, and Goldman Sachs were not punished for their involvement in selling subprime mortgages that led to the collapse of the real estate market and to some extent the United States economy as a whole.[47] Many corporate officers from these banks used their D&O Insurance plans to retain the best legal representation money could buy, which in turn resulted in these officers facing mere monetary damages rather than punitive measures.[48] The American public was outraged at the lack of executive accountability, which prompted the Department of Justice ("DOJ") to respond by taking a harsh stance on individual corporate liability.[49] Under the Obama administration, Deputy Attorney General Sally Yates took it upon herself to create and implement a memorandum that would guide federal prosecutors to strictly hold corporate officers liable for their misconduct within the corporation.[50]

III. CCO AS A SCAPEGOAT

Following the initiatives of the DOJ, former Securities and Exchange Commission ("SEC") Chairwoman Mary Jo White made targeting individuals a "core principle" of the SEC's enforcement program on the theory that "when people fear for their own reputations, careers, or pocketbooks, they tend to stay in line."[51] Conversely, SEC Commissioner

43. *See generally* Stephen A. Allred, *Key Issues in Evaluating and Negotiating D&O Coverage*, MCGUIREWOODS, https://www.mcguirewoods.com/news-resources/publications/Key-Issues-D-O-Insurance-Coverage.pdf (last visited Mar. 13, 2017).

44. *Id.* at 21.

45. *Id.*

46. Eisenberg, *supra* note 1.

47. Eisinger, *supra* note 32.

48. *Id.*

49. Yates Memo, *supra* note 2.

50. *Id.*

51. Eisenberg, *supra* note 1.

Daniel M. Gallagher opposed the SEC's attempt to impose strict liability against corporate officers by saying, "[a]s it stands the [SEC] seems to be cutting off the noses of CCOs to spite [their] faces."[52] Because of statements such as these, at least eighty–one percent of CCOs are concerned about their individual corporate liability.[53] This is especially true for individuals who work in heavily regulated industries, such as in financial services, healthcare, or pharmaceuticals.[54]

These concerns also stem from a lack of resources to: (1) maintain an effective compliance program with a constantly shifting regulatory compliance landscape, and (2) resolve misconduct issues that arise within a corporation.[55] Many CCOs work to create and implement effective compliance programs for their corporations, but these officers are also constantly worried that regardless of how hard they work, their corporation is using their position to create plausible deniability if a link in the compliance chain were to ever break.[56] This type of corporate thinking leaves many CCOs as the corporation's scapegoat when compliance programs are found to be insufficient.[57] Furthermore, the government recognizes the difficulty of a corporation civilly or criminally liable for its actions; thus, it seems that federal prosecutors and administrative agencies are targeting CCOs to appease the public's demand for holding senior executives accountable for their misconduct.[58]

52. Daniel M. Gallagher, Commissioner, SEC, Statement on Recent SEC Settlements Charging Chief Compliance Officers with Violations of Investment Advisors Act Rule 206(4)–7 (June 18, 2015).

53. DLA PIPER'S 2016 COMPLIANCE & RISK REPORT: CCOS UNDER SCRUTINY (2016).

54. *Id.*

55. *See id.* (detailing CCOs concerns about personal liability in a chart).

56. *See* Joanna Belby, 7 *Nightmares Keeping Chief Compliance Officers Awake at Night*, FORBES (July 29, 2016, 4:12 PM), https://www.forbes.com/sites/joannabelbey/2016/07/29/7-nightmares-keeping-chief-compliance-officers-awake-at-night/#f7696d216be9.

57. *Id.*

58. *See* Daniel Rice, *SEC Enforcement Director Defends Approach to Compliance Officer Liability*, WESTLAW CORP. GOV. DAILY BRIEFING (2015) (stating that the SEC often makes compliance officers the scapegoat for violations made by their supervisors or others in the firm); *see also* Selwyn Parker, C*omply or else — Compliance Officers Assume a Heavier Burden of Responsibility*, INSIGHTS (Aug. 5, 2015), https://www.wolterskluwerfs.com/article/comply-or-else-compliance-officers-assume-a-heavier-burden-of-responsibility.aspx ("[T]he SEC has just taken enforcement actions against compliance officers of investment advisors. Indeed some saw it as a witch–hunt in which the compliance department became the scapegoat.").

A. Sources of Liability

The DOJ's Yates Memorandum ("Yates Memo"), which was issued in 2015 by former Deputy Attorney General Sally Yates was the trigger that caused CCOs to become concerned about being individually prosecuted for a corporation's misconduct.[59] In the Yates Memo, Ms. Yates mentions that prosecuting individual wrongdoers both "deters future illegal activity" and "incentivizes changes in corporate misbehavior."[60] The Yates Memo encouraged the government to not only go after corporations for their misconduct, but to also go after the corporation's CCOs as well. However, on January 30, 2017, President Trump asked for Ms. Yates' resignation and she ceased working as the Deputy Attorney General shortly thereafter.[61] Given Ms. Yates' untimely departure, it is unclear whether the Yates Memo will still be used in future DOJ prosecutions.[62] Although, it is relatively safe to assume based upon the Trump administration's pro–business platform that there will not be a significant push to prosecute the CCOs of large corporations anymore, unless there is an outcry from President Trump's voter base.

Another source of liability for CCOs is the Responsible Corporate Officer Doctrine ("RCO"). The RCO Doctrine is a "procedural contrivance that regulators and prosecutors have rediscovered and now are . . . [aggressively applying] against businessmen in administrative, civil, and criminal actions."[63] Rather than focusing on an individual's intent or direct involvement with the crime to sustain culpability, the RCO Doctrine encompasses the "crime of doing nothing," which means that senior executives and CCOs can become culpable just because of their position within the corporation.[64] The RCO Doctrine demonstrates how the

59. Yates Memo, *supra* note 2.

60. *Id.*; Alexis Ronickher, *DOJ's Pursuit of Individual Accountability is Insufficient to Change Corporate Cultures that Promote Fraud*, 21 WESTLAW J. 1, 2 (Oct. 2015).

61. Michael D. Shear et al., *Trump Fires Acting Attorney General Who Defied Him*, N.Y. TIMES (Jan. 30, 2017), https://www.nytimes.com/2017/01/30/us/politics/trump-immigration-ban-memo.html?_r=0.

62. *Id.*

63. Michael E. Clark, *The Responsible Corporate Officer Doctrine*, J. HEALTHCARE COMPLIANCE, Jan–Feb. 2012, at 5, 5.

64. *See* United States v. Park, 421 U.S. 658 (1975) (holding the company's president liable for the company's misconduct because he shared "some measure of blameworthiness . . . by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of . . . [but] he failed to do so"); *see also* United States v. Purdue Frederick Co., 495 F. Supp. 2d 569 (W.D. Va. 2007) (disbarring Purdue's general counsel); *see, e.g.*, Lisa Ann Harig, *Ignorance* is *Not Bliss: Responsible Corporate Officers Convicted of Environmental Crimes and the Federal Sentencing Guidelines*, 42 DUKE L.J.145 (1992).

government has wide–latitude to prosecute CCOs and other high–level officers even if they have no involvement in the wrongdoing.[65] Conversely, this method of charging individual corporate liability is narrow in scope because it can only be used under public welfare statutes.[66] Thus, the RCO doctrine's application is limited and CCOs do not have to be consistently concerned about potential liability under this doctrine.

The combination of the Yates Memo, SEC guiding principles, and the RCO Doctrine made it appear that most future DOJ prosecutions and SEC enforcement actions will target senior executives who hold a "supervisory role" even if these officers were not intimately involved in the misconduct at issue.[67]

B. Supervisory Liability

The most widely discussed enforcement action that was brought against a CCO was that of *Theodore Urban*.[68] In that case, the SEC brought an enforcement action against Mr. Urban for his failure to supervise an employee.[69] Contrary, to the facts alleged indictment Mr. Urban attempted several times to alert the company of the illegal trading activity. However, the SEC still charged Mr. Urban because the SEC asserted he was head of the Compliance Department and the duty to stop and prevent this type of action fell under his "supervisory" role.[70] After the Administrative Law Judge's ("ALJ") decision, both the SEC and Mr. Urban appealed, but the ALJ still did not define a "supervisory role" under the Securities and Exchange Act ("Exchange Act").[71] While the case eventually ended in a stalemate dismissal, the case created substantial buzz because Mr. Urban—in the process of defending himself over the course of five years—had

65. Clark, *supra* note 63.

66. Sarah Riley Howard, *The Responsible Corporate Officer Doctrine: Finding Executives Guilty of Crimes For What They Don't Know*, WARNER NORCROSS & JUDD (Aug. 16, 2011), https://www.wnj.com/Publications/The-Responsible-Corporate-Officer-Doctrine-Findi.

67. *Id.*

68. Urban, SEC Rel. No. 402, 2010 WL 35009288, at *44 (ALJ Sept. 8. 2010) [hereinafter Ted Urban Enforcement Action].

69. Bruce Carton, *Former GC Urban to Compliance Officers: Make Sure You're Covered by Indemnity Agreement*, COMPLIANCE WEEK (Nov. 6, 2012), https://www.complianceweek.com/blogs/enforcement-action/former-gc-urban-to-compliance-officers-make-sure-youre-covered-by-indemnity#.WAKVN5MrLR0.

70. 15 U.S.C § 80b–3(e)(6) (2017); *see also* Ted Urban Enforcement Action, *supra* note 68, at 51–56 (holding that "(1) Mr. Urban was a supervisor, despite the fact that he did not have 'any day–to–day responsibility for the employee' but that (2) Mr. Urban had in fact adequately discharge his supervisory duties over this employee").

71. Mr. Urban argued on appeal that he was not a supervisor of the rogue employee and the SEC argued that Mr. Urban had actually failed to adequately discharge his supervisory duties.

incurred a seven–figure defense bill that the corporation initially refused to pay.[72] It took many rounds of negotiation, but eventually the company reimbursed Mr. Urban for his defense expenses to some degree. The vital takeaway that Mr. Urban stated to the public after having gone through this long and lengthy adjudication process was that an indemnification agreement or some type of D&O Insurance is invaluable to a CCO or General Counsel that handles compliance for the corporation. Thus, Mr. Urban recommends that before taking any senior executive level position—that works with compliance of regulation—an individual should negotiate some type of indemnification agreement just in case a suit arises and the person could be deemed individually liable for corporate misconduct or violations of statutes and regulations.[73]

The concept of "supervisory liability" is still very unclear according to the enforcement actions brought in the financial industry because most of the time these actions result in a settlement. The settlements are a way for the individual and the corporation's they represent to keep their reputations intact.[74] However, these actions do pose an interesting question about whether an officer in a supervisory role can be held personally liable for their employee's actions. Additionally, these kinds of SEC enforcement actions also raise the question of whether CCO or another executive in a supervisory role has a duty to report an employee's misconduct within a particular time period in order to avoid charges?[75]

C. Leverage

The DOJ filed its largest tax case against KPMG and its partners.[76] The DOJ alleged that the corporation created a tax shelter fraud from 1996 to 2003 by selling illicit deals and then misleading the Internal Revenue Service ("IRS") about the transaction it orchestrated for wealthy individuals.[77] However, in the course of the DOJ's investigation, a young and eager Assistant United States Attorney ("AUSA") attempted to use the Thompson Memorandum[78] to try to strong arm KPMG into refusing to pay

72. Carton, *supra* note 69.

73. *Id.*

74. *See, e.g.*, BlackRock Advisors LLC, Investment Advisers Act Release No. 4065, Investment Company Act Release 31,558, 111 SEC Docket (Apr. 20, 2015).

75. *In re* John H. Gutfreund, Securities Exchange Act Release No. 34–31554, Admin. Pro. Release No. 3–7930, 1992 WL 362753 (Dec. 3, 1992).

76. Press Release, Dep't of Justice, KPMG to Pay $456 Million for Criminal Violations in Relation to Largest–Ever Tax Shelter Fraud Case (August 29, 2005) [hereinafter KPMG Press Release].

77. *Id.*

78. *See* Memorandum from Deputy Attorney Gen. Larry D. Thompson to Heads of Dep't Components United States Attorneys (Jan. 20, 2003) (encouraging corporations

the legal fees of those indicted executive officers in exchange for minimizing the corporation's liability. The evidence demonstrated that KPMG had a long–standing history of paying for their employees' legal fees to ensure a well–mounted defense for every employee.[79] This allowed for the employee to hire the counsel of their choosing at the expense of the company.[80] However, in this case, the AUSA met with KPMG's attorneys and made it explicitly clear that if KPMG decided to "circle the wagons" and assist in paying the legal fees for those who were indicted, there would also be consequences for the corporation as a result of their actions.[81] Ultimately, the Court had to dismiss the suits against the indicted executives because of the prosecutors' gross misconduct in the case.[82]

This type of prosecutorial behavior is why many highly qualified individuals feel uncomfortable when being offered the position of a CCO. Often times individuals that are considering accepting a CCO position must also take into account the extensive liability that goes along with the job in recent years.[83] This is why Mr. Urban gives talks to senior executives and CCOs negotiating and obtaining indemnification agreement or D&O Insurance in a written formalized contract. So if that rainy day is ever to come, the CCO's contract can withstand a lengthy and intensive lawsuit based on the CCO's conduct on behalf of the corporation.

IV. ALTERNATIVES TO INDEMNIFICATION: GENERAL INSURANCE

While it would be nice to believe that all corporations would be willing to agree to an indemnification agreement or D&O Insurance plans for CCOs, this is simply not the case. The idea that has been formulating by some practitioners in the financial services industry is to provide the option for CCOs to purchase individual liability insurance through a third party. This insurance to some degree would be similar to a D&O insurance plan; however, it would be paid for by the CCO.

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to reveal information about their indicted executives in exchange for cooperation credit).

79. United States v. Stein, 435 F. Supp. 2d 330, 372 (S.D.N.Y. 2006).

80. *See id.* at 337 (noting that KPMG was now refusing to keep with their longstanding tradition of paying their employees' legal fees).

81. *Id.* at 364.

82. *Id.* at 382.

83. *See, e.g.*, Yates Memo, *supra* note 2; Ted Urban Enforcement Action; *supra* note 68; BlackRock Advisors LLC, Investment Advisers Act Release No. 4065, Investment Company Act Release 31,558, 111 SEC Docket 1721 (Apr. 20, 2015).

A. Public Policy Concerns

The goals of the third party insurance would be to ease the CCO's mind when performing their job responsibilities. This insurance would allow CCOs to conduct proper and thorough investigations knowing that if they are ever indicted for individual liability on behalf of the corporation's misconduct—they would be able to mount a sufficient defense without having to worry about the costs of litigation.[84] The purpose of this insurance would not be to cover disgorgement—allowing the wrongdoer to collect insurance proceeds to defend against his illegal act—but instead to create a cushion that allows CCOs to perform their duties in the best interest of the companies they represent while still having that soft pillow to fall back on just in case the DOJ or SEC decides to bring an action against a CCO for individual corporate liability.[85]

B. Insurance Option that Would Work Best for CCOs

Upon discussions with members of the insurance community, it was clear that the insurance provider would need to offer a Side A policy for CCOs.[86] This is a similar policy that insurance providers offer corporations under D&O Insurance plans. A Side A insurance policy protects officers and directors from economic loss arising from claims for wrongful acts made against the insured individual when the corporation refuses or is unable to provide indemnification.[87] The only difference in the Side A insurance policy for CCOs would be that the corporation would only pay for a portion of the premium or the CCO would entirely cover the premium costs of the insurance policy. While insurance providers may be intrigued by this idea, a concern that may arise is that there may not be enough demand for offering this type of CCO Liability Insurance to have such a policy exist.

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84. *See, e.g.*, International Transport Intermediaries Club Ltd: *Directors' & Officers' Liability Insurance Endorsement Indication to the Current Terms and Conditions of ITIC Certificate of Entry*, INSURE (May 4, 2013), https://www.itic-insure.com/fileadmin/uploads/itic/Photos/Sample%20D%26O%20Terms.pdf (showing a sample D&O insurance policy agreement).

85. *See* Eisenberg, *supra* note 1 (discussing the concerns that insurance for CCOs would not allow for bad actors to obtain insurance payouts).

86. *Id.*; Telephone Interview with Anonymous Insurance Company (Oct. 26, 2016).

87. Jeanne Oronzio Wermuth, *Why Purchase Side 'A' Directors & Officers Liability Coverage?* INS. J. (June 18, 2012), http://www.insurancejournal.com /magazines/features/2012/06/18/251462.htm.

CONCLUSION

The role of a CCO is a continuous debate within many regulated industries.[88] Depending on the size of the corporation, compliance issues may fall under the duties of the General Counsel, but ultimately, it is important for regulated industries to decide where the CCO falls under the corporate ladder. In a post 2007 to 2009 financial crisis world, compliance has become essential to the day–to–day operation of the company. Compliance is especially important in the financial services industry and as a result, a compliance program should be at the top of the priority list for the shareholders and the Board of Directors. It is important for corporations to create a positive compliance culture that allows for CCOs to effectively train employees to comply with industry regulations while maintaining respect within the corporation.[89]

As such, it seems reasonable to consider a CCO as a C–Suite member, but if a corporation feels that this is unreasonable, there should be some ability for a CCO to negotiate some type of insurance policy with the corporation. This insurance policy should allow a CCO to be protected if the corporation is under scrutiny for misconduct. CCOs should not be able to be used as pawns in a corporation's game to avoid liability. It is important for regulated industries, such as the financial services industry, to recognize the value that a CCO adds to their company and acknowledge that they should be protected from individual liability for the corporation's misconduct. CCOs should be provided with some type of insurance or indemnification for the vital roles they play in every regulated industry.

88. Dartley, *supra* note 24; *see also* Barrett et al., *supr*a note 26.

89. Barrett et al., *supra* note 26.

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AU BLR AMERICAN UNIVERSITY BUSINESS LAW REVIEW

The American University Business Law Review ("BLR") has compiled a survey containing the statutes and regulations that a federal government regulator or other agency could rely on to impose financial or other penalties on Chief Compliance Officers ("CCOs"). This chart indicates: (1) a citation to the provision, (2) which regulator or regulators are responsible for the enforcement of the provision, (3) the statutory text (edited for brevity where necessary), and (4) an explanation of the potential impact on a CCO.

While we have attempted to include a variety of industries to which such laws apply, this survey does not purport to be a complete examination of every possible law, regulation, rule, guideline, or edict imposed through enforcement applicable to all industries. In addition, this survey is not intended to provide legal advice and should not be relied upon by any recipient for that purpose.

CCOs may want to pay particular attention to the potential impact of the regulators' power to assess civil money penalties and to remove officers, as well as the limitations imposed by the FDIC on payment of legal defense costs.

BLR would like to thank Steve vonBerg and the late Bob Serino of Buckley Sandler LLP for their contributions and assistance in compiling this chart.

Additionally, special thanks to the BLR staff members who worked tirelessly for their contributions on this chart: Hilary Rosenthal, Morgan McKinlay, Brianna Schacter, Elizabeth Nwabueze, and Zac Johnston.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
STATUTES			
Banking			
12 U.S.C. § 1818(a)	FDIC	(A) If the Board of Directors determines that— (i) an insured depository institution or the directors or trustees of an insured depository institution have engaged or are engaging in unsafe or unsound practices in conducting the business of the depository institution; (ii) an insured depository institution is in an unsafe or unsound condition to continue operations as an insured institution; or (iii) an insured depository institution or the directors or trustees of the insured institution have violated any applicable law, regulation, order, condition imposed in writing by the Corporation in connection with the approval of any application or other request by the insured depository institution, or written agreement entered into between the insured depository institution and the Corporation, the Board of Directors shall notify the appropriate Federal banking agency with respect to such	<u>Hearing</u> If, on the basis of the evidence presented at a hearing before the Board of Directors (or any person designated by the Board for such purpose), in which all issues shall be determined on the record pursuant to section 554 of Title 5 and the written findings of the Board of Directors (or such person) with respect to such evidence (which shall be conclusive), the Board of Directors finds that any unsafe or unsound practice or condition or any violation specified in the notice to an insured depository institution under paragraph (2)(B) or subsection (w) of this section has been established, the Board of Directors may issue an order terminating the insured status of such depository institution effective as of a date subsequent to such finding. <u>Appearance; consent to termination</u> Unless the depository institution shall appear at the hearing by a duly authorized representative, it shall be deemed to have consented to the termination of

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		institution (if other than the Corporation) or the State banking supervisor of such institution (if the Corporation is the appropriate Federal banking agency) of the Board's determination and the facts and circumstances on which such determination is based for the purpose of securing the correction of such practice, condition, or violation. Such notice shall be given to the appropriate Federal banking agency not less than 30 days before the notice required by subparagraph (B), except that this period for notice to the appropriate Federal banking agency may be reduced or eliminated with the agreement of such agency. (B) Notice of intention to terminate insurance If, after giving the notice required under subparagraph (A) with respect to an insured depository institution, the Board of Directors determines that any unsafe or unsound practice or condition or any violation specified in such notice requires the termination of the insured status of the insured depository institution, the Board shall— (i) serve written notice to the insured depository institution of the Board's intention to terminate the insured status of the institution;	its status as an insured depository institution and termination of such status thereupon may be ordered. <u>Judicial review</u> Any insured depository institution whose insured status has been terminated by order of the Board of Directors under this subsection shall have the right of judicial review of such order only to the same extent as provided for the review of orders under subsection (h) of this section.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(ii) provide the insured depository institution with a statement of the charges on the basis of which the determination to terminate such institution's insured status was made (or a copy of the notice under subparagraph (A)); and (iii) notify the insured depository institution of the date (not less than 30 days after notice under this subparagraph) and place for a hearing before the Board of Directors (or any person designated by the Board) with respect to the termination of the institution's insured status.	
12 U.S.C. § 1818(b)	FDIC, OCC, Federal Reserve, and NCUA	Cease-and- desist order: If, in the opinion of the appropriate Federal banking agency, any IAP is, has, or is about to engage in an unsafe or unsound practice in conducting the business of such depository institution, or is, has, or is about to violate, a law, rule, or regulation, or any condition imposed in writing by a Federal banking agency in connection with any action on any application, notice, or other request by the depository institution or institution-affiliated party, or any written agreement entered into with the agency, the appropriate Federal banking agency for the depository institution may issue and serve upon the depository institution or such party a notice of charges in respect thereof. The notice shall contain a statement of the facts constituting the alleged	Any violation of law, including a finding that a CCO has or is engaged in an unsafe or unsound practice in the opinion of a regulator, may result in a cease-and-desist order. Additional Comments: 1. The authority under § 1818(b) to issue a cease-and- desist order also carries the authority to require affirmative action to correct or remedy any conditions resulting from any violation or practice or limit activities and functions. §§ 1818(b)(6)-(7). The cease and desist power has been used on occasion to restrict the activities of bank officials. 2. Among the potential provisions in an order, though rare, could be a requirement that monetary

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		violation or violations or the unsafe or unsound practice or practices, and shall fix a time and place at which a hearing will be held to determine whether an order to cease and desist therefrom should issue against the depository institution or the institution-affiliated party. In the event the agency finds that any violation or unsafe or unsound practice specified in the notice of charges has been established, the agency may issue and serve upon the depository institution or an IAP from any such violation or practice. Such order may, by provisions which may be mandatory or otherwise, require the depository institution or its IAPs to cease and desist from the same, and, further, to take affirmative action to correct the conditions resulting from any such violation or practice.	restitution be paid by a CCO to the financial institution.
12 U.S.C. § 1818(e)	FDIC, OCC, Federal Reserve, and NCUA	Removal: Whenever the appropriate Federal banking agency determines that: A. any IAP has, directly or indirectly… i. violated—— I. any law or regulation; II. any cease-and-desist order which has become final; III. any condition imposed in writing by a Federal banking agency in connection with any action on any application,	A CCO may be removed from office if a regulator determines that the CCO violated any law, regulation, or condition imposed by a regulator, or any written agreement between the financial institution and the regulator involving unsafe or unsound practices or breach of fiduciary duty IF **all** of the following conditions are met: First, the CCO violated: 1) any law or regulation; 2) any final cease-and-desist order; 3) any condition imposed by a Federal banking agency;

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		notice, or request by such depository institution or institution-affiliated party; **or** IV. any written agreement between such depository institution and such agency; ii. engaged or participated in any unsafe or unsound practice in connection with any insured depository institution or business institution; or iii. committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty; **and** B. By reason of the violation, practice, or breach described in any clause of subparagraph (A)— i. such insured depository institution or business institution has suffered or will probably suffer financial loss or other damage; [**or**] ii. the interests of the insured depository institution's depositors have been or could be prejudiced; **or** iii. such party has received financial gain or other benefit by reason of such violation, practice, or breach; **and**	or 4) any written agreement between the bank and regulator involving unsafe or unsound practices or involving an act or practice which constitutes a breach of fiduciary duty. Second, either: 1) the violation or practice caused the financial institution a financial loss or other damage; 2) the interest of depositors was or could have been prejudiced; or 3) the CCO benefited from the violation. Third, the violation 1) involves personal dishonesty by the CCO; or 2) demonstrates willful or continuing disregard by the CCO for the safety and soundness of the depository institution. The CCO is entitled to an Administrative Procedures Act ("APA") hearing if no settlement is reached between the parties. Additional Comments: 1. Knowing violation of a removal order subjects the individual to criminal penalties composed of a fine of up to $1,000,000, up to 5 years in prison, or both. § 1818(j).

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		C. Such violation, practice, or breach— (i) involves personal dishonesty on the part of such party; **or** (ii) demonstrates willful or continuing disregard by such party for the safety or soundness of such insured depository institution or business institution. the appropriate Federal banking agency for the depository institution may serve upon such party a written notice of the agency's intention to remove such party from office or to prohibit any further participation by such party, in any manner, in the conduct of the affairs of any insured depository institution.	
12 U.S.C. § 1818(g)	FDIC, OCC, Federal Reserve, and NCUA	Suspension: Whenever any institution-affiliated party is the subject of any information, indictment, or complaint, involving the commission of or participation in— (i) a crime involving dishonesty or breach of trust which is punishable by imprisonment for a term exceeding one year under State or Federal law, or (ii) a criminal violation of § 1956, 1957, or 1960 of Title 18 or § 5322 or 5324 of Title 31, the appropriate Federal banking agency may, if continued service or participation by such party	A CCO may be suspended for the time during which he or she is the subject of a formal investigation involving a felony crime of dishonesty or breach of trust or a criminal violation of the Bank Secrecy Act. Additional Comments: 1. A suspension or prohibition under § 1818(g) shall remain in effect until the information, indictment, or complaint referred to in such subparagraph is finally disposed of or until terminated by the agency.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		posed, poses, or may pose a threat to the interests of the depositors of, or threatened, threatens, or may threaten to impair public confidence in, any relevant depository institution, by written notice served upon such party, suspend such party from office or prohibit such party from further participation in any manner in the conduct of the affairs of any depository institution.	2. In 1976, a federal court held that due process requires that the individual be given an immediate post-suspension hearing. *Feinberg v. Fed. Deposit Ins. Corp.*, 420 F. Supp. 109 (D.D.C. 1976).
12 U.S.C. § 1818(i)	FDIC, OCC, Federal Reserve, and NCUA	Civil Money Penalty: Applicable to any institution or any IAP. 3 tiers: First Tier: **Strict liability** for violation of any law or regulation, final or temporary order, or any written condition or agreement with a Federal banking agency. CMP is up to **$7,500** per day during which such violation continues. Second Tier: any institution-affiliated party who (i)(I) commits any violation described [in the first tier]; (II) recklessly engages in an unsafe or unsound practice in conducting the affairs of such insured depository institution; **or** (III) breaches any fiduciary duty; (ii) which violation, practice, or breach—	A CCO may be subject to monetary penalties (which cannot be reimbursed by the financial institution) for violating **any** law, regulation, or order related to a Federal banking agency. The amount of potential penalty increases based upon the CCO's mental state or intention in bringing about or failing to prevent a violation. The first tier penalty is available for any violation, regardless of the CCO's intent or lack thereof. An Administrative Procedures Act ("APA") hearing is required if no settlement is reached between the parties, regardless of which tier of violation is implicated. Additional Comments: 1. In 1998, all of the Federal financial regulators adopted a revised interagency statement of policy regarding when they assess the civil money

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(I) is part of a pattern of misconduct; (II) causes or is likely to cause more than a minimal loss to such depository institution; **or** (III) results in pecuniary gain or other benefit to such party, shall pay a CMP of up to **$37,500** per day during which such violation, practice, or breach continues. <u>Third Tier</u>: any IAP who— (i) **knowingly—** (I) commits any violation described in any clause [in the first tier]; (II) engages in any unsafe or unsound practice in conducting the affairs of such depository institution; or (III) breaches any fiduciary duty; **and** (ii) **knowingly or recklessly** causes a substantial loss to such depository institution or a substantial pecuniary gain or other benefit to such party by reason of such violation, practice, or breach… is liable for a CMP of up to **$1,425,000** per day during which such violation, practice, or breach continues.	penalties. In determining whether to assess a penalty and, if so, the amount, the agencies are to evaluate statutory factors including: the size of the financial resources, good faith, gravity of violation, history of violations and other matters that justice requires. Those 13 criteria are: a. Evidence that the violation or practice or breach of fiduciary duty was intentional or was committed with a disregard of the law or with a disregard of the consequences to the institution; b. The duration and frequency of the violations, practices, or breaches of fiduciary duty; c. The continuation of the violations, practices, or breach of fiduciary duty after the respondent was notified or, alternatively, its immediate cessation and correction; d. The failure to cooperate with the agency in effecting early resolution of the problem; e. Evidence of concealment of the violation, practice, or breach of fiduciary duty or, alternatively, voluntary disclosure of the violation, practice or breach of fiduciary duty; f. Any threat of loss, actual loss, or other harm to the institution, including harm to the

Citation	Regulator	Statutory Text	Potential Impact on CCOs
			public confidence in the institution, and the degree of such harm; g. Evidence that a participant or his or her associates received financial gain or other benefit as a result of the violation, practice, or breach of fiduciary duty; h. Evidence of any restitution paid by a participant of losses resulting from the violation, practice, or breach of fiduciary duty; i. History of prior violation, practice, or breach of fiduciary duty, particularly where they are similar to the actions under consideration; j. Previous criticism of the institution or individual for similar actions; k. Presence or absence of a compliance program and its effectiveness; l. Tendency to engage in violations of law, unsafe or unsound banking practices, or breaches of fiduciary duty; and m. The existence of agreements, commitments orders, or conditions imposed in writing intended to prevent the violation, practice, or breach of fiduciary duty. 2. New Matrices:

Citation	Regulator	Statutory Text	Potential Impact on CCOs
			On Feb. 26, 2016 the OCC released new matrices with new factors and weight, one for institutions and the other for individuals. The release can be accessed at http://www.occ.gov/news-issuances/bulletins/2016/ bulletin-2016-5a.pdf. 3. Hearing: The person against whom any penalty is assessed shall be afforded the right to have the matter litigated in an APA hearing before an independent Administrative Law Judge ("ALJ"). The ALJ's recommendations are provided to the agency head for a final decision. That decision can be appealed to the U.S. Court of Appeals.
12 U.S.C. § 1818(w)	FDIC	After receipt of written notification from the Attorney General by the FDIC of a conviction of violations related to money laundering, BSA/AML recordkeeping and reporting violations, or structuring, the FDIC shall issue to the insured depository institution a notice of its intention to terminate the insured status of the insured depository institution and schedule a hearing on the matter, which shall be conducted in all respects as a termination hearing.	In determining whether to terminate insurance the FDIC shall take into account the following factors: 1. The extent to which directors or senior executive officers of the depository institution knew of, or were involved in, the commission of the money laundering offense of which the institution was found guilty. 2. The extent to which the offense occurred despite the existence of policies and procedures within the depository institution

Citation	Regulator	Statutory Text	Potential Impact on CCOs
			which were designed to prevent the occurrence of any such offense. 3. The extent to which the depository institution has fully cooperated with law enforcement authorities with respect to the investigation of the money laundering offense of which the institution was found guilty. 4. The extent to which the depository institution has implemented additional internal controls (since the commission of the offense of which the depository institution was found guilty) to prevent the occurrence of any other money laundering offense. 5. The extent to which the interest of the local community in having adequate deposit and credit services available would be threatened by the termination of insurance. 12 U.S.C. § 1818(w)(2).
12 U.S.C. § 1829(a)	FDIC, OCC, Federal Reserve, and NCUA	Prohibition: Except with the prior written consent of the Corporation— (A) any person who has been convicted of any criminal offense involving dishonesty or a breach of trust or money laundering, or has agreed to enter into	A CCO who is convicted of a criminal offense involving 1) dishonesty, 2) a breach of trust, or 3) money laundering will be summarily dismissed and prohibited from owning or participating in the affairs of an insured financial institution.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		a pretrial diversion or similar program in connection with a prosecution for such offense, may not— (i) become, or continue as, an institution-affiliated party with respect to any insured depository institution; (ii) own or control, directly or indirectly, any insured depository institution; or (iii) otherwise participate, directly or indirectly, in the conduct of the affairs of any insured depository institution; and (B) any insured depository institution may not permit any person referred to in subparagraph (A) to engage in any conduct or continue any relationship prohibited under such subparagraph. Whoever knowingly violates the above shall be fined not more than $1,000,000 for each day such prohibition is violated or imprisoned for not more than 5 years, or both.	This requires the prosecution of the CCO in a court but, once convicted, the agencies may impose the prohibition without further hearings.
12 U.S.C. § 1831o(f)(2)(F)(ii)	FDIC, OCC, Federal Reserve	The appropriate Federal banking agency shall carry out this section by taking one or more of the following actions: (F)(ii) Requiring the institution to **dismiss from office any** director or **senior executive officer** who had held office for more than 180 days immediately	"Executive officer" means any person who "participates or has authority to participate (other than as a director) in major policymaking functions of the company or bank." 12 U.S.C. § 375b. Thus, an undercapitalized institution may be required to dismiss the CCO.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		before the institution became undercapitalized. Dismissal under this clause shall not be construed to be a removal under § 1818e.	No hearing is required for the dismissal of the CCO to proceed; however it may be possible for the institution to argue the determination of being undercapitalized as arbitrary and capricious.
12 U.S.C. § 1833a	FDIC, OCC, Federal Reserve	(a) In general Whoever violates any provision of the 14 criminal statutes shall be subject to a civil penalty brought by the Attorney General in an amount assessed by the court in a civil action under this section. (b) Maximum amount of penalty (1) Generally The amount of the civil penalty shall not exceed $1,000,000. (2) Special rule for continuing violations In the case of a continuing violation, the amount of the civil penalty may exceed the amount described in paragraph (1) but may not exceed the lesser of $1,000,000 per day or $5,000,000. (3) Special rule for violations creating gain or loss (A) If any person derives pecuniary gain from the violation, or if the violation results in pecuniary loss to a person other than the	A CCO may be subject to monetary penalties (which cannot be reimbursed by the financial institution) far in excess of those noted above if they are found to have violated 14 specific criminal offenses. The 14 predicate offenses are: 1. 18 U.S.C. § 215 (receipt of commissions or gifts for procuring loans); 2. 18 U.S.C. § 656 (theft, embezzlement, or misapplication by bank officer or employee); 3. 18 U.S.C. § 657 (embezzling, abstracting, purloining, or willfully misapplying property of lending, credit, and insurance institutions); 4. 18 U.S.C. § 1005 (false bank entries, reports, and transactions); 5. 18 U.S.C. § 1006 (federal credit institution entries, reports, and transactions); 6. 18 U.S.C. § 1007 (Federal Deposit Insurance Corporation transactions);

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		violator, the amount of the civil penalty may exceed the amounts described in paragraphs (1) and (2) but may not exceed the amount of such gain or loss.	7. 18 U.S.C. § 1014 (loan and credit applications generally; renewals and discounts; crop insurance), 8. 18 U.S.C. § 1344 (bank fraud); 9. 18 U.S.C. § 287 (false claims) ; 10. 18 U.S.C. § 1001 (false statements), 11. 18 U.S.C. § 1032 (concealment of assets from conservator, receiver, or liquidating agent); 12. 18 U.S.C. § 1341 (mail fraud); 13. 18 U.S.C. § 1343 (wire fraud); 15 U.S.C. § 645(a) (fraud in connection with Small Business Administration transactions). **However**, because this is a **civil action** to recover a civil penalty under those criminal offenses, the Attorney General must only establish the right to recovery **by a preponderance of the evidence**, and need not prove guilt using the criminal standard (beyond a reasonable doubt). 12 U.S.C. § 1833a(f). No further hearing is required as this is a civil action in a U.S. district court. <u>Additional Comments:</u> 1. For nine of the predicate offenses, which deal specifically with banks or other financial

Citation	Regulator	Statutory Text	Potential Impact on CCOs
			institutions in one way or another (such as bank fraud, 18 U.S.C. § 1344), the government does not have to prove any additional element beyond violation of the predicate offense itself. For the five others, which are the more general offenses such as false claims on the U.S. government (18 U.S.C. § 287), false statements within federal jurisdiction (18 U.S.C. § 1001), fraud on federal receivers and conservators (18 U.S.C. § 1032), and mail and wire fraud (18 U.S.C. §§ 1341, 1343), the government must additionally prove that the violation of the underlying criminal statute was one "affecting a federally insured financial institution" (such as an FDIC-insured bank). 2. In *United States v. Menendez*, No. 11 Civ. 06313 (C.D. Cal.), the court set forth the following eight factors for determining the civil penalty amount under FIRREA: 1. The good or bad faith of the defendant and the degree of his/her scienter; 2. The injury to the public, and whether the defendant's conduct created substantial loss or the risk of substantial loss to other persons; 3. The egregiousness of the violation;

Citation	Regulator	Statutory Text	Potential Impact on CCOs
			4. The isolated or repeated nature of the violation; 5. The defendant's financial condition and ability to pay; 6. The criminal fine that could be levied for this conduct; 7. The amount the defendant sought to profit through his fraud; and 8. The penalty range available under FIRREA.
12 U.S.C. § 1955	Secretary of the Treasury	(a) For **each willful or grossly negligent** violation of any regulation under the general recordkeeping requirement for US financial institutions, the Secretary may assess upon any **person** to which the regulation applies, or any person willfully causing a violation of the regulation, and, if such person is a partnership, corporation, or other entity, upon any **partner, director, officer, or employee thereof** who **willfully or through gross negligence participates in the violation**, a civil penalty not exceeding $10,000 per violation. (b) In the event of the failure of any person to pay any penalty assessed under this section, a civil action for the recovery thereof may, in the discretion of the Secretary, be brought in the name of the United States.	A CCO may be subject to monetary penalties (which cannot be reimbursed by the financial institution) for any willful or grossly negligent violation of any regulation under the general recordkeeping requirement for US financial institutions. The CMP may be up to $10,000 per violation.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
12 U.S.C. § 1956	DOJ	**Whoever willfully violates** any regulation under the general recordkeeping requirement for U.S. financial institutions **shall be fined not more than $1,000, imprisoned not more than one year, or both.**	A CCO may be subject to criminal penalties for any willful violation of any regulation under the general recordkeeping requirement for US financial institutions. The CCO may be fined up to $1,000, imprisoned for up to a year, or both.
12 U.S.C. § 1957	DOJ	**Whoever willfully violates, or willfully causes a violation** of any regulation under the general recordkeeping requirement for US financial institutions, **where the violation is committed in furtherance of the commission of any violation of Federal law punishable by imprisonment for more than one year, shall be fined not more than $10,000 or imprisoned not more than five years, or both**.	Where the violation is committed in furtherance of the commission of any Federal felony, the potential fine increases to $10,000 and the potential time of imprisonment increases to 5 years.
12 U.S.C. § 3108(b)(6)	Comptroller of Currency, Board of Governors of the Federal Reserve System, and FDIC	Any person who willfully fails or refuses to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records in accordance with any subpoena under this subsection shall be fined under Title 18, imprisoned not more than 1 year, or both. Each day during which any such failure or refusal continues shall be treated as a separate offense.	Any person who willfully refuses or fails to answer a lawful inquiry or subpoena shall be fined under Title 18, imprisoned up to a year, or both. Each day during the refusal or failure to answer shall be treated as a separate offense.
12 U.S.C. § 3110(a)(	Comptroller of Currency, Board of Governors	**(a) Civil money penalty** **(1) In general**	Any bank, or person, who participates in the violation of this statute may be fined up to $25,000 for each day during which such violation

Citation	Regulator	Statutory Text	Potential Impact on CCOs
1), (a)(5), (c)	of the Federal Reserve System, and FDIC	Any foreign bank, and any office or subsidiary of a foreign bank, that violates, and any individual who participates in a violation of, any provision of this chapter, or any regulation prescribed or order issued under this chapter, shall forfeit and pay a civil penalty of not more than $25,000 for each day during which such violation continues. **(5) "Violate" defined** For purposes of this section, the term "violate" includes taking any action (alone or with others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation. **(c) Penalty for failure to make reports** **(1) First tier** Any foreign bank, or any office or subsidiary of a foreign bank, that— **(A)** maintains procedures reasonably adapted to avoid any inadvertent error and, unintentionally and as a result of such error— **(i)** fails to make, submit, or publish such reports or information as may be required under this chapter or under regulations prescribed by the Board or the Comptroller of the Currency under this chapter, within the period of time specified by the agency; or	continues. Violation is defined very broadly to include aiding or abetting a violation. The Statute provides three tiers of violations and penalties for violations for any foreign bank found in violation of the statute.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(ii) submits or publishes any false or misleading report or information; or **(B)** inadvertently transmits or publishes any report that is minimally late, shall be subject to a penalty of not more than $2,000 for each day during which such failure continues or such false or misleading information is not corrected. The foreign bank, or the office or subsidiary of a foreign bank, shall have the burden of proving that an error was inadvertent and that a report was inadvertently transmitted or published late. **(2) Second tier** Any foreign bank, or any office or subsidiary of a foreign bank, that-- **(A)** fails to make, submit, or publish such reports or information as may be required under this chapter or under regulations prescribed by the Board or the Comptroller of the Currency pursuant to this chapter, within the time period specified by such agency; or **(B)** submits or publishes any false or misleading report or information, in a manner not described in paragraph (1) shall be subject to a penalty of not more than $20,000 for each day during which such failure continues or such false or misleading information is not corrected.	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(3) Third tier Notwithstanding paragraph (2), if any company knowingly or with reckless disregard for the accuracy of any information or report described in paragraph (2) submits or publishes any false or misleading report or information, the Board or the Comptroller of the Currency may, in the Board's or Comptroller's discretion, assess a penalty of not more than $1,000,000 or 1 percent of total assets of such foreign bank, or such office or subsidiary of a foreign bank, whichever is less, per day for each day during which such failure continues or such false or misleading information is not corrected. **(4) Assessment of penalties** Any penalty imposed under paragraph (1), (2), or (3) shall be assessed and collected by the Board or the Comptroller of the Currency in the manner provided in subsection (a)(2) of this section (for penalties imposed under such subsection) and any such assessment (including the determination of the amount of the penalty) shall be subject to the provisions of such subsection. **(5) Hearing procedure** Section 1818(h) of this title shall apply to any proceeding under this subsection.	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
12 U.S.C. § 3111	Comptroller of Currency, Board of Governors of the Federal Reserve System, and FDIC	Whoever, with the intent to deceive, to gain financially, or to cause financial gain or loss to any person, knowingly violates any provision of this chapter or any regulation or order issued by the appropriate Federal banking agency under this chapter shall be imprisoned not more than 5 years or fined not more than $1,000,000 for each day during which a violation continues, or both.	Any person who knowingly violates any provision in this chapter or any regulation issued by the appropriate Federal banking agency shall be imprisoned not more than 5 years or fined not more than $1,000,000 for each day during which a violation continues, or both.
12 U.S.C. § 5536(a)(3)	CFPB	**a) In general** It shall be unlawful for-- **(3)** any person to knowingly or recklessly provide substantial assistance to a covered person or service provider in violation of the provisions of section 5531 of this title, or any rule or order issued thereunder, and notwithstanding any provision of this title, the provider of such substantial assistance shall be deemed to be in violation of that section to the same extent as the person to whom such assistance is provided.	It is unlawful for any person to knowingly or recklessly provide assistance to anyone in violation to section 5531 of this title.
12 U.S.C. § 5565(c)	CFPB	**(c) Civil money penalty in court and administrative actions** **(1) In general** Any person that violates, through any act or omission, any provision of Federal consumer financial law shall	The statute provides civil penalty amounts in three tiers for any person in violation, through any act or omission, of any provision of Federal consumer financial law. Further, the statute provides mitigating factors:

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		forfeit and pay a civil penalty pursuant to this subsection. **(2) Penalty amounts** **(A) First tier** For any violation of a law, rule, or final order or condition imposed in writing by the Bureau, a civil penalty may not exceed $5,000 for each day during which such violation or failure to pay continues. **(B) Second tier** Notwithstanding paragraph (A), for any person that recklessly engages in a violation of a Federal consumer financial law, a civil penalty may not exceed $25,000 for each day during which such violation continues. **(C) Third tier** Notwithstanding subparagraphs (A) and (B), for any person that knowingly violates a Federal consumer financial law, a civil penalty may not exceed $1,000,000 for each day during which such violation continues. **(3) Mitigating factors** In determining the amount of any penalty assessed under paragraph (2), the Bureau or the court shall take	(**A**) the size of financial resources and good faith of the person charged; **(B)** the gravity of the violation or failure to pay; **(C)** the severity of the risks to or losses of the consumer, which may take into account the number of products or services sold or provided; **(D)** the history of previous violations; and **(E)** such other matters as justice may require.

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		into account the appropriateness of the penalty with respect to-- **(A)** the size of financial resources and good faith of the person charged; **(B)** the gravity of the violation or failure to pay; **(C)** the severity of the risks to or losses of the consumer, which may take into account the number of products or services sold or provided; **(D)** the history of previous violations; and **(E)** such other matters as justice may require. **(4) Authority to modify or remit penalty** The Bureau may compromise, modify, or remit any penalty which may be assessed or had already been assessed under paragraph (2). The amount of such penalty, when finally determined, shall be exclusive of any sums owed by the person to the United States in connection with the costs of the proceeding, and may be deducted from any sums owing by the United States to the person charged. **(5) Notice and hearing** No civil penalty may be assessed under this subsection with respect to a violation of any Federal consumer financial law, unless--	

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		(A) the Bureau gives notice and an opportunity for a hearing to the person accused of the violation; or **(B)** the appropriate court has ordered such assessment and entered judgment in favor of the Bureau.	
12 U.S.C. § 5566	CFPB	If the Bureau obtains evidence that any person, domestic or foreign, has engaged in conduct that may constitute a violation of Federal criminal law, the Bureau shall transmit such evidence to the Attorney General of the United States, who may institute criminal proceedings under appropriate law. Nothing in this section affects any other authority of the Bureau to disclose information.	The CFPB must give any evidence of a violation to the Attorney General of the United States.
Commerce & Trade			
15 U.S.C. § 2	DOJ	Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.	A CCO may be held personally liable if the company he or she works for violates this statute. *See Tillamook Cheese & Dairy Ass'n v. Tillamook County Creamery Ass'n*, 358 F.2d 115, 118 (stating that "individuals whom a corporation acts and who shape its intentions can be held liable on a charge of attempted monopolization").
15 U.S.C. § 24	DOJ	Whenever a corporation shall violate any of the penal provisions of the antitrust laws, **such violation shall**	If a corporation has violated any antitrust laws and the CCO has authorized, ordered, or done any acts

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		be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court.	that constitute part of that violation, the CCO will be found guilty of a misdemeanor. *See United States v. North American Van Lines, Inc.*, 202 F. Supp. 639, 644 (D.C. Cir. 1962) ("The accepted rule is that officers, directors and agents of a corporation may be held criminally liable for their acts although performed in their official capacity but where they have neither actively participated in nor directed nor authorized a violation of law by their corporation they are not liable.").
15 U.S.C. § 50	FTC	Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry or to produce any documentary evidence, if in his power to do so, in obedience to an order of a district court of the United States directing compliance with the subpoena or lawful requirement of the Commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment. Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this subchapter, or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by	A CCO may be held liable for (1) refusing to attend and testify to any lawful inquiry or to produce any documentary evidence in his or her power, (2) wilfully making any false entry or statement of fact in any account, record, or memorandum kept by the corporation, and/or (3) making public any information obtained by the FTC without its authority.

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		any person, partnership, or corporation subject to this subchapter, or who shall willfully neglect or fail to make, or to cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such person, partnership, or corporation, or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such person, partnership, or corporation, or who shall willfully refuse to submit to the Commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such person, partnership, or corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than $1,000 nor more than $5,000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment. If any persons, partnership, or corporation required by this subchapter to file any annual or special report shall fail so to do within the time fixed by the Commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the	

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		sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the case of a corporation or partnership in the district where the corporation or partnership has its principal office or in any district in which it shall do business, and in the case of any person in the district where such person resides or has his principal place of business. It shall be the duty of the various United States attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of the forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States. Any officer or employee of the Commission who shall make public any information obtained by the Commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.	
15 U.S.C. § 77x	SEC, DOJ	Any person who willfully violates any of the provisions of this subchapter, or the rules and	A CCO who willfully violates any securities law or regulation may be held criminally liable. *See*

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		regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $10,000 or imprisoned not more than five years, or both.	*United States v. Szur*, No. S5 97 CR 108 (JGK), 1998 WL 132942 (S.D.N.Y. Mar. 20, 1998) (explaining that a compliance officer was charged in a twenty-eight count indictment under 15 U.S.C § 77x and other securities laws for conspiring to commit securities fraud).
15 U.S.C. § 77d-1(c)	SEC	**(c) Liability for material misstatements and omissions** **(1) Actions authorized** **(A) In general** Subject to paragraph (2), a person who purchases a security in a transaction exempted by the provisions of section 77d(6) of this title may bring an action against an issuer described in paragraph (2), either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if such person no longer owns the security. **(B) Liability**	Any person who purchases a security may bring an action against an issuer. The term issuer includes any person who is a director and principal executive officer or officer. Thus, a person could potentially bring an action against a CCO because of the CCO's role as an officer.

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		An action brought under this paragraph shall be subject to the provisions of section 77*l* (b) of this title and section 77m of this title, as if the liability were created under section 77*l* (a)(2) of this title. **(2) Applicability** An issuer shall be liable in an action under paragraph (1), if the issuer-- **(A)** by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by any means of any written or oral communication, in the offering or sale of a security in a transaction exempted by the provisions of section 77d(6) of this title, makes an untrue statement of a material fact or omits to state a material fact required to be stated or necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading, provided that the purchaser did not know of such untruth or omission; and **(B)** does not sustain the burden of proof that such issuer did not know, and in the exercise of reasonable care could not have known, of such untruth or omission. **(3) Definition**	

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		As used in this subsection, the term "issuer" includes any person who is a director or partner of the issuer, and the principal executive officer or officers, principal financial officer, and controller or principal accounting officer of the issuer (and any person occupying a similar status or performing a similar function) that offers or sells a security in a transaction exempted by the provisions of section 77d(6) of this title and any person who offers or sells the security in such offering.	
15 U.S.C. § 77h-1(a)	SEC	Authority of the Commission. If the Commission finds, after notice and opportunity for hearing, that any person is violating, has violated, or is about to violate any provision of this title [15 USCS §§ 77a et seq.], or any rule or regulation thereunder, the Commission may publish its findings and enter an order requiring such person, and any other person that is, was, or would be a cause of the violation, due to an act or omission the person knew or should have known would contribute to such violation, to cease and desist from committing or causing such violation and any future violation of the same provision, rule, or regulation. Such order may, in addition to requiring a person to cease and desist from committing or causing a violation, require such person to comply, or to take steps to effect compliance, with such provision, rule, or regulation, upon such terms and	The SEC may enter a cease and desist order against a CCO if it finds that the CCO has violated or is violating and securities rule or regulation.

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		conditions and within such time as the Commission may specify in such order. Any such order may, as the Commission deems appropriate, require future compliance or steps to effect future compliance, either permanently or for such period of time as the Commission may specify, with such provision, rule, or regulation with respect to any security, any issuer, or any other person.	
15 U.S.C. § 77k(a)	SEC	Persons possessing cause of action; persons liable. In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue— (1) every person who signed the registration statement; (2) every person who was a director of (or person performing similar functions) or partner in, the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;	Every person who acquires a security burdened by an untrue statement or omission of material fact may sue every director and officer of the offeror. This statute applies to misleading statements made by one "whose profession gives authority to statements made by him." *In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. 1424, 1453 (D. Ariz. 1992). An attorney who provides a legal opinion used in connection with an SEC registration statement is an expert within this statute and therefore can be held liable. *Id.* Thus, a CCO may be held liable for any untrue statements or any omissions of material facts in connection with a registration statement.

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		(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner; (4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement, in such registration statement, report, or valuation, which purports to have been prepared or certified by him; (5) every underwriter with respect to such security. If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing	

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		of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.	
15 U.S.C. § 77o(a)	SEC	Controlling persons. Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under section 11 or 12 [15 USCS § 77k or 77l], shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.	A CCO may be held liable if the CCO is a "controlling person" in that he or she has "actual power or influence" over a controlled person. *Durham v. Kelly*, 810 F.2d 1500, 1503-04 (9th Cir. 1987); *see also Wiley v. Hughes Capital Corp.*, 746 F. Supp. 1264, 1281-82 (D.N.J. 1990) (holding a controlling person has "direct or indirect power over management or policies of a person and is a "culpable participant" in the fraud perpetrated by the controlled person); *Babst v. Morgan Keegan & Co.*, 687 F. Supp. 255, 262 (E.D. La. 1988) ("[O]ne who has the power to direct the management and policies of a person held liable under the securities laws may also be held liable as a controlling person.").
15 U.S.C. § 77t(b)	SEC	Action for injunction or criminal prosecution in district court. Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title [15 USCS §§ 77a et seq.], or of any rule or regulation prescribed under authority thereof, the Commission may, in its discretion, bring an action in any district	The SEC may bring a case against a CCO if it finds that the CCO is engaged in or about to engage in acts that violate securities laws or regulations.

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		court of the United States, or United States court of any Territory, to enjoin such acts or practices, and upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this title [15 USCS §§ 77a et seq.]. Any such criminal proceeding may be brought either in the district wherein the transmittal of the prospectus or security complained of begins, or in the district wherein such prospectus or security is received.	
15 U.S.C. § 77x	SEC	Any person who wilfully violates any of the provisions of this title [15 USCS §§ 77a et seq.], or the rules and regulations promulgated by the Commission under authority thereof, or any person who wilfully, in a registration statement filed under this title [15 USCS §§ 77a et seq.], makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $ 10,000 or imprisoned not more than five years, or both.	A CCO who wilfully violates any securities law or regulation may face criminal liability.

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15 U.S.C. § 78c-3(j)	SEC	Designation of chief compliance officer. (1) In general. Each registered clearing agency shall designate an individual to serve as a chief compliance officer. (2) Duties. The chief compliance officer shall— (A) report directly to the board or to the senior officer of the clearing agency; (B) in consultation with its board, a body performing a function similar thereto, or the senior officer of the registered clearing agency, resolve any conflicts of interest that may arise; (C) be responsible for administering each policy and procedure that is required to be established pursuant to this section; (D) ensure compliance with this title [15 USCS §§ 78a et seq.] (including regulations issued under this title [15 USCS §§ 78a et seq.]) relating to agreements, contracts, or transactions, including each rule prescribed by the Commission under this section; (E) establish procedures for the remediation of noncompliance issues identified by the compliance officer through any— (i) compliance office review;	A CCO may be held liable for failing to supervise.

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		(ii) look-back; (iii) internal or external audit finding; (iv) self-reported error; or (v) validated complaint; and (F) establish and follow appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.	
15 U.S.C. § 78j	SEC	It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange— **(a)(1)** To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security other than a government security, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. **(2)** Paragraph (1) of this subsection shall not apply to security futures products. **(b)** To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered,	Any person, including a CCO, who employs a manipulative device or makes a material misstatement , or omission, on which a purchaser or seller of securities relies may be liable for securities fraud as a primary violator. *In re Charter Communications, Inc.*, 443 F.3d 987 (8th Cir. 2006); *see also SEC v. Bauer*, 723 F.3d 758 (charging a CCO under 10b-5).

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		or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. **(c)(1)** To effect, accept, or facilitate a transaction involving the loan or borrowing of securities in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. **(2)** Nothing in paragraph (1) may be construed to limit the authority of the appropriate Federal banking agency (as defined in section 1813(q) of Title 12), the National Credit Union Administration, or any other Federal department or agency having a responsibility under Federal law to prescribe rules or regulations restricting transactions involving the loan or borrowing of securities in order to protect the safety and soundness of a financial institution or to protect the financial system from systemic risk. Rules promulgated under subsection (b) of this section that prohibit fraud, manipulation, or insider trading (but not rules imposing or specifying reporting or recordkeeping requirements, procedures,	

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		or standards as prophylactic measures against fraud, manipulation, or insider trading), and judicial precedents decided under subsection (b) of this section and rules promulgated thereunder that prohibit fraud, manipulation, or insider trading, shall apply to security-based swap agreements to the same extent as they apply to securities. Judicial precedents decided under section 77q(a) of this title and sections 78i, 78*o*, 78p, 78t, and 78u-1of this title, and judicial precedents decided under applicable rules promulgated under such sections, shall apply to security-based swap agreements to the same extent as they apply to securities.	
15 U.S.C. §§ 78t(a)-(c), and (e)	SEC	**(a) Joint and several liability; good faith defense** Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable (including to the Commission in any action brought under paragraph (1) or (3) of section 78u(d) of this title), unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.	A CCO may be held liable as a controlling person if any person under his or her control violates a securities law or regulation. "Controlling" means "possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person." *Poptech, L.P. v. Stewardship Credit Arbitrage Fund, LLC*, 792 F. Supp. 2d 328 (D. Conn. 2011). However, officers are not liable under this statute absent an underlying securities violation. *In re Dura Pharmaceuticals, Inc.*, 452 F. Supp. 2d 1005 (S.D. Cal. 2006).

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		(b) Unlawful activity through or by means of any other person It shall be unlawful for any person, directly or indirectly, to do any act or thing which it would be unlawful for such person to do under the provisions of this chapter or any rule or regulation thereunder through or by means of any other person. **(c) Hindering, delaying, or obstructing the making or filing of any document, report, or information** It shall be unlawful for any director or officer of, or any owner of any securities issued by, any issuer required to file any document, report, or information under this chapter or any rule or regulation thereunder without just cause to hinder, delay, or obstruct the making or filing of any such document, report, or information…. **(e) Prosecution of persons who aid and abet violations** For purposes of any action brought by the Commission under paragraph (1) or (3) of section 78u(d) of this title, any person that knowingly or recklessly provides substantial assistance to another person in violation of a provision of this chapter, or of any rule or regulation issued under this chapter, shall be deemed to be in violation of such provision	

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		to the same extent as the person to whom such assistance is provided. **(f) Limitation on Commission authority** The authority of the Commission under this section with respect to security-based swap agreements shall be subject to the restrictions and limitations of section 78c-1(b) of this title.	
15 U.S.C. § 78u(d)(2)-(3)	SEC	**(2) Authority of court to prohibit persons from serving as officers and directors** In any proceeding under paragraph (1) of this subsection, the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who violated section 78j(b) of this title or the rules or regulations thereunder from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 78*l* of this title or that is required to file reports pursuant to section 78*o*(d) of this title if the person's conduct demonstrates unfitness to serve as an officer or director of any such issuer. **(3) Money penalties in civil actions** **(A) Authority of Commission** Whenever it shall appear to the Commission that any person has violated any provision of this chapter, the	If the SEC finds that a CCO violates the antifraud provisions of the securities laws, it can impose a fine on the CCO *and/or* enjoin, temporarily or permanently, that CCO from serving as an officer or director of any public company. *See SEC v. Patel*, 61 F.3d 137, 141 (2d Cir. 1995) (determining that a lifetime injunction enjoining a vice president of a pharmaceutical company from serving as an officer or director of any public company was not warranted after considering the following six factors: "(1) the 'egregiousness' of the underlying securities law violation; (2) the defendant's 'repeat offender' status; (3) the defendant's 'role' or position when he engaged in the fraud; (4) the defendant's degree of scienter; (5) the defendant's economic stake in the violation; and (6) the likelihood that misconduct will recur").

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		rules or regulations thereunder, or a cease-and-desist order entered by the Commission pursuant to section 78u-3 of this title, other than by committing a violation subject to a penalty pursuant to section 78u-1 of this title, the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation. **(B) Amount of penalty** **(i) First tier** The amount of the penalty shall be determined by the court in light of the facts and circumstances. For each violation, the amount of the penalty shall not exceed the greater of (I) $5,000 for a natural person or $50,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation. **(ii) Second tier** Notwithstanding clause (i), the amount of penalty for each such violation shall not exceed the greater of (I) $50,000 for a natural person or $250,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation, if the violation described in subparagraph (A) involved	

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		fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement. **(iii) Third tier** Notwithstanding clauses (i) and (ii), the amount of penalty for each such violation shall not exceed the greater of (I) $100,000 for a natural person or $500,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation, if— **(aa)** the violation described in subparagraph (A) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and **(bb)** such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.	
15 U.S.C. §§ 78u-1(a)(3)-(b)	SEC	**(a)(3) Amount of penalty for controlling person** The amount of the penalty which may be imposed on any person who, at the time of the violation, directly or indirectly controlled the person who committed such violation, shall be determined by the court in light of the facts and circumstances, but shall not exceed the greater of $1,000,000, or three times the amount of the profit gained or loss avoided as a result of such controlled person's violation. If such controlled person's violation was a violation by	A CCO may be liable for the actions of those he or she controls if (1) the CCO recklessly disregarded the fact that the controlled person was likely to engage in the acts and failed to take appropriate steps to prevent the act or (2) if the CCO knowingly or recklessly failed to establish, maintain, or enforce any policy or procedure required under 78o(f). *See* 15 U.S.C. § 78o(f) (establishing that the SEC may require any member of a national securities exchange or any

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		communication, the profit gained or loss avoided as a result of the violation shall, for purposes of this paragraph only, be deemed to be limited to the profit gained or loss avoided by the person or persons to whom the controlled person directed such communication. **(b) Limitations on liability** **(1) Liability of controlling persons** No controlling person shall be subject to a penalty under subsection (a)(1)(B) of this section unless the Commission establishes that — **(A)** such controlling person knew or recklessly disregarded the fact that such controlled person was likely to engage in the act or acts constituting the violation and failed to take appropriate steps to prevent such act or acts before they occurred; or **(B)** such controlling person knowingly or recklessly failed to establish, maintain, or enforce any policy or procedure required under section 78*o*(f) of this title or section 80b-4a of this title and such failure substantially contributed to or permitted the occurrence of the act or acts constituting the violation.	person associated with any such member to comply with the securities laws and regulations).
15 U.S.C. § 78u-2	SEC	**(a) Commission authority to assess money penalties.**	A CCO may be liable under this statute if he or she wilfully aided, abetted, or counseled any other person in violating the securities laws.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(1) In general. In any proceeding instituted pursuant to sections 15(b)(4), 15(b)(6), 15D, 15B, 15C, 15E, or 17A of this title [15 USCS § 78o(b)(4), (6), 78o-6, 78o-4, 78o-5, 78o-7, or 78q-1] against any person, the Commission or the appropriate regulatory agency may impose a civil penalty if it finds, on the record after notice and opportunity for hearing, that such penalty is in the public interest and that such person— (A) has willfully violated any provision of the Securities Act of 1933 [15 USCS §§ 77a et seq.], the Investment Company Act of 1940 [15 USCS §§ 80a-1 et seq.], the Investment Advisers Act of 1940 [15 USCS §§ 80b-1 et seq.], or this title [15 USCS §§ 78a et seq.], or the rules or regulations thereunder, or the rules of the Municipal Securities Rulemaking Board; (B) has willfully aided, abetted, counseled, commanded, induced, or procured such a violation by any other person; (C) has willfully made or caused to be made in any application for registration or report required to be filed with the Commission or with any other appropriate regulatory agency under this title [15 USCS §§ 78a et seq.], or in any proceeding before the Commission with	Additionally, a CCO may be liable if he or she fails to reasonably supervise another person who violates any securities statute, rule, and regulation, if that other person was subject to the CCO's supervision. A CCO will be found to have reasonably supervised another person if: (i) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and (ii) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with. 15 U.S.C. § 78o(b)(4)(E).

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		respect to registration, any statement which was, at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which is required to be stated therein; or (D) has failed reasonably to supervise, within the meaning of section 15(b)(4)(E) of this title [15 USCS § 78o(b)(4)(E)], with a view to preventing violations of the provisions of such statutes, rules and regulations, another person who commits such a violation, if such other person is subject to his supervision;[.] (2) Cease-and-desist proceedings. In any proceeding instituted under section 21C [15 USCS § 78u-3] against any person, the Commission may impose a civil penalty, if the Commission finds, on the record after notice and opportunity for hearing, that such person— (A) is violating or has violated any provision of this title [15 USCS §§ 78a et seq.], or any rule or regulation issued under this title [15 USCS §§ 78a et seq.]; or	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(B) is or was a cause of the violation of any provision of this title [15 USCS §§ 78a et seq.], or any rule or regulation issued under this title [15 USCS §§ 78a et seq.]. (b) Maximum amount of penalty. (1) First tier. The maximum amount of penalty for each act or omission described in subsection (a) shall be $ 5,000 for a natural person or $ 50,000 for any other person. (2) Second tier. Notwithstanding paragraph (1), the maximum amount of penalty for each such act or omission shall be $ 50,000 for a natural person or $ 250,000 for any other person if the act or omission described in subsection (a) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement. (3) Third tier. Notwithstanding paragraphs (1) and (2), the maximum amount of penalty for each such act or omission shall be $ 100,000 for a natural person or $ 500,000 for any other person if— (A) the act or omission described in subsection (a) involved fraud, deceit, manipulation, or	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		deliberate or reckless disregard of a regulatory requirement; and (B) such act or omission directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed the act or omission. (c) Determination of public interest. In considering under this section whether a penalty is in the public interest, the Commission or the appropriate regulatory agency may consider— (1) whether the act or omission for which such penalty is assessed involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; (2) the harm to other persons resulting either directly or indirectly from such act or omission; (3) the extent to which any person was unjustly enriched, taking into account any restitution made to persons injured by such behavior; (4) whether such person previously has been found by the Commission, another appropriate regulatory agency, or a self-regulatory organization to have violated the Federal	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		securities laws, State securities laws, or the rules of a self-regulatory organization, has been enjoined by a court of competent jurisdiction from violations of such laws or rules, or has been convicted by a court of competent jurisdiction of violations of such laws or of any felony or misdemeanor described in section 15(b)(4)(B) of this title [15 USCS § 78o(b)(4)(B)]; (5) the need to deter such person and other persons from committing such acts or omissions; and (6) such other matters as justice may require. (d) Evidence concerning ability to pay. In any proceeding in which the Commission or the appropriate regulatory agency may impose a penalty under this section, a respondent may present evidence of the respondent's ability to pay such penalty. The Commission or the appropriate regulatory agency may, in its discretion, consider such evidence in determining whether such penalty is in the public interest. Such evidence may relate to the extent of such person's ability to continue in business and the collectability of a penalty, taking into account any other claims of the United States or third parties upon	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		such person's assets and the amount of such person's assets. (e) Authority to enter an order requiring an accounting and disgorgement. In any proceeding in which the Commission or the appropriate regulatory agency may impose a penalty under this section, the Commission or the appropriate regulatory agency may enter an order requiring accounting and disgorgement, including reasonable interest. The Commission is authorized to adopt rules, regulations, and orders concerning payments to investors, rates of interest, periods of accrual, and such other matters as it deems appropriate to implement this subsection.	
15 U.S.C. § 78u-3(a)	SEC	If the Commission finds, after notice and opportunity for hearing, that any person is violating, has violated, or is about to violate any provision of this title [15 USCS §§ 78a et seq.], or any rule or regulation thereunder, the Commission may publish its findings and enter an order requiring such person, and any other person that is, was, or would be a cause of the violation, due to an act or omission the person knew or should have known would contribute to such violation, to cease and desist from committing or causing such violation and any future violation of the same provision, rule, or regulation. Such order may, in addition to requiring a person to cease and desist	If the SEC finds a CCO is violating, has violated, or is about to violate any securities law, rule, or regulation, it may enter an order requiring the CCO to cease and desist from committing or causing such violation and any future violation.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		from committing or causing a violation, require such person to comply, or to take steps to effect compliance, with such provision, rule, or regulation, upon such terms and conditions and within such time as the Commission may specify in such order. Any such order may, as the Commission deems appropriate, require future compliance or steps to effect future compliance, either permanently or for such period of time as the Commission may specify, with such provision, rule, or regulation with respect to any security, any issuer, or any other person.	
15 U.S.C. § 78u-6(h)(1)(A)	SEC	**(h) Protection of whistleblowers** **(1) Prohibition against retaliation** **(A) In general** No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower— **(i)** in providing information to the Commission in accordance with this section; **(ii)** in initiating, testifying in, or assisting in any investigation or judicial or administrative action of	If a CCO blows the whistle on corporate misconduct, this statute provides protection for that CCO. It reduces the consequences of reporting to the SEC in that it prohibits employers from discharging, demoting, suspending, threatening, or discriminating in any way against any whistleblower.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		the Commission based upon or related to such information; or **(iii)** in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.	
15 U.S.C. § 78ff	SEC	(a) Willful violations; false and misleading statements. Any person who willfully violates any provision of this title [15 USCS §§ 78a et seq.] (other than section 30A [15 USCS § 78dd-1]), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this title [15 USCS §§ 78a et seq.], or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this title [15 USCS §§ 78a et seq.] or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 15 of this title [15 USCS § 78o(d)], or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any	A CCO may be held liable if he or she (1) willfully violates any provision in the chapter or (2) willfully and knowingly makes, or causes to be made, any false or misleading statement of material fact in any document required to be filed. The CCO may be subject to a maximum civil penalty of $10,000. 15 U.S.C. § 78ff(c)(2)(A).

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		material fact, shall upon conviction be fined not more than $ 5,000,000, or imprisoned not more than 20 years, or both, except that when such person is a person other than a natural person, a fine not exceeding $ 25,000,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation. (b) Failure to file information, documents, or reports. Any issuer which fails to file information, documents, or reports required to be filed under subsection (d) of section 15 of this title [15 USCS § 78o(d)] or any rule or regulation thereunder shall forfeit to the United States the sum of $ 100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable to the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States. (c) Violations by issuers, officers, directors, stockholders, employees, or agents of issuers. (1) (A) Any issuer that violates subsection (a) or (g) of section 30A [15 USCS § 78dd-1] shall be fined not more than $ 2,000,000. (B) Any issuer that violates	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		subsection (a) or (g) of section 30A [15 USCS § 78dd-1] shall be subject to a civil penalty of not more than $ 10,000 imposed in an action brought by the Commission. (2) (A) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who willfully violates subsection (a) or (g) of section 30A of this title [15 USCS § 78dd-1] shall be fined not more than $ 100,000, or imprisoned not more than 5 years, or both. (B) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who violates subsection (a) or (g) of section 30A of this title [15 USCS § 78dd-1] shall be subject to a civil penalty of not more than $ 10,000 imposed in an action brought by the Commission. (3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of an issuer, such fine may not be paid, directly or indirectly, by such issuer.	
15 U.S.C. § 80a-35(a)	SEC	**(a) Civil actions by Commission; jurisdiction; allegations; injunctive or other relief** The Commission is authorized to bring an action in the proper district court of the United States, or in the United States court of any territory or other place subject to the jurisdiction of the United States, alleging that a person who is, or at the time of the	The SEC may bring an action against a CCO if the CCO has engaged within five years of the commencement of the action or is about to engage in any act or practice constituting a breach of fiduciary duty involving personal misconduct in respect of any registered investment company.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		alleged misconduct was, serving or acting in one or more of the following capacities has engaged within five years of the commencement of the action or is about to engage in any act or practice constituting a breach of fiduciary duty involving personal misconduct in respect of any registered investment company for which such person so serves or acts, or at the time of the alleged misconduct, so served or acted— **(1)** as officer, director, member of any advisory board, investment adviser, or depositor; or **(2)** as principal underwriter, if such registered company is an open-end company, unit investment trust, or face-amount certificate company. If such allegations are established, the court may enjoin such persons from acting in any or all such capacities either permanently or temporarily and award such injunctive or other relief against such person as may be reasonable and appropriate in the circumstances, having due regard to the protection of investors and to the effectuation of the policies declared in section 80a-1(b) of this title.	
15 U.S.C. § 80a-47	SEC	**(a) Procurement** It shall be unlawful for any person, directly or indirectly, to cause to be done any act or thing through	A CCO may be held liable if he or she knowingly or recklessly provides substantial assistance to

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		or by means of any other person which it would be unlawful for such person to do under the provisions of this subchapter or any rule, regulation, or order thereunder. **(b) Substantially assisting a violation** For purposes of any action brought by the Commission under subsection (d) or (e) of section 80a-41 of this title, any person that knowingly or recklessly provides substantial assistance to another person in violation of a provision of this subchapter, or of any rule or regulation issued under this subchapter, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided. **(c) Obstructing compliance** It shall be unlawful for any person without just cause to hinder, delay, or obstruct the making, filing, or keeping of any information, document, report, record, or account required to be made, filed, or kept under any provision of this subchapter or any rule, regulation, or order thereunder.	another person in violation of the securities laws or regulations.
15 U.S.C. § 80a-48	SEC	Any person who willfully violates any provision of this subchapter or of any rule, regulation, or order hereunder, or any person who willfully in any registration statement, application, report, account,	A CCO may be held liable if he or she wilfully violates any securities law, rule, or regulation or wilfully in any registration statement, application, report, account record, or other document filed or

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		record, or other document filed or transmitted pursuant to this subchapter or the keeping of which is required pursuant to section 80a-30(a) of this title makes any untrue statement of a material fact or omits to state any material fact necessary in order to prevent the statements made therein from being materially misleading in the light of the circumstances under which they were made, shall upon conviction be fined not more than $10,000 or imprisoned not more than five years, or both; but no person shall be convicted under this section for the violation of any rule, regulation, or order if he proves that he had no actual knowledge of such rule, regulation, or order.	transmitted to the SEC makes an untrue statement of a material fact or omits any material fact.
15 U.S.C. § 80b-3(f)	SEC	Bar or Suspension The SEC, by order, **shall censure or place limitations on the activities of any person** associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with an investment adviser, or suspend for a period not exceeding 12 months or bar any such person from being associated with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization. To do this the SEC must find, on the record after notice and opportunity for hearing, that such censure,	A CCO may be barred or suspended from associating with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization if the CCO willfully made a false or misleading statement in an application for registration or report, or violated any of the major securities acts or the rules or regulations thereunder, or willfully assisted or caused another person to do the same.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		placing of limitations, suspension, or bar is in the public interest and that such person has committed or omitted any of the following acts or omissions: 1. **willfully** made a false or misleading statement in an application for registration or report; 2. has **willfully** violated any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, the Investment Advisers Act of 1940, the Commodity Exchange Act, or the rules or regulations under any such statutes or any rule of the Municipal Securities Rulemaking Board; 3. has **willfully** aided, abetted, counseled, commanded, induced, or procured the violation by any other person of any of the above provisions or has failed reasonably to supervise, with a view to preventing violations of the provisions of such statutes, rules, and regulations, another person who commits such a violation; 4. been found by a foreign financial regulatory authority to have committed any of the violations list above or violated any foreign statute or regulation regarding securities or commodities transactions;	

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		5. is subject to a final order of a State securities, banking, or insurance regulator that bars such person from association with a regulated entity or is based on a violation of any law or regulation prohibiting fraudulent, manipulative or deceptive conduct. **Or**, within ten years of the commencement of the proceedings, has been **convicted of any crime punishable by 1 or more years in prison or any crime**: 1. involving the purchase or sale of a security, taking a false oath, or making a false report, bribery, perjury, burglary, or any substantially similar activity; 2. arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or other financial professional; 3. involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; 4. involving fraud, use of a fictitious name, counterfeiting, forgery, or false statements.	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		Or, is enjoined by order from acting as an investment adviser, underwriter, broker, dealer, or other financial professional. It is unlawful for any person as to whom such an order suspending or barring him from being associated with an investment adviser is in effect **willfully to become, or to be, associated with an investment adviser without the consent of the SEC**. Also, it is unlawful for any investment adviser **to permit** such a person to become, or remain, a person associated with him without the consent of the SEC, if such investment adviser knew, or in the exercise of reasonable care, should have known, of such order.	
15 U.S.C. § 80b-3(i)	SEC	Civil Monetary Penalty - Maximum amount (A) First tier The maximum amount of penalty for each act or omission described to the left shall be $7,500 for a natural person or $80,000 for any other person. (B) Second tier Notwithstanding [the first tier], the maximum amount of penalty for each such act or omission shall be $80,000 for a natural person or $400,000 for any other person if the act or omission described in paragraph	A CCO may be subject to monetary penalties (which cannot be reimbursed by the financial institution) for willfully violating any provision of the 33, 34 and Investment Company Acts or the rules and regulations thereunder, or directing or helping another to violate those laws, or willfully making a false statement in an application for registration, or failing to reasonably supervise. Additional Comments 1. The SEC does not have a mechanical formula for assessing CMPs aside from the statute. The D.C. Circuit has jurisdiction to hear petitions to

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		(1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement. (C) Third tier Notwithstanding[the first or second tiers], the maximum amount of penalty for each such act or omission shall be $160,000 for a natural person or $775,000 for any other person if— (i) the act or omission described to the left involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and (ii) such act or omission directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed the act or omission.	review SEC disciplinary actions and in 2012 criticized the SEC for "not provid[ing] a consistent interpretation of the Rule nor justified the apparent inconsistency of its application." *Rapoport v. S.E.C.*, 682 F.3d 98, 106 (D.C. Cir. 2012). 2. In 2010, as part of an SEC enforcement action against the general counsel for a brokerage and investment bank, an ALJ found that the general counsel was a supervisor for purposes of § 80b-3. The case against the general counsel was dismissed because the ALJ found that the general counsel did not fail to exercise that supervision reasonably. Arguably, this case opened the door to compliance officers and general counsel being labeled as "supervisors." *See* Admin. Proc. File No. 3-13655, Initial Decision Rel. No. 402 (Sept. 8, 2010), *available at* http://www.sec.gov/litigation/aljdec/2010/id402bpm.pdf. 3. In 2015, the SEC charged the CCO of BlackRock Advisors LLC, an investment adviser, with causing the firms compliance-related violations for failing to implement compliance policies and procedures reasonably designed to prevent violations of the Advisers Act and its rules concerning the outside activities of BlackRock's

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			employees, including how they should be assessed and monitored for conflicts purposes, and when conflicts of interest should be disclosed to BlackRock fund's boards and advisory clients. The CCO agreed to pay a $60,000 penalty. *See In re: BlackRock Advisors LLC, et al.*, SEC Rel. No. IA-4065 (Apr. 20, 2015) *available at* https://www.sec.gov/litigation/admin/2015/ia-4065.pdf. 4. Also in 2015, the SEC charged the CCO of SFX Financial Advisory Management Enterprises Inc., an investment adviser, with failing to implement compliance policies and procedures that should have detected an alleged misappropriation of client assets by an executive at the firm and with responsibility for material misstatements in certain firm filings. The CCO agreed to pay a $25,000 penalty. *See In re: SFX Financial Advisory Management, et. al,* SEC Rel. No IA-4166 (June 15, 2015) *available at* https://www.sec.gov/litigation/admin/2015/ia-4116.pdf.
15 U.S.C. § 80b-3(k)	SEC	Cease and Desist If the SEC finds, after notice and opportunity for a hearing with the SEC, that any person is, has, or is about to violate any provision of the Investment Advisers Act of 1940, or any rule or regulation	**Any** violation of the Investment Advisors Act (or regulations thereunder), may result in a cease-and-desist order.

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		thereunder, the SEC may publish its findings and enter an order requiring such person to **cease and desist** from committing or causing such violation and any future violation of the same provision, rule, or regulation. Such order may also require such person to comply, or to take steps to effect compliance, with such provision, rule, or regulation, upon the terms and conditions as the SEC may specify. Any such order may, as the SEC deems appropriate, require future compliance or steps to effect future compliance, either permanently or for such period of time as the SEC may specify, with such provision, rule, or regulation with respect to any security, any issuer, or any other person	
Criminal			
18 U.S.C. § 2	DOJ	**(a)** Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. **(b)** Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.	If a CCO aids, abets, counsels, commands, induces, or procures the commission of an act is as responsible for the act as if he committed it directly. *Nye & Nissen v. United States*, 336 U.S. 613, 618 (1949).This statute does not establish a separate crime, but rather merely permits one who aids and abets the commission of a crime to be punished as a principal. *United States v. Walser*, 3 F.3d 380, 388 (11th Cir. 1993). The standard test for determining guilt by aiding and abetting is to

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			determine (1) whether a substantive offense was committed, (2) whether the principal contributed to and furthered the offense, and (3) whether the principal intended to aid in the crime's commission. *United States v. Jones*, 913 F.2d 1152, 1558 (11th Cir. 1990).
18 U.S.C. § 3	DOJ	Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact. Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or (notwithstanding section 3571) fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by life imprisonment or death, the accessory shall be imprisoned not more than 15 years.	A CCO may be charged as an accessory after the fact if he or she knows that an offense has been committed and "receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension." 18 U.S.C. § 3. Actual knowledge that the CCO knew that an offense occurred may be shown entirely through circumstantial evidence. *United States v. Burnette*, 698 F.2d 1038, 1051 (9th Cir. 1983).
18 U.S.C. § 371	DOJ	If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each	If a CCO is a part of a conspiracy to defraud the United States or any U.S. agency, and any party of the conspiracy does any act to effect the object of the conspiracy, the CCO may be liable. A conspiracy exists where there is an agreement between two or more people to violate a law, one

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		shall be fined under this title or imprisoned not more than five years, or both. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.	conspirator commits an overt act in furtherance of the agreement, and the conspirators knew of the conspiracy and voluntarily participated in it. *United States v. Faulkner*, 17 F.3d 745, 768 (5th Cir. 1994). An "overt act" is defined as an "outward act done in pursuance of crime and a manifestation of an intent or design, looking toward accomplishment of crime." *Chavez v. United States*, 275 F.2d 813, 817 (9th Cir. 1960).
18 U.S.C. § 551	DOJ	Whoever willfully conceals or destroys any invoice, book, or paper relating to any merchandise imported into the United States, after an inspection thereof has been demanded by the collector of any collection district; or Whoever conceals or destroys at any time any such invoice, book, or paper for the purpose of suppressing any evidence of fraud therein contained— Shall be fined under this title or imprisoned not more than two years, or both.	This statute imposes liability for any willful concealment or destruction of any invoice, book, or paper relating to merchandise imported into the United States after an inspection has been demanded by the collector of any collection district.
18 U.S.C. § 657	DOJ & FDIC	Whoever, being an officer, agent or employee of or connected in any capacity with the Federal Deposit Insurance Corporation, National Credit Union Administration, any Federal home loan bank, the Federal Housing Finance Agency, Farm Credit Administration, Department of Housing and Urban	This statute makes it illegal for officers of any lending, credit, and insurance institution to embezzle or wilfully misapply money or other things of value from such an institution.

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		Development, Federal Crop Insurance Corporation, the Secretary of Agriculture acting through the Farmers Home Administration or successor agency, the Rural Development Administration or successor agency or the Farm Credit System Insurance Corporation, a Farm Credit Bank, a bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution, other than an insured bank (as defined in section 656), the accounts of which are insured by the Federal Deposit Insurance Corporation or by the National Credit Union Administration Board or any small business investment company, or any community development financial institution receiving financial assistance under the Riegle Community Development and Regulatory Improvement Act of 1994, and whoever, being a receiver of any such institution, or agent or employee of the receiver, embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both; but if the amount or value embezzled, abstracted, purloined or misapplied does not exceed $ 1,000, he shall be fined	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		under this title or imprisoned not more than one year, or both.	
18 U.S.C. § 1349	DOJ	Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.	A CCO who attempts or conspires to commit fraud shall be held criminally liable.
18 U.S.C. § 1623	DOJ	(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both. (b) This section is applicable whether the conduct occurred within or without the United States. (c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made	A CCO may be held criminally liable if he or she knowingly makes any false material declaration in any proceeding before or ancillary to any court or grand jury while under oath.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if— (1) each declaration was material to the point in question, and (2) each declaration was made within the period of the statute of limitations for the offense charged under this section. In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true. (d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		proceeding, or it has not become manifest that such falsity has been or will be exposed. (e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.	
18 U.S.C. § 1956	DOJ	**Whoever**, **knowing** that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity, or who transports, transmits, or transfers –or attempts to–a monetary instrument or funds — (A) (i) with the intent to promote the carrying on of specified unlawful activity; or (ii) with intent to engage in tax fraud; or (B) knowing that the transaction is designed in whole or in part— (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or	A CCO who knowingly engages in money laundering may be fined up to $500,000 or twice the value of the property involved in the transaction, (whichever is greater), or imprisoned for up to 20 years, or both.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(ii) to avoid a transaction reporting requirement under State or Federal law, shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both. Additionally, anyone who conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity with the intent: (A) to promote the carrying on of specified unlawful activity; (B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or (C) to avoid a transaction reporting requirement under State or Federal law, shall be fined the greater of $10,000 or the value of the property or funds involved, or imprisoned for not more than 20 years, or both.	
Money & Finance			

Citation	Regulator	Statutory Text	Potential Impact on CCOs
31 U.S.C. § 5318(g)	Secretary of Treasury	**(g) Reporting of suspicious transactions.--** **(1) In general.**--The Secretary may require any financial institution, and any director, officer, employee, or agent of any financial institution, to report any suspicious transaction relevant to a possible violation of law or regulation. **(2) Notification prohibited.**— **(A) In general.**—If a financial institution or any director, officer, employee, or agent of any financial institution, voluntarily or pursuant to this section or any other authority, reports a suspicious transaction to a government agency— **(i)** neither the financial institution, director, officer, employee, or agent of such institution (whether or not any such person is still employed by the institution), nor any other current or former director, officer, or employee of, or contractor for, the financial institution or other reporting person, may notify any person involved in the transaction that the transaction has been reported; and **(ii)** no current or former officer or employee of or contractor for the Federal Government or of or for any State, local, tribal, or territorial government within the United States, who has any knowledge that such report was made may disclose to any person involved	This statute provides protection to CCOs who report suspicious transactions relevant to a possible violation of law or regulation.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		in the transaction that the transaction has been reported, other than as necessary to fulfill the official duties of such officer or employee. **(B) Disclosures in certain employment references.**— **(i) Rule of construction.**—Notwithstanding the application of subparagraph (A) in any other context, subparagraph (A) shall not be construed as prohibiting any financial institution, or any director, officer, employee, or agent of such institution, from including information that was included in a report to which subparagraph (A) applies— **(I)** in a written employment reference that is provided in accordance with section 18(w) of the Federal Deposit Insurance Act in response to a request from another financial institution; or **(II)** in a written termination notice or employment reference that is provided in accordance with the rules of a self-regulatory organization registered with the Securities and Exchange Commission or the Commodity Futures Trading Commission, except that such written reference or notice may not disclose that such information was also included in any such report, or that such report was made.	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(ii) Information not required.—Clause (i) shall not be construed, by itself, to create any affirmative duty to include any information described in clause (i) in any employment reference or termination notice referred to in clause (i). **(3) Liability for disclosures.**— **(A) In general.**—Any financial institution that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this subsection or any other authority, and any director, officer, employee, or agent of such institution who makes, or requires another to make any such disclosure, shall not be liable to any person under any law or regulation of the United States, any constitution, law, or regulation of any State or political subdivision of any State, or under any contract or other legally enforceable agreement (including any arbitration agreement), for such disclosure or for any failure to provide notice of such disclosure to the person who is the subject of such disclosure or any other person identified in the disclosure. **(B) Rule of construction.**—Subparagraph (A) shall not be construed as creating—	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(i) any inference that the term "person", as used in such subparagraph, may be construed more broadly than its ordinary usage so as to include any government or agency of government; or **(ii)** any immunity against, or otherwise affecting, any civil or criminal action brought by any government or agency of government to enforce any constitution, law, or regulation of such government or agency.	
31 U.S.C. § 5321	FinCEN and DOJ	A domestic financial institution or nonfinancial trade or business, **and a partner, director, officer, or employee** of a domestic financial institution or nonfinancial trade or business, **willfully** violating: a. the reporting and recordkeeping requirements for currency transaction in the Bank Secrecy Act (except provisions related to foreign transactions (see below)); b. the retention of records provisions in the Federal Deposit Insurance Act; c. the recordkeeping procedures provision for non-insured businesses in the Bank Secrecy Act. is liable to the United States Government for a civil penalty of not more than the greater of the amount (not to exceed $100,000) involved in the transaction (if any) or $25,000 per violation or per day.	A CCO may be subject to monetary penalties (which cannot be reimbursed by the financial institution) for willfully violating the reporting and recordkeeping requirements for currency transaction in the Bank Secrecy Act and Federal Deposit Insurance Act. The CMP may be up to $25,000 per violation or per day the violation continues or for the amount involved in the transaction up to $100,000. Additional Comments: 1. FinCEN used this provision to impose a $1 million CMP against the CCO of MoneyGram in 2014. *See In the Matter of Thomas E. Haider*, Number 2014-08 (Dec. 18, 2014) *available at* https://www.fincen.gov/news_room/ea/files/Haider_Assessment.pdf.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		In addition, this provision provides the following penalties for violations of specific law: Structured transaction violation–The amount of any civil money penalty for structuring transactions to evade Bank Secrecy Act reporting shall not exceed the amount of the coins and currency (or such other monetary instruments as the Secretary may prescribe) involved in the transaction with respect to which such penalty is imposed. 31 U.S.C. § 5321(a)(4). Foreign financial agency transaction violation–greater of $100,000 or 50% of the amount of the transaction or balance of an unreported account; must be willful.	FinCEN found that "Haider failed to ensure that MoneyGram implemented and maintained an effective AML program." 2. Unlike other agencies who have used publicly-available matrices to determine whether and how much to assess as a fine, FinCEN has made no such public disclosure. Similarly, a person is not entitled to an APA hearing on the matter. *See* Robert B. Serino, It's Anyone's Guess How Fincen Determines Fines, American Banker, March 9, 2016 *available at* http://www.americanbanker.com/bankthink/its-anyon es-guess-how-fincen-determines-fines-1079793-1.html.
31 U.S.C. § 5322	FinCEN	(a) A person **willfully violating** the recordkeeping requirements of the Bank Secrecy Act or a regulation prescribed or order issued thereunder (except for reporting requirements on foreign currency transactions or the prohibition on structuring), or **willfully violating** 1) a record-retention requirement for insured depository institutions, or 2) any regulation prescribed by the Secretary of the Treasury related to recordkeeping for non-insured institutions, shall be **fined not more than $250,000, or imprisoned for not more than five years, or both.**	A CCO who willfully violates recordkeeping requirements of the Bank Secrecy Act may be fined up to $250,000 or imprisoned for up to 5 years, or both. If the violation is in connection with violating any other law or is part of a pattern of illegal activity involving more than $100,000 in a year, the potential fine and jail term double.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(b) A person **willfully violating** the recordkeeping requirements of the Bank Secrecy Act or a regulation prescribed or order issued thereunder (except for reporting requirements on foreign currency transactions or the prohibition on structuring), or **willfully violating** 1) a record-retention requirement for insured depository institutions, or 2) any regulation prescribed by the Secretary of the Treasury related to recordkeeping for non-insured institutions **while violating another law of the United States or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned for not more than 10 years, or both.** (c) For a violation of the requirement that a financial institution or non-financial business maintain appropriate procedures to ensure compliance with the recordkeeping requirements, **a separate violation occurs for each day the violation continues and at each office, branch, or place of business at which a violation occurs or continues.** (d) A financial institution or agency that violates 1) any requirement to establish appropriate due diligence procedures and controls with respect to the detection and reporting of money laundering on bank accounts involving foreign persons, or 2) the	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		prohibition on maintaining correspondent accounts with foreign shell banks, or any special measures imposed with respect to types of accounts of primary money laundering concern, shall be fined in **an amount equal to not less than 2 times the amount of the transaction, but not more than $1,000,000.**	
31 U.S.C. § 5328	FinCEN	**(a) Prohibition against discrimination.**—No financial institution or nonfinancial trade or business may discharge or otherwise discriminate against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to the request of the employee) provided information to the Secretary of the Treasury, the Attorney General, or any Federal supervisory agency regarding a possible violation of any provision of this subchapter or section 1956, 1957, or 1960 of title 18, or any regulation under any such provision, by the financial institution or nonfinancial trade or business or any director, officer, or employee of the financial institution or nonfinancial trade or business. **(b) Enforcement.**--Any employee or former employee who believes that such employee has been discharged or discriminated against in violation of subsection (a) may file a civil action in the appropriate United States district court before the end	This statute provides protection to CCOs who blow the whistle on financial institutions.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		of the 2-year period beginning on the date of such discharge or discrimination. **(c) Remedies.**−If the district court determines that a violation has occurred, the court may order the financial institution or nonfinancial trade or business which committed the violation to-- **(1)** reinstate the employee to the employee's former position; **(2)** pay compensatory damages; or **(3)** take other appropriate actions to remedy any past discrimination. **(d) Limitation.**−The protections of this section shall not apply to any employee who-- **(1)** deliberately causes or participates in the alleged violation of law or regulation; or **(2)** knowingly or recklessly provides substantially false information to the Secretary, the Attorney General, or any Federal supervisory agency. **(e) Coordination with other provisions of law.** −This section shall not apply with respect to any financial institution or nonfinancial trade or business which is subject to section 33 of the Federal Deposit Insurance Act, section 213 of the Federal Credit Union Act, or section 21A(q) of the Home Owners'	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		Loan Act (as added by section 251(c) of the Federal Deposit Insurance Corporation Improvement Act of 1991).	
REGULATIONS			
Energy			
10 C.F.R. § 13.3	NRC	(a) Claims. (1) Any person who makes a claim that the person knows or has reason to know— (i) Is false, fictitious, or fraudulent; (ii) Includes or is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent; (iii) Includes or is supported by any written statement that— (A) Omits a material fact; (B) Is false, fictitious, or fraudulent as a result of such omission; and (C) Is a statement in which the person making such statement has a duty to include such material fact; or (iv) Is for payment for the provision of property or services which the person has not provided as claimed, shall be subject, in addition to any other	The CCO could incur civil penalties for false statements or false information given.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		remedy that may be prescribed by law, to a civil penalty of not more than $10,781 for each such claim. (2) Each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim. (3) A claim shall be considered made to the authority, recipient, or party when such claim is actually made to an agent, fiscal intermediary or other entity, including any State or political subdivision thereof, acting for or on behalf of the authority, recipient, or party. (4) Each claim for property, services, or money is subject to a civil penalty regardless of whether such property, services, or money is actually delivered or paid. (5) If the Government has made any payment (including transferred property or provided services) on a claim, a person subject to a civil penalty under paragraph (a)(1) of this section shall also be subject to an assessment of not more than twice the amount of such claim or that portion thereof that is determined to be in violation of paragraph (a)(1) of this section. Such assessment shall be in lieu of damages sustained by the Government because of such claim.	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(b) Statements. (1) Any person who makes a written statement that— (i) The person knows or has reason to know— (A) Asserts a material fact which is false, fictitious, or fraudulent; or (B) Is false, fictitious, or fraudulent because it omits a material fact that the person making the statement has a duty to include in such statement; and (ii) Contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $10,781 for each such statement. (2) Each written representation, certification, or affirmation constitutes a separate statement. (3) A statement shall be considered made to the authority when such statement is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of the authority. (c) No proof of specific intent to defraud is required to establish liability under this section.	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(d) In any case in which it is determined that more than one person is liable for making a claim or statement under this section, each such person may be held liable for a civil penalty under this section. (e) In any case in which it is determined that more than one person is liable for making a claim under this section on which the Government has made payment (including transferred property or provided services), an assessment may be imposed against any such person or jointly and severally against any combination of such persons.	
10 C.F.R. § 21.1	NRC	The regulations in this part establish procedures and requirements for implementation of section 206 of the Energy Reorganization Act of 1974. That section requires any individual director or responsible officer of a firm constructing, owning, operating or supplying the components of any facility or activity which is licensed or otherwise regulated pursuant to the Atomic Energy Act of 1954, as amended, or the Energy Reorganization Act of 1974, who obtains information reasonably indicating: (a) That the facility, activity or basic component supplied to such facility or activity fails to comply with the Atomic Energy Act of 1954, as amended, or any applicable rule, regulation, order, or license of the Commission relating to substantial safety hazards or (b) that the	A CCO must immediately notify the NRC if the facility, activity, or basic component supplied to such facility or activity contains defects, which could create a substantial safety hazard unless they have actual knowledge that the NRC has been adequately informed.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		facility, activity, or basic component supplied to such facility or activity contains defects, which could create a substantial safety hazard, to immediately notify the Commission of such failure to comply or such defect, unless he has actual knowledge that the Commission has been adequately informed of such defect or failure to comply.	
10 C.F.R. § 21.21	NRC	(a) Each individual, corporation, partnership, dedicating entity, or other entity subject to the regulations in this part shall adopt appropriate procedures to— (1) Evaluate deviations and failures to comply to identify defects and failures to comply associated with substantial safety hazards as soon as practicable, and, except as provided in paragraph (a)(2) of this section, in all cases within 60 days of discovery, in order to identify a reportable defect or failure to comply that could create a substantial safety hazard, were it to remain uncorrected, and (2) Ensure that if an evaluation of an identified deviation or failure to comply potentially associated with a substantial safety hazard cannot be completed within 60 days from discovery of the deviation or failure to comply, an interim report is prepared and submitted to the Commission through a director or responsible officer or designated person as discussed	A CCO must develop appropriate procedures to evaluate compliance and ensure safety and regularly notify the NRC of hazardous conditions.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		in § 21.21(d)(5). The interim report should describe the deviation or failure to comply that is being evaluated and should also state when the evaluation will be completed. This interim report must be submitted in writing within 60 days of discovery of the deviation or failure to comply. (3) Ensure that a director or responsible officer subject to the regulations of this part is informed as soon as practicable, and, in all cases, within the 5 working days after completion of the evaluation described in paragraphs (a)(1) or (a)(2) of this section if the manufacture, construction, or operation of a facility or activity, a basic component supplied for such facility or activity, or the design certification or design approval under part 52 of this chapter— (i) Fails to comply with the Atomic Energy Act of 1954, as amended, or any applicable rule, regulation, order, or license of the Commission or standard design approval under part 52 of this chapter, relating to a substantial safety hazard, or (ii) Contains a defect. (b) If the deviation or failure to comply is discovered by a supplier of basic components, or services associated with basic components, and the supplier determines that it does not have the capability to	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		perform the evaluation to determine if a defect exists, then the supplier must inform the purchasers or affected licensees within five working days of this determination so that the purchasers or affected licensees may evaluate the deviation or failure to comply, pursuant to § 21.21(a). (c) A dedicating entity is responsible for— (1) Identifying and evaluating deviations and reporting defects and failures to comply associated with substantial safety hazards for dedicated items; and (2) Maintaining auditable records for the dedication process. (d)(1) A director or responsible officer subject to the regulations of this part or a person designated under § 21.21(d)(5) must notify the Commission when he or she obtains information reasonably indicating a failure to comply or a defect affecting— (i) The manufacture, construction or operation of a facility or an activity within the United States that is subject to the licensing requirements under parts 30, 40, 50, 52, 60, 61, 63, 70, 71, or 72 of this chapter and that is within his or her organization's responsibility; or	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(ii) A basic component that is within his or her organization's responsibility and is supplied for a facility or an activity within the United States that is subject to the licensing, design certification, or approval requirements under parts 30, 40, 50, 52, 60, 61, 63, 70, 71, or 72 of this chapter. (2) The notification to NRC of a failure to comply or of a defect under paragraph (d)(1) of this section and the evaluation of a failure to comply or a defect under paragraphs (a)(1) and (a)(2) of this section, are not required if the director or responsible officer has actual knowledge that the Commission has been notified in writing of the defect or the failure to comply. (3) Notification required by paragraph (d)(1) of this section must be made as follows— (i) Initial notification by facsimile, which is the preferred method of notification, to the NRC Operations Center at (301)816–5151 or by telephone at (301)816–5100 within two days following receipt of information by the director or responsible corporate officer under paragraph (a)(1) of this section, on the identification of a defect or a failure to comply. Verification that the facsimile has been received should be made by calling the NRC	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		Operations Center. This paragraph does not apply to interim reports described in § 21.21(a)(2). (ii) Written notification to the NRC at the address specified in § 21.5 within 30 days following receipt of information by the director or responsible corporate officer under paragraph (a)(3) of this section, on the identification of a defect or a failure to comply. (4) The written report required by this paragraph shall include, but need not be limited to, the following information, to the extent known: (i) Name and address of the individual or individuals informing the Commission. (ii) Identification of the facility, the activity, or the basic component supplied for such facility or such activity within the United States which fails to comply or contains a defect. (iii) Identification of the firm constructing the facility or supplying the basic component which fails to comply or contains a defect. (iv) Nature of the defect or failure to comply and the safety hazard which is created or could be created by such defect or failure to comply.	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(v) The date on which the information of such defect or failure to comply was obtained. (vi) In the case of a basic component which contains a defect or fails to comply, the number and location of these components in use at, supplied for, being supplied for, or may be supplied for, manufactured, or being manufactured for one or more facilities or activities subject to the regulations in this part. (vii) The corrective action which has been, is being, or will be taken; the name of the individual or organization responsible for the action; and the length of time that has been or will be taken to complete the action. (viii) Any advice related to the defect or failure to comply about the facility, activity, or basic component that has been, is being, or will be given to purchasers or licensees. (ix) In the case of an early site permit, the entities to whom an early site permit was transferred. (5) The director or responsible officer may authorize an individual to provide the notification required by this paragraph, provided that, this shall not relieve the director or responsible officer of his or her responsibility under this paragraph.	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(e) Individuals subject to this part may be required by the Commission to supply additional information related to a defect or failure to comply. Commission action to obtain additional information may be based on reports of defects from other reporting entities.	
10 C.F.R. § 21.61(a)	NRC	Any director or responsible officer of an entity (including dedicating entity) that is not otherwise subject to the deliberate misconduct provisions of this chapter but is subject to the regulations in this part who knowingly and consciously fails to provide the notice required as by § 21.21 shall be subject to a civil penalty equal to the amount provided by section 234 of the Atomic Energy Act of 1954, as amended.	A CCO who knowingly or consciously fails to provide notice to the NRC is subject to a civil penalty equal to the amount provided in the Act.
10 C.F.R. § 21.62(a)	NRC	Section 223 of the Atomic Energy Act of 1954, as amended, provides for criminal sanctions for willful violation of, attempted violation of, or conspiracy to violate, any regulation issued under sections 161b, 161i, or 161***o*** of the Act. For purposes of section 223, all the regulations in part 21 are issued under one or more of sections 161b, 161i, or 161***o***, except for the sections listed in paragraph (b) of this section.	A CCO may be held criminally liable for willful violation, attempted violation, or conspiracy violation of the Act.
10 C.F.R. § 26.825(a)	NRC	Section 223 of the Atomic Energy Act of 1954, as amended, provides for criminal sanctions for willful violation of, attempted violation of, or conspiracy to violate, any regulation issued under sections 161b, 161i, or 161*o* of the Act. For the purposes of section	A CCO may be held criminally liable for willful violation, attempted violation, or conspiracy violation of the Act.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		223, all of the regulations in Part 26 are issued under one or more of sections 161b, 161i, or 161***o***, except for the sections listed in paragraph (b) of this section.	
10 C.F.R. § 820.20(a) -(b)	DOE	(a) Purpose. This subpart establishes the procedures for investigating the nature and extent of violations of the DOE Nuclear Safety Requirements, for determining, whether a violation has occurred, for imposing an appropriate remedy, and for adjudicating the assessment of a civil penalty. (b) Basis for civil penalties. DOE may assess civil penalties against any person subject to the provisions of this part who has entered into an agreement of indemnification under 42 U.S.C. 2210(d) (or any subcontractor or supplier thereto), unless exempted from civil penalties as provided in paragraph (c) of this section, on the basis of a violation of: (1) Any DOE Nuclear Safety Requirement set forth in the Code of Federal Regulations; (2) Any Compliance Order issued pursuant to subpart C of this part; or (3) Any program, plan or other provision required to implement any requirement or order identified in paragraphs (b)(1) or (b)(2) of this section.	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
10 C.F.R. § 820.71	DOE	If a person subject to the Act or the DOE Nuclear Safety Requirements has, by act or omission, knowingly and willfully violated, caused to be violated, attempted to violate, or conspired to violate any section of the Act or any applicable DOE Nuclear Safety Requirement, the person shall be subject to criminal sanctions under the Act.	A CCO shall be subject to criminal sanctions if they knowingly and willfully violate, cause to be violated, attempt to violate, or conspire to violate any section of the Act.
10 C.F.R. § 820.72	DOE	If there is reason to believe a criminal violation of the Act or the DOE Nuclear Safety Requirements has occurred, DOE may refer the matter to the Attorney General of the United States for investigation or prosecution.	The DOE may refer the matter to the Attorney General for investigation or prosecution.
10 C.F.R. § 820.81	DOE	Any person subject to a penalty under 42 U.S.C. 2282a shall be subject to a civil penalty in an amount not to exceed $197,869 for each such violation. If any violation under 42 U.S.C. 2282a is a continuing one, each day of such violation shall constitute a separate violation for the purpose of computing the applicable civil penalty.	A person subject to penalty may have civil penalty up to $197,869 for each such violation.
10 C.F.R. § 1013.3	DOE	(a) Claims. (1) Except as provided in paragraph (c) of this section, any person who makes a claim that the person knows or has reason to know— (i) Is false, fictitious, or fraudulent;	The CCO could incur civil penalties for false statements or false information given.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(ii) Includes or is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent; (iii) Includes or is supported by any written statement that— (A) Omits a material fact; (B) Is false, fictitious, or fraudulent as a result of such omission; and (C) Is a statement in which the person making such statement has a duty to include such material fact; or (iv) Is for payment for the provision of property or services which the person has not provided as claimed, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $10,781 for each such claim. (2) Each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim. (3) A claim shall be considered made to the authority, recipient, or party when such claim is actually made to an agent, fiscal intermediary, or other entity, including any State or political	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		subdivision thereof, acting for or on behalf of such authority, recipient, or party. (4) Each claim for property, services, or money is subject to a civil penalty regardless of whether such property, services, or money is actually delivered or paid. (5) If the Government has made any payment (including transferred property or provided services) on a claim, a person subject to a civil penalty under paragraph (a)(1) of this section shall also be subject to an assessment of not more than twice the amount of such claim or that portion thereof that is determined to be in violation of paragraph (a)(1) of this section. Such assessment shall be in lieu of damages sustained by the Government because of such claim. (b) Statements. (1) Except as provided in paragraph (c) of this section, any person who makes a written statement that— (i) The person knows or has reason to know— (A) Asserts a material fact which is false, fictitious, or fraudulent; or	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(B) Is false, fictitious, or fraudulent because it omits a material fact that the person making the statement has a duty to include in such statement, and (ii) Contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $10,781 for each such statement. (2) Each written representation, certification, or affirmation constitutes a separate statement. (3) A statement shall be considered made to the authority when such statement is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of such authority. (c) Application for certain benefits. (1) In the case of any claim or statement made by any individual relating to any of the benefits listed in paragraph (c)(2) of this section received by such individual, such individual may be held liable for penalties and assessments under this section only if such claim or statement is made by such individual	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		in making application for such benefits with respect to such individual's eligibility to receive such benefits. (2) For purposes of paragraph (c) of this section, the term "benefits" means benefits under part A of the Energy Conservation in Existing Buildings Act of 1976, which are intended for the personal use of the individual who receives the benefits or for a member of the individual's family. (d) No proof of specific intent to defraud is required to establish liability under this section. (e) In any case in which it is determined that more than one person is liable for making a claim or statement under this section, each such person may be held liable for a civil penalty under this section. (f) In any case in which it is determined that more than one person is liable for making a claim under this section on which the Government has made payment (including transferred property or provided services), an assessment may be imposed against any such person or jointly and severally against any combination of such persons.	
Banks & Banking			

Citation	Regulator	Statutory Text	Potential Impact on CCOs
12 C.F.R. § 21.21(c)-(d)	Comptroller of Currency	(c) Establishment of a BSA compliance program— (1) Program requirement. Each national bank and each savings association shall develop and provide for the continued administration of a program reasonably designed to assure and monitor compliance with the recordkeeping and reporting requirements set forth in subchapter II of chapter 53 of title 31, United States Code and the implementing regulations issued by the Department of the Treasury at 31 CFR Chapter X. The compliance program must be written, approved by the national bank's or savings association's board of directors, and reflected in the minutes of the national bank or savings association. (2) Customer identification program. Each national bank and each savings association is subject to the requirements of 31 U.S.C. 5318(l) and the implementing regulations jointly promulgated by the OCC and the Department of the Treasury at 31 CFR 1020.220, which require a customer identification program to be implemented as part of the BSA compliance program required under this section.	A CCO shall establish a compliance program. The compliance program shall, at a minimum: (1) Provide for a system of internal controls to assure ongoing compliance; (2) Provide for independent testing for compliance to be conducted by national bank or savings association personnel or by an outside party; (3) Designate an individual or individuals responsible for coordinating and monitoring day-to-day compliance; and (4) Provide training for appropriate personnel.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(d) Contents of compliance program. The compliance program shall, at a minimum: (1) Provide for a system of internal controls to assure ongoing compliance; (2) Provide for independent testing for compliance to be conducted by national bank or savings association personnel or by an outside party; (3) Designate an individual or individuals responsible for coordinating and monitoring day-to-day compliance; and (4) Provide training for appropriate personnel.	
12 C.F.R. § 30.6(b)	OCC	Failure to comply with order. Pursuant to [the first tier of the CMP provision of § 1818(i) discussed above] the OCC may assess a civil money penalty against any national bank or Federal savings association that violates or otherwise fails to comply with any final safety and soundness order and against any institution-affiliated party who participates in such violation or noncompliance.	The OCC may access a CMP against a CCO who participates in the failure to comply with a safety and soundness order. The amount of the CMP may be up to **$7,500** per day. The CCO is entitled to an APA hearing to determine the penalty.
12 C.F.R. § 308.116	FDIC	(a) In general. The civil money penalty shall be assessed upon the service of a Notice of Assessment which shall become final and unappealable unless the respondent requests a hearing pursuant to § 308.19(c)(2).	The civil money penalty for a violation of the Change in Bank Control Act or any rule, regulation, or order issued by the FDIC is as follows: <u>Any Violation</u>:

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(b) Amount. (1) Any person who violates any provision of the Change in Bank Control Act or any rule, regulation, or order issued by the FDIC pursuant thereto, shall forfeit and pay a civil money penalty of not more than $5,000 for each day the violation continues. (2) Any person who violates any provision of the Change in Bank Control Act or any rule, regulation, or order issued by the FDIC pursuant thereto; or recklessly engages in any unsafe or unsound practice in conducting the affairs of a depository institution; or breaches any fiduciary duty; which violation, practice or breach is part of a pattern of misconduct; or causes or is likely to cause more than a minimal loss to such institution; or results in pecuniary gain or other benefit to such person, shall forfeit and pay a civil money penalty of not more than $25,000 for each day such violation, practice or breach continues. (3) Any person who knowingly violates any provision of the Change in Bank Control Act or any rule, regulation, or order issued by the FDIC pursuant thereto; or engages in any unsafe or unsound practice in conducting the affairs of a depository institution; or breaches any fiduciary duty; and knowingly or recklessly causes a	A person shall forfeit and pay a civil money penalty of not more than $5,000 for each day the violation continues. After August 1, 2016: $9,468. Reckless Violation: A person shall forfeit and pay a civil money penalty of not more than $25,000 for each day such violation, practice or breach continues. After August 1, 2016: $47,340. Knowing Violation: (i) In the case of a person other than a depository institution—$1,000,000 per day for each day the violation, practice or breach continues; After August 1, 2016: $1,893,610. or (ii) In the case of a depository institution—an amount not to exceed the lesser of $1,000,000 or one percent of the total assets of such institution for each day the violation, practice or breach continues. After August 1, 2016: $1,893,610.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		substantial loss to such institution or a substantial pecuniary gain or other benefit to such institution or a substantial pecuniary gain or other benefit to such person by reason of such violation, practice or breach, shall forfeit and pay a civil money penalty not to exceed: (i) In the case of a person other than a depository institution—$1,000,000 per day for each day the violation, practice or breach continues; or (ii) In the case of a depository institution—an amount not to exceed the lesser of $1,000,000 or one percent of the total assets of such institution for each day the violation, practice or breach continues. (4) Adjustment of civil money penalties by the rate of inflation pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. On or after August 1, 2016: (i) Any person who has engaged in a violation as set forth in paragraph (b)(1) of this section shall forfeit and pay a civil money penalty of not more than $9,468 for each day the violation continued. (ii) Any person who has engaged in a violation, unsafe or unsound practice or breach of fiduciary duty, as set forth in paragraph (b)(2) of this	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		section, shall forfeit and pay a civil money penalty of not more than $47,340 for each day such violation, practice or breach continued. (iii) Any person who has knowingly engaged in a violation, unsafe or unsound practice or breach of fiduciary duty, as set forth in paragraph (b)(3) of this section, shall forfeit and pay a civil money penalty not to exceed: (A) In the case of a person other than a depository institution—$1,893,610 per day for each day the violation, practice or breach continued; or (B) In the case of a depository institution—an amount not to exceed the lesser of $1,893,610 or one percent of the total assets of such institution for each day the violation, practice or breach continued. (c) Mitigating factors. In assessing the amount of the penalty, the Board of Directors or its designee shall consider the gravity of the violation, the history of previous violations, respondent's financial resources, good faith, and any other matters as justice may require. (d) Failure to answer. Failure of a respondent to file an answer required by this section within the	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		time provided constitutes a waiver of his or her right to appear and contest the allegations in the notice of disapproval. If no timely answer is filed, Enforcement Counsel may file a motion for entry of an order of default. Upon a finding that no good cause has been shown for the failure to file a timely answer, the administrative law judge shall file a recommended decision containing the findings and relief sought in the notice. A final order issued by the Board of Directors based upon a respondent's failure to answer is deemed to be an order issued upon consent.	
12 C.F.R. § 308.502	FDIC	(a) Claims. (1) A person who makes a false, fictitious, or fraudulent claim to the FDIC is subject to a civil penalty of up to $5,000 per claim. A claim is false, fictitious, or fraudulent if the person making the claim knows, or has reason to know, that: (i) The claim is false, fictitious, or fraudulent; or (ii) The claim includes, or is supported by, a written statement that asserts a material fact which is false, fictitious or fraudulent; or (iii) The claim includes, or is supported by, a written statement that:	The CCO could incur civil penalties for false statements or false information given.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(A) Omits a material fact; and (B) Is false, fictitious, or fraudulent as a result of that omission; and (C) Is a statement in which the person making the statement has a duty to include the material fact; or (iv) The claim seeks payment for providing property or services that the person has not provided as claimed. (2) Each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim. (3) A claim will be considered made to the FDIC, recipient, or party when the claim is actually made to an agent, fiscal intermediary, or other entity, including any state or political subdivision thereof, acting for or on behalf of the FDIC, recipient, or party. (4) Each claim for property, services, or money that constitutes any one of the elements in paragraph (a)(1) of this section is subject to a civil penalty regardless of whether the property, services, or money is actually delivered or paid.	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(5) If the FDIC has made any payment (including transferred property or provided services) on a claim, a person subject to a civil penalty under paragraph (a)(1) of this section will also be subject to an assessment of not more than twice the amount of such claim (or portion of the claim) that is determined to constitute a false, fictitious, or fraudulent claim under paragraph (a)(1) of this section. The assessment will be in lieu of damages sustained by the FDIC because of the claims. (6) The amount of any penalty assessed under paragraph (a)(1) of this section will be adjusted for inflation in accordance with§ 308.132(d)(17) of this part. (7) The penalty specified in paragraph (a)(1) of this section is in addition to any other remedy allowable by law. (b) Statements. (1) A person who submits to the FDIC a false, fictitious or fraudulent statement is subject to a civil penalty of up to $5,000 per statement. A statement is false, fictitious or fraudulent if the person submitting the statement to the FDIC knows, or has reason to know, that:	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(i) The statement asserts a material fact which is false, fictitious, or fraudulent; or (ii) The statement omits a material fact that the person making the statement has a duty to include in the statement; and (iii) The statement contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement. (2) Each written representation, certification, or affirmation constitutes a separate statement. (3) A statement will be considered made to the FDIC when the statement is actually made to an agent, fiscal intermediary, or other entity, including any state or political subdivision thereof, acting for or on behalf of the FDIC. (4) The amount of any penalty assessed under paragraph (a)(1) of this section will be adjusted for inflation in accordance with§ 308.132(d)(17) of this part. (5) The penalty specified in paragraph (a)(1) of this section is in addition to any other remedy allowable by law.	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(c) Failure to file declaration/certification. Where, as a prerequisite to conducting business with the FDIC, a person is required by law to file one or more declarations and/or certifications, and the person intentionally fails to file such declaration/certification, the person will be subject to the civil penalties as prescribed by this subpart. (d) Civil money penalties that are assessed under this subpart are subject to annual adjustments to account for inflation as required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub.L. 114–74, sec. 701, 129 Stat. 584) (see also 12 CFR 308.132(d)(17)). (e) Liability. (1) In any case in which it is determined that more than one person is liable for making a claim or statement under this section, each such person may be held jointly and severally liable for a civil penalty under this section. (2) In any case in which it is determined that more than one person is liable for making a claim under this section on which the FDIC has made payment (including transferred property or provided services), an assessment may be imposed against	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		any such person or jointly and severally against any combination of such persons.	
12 C.F.R. § 570.3	Dept. of Treasury	(a) Schedule for filing compliance plan— (1) In general. A savings association shall file a written safety and soundness compliance plan with the OTS within 30 days of receiving a request for a compliance plan pursuant to § 570.2(b), unless the OTS notifies the savings association in writing that the plan is to be filed within a different period. (2) Other plans. If a savings association is obligated to file, or is currently operating under, a capital restoration plan submitted pursuant to section 38 of the FDI Act (12 U.S.C. 1831*o*), a cease-and-desist order entered into pursuant to section 8 of the FDI Act, a formal or informal agreement, or a response to a report of examination, it may, with the permission of the OTS, submit a compliance plan under this section as part of that plan, order, agreement, or response, subject to the deadline provided in paragraph (a)(1) of this section. (b) Contents of plan. The compliance plan shall include a description of the steps the savings association will take to correct the deficiency and the time within which those steps will be taken.	If a savings association fails to submit an acceptable plan within the time specified by the OTS or fails in any material respect to implement a compliance plan, then the OTS shall, by order, require the savings association to correct the deficiency and may take further actions provided in the FDI Act.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(c) Review of safety and soundness compliance plans. Within 30 days after receiving a safety and soundness compliance plan under this subpart, the OTS shall provide written notice to the savings association of whether the plan has been approved or seek additional information from the savings association regarding the plan. The OTS may extend the time within which notice regarding approval of a plan will be provided. (d) Failure to submit or implement a compliance plan. If a savings association fails to submit an acceptable plan within the time specified by the OTS or fails in any material respect to implement a compliance plan, then the OTS shall, by order, require the savings association to correct the deficiency and may take further actions provided in section 39(e)(2)(B) of the FDI Act. Pursuant to section 39(e)(3), the OTS may be required to take certain actions if the savings association commenced operations or experienced a change in control within the previous 24–month period, or the savings association experienced extraordinary growth during the previous 18–month period. (e) Amendment of compliance plan. A savings association that has filed an approved compliance plan may, after prior written notice to and approval by the OTS, amend the plan to reflect a change in	

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		circumstance. Until such time as a proposed amendment has been approved, the savings association shall implement the compliance plan as previously approved.	
12 C.F.R. § 1007.104	CFPB	A covered financial institution that employs one or more mortgage loan originators must adopt and follow written policies and procedures designed to assure compliance with this part. These policies and procedures must be appropriate to the nature, size, complexity, and scope of the mortgage lending activities of the covered financial institution, and apply only to those employees acting within the scope of their employment at the covered financial institution. At a minimum, these policies and procedures must: (a) Establish a process for identifying which employees of the covered financial institution are required to be registered mortgage loan originators; (b) Require that all employees of the covered financial institution who are mortgage loan originators be informed of the registration requirements of the S.A.F.E. Act and this part and be instructed on how to comply with such requirements and procedures;	A CCO must develop policies and procedures to assure compliance. The policies must be appropriate with the financial institution.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(c) Establish procedures to comply with the unique identifier requirements in § 1007.105; (d) Establish reasonable procedures for confirming the adequacy and accuracy of employee registrations, including updates and renewals, by comparisons with its own records; (e) Establish reasonable procedures and tracking systems for monitoring compliance with registration and renewal requirements and procedures; (f) Provide for independent testing for compliance with this part to be conducted at least annually by covered financial institution personnel or by an outside party; (g) Provide for appropriate action in the case of any employee who fails to comply with the registration requirements of the S.A.F.E. Act, this part, or the covered financial institution's related policies and procedures, including prohibiting such employees from acting as mortgage loan originators or other appropriate disciplinary actions; (h) Establish a process for reviewing employee criminal history background reports received pursuant to this part, taking appropriate action consistent with applicable Federal law, including	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		section 19 of the Federal Deposit Insurance Act (12 U.S.C. 1829), section 206 of the Federal Credit Union Act (12 U.S.C. 1786(i)), and section 5.65(d) of the Farm Credit Act of 1971, as amended (12 U.S.C. 2277a–14(d)), and implementing regulations with respect to these reports, and maintaining records of these reports and actions taken with respect to applicable employees; and (i) Establish procedures designed to ensure that any third party with which the covered financial institution has arrangements related to mortgage loan origination has policies and procedures to comply with the S.A.F.E. Act, including appropriate licensing and/or registration of individuals acting as mortgage loan originators.	
Commodities & Securities Exchanges			
17 C.F.R. § 1.2	CFTC	The act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust, within the scope of his employment or office, shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust as well as of such official, agent, or other person.	A CCO could be liable for failing to act within his or her duties of his office or place of employment or acting outside the scope of his or her office or place of employment
17 C.F.R. § 3.3	CFTC	(a) Designation. Each futures commission merchant, swap dealer, and major swap participant shall designate an individual to serve as its chief	The CCO could be liable for failing to develop appropriate policies and procedures to fulfill the duties in the Act and Commission regulations in

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		compliance officer, and provide the chief compliance officer with the responsibility and authority to develop, in consultation with the board of directors or the senior officer, appropriate policies and procedures to fulfill the duties set forth in the Act and Commission regulations relating to the swap dealer's or major swap participant's swaps activities, or to the futures commission merchant's business as a futures commission merchant and to ensure compliance with the Act and Commission regulations relating to the swap dealer's or major swap participant's swaps activities, or to the futures commission merchant's business as a futures commission merchant. (1) The chief compliance officer shall report to the board of directors or the senior officer of the futures commission merchant, swap dealer, or major swap participant. The board of directors or the senior officer shall appoint the chief compliance officer, shall approve the compensation of the chief compliance officer, and shall meet with the chief compliance officer at least once a year and at the election of the chief compliance officer. (2) Only the board of directors or the senior officer of the futures commission merchant, swap dealer, or major swap participant may remove the chief compliance officer.	relation to the swap dealer's or swap participant's activities, or to the futures commission merchant's business. (1) The CCO could be liable for failure to report to the board of directors. (2) The CCO could be liable for failing to meet the qualifications to become a CCO. (3) The CCO could be liable for failing to meet its duties

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(b) Qualifications. The individual designated to serve as chief compliance officer shall have the background and skills appropriate for fulfilling the responsibilities of the position. No individual disqualified, or subject to disqualification, from registration under section 8a(2) or 8a(3) of the Act may serve as a chief compliance officer. (c) Submission with registration. Each application for registration as a futures commission merchant under § 3.10, a swap dealer under § 23.21, or a major swap participant under § 23.21, must include a designation of a chief compliance officer by submitting a Form 8–R for the chief compliance officer as a principal of the applicant pursuant to § 3.10(a)(2). (d) Chief compliance officer duties. The chief compliance officer's duties shall include, but are not limited to: (1) Administering the registrant's policies and procedures reasonably designed to ensure compliance with the Act and Commission regulations; (2) In consultation with the board of directors or the senior officer, resolving any conflicts of interest that may arise;	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(3) Taking reasonable steps to ensure compliance with the Act and Commission regulations relating to the swap dealer's or major swap participant's swaps activities, or to the futures commission merchant's business as a futures commission merchant; (4) Establishing procedures, in consultation with the board of directors or the senior officer, for the remediation of noncompliance issues identified by the chief compliance officer through a compliance office review, look-back, internal or external audit finding, self-reported error, or validated complaint; (5) Establishing procedures, in consultation with the board of directors or the senior officer, for the handling, management response, remediation, retesting, and closing of noncompliance issues; and (6) Preparing and signing the annual report required under paragraphs (e) and (f) of this section. (e) Annual report. The chief compliance officer annually shall prepare a written report that covers the most recently completed fiscal year of the futures commission merchant, swap dealer, or major swap participant, and provide the annual report to the board of directors or the senior officer. The annual report shall, at a minimum:	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(1) Contain a description of the written policies and procedures, including the code of ethics and conflicts of interest policies, of the futures commission merchant, swap dealer, or major swap participant; (2) Review each applicable requirement under the Act and Commission regulations, and with respect to each: (i) Identify the policies and procedures that are reasonably designed to ensure compliance with the requirement under the Act and Commission regulations; (ii) Provide an assessment as to the effectiveness of these policies and procedures; and (iii) Discuss areas for improvement, and recommend potential or prospective changes or improvements to its compliance program and resources devoted to compliance; (3) List any material changes to compliance policies and procedures during the coverage period for the report; (4) Describe the financial, managerial, operational, and staffing resources set aside for compliance with respect to the Act and Commission regulations,	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		including any material deficiencies in such resources; and (5) Describe any material non-compliance issues identified, and the corresponding action taken. (f) Furnishing the annual report to the Commission. (1) Prior to furnishing the annual report to the Commission, the chief compliance officer shall provide the annual report to the board of directors or the senior officer of the futures commission merchant, swap dealer, or major swap participant for its review. Furnishing the annual report to the board of directors or the senior officer shall be recorded in the board minutes or otherwise, as evidence of compliance with this requirement. (2) The annual report shall be furnished electronically to the Commission not more than 60 days after the end of the fiscal year of the futures commission merchant, swap dealer, or major swap participant, simultaneously with the submission of Form 1–FR–FCM, as required under § 1.10(b)(2)(ii) of this chapter, simultaneously with the Financial and Operational Combined Uniform Single Report, as required under § 1.10(h) of this chapter, or simultaneously with the financial	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		condition report, as required under section 4s(f) of the Act, as applicable. (3) The report shall include a certification by the chief compliance officer or chief executive officer of the registrant that, to the best of his or her knowledge and reasonable belief, and under penalty of law, the information contained in the annual report is accurate and complete. (4) The futures commission merchant, swap dealer, or major swap participant shall promptly furnish an amended annual report if material errors or omissions in the report are identified. An amendment must contain the certification required under paragraph (f)(3) of this section. (5) A futures commission merchant, swap dealer, or major swap participant may request from the Commission an extension of time to furnish its annual report, provided the registrant's failure to timely furnish the report could not be eliminated by the registrant without unreasonable effort or expense. Extensions of the deadline will be granted at the discretion of the Commission. (6) A futures commission merchant, swap dealer, or major swap participant may incorporate by reference sections of an annual report that has been	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		furnished within the current or immediately preceding reporting period to the Commission. If the futures commission merchant, swap dealer, or major swap participant is registered in more than one capacity with the Commission, and must submit more than one annual report, an annual report submitted as one registrant may incorporate by reference sections in the annual report furnished within the current or immediately preceding reporting period as the other registrant. (g) Recordkeeping. (1) The futures commission merchant, swap dealer, or major swap participant shall maintain: (i) A copy of the registrant's policies and procedures reasonably designed to ensure compliance with the Act and Commission regulations; (ii) Copies of materials, including written reports provided to the board of directors or the senior officer in connection with the review of the annual report under paragraph (e) of this section; and (iii) Any records relevant to the annual report, including, but not limited to, work papers and other documents that form the basis of the	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		report, and memoranda, correspondence, other documents, and records that are created, sent or received in connection with the annual report and contain conclusions, opinions, analyses, or financial data related to the annual report. (2) All records or reports that a futures commission merchant, swap dealer, or major swap participant are required to maintain pursuant to this section shall be maintained in accordance with § 1.31 and shall be made available promptly upon request to representatives of the Commission and to representatives of the applicable prudential regulator, as defined in 1a(39) of the Act.	
17 C.F.R. § 11.6	CFTC	(a) Oath. At the discretion of the member of the Commission or staff member conducting the investigation, testimony of a witness may be taken under oath. (b) Penalties for false statements and other false information. Any person making false statements under oath during the course of a Commission investigation is subject to the criminal penalties for perjury in 18 U.S.C. 1621. Any person who knowingly and willfully makes false or fraudulent statements, whether under oath or otherwise, or who falsifies, conceals or covers up a material fact, or submits any false writing or document, knowing it to	The CCO could incur criminal penalties for false statements or false information given.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		contain false, fictitious or fraudulent information, is subject to the criminal penalties set forth in 18 U.S.C. 1001.	
17 C.F.R. § 33.10	CFTC	It shall be unlawful for any person directly or indirectly: (a) To cheat or defraud or attempt to cheat or defraud any other person; (b) To make or cause to be made to any other person any false report or statement thereof or cause to be entered for any person any false record thereof; (c) To deceive or attempt to deceive any other person by any means whatsoever in or in connection with an offer to enter into, the entry into, the confirmation of the execution of, or the maintenance of, any commodity option transaction.	The CCO could be liable for cheating, defrauding, making or causing another to make false reports or statements or to deceive another by any means done directly or indirectly.
17 C.F.R. § 37.200	CFTC	A swap execution facility shall: (a) Establish and enforce compliance with any rule of the swap execution facility, including the terms and conditions of the swaps traded or processed on or through the swap execution facility and any limitation on access to the swap execution facility; (b) Establish and enforce trading, trade processing, and participation rules that will deter abuses and have the capacity to detect, investigate, and enforce those	The CCO could be liable for failing to establish and enforce compliance with the swap execution facility; failing to establish and enforce trading, trade processing and deterring abuses; failing to establish rules that govern the swap facility; or failing to provide the rules when a swap dealer or swap participant enters into or facilitates a swap.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		rules, including means to provide market participants with impartial access to the market and to capture information that may be used in establishing whether rule violations have occurred; (c) Establish rules governing the operation of the facility, including rules specifying trading procedures to be used in entering and executing orders traded or posted on the facility, including block trades; and (d) Provide by its rules that when a swap dealer or major swap participant enters into or facilitates a swap that is subject to the mandatory clearing requirement of section 2(h) of the Act, the swap dealer or major swap participant shall be responsible for compliance with the mandatory trading requirement under section 2(h)(8) of the Act.	
17 C.F.R. § 37.203	CFTC	A swap execution facility shall establish and enforce trading, trade processing, and participation rules that will deter abuses and it shall have the capacity to detect, investigate, and enforce those rules. (a) Abusive trading practices prohibited. A swap execution facility shall prohibit abusive trading practices on its markets by members and market participants. Swap execution facilities that permit intermediation shall prohibit customer-related abuses including, but not limited to, trading ahead	A CCO could be liable if it fails to establish and enforce trading, trade processing and rules that deter abuses or if it fails to investigate and enforce said rules. (a) A CCO could be liable if he or she engages in abusive trading practices. (b) A CCO could be liable if he or she fails to detect and investigate potential rule violations. (c) failure to comply.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		of customer orders, trading against customer orders, accommodation trading, and improper cross trading. Specific trading practices that shall be prohibited include front-running, wash trading, pre-arranged trading (except for block trades permitted by part 43 of this chapter or other types of transactions certified to or approved by the Commission pursuant to the procedures under part 40 of this chapter), fraudulent trading, money passes, and any other trading practices that a swap execution facility deems to be abusive. A swap execution facility shall also prohibit any other manipulative or disruptive trading practices prohibited by the Act or by the Commission pursuant to Commission regulation. (b) Capacity to detect and investigate rule violations. A swap execution facility shall have arrangements and resources for effective enforcement of its rules. Such arrangements shall include the authority to collect information and documents on both a routine and non-routine basis, including the authority to examine books and records kept by the swap execution facility's members and by persons under investigation. A swap execution facility's arrangements and resources shall also facilitate the direct supervision	(d) failure to complete trade surveillance (e) failure to keep real time marketing analysis (f) failure to comply or complete investigations or investigative reports

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		of the market and the analysis of data collected to determine whether a rule violation has occurred. (c) Compliance staff and resources. A swap execution facility shall establish and maintain sufficient compliance staff and resources to ensure that it can conduct effective audit trail reviews, trade practice surveillance, market surveillance, and real-time market monitoring. The swap execution facility's compliance staff shall also be sufficient to address unusual market or trading events as they arise, and to conduct and complete investigations in a timely manner, as set forth in § 37.203(f). (d) Automated trade surveillance system. A swap execution facility shall maintain an automated trade surveillance system capable of detecting potential trade practice violations. The automated trade surveillance system shall load and process daily orders and trades no later than 24 hours after the completion of the trading day. The automated trade surveillance system shall have the capability to detect and flag specific trade execution patterns and trade anomalies; compute, retain, and compare trading statistics; compute trade gains, losses, and swap-equivalent positions; reconstruct the sequence of market activity; perform market analyses; and support system users to perform in-	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		depth analyses and ad hoc queries of trade-related data. (e) Real-time market monitoring. A swap execution facility shall conduct real-time market monitoring of all trading activity on its system(s) or platform(s) to identify disorderly trading and any market or system anomalies. A swap execution facility shall have the authority to adjust trade prices or cancel trades when necessary to mitigate market disrupting events caused by malfunctions in its system(s) or platform(s) or errors in orders submitted by members and market participants. Any trade price adjustments or trade cancellations shall be transparent to the market and subject to standards that are clear, fair, and publicly available. (f) Investigations and investigation reports— (1) Procedures. A swap execution facility shall establish and maintain procedures that require its compliance staff to conduct investigations of possible rule violations. An investigation shall be commenced upon the receipt of a request from Commission staff or upon the discovery or receipt of information by the swap execution facility that indicates a reasonable basis for	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		finding that a violation may have occurred or will occur. (2) Timeliness. Each compliance staff investigation shall be completed in a timely manner. Absent mitigating factors, a timely manner is no later than 12 months after the date that an investigation is opened. Mitigating factors that may reasonably justify an investigation taking longer than 12 months to complete include the complexity of the investigation, the number of firms or individuals involved as potential wrongdoers, the number of potential violations to be investigated, and the volume of documents and data to be examined and analyzed by compliance staff. (3) Investigation reports when a reasonable basis exists for finding a violation. Compliance staff shall submit a written investigation report for disciplinary action in every instance in which compliance staff determines from surveillance or from an investigation that a reasonable basis exists for finding a rule violation. The investigation report shall include the reason the investigation was initiated; a summary of the complaint, if any; the relevant facts; compliance staff's analysis and conclusions; and a	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		recommendation as to whether disciplinary action should be pursued. (4) Investigation reports when no reasonable basis exists for finding a violation. If after conducting an investigation, compliance staff determines that no reasonable basis exists for finding a rule violation, it shall prepare a written report including the reason the investigation was initiated; a summary of the complaint, if any; the relevant facts; and compliance staff's analysis and conclusions. (5) Warning letters. No more than one warning letter may be issued to the same person or entity found to have committed the same rule violation within a rolling twelve month period. (g) Additional sources for compliance. A swap execution facility may refer to the guidance and/or acceptable practices in Appendix B of this part to demonstrate to the Commission compliance with the requirements of § 37.203.	
17 C.F.R. § 37.400	CFTC	The swap execution facility shall: (a) Establish and enforce rules or terms and conditions defining, or specifications detailing:	A CCO could be liable for failing to establish and enforce rules and conditions of a swap execution facility in regards to trading procedures and processing; monitoring trading in swaps.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(1) Trading procedures to be used in entering and executing orders traded on or through the facilities of the swap execution facility; and (2) Procedures for trade processing of swaps on or through the facilities of the swap execution facility; and (b) Monitor trading in swaps to prevent manipulation, price distortion, and disruptions of the delivery or cash settlement process through surveillance, compliance, and disciplinary practices and procedures, including methods for conducting real-time monitoring of trading and comprehensive and accurate trade reconstructions.	
17 C.F.R. § 37.1500	CFTC	(a) In general. Each swap execution facility shall designate an individual to serve as a chief compliance officer. (b) Duties. The chief compliance officer shall: (1) Report directly to the board or to the senior officer of the facility; (2) Review compliance with the core principles in this subsection; (3) In consultation with the board of the facility, a body performing a function similar to that of a	A CCO could be liable for failing to comply with its duties in relation to the swap execution facility. These include: reporting to the board or senior officer, reviewing compliance; resolving conflicts, establish and administer policies and procedures, complying with the Act and establishing procedures for remediation of noncompliance issues. The CCO could be liable if he or she fails to annually prepare and sign a report detailing the financials of the swap facility.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		board, or the senior officer of the facility, resolve any conflicts of interest that may arise; (4) Be responsible for establishing and administering the policies and procedures required to be established pursuant to this section; (5) Ensure compliance with the Act and the rules and regulations issued under the Act, including rules prescribed by the Commission pursuant to section 5h of the Act; and (6) Establish procedures for the remediation of noncompliance issues found during compliance office reviews, look backs, internal or external audit findings, self-reported errors, or through validated complaints. (c) Requirements for procedures. In establishing procedures under paragraph (b)(6) of this section, the chief compliance officer shall design the procedures to establish the handling, management response, remediation, retesting, and closing of noncompliance issues. (d) Annual reports— (1) In general. In accordance with rules prescribed by the Commission, the chief compliance officer	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		shall annually prepare and sign a report that contains a description of: (i) The compliance of the swap execution facility with the Act; and (ii) The policies and procedures, including the code of ethics and conflict of interest policies, of the swap execution facility. (2) Requirements. The chief compliance officer shall: (i) Submit each report described in paragraph (d)(1) of this section with the appropriate financial report of the swap execution facility that is required to be submitted to the Commission pursuant to section 5h of the Act; and (ii) Include in the report a certification that, under penalty of law, the report is accurate and complete.	
17 C.F.R. § 37.1501	CFTC	(a) Definition of board of directors. For purposes of this part, the term "board of directors" means the board of directors of a swap execution facility, or for those swap execution facilities whose organizational structure does not include a board of directors, a body performing a function similar to a board of directors.	Liability for failure to designate a CCO. (1) A CCO could be liable for failure to carry out the duties of a CCO in the Act and Commission regulations (2) Liability if the CCO does not meet the designated qualifications.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(b) Designation and qualifications of chief compliance officer— (1) Chief compliance officer required. Each swap execution facility shall establish the position of chief compliance officer and designate an individual to serve in that capacity. (i) The position of chief compliance officer shall carry with it the authority and resources to develop and enforce policies and procedures necessary to fulfill the duties set forth for chief compliance officers in the Act and Commission regulations. (ii) The chief compliance officer shall have supervisory authority over all staff acting at the direction of the chief compliance officer. (2) Qualifications of chief compliance officer. The individual designated to serve as chief compliance officer shall have the background and skills appropriate for fulfilling the responsibilities of the position. No individual disqualified from registration pursuant to sections 8a(2) or 8a(3) of the Act may serve as a chief compliance officer. (c) Appointment, supervision, and removal of chief compliance office—	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(1) Appointment and compensation of chief compliance officer. (i) A swap execution facility's chief compliance officer shall be appointed by its board of directors or senior officer. A swap execution facility shall notify the Commission within two business days of appointing any new chief compliance officer, whether interim or permanent. (ii) The board of directors or the senior officer shall approve the compensation of the chief compliance officer. (iii) The chief compliance officer shall meet with the board of directors at least annually and the regulatory oversight committee at least quarterly. (iv) The chief compliance officer shall provide any information regarding the swap execution facility's self-regulatory program that is requested by the board of directors or the regulatory oversight committee. (2) Supervision of chief compliance officer. A swap execution facility's chief compliance officer shall report directly to the board of directors or to the senior officer of the swap execution facility, at the swap execution facility's discretion.	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(3) Removal of chief compliance officer. (i) Removal of a swap execution facility's chief compliance officer shall require the approval of a majority of the swap execution facility's board of directors. If the swap execution facility does not have a board of directors, then the chief compliance officer may be removed by the senior officer of the swap execution facility. (ii) The swap execution facility shall notify the Commission of such removal within two business days. (d) Duties of chief compliance officer. The chief compliance officer's duties shall include, but are not limited to, the following: (1) Overseeing and reviewing the swap execution facility's compliance with section 5h of the Act and any related rules adopted by the Commission; (2) In consultation with the board of directors, a body performing a function similar to the board of directors, or the senior officer of the swap execution facility, resolving any conflicts of interest that may arise, including: (i) Conflicts between business considerations and compliance requirements;	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(ii) Conflicts between business considerations and the requirement that the swap execution facility provide fair, open, and impartial access as set forth in § 37.202; and; (iii) Conflicts between a swap execution facility's management and members of the board of directors; (3) Establishing and administering written policies and procedures reasonably designed to prevent violations of the Act and the rules of the Commission; (4) Taking reasonable steps to ensure compliance with the Act and the rules of the Commission; (5) Establishing procedures for the remediation of noncompliance issues identified by the chief compliance officer through a compliance office review, look-back, internal or external audit finding, self-reported error, or validated complaint; (6) Establishing and following appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues; (7) Establishing and administering a compliance manual designed to promote compliance with the applicable laws, rules, and regulations and a written	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		code of ethics designed to prevent ethical violations and to promote honesty and ethical conduct; (8) Supervising the swap execution facility's self-regulatory program with respect to trade practice surveillance; market surveillance; real-time market monitoring; compliance with audit trail requirements; enforcement and disciplinary proceedings; audits, examinations, and other regulatory responsibilities with respect to members and market participants (including ensuring compliance with, if applicable, financial integrity, financial reporting, sales practice, recordkeeping, and other requirements); and (9) Supervising the effectiveness and sufficiency of any regulatory services provided to the swap execution facility by a regulatory service provider in accordance with § 37.204. (e) Preparation of annual compliance report. The chief compliance officer shall, not less than annually, prepare and sign an annual compliance report that, at a minimum, contains the following information covering the time period since the date on which the swap execution facility became registered with the Commission or since the end of the period covered by	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		a previously filed annual compliance report, as applicable: (1) A description of the swap execution facility's written policies and procedures, including the code of ethics and conflict of interest policies; (2) A review of applicable Commission regulations and each subsection and core principle of section 5h of the Act, that, with respect to each: (i) Identifies the policies and procedures that are designed to ensure compliance with each subsection and core principle, including each duty specified in section 5h(f)(15)(B) of the Act; (ii) Provides a self-assessment as to the effectiveness of these policies and procedures; and (iii) Discusses areas for improvement and recommends potential or prospective changes or improvements to its compliance program and resources; (3) A list of any material changes to compliance policies and procedures since the last annual compliance report; (4) A description of the financial, managerial, and operational resources set aside for compliance with	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		respect to the Act and Commission regulations, including a description of the swap execution facility's self-regulatory program's staffing and structure, a catalogue of investigations and disciplinary actions taken since the last annual compliance report, and a review of the performance of disciplinary committees and panels; (5) A description of any material compliance matters, including noncompliance issues identified through a compliance office review, look-back, internal or external audit finding, self-reported error, or validated complaint, and an explanation of how they were resolved; and (6) A certification by the chief compliance officer that, to the best of his or her knowledge and reasonable belief, and under penalty of law, the annual compliance report is accurate and complete. (f) Submission of annual compliance report. (1) Prior to submission to the Commission, the chief compliance officer shall provide the annual compliance report to the board of directors of the swap execution facility for its review. If the swap execution facility does not have a board of directors, then the annual compliance report shall be provided to the senior officer for his or her review.	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		Members of the board of directors and the senior officer shall not require the chief compliance officer to make any changes to the report. Submission of the report to the board of directors or the senior officer, and any subsequent discussion of the report, shall be recorded in board minutes or a similar written record, as evidence of compliance with this requirement. (2) The annual compliance report shall be submitted electronically to the Commission not later than 60 calendar days after the end of the swap execution facility's fiscal year, concurrently with the filing of the fourth fiscal quarter financial report pursuant to§ 37.1306. (3) Promptly upon discovery of any material error or omission made in a previously filed annual compliance report, the chief compliance officer shall file an amendment with the Commission to correct the material error or omission. An amendment shall contain the certification required under paragraph (e)(6) of this section. (4) A swap execution facility may request from the Commission an extension of time to file its annual compliance report based on substantial, undue	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		hardship. Extensions of the filing deadline may be granted at the discretion of the Commission. (g) Recordkeeping. (1) The swap execution facility shall maintain: (i) A copy of the written policies and procedures, including the code of ethics and conflicts of interest policies adopted in furtherance of compliance with the Act and Commission regulations; (ii) Copies of all materials created in furtherance of the chief compliance officer's duties listed in paragraphs (d)(8) and (d)(9) of this section, including records of any investigations or disciplinary actions taken by the swap execution facility; (iii) Copies of all materials, including written reports provided to the board of directors or senior officer in connection with the review of the annual compliance report under paragraph (f)(1) of this section and the board minutes or a similar written record that documents the review of the annual compliance report by the board of directors or senior officer; and (iv) Any records relevant to the swap execution facility's annual compliance report, including, but	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		not limited to, work papers and other documents that form the basis of the report, and memoranda, correspondence, other documents, and records that are (A) Created, sent, or received in connection with the annual compliance report and (B) Contain conclusions, opinions, analyses, or financial data related to the annual compliance report. (2) The swap execution facility shall maintain records in accordance with § 1.31 and part 45 of this chapter. (h) Delegation of authority. The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, authority to grant or deny a swap execution facility's request for an extension of time to file its annual compliance report under paragraph (f)(4) of this section. SOURCE: 78 FR 33582, June 4, 2013, unless otherwise noted.	
17 C.F.R. § 38.158	CFTC	(a) Procedures. A designated contract market must establish and maintain procedures that require its compliance staff to conduct investigations of possible	(a) A CCO could be liable for failure to start an investigation upon the receipt of a request from Commission staff or discovery or receipt

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		rule violations. An investigation must be commenced upon the receipt of a request from Commission staff or upon the discovery or receipt of information by the designated contract market that indicates a reasonable basis for finding that a violation may have occurred or will occur. (b) Timeliness. Each compliance staff investigation must be completed in a timely manner. Absent mitigating factors, a timely manner is no later than 12 months after the date that an investigation is opened. Mitigating factors that may reasonably justify an investigation taking longer than 12 months to complete include the complexity of the investigation, the number of firms or individuals involved as potential wrongdoers, the number of potential violations to be investigated, and the volume of documents and data to be examined and analyzed by compliance staff. (c) Investigation reports when a reasonable basis exists for finding a violation. Compliance staff must submit a written investigation report for disciplinary action in every instance in which compliance staff determines from surveillance or from an investigation that a reasonable basis exists for finding a rule violation. The investigation report must include the reason the investigation was initiated; a summary of	of information by the designated contract market. (b) liability for failure to complete the investigation in a timely manner (c) liability for not submitting a written investigation report when reasonable basis for a violation exists (d) liability for not submitting a written report when a reasonable basis does not exist (e) liability for issuing more than one warning for the same violation.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		the complaint, if any; the relevant facts; compliance staff's analysis and conclusions; and a recommendation as to whether disciplinary action should be pursued. (d) Investigation reports when no reasonable basis exists for finding a violation. If after conducting an investigation, compliance staff determines that no reasonable basis exists for finding a violation, it must prepare a written report including the reason(s) the investigation was initiated; a summary of the complaint, if any; the relevant facts; and compliance staff's analysis and conclusions. (e) Warning letters. No more than one warning letter may be issued to the same person or entity found to have committed the same rule violation within a rolling twelve month period.	
17 C.F.R. § 39.10(c)	CFTC	(c) Chief compliance officer— (1) Designation. Each derivatives clearing organization shall establish the position of chief compliance officer, designate an individual to serve as the chief compliance officer, and provide the chief compliance officer with the full responsibility and authority to develop and enforce, in consultation with the board of directors or the senior officer, appropriate compliance policies and	The CCO could be liable if they fail to fulfill their responsibilities.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		procedures, to fulfill the duties set forth in the Act and Commission regulations. (i) The individual designated to serve as chief compliance officer shall have the background and skills appropriate for fulfilling the responsibilities of the position. No individual who would be disqualified from registration under sections 8a(2) or 8a(3) of the Act may serve as a chief compliance officer. (ii) The chief compliance officer shall report to the board of directors or the senior officer of the derivatives clearing organization. The board of directors or the senior officer shall approve the compensation of the chief compliance officer. (iii) The chief compliance officer shall meet with the board of directors or the senior officer at least once a year. (iv) A change in the designation of the individual serving as the chief compliance officer of the derivatives clearing organization shall be reported to the Commission in accordance with the requirements of § 39.19(c)(4)(ix) of this part. (2) Chief compliance officer duties. The chief compliance officer's duties shall include, but are not limited to:	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(i) Reviewing the derivatives clearing organization's compliance with the core principles set forth in section 5b of the Act, and the Commission's regulations thereunder; (ii) In consultation with the board of directors or the senior officer, resolving any conflicts of interest that may arise; (iii) Establishing and administering written policies and procedures reasonably designed to prevent violation of the Act; (iv) Taking reasonable steps to ensure compliance with the Act and Commission regulations relating to agreements, contracts, or transactions, and with Commission regulations prescribed under section 5b of the Act; (v) Establishing procedures for the remediation of noncompliance issues identified by the chief compliance officer through any compliance office review, look-back, internal or external audit finding, self-reported error, or validated complaint; and (vi) Establishing and following appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(3) Annual report. The chief compliance officer shall, not less than annually, prepare and sign a written report that covers the most recently completed fiscal year of the derivatives clearing organization, and provide the annual report to the board of directors or the senior officer. The annual report shall, at a minimum: (i) Contain a description of the derivatives clearing organization's written policies and procedures, including the code of ethics and conflict of interest policies; (ii) Review each core principle and applicable Commission regulation, and with respect to each: (A) Identify the compliance policies and procedures that are designed to ensure compliance with the core principle; (B) Provide an assessment as to the effectiveness of these policies and procedures; (C) Discuss areas for improvement, and recommend potential or prospective changes or improvements to the derivatives clearing organization's compliance program and resources allocated to compliance;	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(iii) List any material changes to compliance policies and procedures since the last annual report; (iv) Describe the financial, managerial, and operational resources set aside for compliance with the Act and Commission regulations; and (v) Describe any material compliance matters, including incidents of noncompliance, since the date of the last annual report and describe the corresponding action taken. (4) Submission of annual report to the Commission. (i) Prior to submitting the annual report to the Commission, the chief compliance officer shall provide the annual report to the board of directors or the senior officer of the derivatives clearing organization for review. Submission of the report to the board of directors or the senior officer shall be recorded in the board minutes or otherwise, as evidence of compliance with this requirement. (ii) The annual report shall be submitted electronically to the Secretary of the Commission in the format and manner specified by the Commission not more than 90 days after the end of the derivatives clearing organization's fiscal year, concurrently with submission of the fiscal	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		year-end audited financial statement that is required to be furnished to the Commission pursuant to § 39.19(c)(3)(ii) of this part. The report shall include a certification by the chief compliance officer that, to the best of his or her knowledge and reasonable belief, and under penalty of law, the annual report is accurate and complete. (iii) The derivatives clearing organization shall promptly submit an amended annual report if material errors or omissions in the report are identified after submission. An amendment must contain the certification required under paragraph (c)(4)(ii) of this section. (iv) A derivatives clearing organization may request from the Commission an extension of time to submit its annual report in accordance with § 39.19(c)(3) of this part. (5) Recordkeeping. (i) The derivatives clearing organization shall maintain: (A) A copy of all compliance policies and procedures and all other policies and procedures adopted in furtherance of	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		compliance with the Act and Commission regulations; (B) Copies of materials, including written reports provided to the board of directors or the senior officer in connection with the review of the annual report under paragraph (c)(4)(i) of this section; and (C) Any records relevant to the annual report, including, but not limited to, work papers and other documents that form the basis of the report, and memoranda, correspondence, other documents, and records that are created, sent, or received in connection with the annual report and contain conclusions, opinions, analyses, or financial data related to the annual report. (ii) The derivatives clearing organization shall maintain records in accordance with § 1.31 of this chapter and § 39.20 of this part.	
17 C.F.R. § 49.22	CFTC	(a) Definition of Board of Directors. For purposes of this part 49, the term "board of directors" means the board of directors of a registered swap data repository, or for those swap data repositories whose organizational structure does not include a board of	The Board of Directors could be liable if they do not designate a CCO or if they are designate an unqualified candidate. The CCO could be liable for failure to carry out his or her duties.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		directors, a body performing a function similar to that of a board of directors. (b) Designation and qualifications of chief compliance officer. (1) Chief Compliance Officer required. Each registered swap data repository shall establish the position of chief compliance officer, and designate an individual to serve in that capacity. (i) The position of chief compliance officer shall carry with it the authority and resources to develop and enforce policies and procedures necessary to fulfill the duties set forth for chief compliance officers in the Act and Commission regulations. (ii) The chief compliance officer shall have supervisory authority over all staff acting at the direction of the chief compliance officer. (2) Qualifications of chief compliance officer. The individual designated to serve as chief compliance officer shall have the background and skills appropriate for fulfilling the responsibilities of the position and shall be subject to the following requirements:	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(i) No individual disqualified from registration pursuant to Sections 8a(2) or 8a(3) of the Act may serve as a chief compliance officer. (ii) The chief compliance officer may not be a member of the swap data repository's legal department or serve as its general counsel. (c) Appointment, Supervision, and Removal of Chief Compliance Officer. (1) Appointment and Compensation of Chief Compliance Officer Determined by Board of Directors. A registered swap data repository's chief compliance officer shall be appointed by its board of directors. The board of directors shall also approve the compensation of the chief compliance officer and shall meet with the chief compliance officer at least annually. The appointment of the chief compliance officer and approval of the chief compliance officer's compensation shall require the approval of the board of directors. The senior officer of the swap data repository may fulfill these responsibilities. A swap data repository shall notify the Commission of the appointment of a new chief compliance officer within two business days of such appointment.	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(2) Supervision of Chief Compliance Officer. A registered swap data repository's chief compliance officer shall report directly to the board of directors or to the senior officer of the swap data repository, at the swap data repository's discretion. (3) Removal of Chief Compliance Officer by Board of Directors. (i) Removal of a registered swap data repository's chief compliance officer shall require the approval of the swap data repository's board of directors. If the swap data repository does not have a board of directors, then the chief compliance officer may be removed by the senior officer of the swap data repository; (ii) The swap data repository shall notify the Commission of such removal within two business days; and (iii) The swap data repository shall notify the Commission within two business days of appointing any new chief compliance officer, whether interim or permanent. (d) Duties of chief compliance officer. The chief compliance officer's duties shall include, but are not limited to, the following:	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(1) Overseeing and reviewing the swap data repository's compliance with Section 21 of the Act and any related rules adopted by the Commission; (2) In consultation with the board of directors, a body performing a function similar to the board, or the senior officer of the swap data repository, resolving any conflicts of interest that may arise including: (i) Conflicts between business considerations and compliance requirements; (ii) Conflicts between business considerations and the requirement that the registered swap data repository provide fair and open access as set forth in § 49.27 of this part; and (iii) Conflicts between a registered swap data repository's management and members of the board of directors; (3) Establishing and administering written policies and procedures reasonably designed to prevent violation of the Act and any rules adopted by the Commission; (4) Taking reasonable steps to ensure compliance with the Act and Commission regulations relating to agreements, contracts, or transactions, and with Commission regulations under Section 21 of the	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		Act, including confidentiality and indemnification agreements entered into with foreign or domestic regulators pursuant to Section 21(d) of the Act; (5) Establishing procedures for the remediation of noncompliance issues identified by the chief compliance officer through a compliance office review, look-back, internal or external audit finding, self-reported error, or validated complaint; (6) Establishing and following appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues; and (7) Establishing and administering a written code of ethics designed to prevent ethical violations and to promote honesty and ethical conduct. (e) Annual compliance report prepared by chief compliance officer. The chief compliance officer shall, not less than annually, prepare and sign an annual compliance report, that at a minimum, contains the following information covering the time period since the date on which the swap data repository became registered with the Commission or since the end of the period covered by a previously filed annual compliance report, as applicable:	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(1) A description of the registered swap data repository's written policies and procedures, including the code of ethics and conflict of interest policies; (2) A review of applicable Commission regulations and each subsection and core principle of Section 21 of the Act, that, with respect to each: (i) Identifies the policies and procedures that are designed to ensure compliance with each subsection and core principle, including each duty specified in Section 21(c); (ii) Provides a self-assessment as to the effectiveness of these policies and procedures; and (iii) Discusses areas for improvement, and recommends potential or prospective changes or improvements to its compliance program and resources; (3) A list of any material changes to compliance policies and procedures since the last annual compliance report; (4) A description of the financial, managerial, and operational resources set aside for compliance with respect to the Act and Commission regulations;	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(5) A description of any material compliance matters, including noncompliance issues identified through a compliance office review, look-back, internal or external audit finding, self-reported error, or validated complaint, and explains how they were resolved; and (6) A certification by the chief compliance officer that, to the best of his or her knowledge and reasonable belief, and under penalty of law, the annual compliance report is accurate and complete. (f) Submission of Annual Compliance Report by Chief Compliance Officer to the Commission. (1) Prior to submission of the annual compliance report to the Commission, the chief compliance officer shall provide the annual compliance report to the board of the registered swap data repository for its review. If the swap data repository does not have a board, then the annual compliance report shall be provided to the senior officer for their review. Members of the board and the senior officer may not require the chief compliance officer to make any changes to the report. Submission of the report to the board or senior officer, and any subsequent discussion of the report, shall be	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		recorded in board minutes or similar written record, as evidence of compliance with this requirement. (2) The annual compliance report shall be provided electronically to the Commission not more than 60 days after the end of the registered swap data repository's fiscal year, concurrently with the filing of the annual amendment to Form SDR that must be submitted to the Commission pursuant to § 49.3(a)(5) of this part. (3) Promptly upon discovery of any material error or omission made in a previously filed compliance report, the chief compliance officer shall file an amendment with the Commission to correct any material error or omission. An amendment shall contain the oath or certification required under paragraph (e)(67) of this section. (4) A registered swap data repository may request the Commission for an extension of time to file its compliance report based on substantial, undue hardship. Extensions for the filing deadline may be granted at the discretion of the Commission. (g) Recordkeeping. (1) The registered swap data repository shall maintain:	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(i) A copy of the written policies and procedures, including the code of ethics and conflicts of interest policies adopted in furtherance of compliance with the Act and Commission regulations; (ii) Copies of all materials, including written reports provided to the board of directors or senior officer in connection with the review of the annual compliance report under paragraph (f)(1) of this section and the board minutes or similar written record of such review, that record the submission of the annual compliance report to the board of directors or senior officer; and (iii) Any records relevant to the registered swap data repository's annual compliance report, including, but not limited to, work papers and other documents that form the basis of the report, and memoranda, correspondence, other documents, and records that are: (A) Created, sent or received in connection with the annual compliance report and (B) Contain conclusions, opinions, analyses, or financial data related to the annual compliance report.	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(2) The registered swap data repository shall maintain records in accordance with § 1.31 of this chapter.	
17 C.F.R. § 75.20(a)-(d)	CFTC	(a) Program requirement. Each banking entity shall develop and provide for the continued administration of a compliance program reasonably designed to ensure and monitor compliance with the prohibitions and restrictions on proprietary trading and covered fund activities and investments set forth in section 13 of the BHC Act and this part. The terms, scope and detail of the compliance program shall be appropriate for the types, size, scope and complexity of activities and business structure of the banking entity. (b) Contents of compliance program. Except as provided in paragraph (f) of this section, the compliance program required by paragraph (a) of this section, at a minimum, shall include: (1) Written policies and procedures reasonably designed to document, describe, monitor and limit trading activities subject to subpart B of this part (including those permitted under §§ 75.3 to 75.6), including setting, monitoring and managing required limits set out in §§ 75.4 and 75.5, and activities and investments with respect to a covered fund subject to subpart C of this part (including those permitted under §§ 75.11 through 75.14)	There could be liability if there is not a compliance program of trading and investments instituted in each banking entity.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		conducted by the banking entity to ensure that all activities and investments conducted by the banking entity that are subject to section 13 of the BHC Act and this part comply with section 13 of the BHC Act and this part; (2) A system of internal controls reasonably designed to monitor compliance with section 13 of the BHC Act and this part and to prevent the occurrence of activities or investments that are prohibited by section 13 of the BHC Act and this part; (3) A management framework that clearly delineates responsibility and accountability for compliance with section 13 of the BHC Act and this part and includes appropriate management review of trading limits, strategies, hedging activities, investments, incentive compensation and other matters identified in this part or by management as requiring attention; (4) Independent testing and audit of the effectiveness of the compliance program conducted periodically by qualified personnel of the banking entity or by a qualified outside party; (5) Training for trading personnel and managers, as well as other appropriate personnel, to effectively	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		implement and enforce the compliance program; and (6) Records sufficient to demonstrate compliance with section 13 of the BHC Act and this part, which a banking entity must promptly provide to the Commission upon request and retain for a period of no less than 5 years or such longer period as required by the Commission. (c) Additional standards. In addition to the requirements in paragraph (b) of this section, the compliance program of a banking entity must satisfy the requirements and other standards contained in Appendix B of this part, if: (1) The banking entity engages in proprietary trading permitted under subpart B of this part and is required to comply with the reporting requirements of paragraph (d) of this section; (2) The banking entity has reported total consolidated assets as of the previous calendar year end of $50 billion or more or, in the case of a foreign banking entity, has total U.S. assets as of the previous calendar year end of $50 billion or more (including all subsidiaries, affiliates, branches and agencies of the foreign banking entity operating, located or organized in the United States); or	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(3) The Commission notifies the banking entity in writing that it must satisfy the requirements and other standards contained in Appendix B of this part. (d) Reporting requirements under Appendix A of this Part. (1) A banking entity engaged in proprietary trading activity permitted under subpart B of this part shall comply with the reporting requirements described in Appendix A of this part, if: (i) The banking entity (other than a foreign banking entity as provided in paragraph (d)(1)(ii) of this section) has, together with its affiliates and subsidiaries, trading assets and liabilities (excluding trading assets and liabilities involving obligations of or guaranteed by the United States or any agency of the United States) the average gross sum of which (on a worldwide consolidated basis) over the previous consecutive four quarters, as measured as of the last day of each of the four prior calendar quarters, equals or exceeds the threshold established in paragraph (d)(2) of this section; (ii) In the case of a foreign banking entity, the average gross sum of the trading assets and	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		liabilities of the combined U.S. operations of the foreign banking entity (including all subsidiaries, affiliates, branches and agencies of the foreign banking entity operating, located or organized in the United States and excluding trading assets and liabilities involving obligations of or guaranteed by the United States or any agency of the United States) over the previous consecutive four quarters, as measured as of the last day of each of the four prior calendar quarters, equals or exceeds the threshold established in paragraph (d)(2) of this section; or (iii) The Commission notifies the banking entity in writing that it must satisfy the reporting requirements contained in Appendix A of this part. (2) The threshold for reporting under paragraph (d)(1) of this section shall be $50 billion beginning on June 30, 2014; $25 billion beginning on April 30, 2016; and $10 billion beginning on December 31, 2016. (3) Frequency of reporting. Unless the Commission notifies the banking entity in writing that it must report on a different basis, a banking entity with $50 billion or more in trading assets and liabilities (as	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		calculated in accordance with paragraph (d)(1) of this section) shall report the information required by Appendix A of this part for each calendar month within 30 days of the end of the relevant calendar month; beginning with information for the month of January 2015, such information shall be reported within 10 days of the end of each calendar month. Any other banking entity subject to Appendix A of this part shall report the information required by Appendix A of this part for each calendar quarter within 30 days of the end of that calendar quarter unless the Commission notifies the banking entity in writing that it must report on a different basis.	
17 C.F.R. § 165.16	CFTC	The Commodity Whistleblower Incentives and Protections provisions set forth in Section 23(h) of Commodity Exchange Act and this part 165 do not provide individuals who provide information to the Commission with immunity from prosecution. The fact that an individual may become a whistleblower and assist in Commission investigations and enforcement actions does not preclude the Commission from bringing an action against the whistleblower based upon the whistleblower's own conduct in connection with violations of the Commodity Exchange Act and the Commission's	The CCO could be liable in spite of being a whistleblower based on the whistleblower's own conduct in connection with violations of the Commodity Exchange Act and the Commission's regulations. The cooperation may be taken into consideration when determining a sanction for the whistleblower.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		regulations. If such an action is determined to be appropriate, however, the Commission's Division of Enforcement will take the whistleblower's cooperation into consideration in accordance with its sanction recommendations to the Commission.	
17 C.F.R. § 200.311	SEC	Penalties. Title 18 U.S.C. 1001 makes it a criminal offense, subject to a maximum fine of $10,000, or imprisonment for not more than 5 years or both, to knowingly and willingly make or cause to be made any false or fraudulent statements or representations in any matter within the jurisdiction of any agency of the United States. 5 U.S.C. 552a(i) makes it a misdemeanor punishable by a fine of not more than $5,000 for any person knowingly and willfully to request or obtain any record concerning an individual from the Commission under false pretenses. 5 U.S.C. 552a(i) (1) and (2) provide criminal penalties for certain violations of the Privacy Act by officers and employees of the Commission.	The CCO could receive criminal charges subject to a fine or imprisonment if they knowingly or willingly make any false or fraudulent statements or representations within the jurisdiction of any agency in the U.S. There also could be criminal penalties for certain violations of the Privacy Act.
17 C.F.R. § 240.13n-11	SEC	(a) In general. Each security-based swap data repository shall identify on Form SDR (17 CFR 249.1500) a person who has been designated by the board to serve as a chief compliance officer of the security-based swap data repository. The compensation, appointment, and removal of the chief compliance officer shall require the approval of a	Liability for failure of CCO to comply with their duties.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		majority of the security-based swap data repository's board. (b) Definitions. For purposes of this section— (1) Board means the board of directors of the security-based swap data repository or a body performing a function similar to the board of directors of the security-based swap data repository. (2) Director means any member of the board. (3) EDGAR Filer Manual has the same meaning as set forth in Rule 11 of Regulation S–T (17 CFR 232.11). (4) Interactive Data Financial Report has the same meaning as set forth in Rule 11 of Regulation S–T (17 CFR 232.11). (5) Material change means a change that a chief compliance officer would reasonably need to know in order to oversee compliance of the security-based swap data repository. (6) Material compliance matter means any compliance matter that the board would reasonably need to know to oversee the compliance of the security-based swap data repository and that involves, without limitation:	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(i) A violation of the federal securities laws by the security-based swap data repository, its officers, directors, employees, or agents; (ii) A violation of the policies and procedures of the security-based swap data repository by the security-based swap data repository, its officers, directors, employees, or agents; or (iii) A weakness in the design or implementation of the policies and procedures of the security-based swap data repository. (7) Official filing has the same meaning as set forth in Rule 11 of Regulation S–T (17 CFR 232.11). (8) Senior officer means the chief executive officer or other equivalent officer. (9) Tag (including the term tagged) has the same meaning as set forth in Rule 11 of Regulation S–T (17 CFR 232.11). (c) Duties. Each chief compliance officer of a security-based swap data repository shall: (1) Report directly to the board or to the senior officer of the security-based swap data repository; (2) Review the compliance of the security-based swap data repository with respect to the requirements and core principles described in	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		section 13(n) of the Act (15 U.S.C. 78m(n)) and the rules and regulations thereunder; (3) In consultation with the board or the senior officer of the security-based swap data repository, take reasonable steps to resolve any material conflicts of interest that may arise; (4) Be responsible for administering each policy and procedure that is required to be established pursuant to section 13 of the Act (15 U.S.C. 78m) and the rules and regulations thereunder; (5) Take reasonable steps to ensure compliance with the Act and the rules and regulations thereunder relating to security-based swaps, including each rule prescribed by the Commission under section 13 of the Act (15 U.S.C. 78m); (6) Establish procedures for the remediation of noncompliance issues identified by the chief compliance officer through any— (i) Compliance office review; (ii) Look-back; (iii) Internal or external audit finding; (iv) Self-reported error; or (v) Validated complaint; and	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(7) Establish and follow appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues. (d) Compliance reports— (1) In general. The chief compliance officer shall annually prepare and sign a report that contains a description of the compliance of the security-based swap data repository with respect to the Act and the rules and regulations thereunder and each policy and procedure of the security-based swap data repository (including the code of ethics and conflicts of interest policies of the security-based swap data repository). Each compliance report shall also contain, at a minimum, a description of: (i) The security-based swap data repository's enforcement of its policies and procedures; (ii) Any material changes to the policies and procedures since the date of the preceding compliance report; (iii) Any recommendation for material changes to the policies and procedures as a result of the annual review, the rationale for such recommendation, and whether such policies and procedures were or will be modified by the	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		security-based swap data repository to incorporate such recommendation; and (iv) Any material compliance matters identified since the date of the preceding compliance report. (2) Requirements. A financial report of the security-based swap data repository shall be filed with the Commission as described in paragraph (g) of this section and shall accompany a compliance report as described in paragraph (d)(1) of this section. The compliance report shall include a certification by the chief compliance officer that, to the best of his or her knowledge and reasonable belief, and under penalty of law, the compliance report is accurate and complete. The compliance report shall also be filed in a tagged data format in accordance with the instructions contained in the EDGAR Filer Manual, as described in Rule 301 of Regulation S–T (17 CFR 232.301). (e) The chief compliance officer shall submit the annual compliance report to the board for its review prior to the filing of the report with the Commission. (f) Financial reports. Each financial report filed with a compliance report shall: (1) Be a complete set of financial statements of the security-based swap data repository that are	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		prepared in accordance with U.S. generally accepted accounting principles for the most recent two fiscal years of the security-based swap data repository; (2) Be audited in accordance with the standards of the Public Company Accounting Oversight Board by a registered public accounting firm that is qualified and independent in accordance with Rule 2–01 of Regulation S–X (17 CFR 210.2–01); (3) Include a report of the registered public accounting firm that complies with paragraphs (a) through (d) of Rule 2–02 of Regulation S–X (17 CFR 210.2–02); (4) If the security-based swap data repository's financial statements contain consolidated information of a subsidiary of the security-based swap data repository, provide condensed financial information, in a financial statement footnote, as to the financial position, changes in financial position and results of operations of the security-based swap data repository, as of the same dates and for the same periods for which audited consolidated financial statements are required. Such financial information need not be presented in greater detail than is required for condensed statements by Rules 10–01(a)(2), (3), and (4) of Regulation S–X (17	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		CFR 210.10–01). Detailed footnote disclosure that would normally be included with complete financial statements may be omitted with the exception of disclosures regarding material contingencies, long-term obligations, and guarantees. Descriptions of significant provisions of the security-based swap data repository's long-term obligations, mandatory dividend or redemption requirements of redeemable stocks, and guarantees of the security-based swap data repository shall be provided along with a five-year schedule of maturities of debt. If the material contingencies, long-term obligations, redeemable stock requirements, and guarantees of the security-based swap data repository have been separately disclosed in the consolidated statements, then they need not be repeated in this schedule; and (5) Be provided as an official filing in accordance with the EDGAR Filer Manual and include, as part of the official filing, an Interactive Data Financial Report filed in accordance with Rule 407 of Regulation S–T (17 CFR 232.407). (g) Reports filed pursuant to paragraphs (d) and (f) of this section shall be filed within 60 days after the end of the fiscal year covered by such reports.	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(h) No officer, director, or employee of a security-based swap data repository may directly or indirectly take any action to coerce, manipulate, mislead, or fraudulently influence the security-based swap data repository's chief compliance officer in the performance of his or her duties under this section.	
17 C.F.R. § 240.15Fk-1	SEC	(a) In general. A security-based swap dealer and major security-based swap participant shall designate an individual to serve as a chief compliance officer on its registration form. (b) Duties. The chief compliance officer shall: (1) Report directly to the board of directors or to the senior officer of the security-based swap dealer or major security-based swap participant; and (2) Take reasonable steps to ensure that the registrant establishes, maintains and reviews written policies and procedures reasonably designed to achieve compliance with the Act and the rules and regulations thereunder relating to its business as a security-based swap dealer or major security-based swap participant by: (i) Reviewing the compliance of the security-based swap dealer or major security-based swap participant with respect to the security-based	A CCO could be liable for failure to complete his or her duties.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		swap dealer and major security-based swap participant requirements described in section 15F of the Act, and the rules and regulations thereunder, where the review shall involve preparing the registrant's annual assessment of its written policies and procedures reasonably designed to achieve compliance with section 15F of the Act, and the rules and regulations thereunder, by the security-based swap dealer or major security-based swap participant; (ii) Taking reasonable steps to ensure that the registrant establishes, maintains and reviews policies and procedures reasonably designed to remediate non-compliance issues identified by the chief compliance officer through any means, including any: (A) Compliance office review; (B) Look-back; (C) Internal or external audit finding; (D) Self-reporting to the Commission and other appropriate authorities; or (E) Complaint that can be validated; and (iii) Taking reasonable steps to ensure that the registrant establishes and follows procedures	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		reasonably designed for the handling, management response, remediation, retesting, and resolution of non-compliance issues; (3) In consultation with the board of directors or the senior officer of the security-based swap dealer or major security-based swap participant, take reasonable steps to resolve any material conflicts of interest that may arise; and (4) Administer each policy and procedure that is required to be established pursuant to section 15F of the Act and the rules and regulations thereunder. (c) Annual reports— (1) In general. The chief compliance officer shall annually prepare and sign a compliance report that contains a description of the written policies and procedures of the security-based swap dealer or major security-based swap participant described in paragraph (b) of this section (including the code of ethics and conflict of interest policies). (2) Requirements. (i) Each compliance report shall also contain, at a minimum, a description of: (A) The security-based swap dealer or major security-based swap participant's assessment of	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		the effectiveness of its policies and procedures relating to its business as a security-based swap dealer or major security-based participant; (B) Any material changes to the registrant's policies and procedures since the date of the preceding compliance report; (C) Any areas for improvement, and recommended potential or prospective changes or improvements to its compliance program and resources devoted to compliance; (D) Any material non-compliance matters identified; and (E) The financial, managerial, operational, and staffing resources set aside for compliance with the Act and the rules and regulations thereunder relating to its business as a security-based swap dealer or major security-based swap participant, including any material deficiencies in such resources. (ii) A compliance report under paragraph (c)(1) of this section also shall: (A) Be submitted to the Commission within 30 days following the deadline for filing the security-based swap dealer's or major security-based swap participant's annual financial report	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		with the Commission pursuant to section 15F of the Act and rules and regulations thereunder; (B) Be submitted to the board of directors and audit committee (or equivalent bodies) and the senior officer of the security-based swap dealer or major security-based swap participant prior to submission to the Commission; (C) Be discussed in one or more meetings conducted by the senior officer with the chief compliance officer(s) in the preceding 12 months, the subject of which addresses the obligations in this section; and (D) Include a certification by the chief compliance officer or senior officer that, to the best of his or her knowledge and reasonable belief and under penalty of law, the information contained in the compliance report is accurate and complete in all material respects. (iii) Extensions of time. A security-based swap dealer or major security-based swap participant may request from the Commission an extension of time to submit its compliance report, provided the registrant's failure to timely submit the report could not be eliminated by the registrant without	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		unreasonable effort or expense. Extensions of the deadline will be granted at the discretion of the Commission. (iv) Incorporation by reference. A security-based swap dealer or major security-based swap participant may incorporate by reference sections of a compliance report that have been submitted within the current or immediately preceding reporting period to the Commission. (v) Amendments. A security-based swap dealer or major security-based swap participant shall promptly submit an amended compliance report if material errors or omissions in the report are identified. An amendment must contain the certification required under paragraph (c)(2)(ii)(D) of this section. (d) Compensation and removal. The compensation and removal of the chief compliance officer shall require the approval of a majority of the board of directors of the security-based swap dealer or major security-based swap participant. (e) Definitions. For purposes of this section, references to:	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(1) The board or board of directors shall include a body performing a function similar to the board of directors. (2) The senior officer shall include the chief executive officer or other equivalent officer. (3) Complaint that can be validated shall include any written complaint by a counterparty involving the security-based swap dealer or major security-based swap participant or associated person of a security-based swap dealer or major security-based swap participant that can be supported upon reasonable investigation. (4) A material non-compliance matter means any non-compliance matter about which the board of directors of the security-based swap dealer or major security-based swap participant would reasonably need to know to oversee the compliance of the security-based swap dealer or major security-based swap participant, and that involves, without limitation: (i) A violation of the federal securities laws relating to its business as a security-based swap dealer or major security-based swap participant by the firm or its officers, directors, employees or agents;	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(ii) A violation of the policies and procedures relating to its business as a security-based swap dealer or major security-based swap participant by the firm or its officers, directors, employees or agents; or (iii) A weakness in the design or implementation of the policies and procedures relating to its business as a security-based swap dealer or major security-based swap participant.	
17 C.F.R. § 240.21F-2	SEC	(a) Definition of a whistleblower. (1) You are a whistleblower if, alone or jointly with others, you provide the Commission with information pursuant to the procedures set forth in § 240.21F–9(a) of this chapter, and the information relates to a possible violation of the Federal securities laws (including any rules or regulations thereunder) that has occurred, is ongoing, or is about to occur. A whistleblower must be an individual. A company or another entity is not eligible to be a whistleblower. (2) To be eligible for an award, you must submit original information to the Commission in accordance with the procedures and conditions described in §§ 240.21F–4, 240.21F–8, and 240.21F–9 of this chapter.	This regulation could help eliminate liability for a CCO if he or she submits the correct information to the SEC.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(b) Prohibition against retaliation. (1) For purposes of the anti-retaliation protections afforded by Section 21F(h)(1) of the Exchange Act (15 U.S.C. 78u–6(h)(1)), you are a whistleblower if: (i) You possess a reasonable belief that the information you are providing relates to a possible securities law violation (or, where applicable, to a possible violation of the provisions set forth in 18 U.S.C. 1514A(a)) that has occurred, is ongoing, or is about to occur, and; (ii) You provide that information in a manner described in Section 21F(h)(1)(A) of the Exchange Act (15 U.S.C. 78u–6(h)(1)(A)). (iii) The anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award. (2) Section 21F(h)(1) of the Exchange Act (15 U.S.C. 78u–6(h)(1)), including any rules promulgated thereunder, shall be enforceable in an action or proceeding brought by the Commission.	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
17 C.F.R. § 255.20	SEC	(a) Program requirement. Each banking entity shall develop and provide for the continued administration of a compliance program reasonably designed to ensure and monitor compliance with the prohibitions and restrictions on proprietary trading and covered fund activities and investments set forth in section 13 of the BHC Act and this part. The terms, scope and detail of the compliance program shall be appropriate for the types, size, scope and complexity of activities and business structure of the banking entity. (b) Contents of compliance program. Except as provided in paragraph (f) of this section, the compliance program required by paragraph (a) of this section, at a minimum, shall include: (1) Written policies and procedures reasonably designed to document, describe, monitor and limit trading activities subject to subpart B (including those permitted under §§ 255.3 to 255.6 of subpart B), including setting, monitoring and managing required limits set out in § 2554 and § 2555, and activities and investments with respect to a covered fund subject to subpart C (including those permitted under §§ 255.11 through 255.14 of subpart C) conducted by the banking entity to ensure that all activities and investments conducted by the banking entity that are subject to section 13 of the BHC Act	A CCO could be liable for failure to develop, administer, and monitor a compliance program at each banking entity.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		and this part comply with section 13 of the BHC Act and this part; (2) A system of internal controls reasonably designed to monitor compliance with section 13 of the BHC Act and this part and to prevent the occurrence of activities or investments that are prohibited by section 13 of the BHC Act and this part; (3) A management framework that clearly delineates responsibility and accountability for compliance with section 13 of the BHC Act and this part and includes appropriate management review of trading limits, strategies, hedging activities, investments, incentive compensation and other matters identified in this part or by management as requiring attention; (4) Independent testing and audit of the effectiveness of the compliance program conducted periodically by qualified personnel of the banking entity or by a qualified outside party; (5) Training for trading personnel and managers, as well as other appropriate personnel, to effectively implement and enforce the compliance program; and	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(6) Records sufficient to demonstrate compliance with section 13 of the BHC Act and this part, which a banking entity must promptly provide to the SEC upon request and retain for a period of no less than 5 years or such longer period as required by the SEC. (c) Additional standards. In addition to the requirements in paragraph (b) of this section, the compliance program of a banking entity must satisfy the requirements and other standards contained in Appendix B, if: (1) The banking entity engages in proprietary trading permitted under subpart B and is required to comply with the reporting requirements of paragraph (d) of this section; (2) The banking entity has reported total consolidated assets as of the previous calendar year end of $50 billion or more or, in the case of a foreign banking entity, has total U.S. assets as of the previous calendar year end of $50 billion or more (including all subsidiaries, affiliates, branches and agencies of the foreign banking entity operating, located or organized in the United States); or	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(3) The SEC notifies the banking entity in writing that it must satisfy the requirements and other standards contained in Appendix B to this part. (d) Reporting requirements under Appendix A to this part. (1) A banking entity engaged in proprietary trading activity permitted under subpart B shall comply with the reporting requirements described in Appendix A, if: (i) The banking entity (other than a foreign banking entity as provided in paragraph (d)(1)(ii) of this section) has, together with its affiliates and subsidiaries, trading assets and liabilities (excluding trading assets and liabilities involving obligations of or guaranteed by the United States or any agency of the United States) the average gross sum of which (on a worldwide consolidated basis) over the previous consecutive four quarters, as measured as of the last day of each of the four prior calendar quarters, equals or exceeds the threshold established in paragraph (d)(2) of this section; (ii) In the case of a foreign banking entity, the average gross sum of the trading assets and liabilities of the combined U.S. operations of the	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		foreign banking entity (including all subsidiaries, affiliates, branches and agencies of the foreign banking entity operating, located or organized in the United States and excluding trading assets and liabilities involving obligations of or guaranteed by the United States or any agency of the United States) over the previous consecutive four quarters, as measured as of the last day of each of the four prior calendar quarters, equals or exceeds the threshold established in paragraph (d)(2) of this section; or (iii) The SEC notifies the banking entity in writing that it must satisfy the reporting requirements contained in Appendix A. (2) The threshold for reporting under paragraph (d)(1) of this section shall be $50 billion beginning on June 30, 2014; $25 billion beginning on April 30, 2016; and $10 billion beginning on December 31, 2016. (3) Frequency of reporting: Unless the SEC notifies the banking entity in writing that it must report on a different basis, a banking entity with $50 billion or more in trading assets and liabilities (as calculated in accordance with paragraph (d)(1) of this section) shall report the information required by Appendix A for each calendar month within 30 days of the end	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		of the relevant calendar month; beginning with information for the month of January 2015, such information shall be reported within 10 days of the end of each calendar month. Any other banking entity subject to Appendix A shall report the information required by Appendix A for each calendar quarter within 30 days of the end of that calendar quarter unless the SEC notifies the banking entity in writing that it must report on a different basis. (e) Additional documentation for covered funds. Any banking entity that has more than $10 billion in total consolidated assets as reported on December 31 of the previous two calendar years shall maintain records that include: (1) Documentation of the exclusions or exemptions other than sections 3(c)(1) and 3(c)(7) of the Investment Company Act of 1940 relied on by each fund sponsored by the banking entity (including all subsidiaries and affiliates) in determining that such fund is not a covered fund; (2) For each fund sponsored by the banking entity (including all subsidiaries and affiliates) for which the banking entity relies on one or more of the exclusions from the definition of covered fund provided by §§ 255.10(c)(1), 255.10(c)(5),	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		255.10(c)(8), 255.10(c)(9), or 255.10(c)(10) of subpart C, documentation supporting the banking entity's determination that the fund is not a covered fund pursuant to one or more of those exclusions; (3) For each seeding vehicle described in § 255.10(c)(12)(i) or (iii) of subpart C that will become a registered investment company or SEC–regulated business development company, a written plan documenting the banking entity's determination that the seeding vehicle will become a registered investment company or SEC–regulated business development company; the period of time during which the vehicle will operate as a seeding vehicle; and the banking entity's plan to market the vehicle to third-party investors and convert it into a registered investment company or SEC–regulated business development company within the time period specified in § 255.12(a)(2)(i)(B) of subpart C; (4) For any banking entity that is, or is controlled directly or indirectly by a banking entity that is, located in or organized under the laws of the United States or of any State, if the aggregate amount of ownership interests in foreign public funds that are described in § 255.10(c)(1) of subpart C owned by such banking entity (including ownership interests	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		owned by any affiliate that is controlled directly or indirectly by a banking entity that is located in or organized under the laws of the United States or of any State) exceeds $50 million at the end of two or more consecutive calendar quarters, beginning with the next succeeding calendar quarter, documentation of the value of the ownership interests owned by the banking entity (and such affiliates) in each foreign public fund and each jurisdiction in which any such foreign public fund is organized, calculated as of the end of each calendar quarter, which documentation must continue until the banking entity's aggregate amount of ownership interests in foreign public funds is below $50 million for two consecutive calendar quarters; and (5) For purposes of paragraph (e)(4) of this section, a U.S. branch, agency, or subsidiary of a foreign banking entity is located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary. (f) Simplified programs for less active banking entities—	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(1) Banking entities with no covered activities. A banking entity that does not engage in activities or investments pursuant to subpart B or subpart C (other than trading activities permitted pursuant to § 255.6(a) of subpart B) may satisfy the requirements of this section by establishing the required compliance program prior to becoming engaged in such activities or making such investments (other than trading activities permitted pursuant to § 255.6(a) of subpart B). (2) Banking entities with modest activities. A banking entity with total consolidated assets of $10 billion or less as reported on December 31 of the previous two calendar years that engages in activities or investments pursuant to subpart B or subpart C (other than trading activities permitted under § 255.6(a) of subpart B) may satisfy the requirements of this section by including in its existing compliance policies and procedures appropriate references to the requirements of section 13 of the BHC Act and this part and adjustments as appropriate given the activities, size, scope and complexity of the banking entity.	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
17 C.F.R. § 270.38a-1	SEC	(a) Each registered investment company and business development company ("fund") must: (1) Policies and procedures. Adopt and implement written policies and procedures reasonably designed to prevent violation of the Federal Securities Laws by the fund, including policies and procedures that provide for the oversight of compliance by each investment adviser, principal underwriter, administrator, and transfer agent of the fund; (2) Board approval. Obtain the approval of the fund's board of directors, including a majority of directors who are not interested persons of the fund, of the fund's policies and procedures and those of each investment adviser, principal underwriter, administrator, and transfer agent of the fund, which approval must be based on a finding by the board that the policies and procedures are reasonably designed to prevent violation of the Federal Securities Laws by the fund, and by each investment adviser, principal underwriter, administrator, and transfer agent of the fund; (3) Annual review. Review, no less frequently than annually, the adequacy of the policies and procedures of the fund and of each investment adviser, principal underwriter, administrator, and	A CCO could be liable for failing to comply with policies and procedures of an investment or business development company.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		transfer agent and the effectiveness of their implementation; (4) Chief compliance officer. Designate one individual responsible for administering the fund's policies and procedures adopted under paragraph (a)(1) of this section: (i) Whose designation and compensation must be approved by the fund's board of directors, including a majority of the directors who are not interested persons of the fund; (ii) Who may be removed from his or her responsibilities by action of (and only with the approval of) the fund's board of directors, including a majority of the directors who are not interested persons of the fund; (iii) Who must, no less frequently than annually, provide a written report to the board that, at a minimum, addresses: (A) The operation of the policies and procedures of the fund and each investment adviser, principal underwriter, administrator, and transfer agent of the fund, any material changes made to those policies and procedures since the date of the last report, and any material changes to the policies and procedures	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		recommended as a result of the annual review conducted pursuant to paragraph (a)(3) of this section; and (B) Each Material Compliance Matter that occurred since the date of the last report; and (iv) Who must, no less frequently than annually, meet separately with the fund's independent directors. (b) Unit investment trusts. If the fund is a unit investment trust, the fund's principal underwriter or depositor must approve the fund's policies and procedures and chief compliance officer, must receive all annual reports, and must approve the removal of the chief compliance officer from his or her responsibilities. (c) Undue influence prohibited. No officer, director, or employee of the fund, its investment adviser, or principal underwriter, or any person acting under such person's direction may directly or indirectly take any action to coerce, manipulate, mislead, or fraudulently influence the fund's chief compliance officer in the performance of his or her duties under this section. (d) Recordkeeping. The fund must maintain: (1) A copy of the policies and procedures adopted by the fund under paragraph (a)(1) that are in effect,	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		or at any time within the past five years were in effect, in an easily accessible place; and (2) Copies of materials provided to the board of directors in connection with their approval under paragraph (a)(2) of this section, and written reports provided to the board of directors pursuant to paragraph (a)(4)(iii) of this section (or, if the fund is a unit investment trust, to the fund's principal underwriter or depositor, pursuant to paragraph (b) of this section) for at least five years after the end of the fiscal year in which the documents were provided, the first two years in an easily accessible place; and (3) Any records documenting the fund's annual review pursuant to paragraph (a)(3) of this section for at least five years after the end of the fiscal year in which the annual review was conducted, the first two years in an easily accessible place. (e) Definitions. For purposes of this section: (1) Federal Securities Laws means the Securities Act of 1933 (15 U.S.C. 77a-aa), the Securities Exchange Act of 1934 (15 U.S.C. 78a-mm), the Sarbanes–Oxley Act of 2002 (Pub.L. 107–204, 116 Stat. 745 (2002)), the Investment Company Act of 1940 (15 U.S.C. 80a), the Investment Advisers Act	

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		of 1940 (15 U.S.C. 80b), Title V of the Gramm–Leach–Bliley Act (Pub.L. No. 106–102, 113 Stat. 1338 (1999), any rules adopted by the Commission under any of these statutes, the Bank Secrecy Act (31 U.S.C. 5311–5314; 5316–5332) as it applies to funds, and any rules adopted thereunder by the Commission or the Department of the Treasury. (2) A Material Compliance Matter means any compliance matter about which the fund's board of directors would reasonably need to know to oversee fund compliance, and that involves, without limitation: (i) A violation of the Federal securities laws by the fund, its investment adviser, principal underwriter, administrator or transfer agent (or officers, directors, employees or agents thereof), (ii) A violation of the policies and procedures of the fund, its investment adviser, principal underwriter, administrator or transfer agent, or (iii) A weakness in the design or implementation of the policies and procedures of the fund, its investment adviser, principal underwriter, administrator or transfer agent.	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
17 C.F.R. § 275.206(4)-7	SEC	If you are an investment adviser registered or required to be registered under section 203 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3), it shall be unlawful within the meaning of section 206 of the Act (15 U.S.C. 80b–6) for you to provide investment advice to clients unless you: (a) Policies and procedures. Adopt and implement written policies and procedures reasonably designed to prevent violation, by you and your supervised persons, of the Act and the rules that the Commission has adopted under the Act; (b) Annual review. Review, no less frequently than annually, the adequacy of the policies and procedures established pursuant to this section and the effectiveness of their implementation; and (c) Chief compliance officer. Designate an individual (who is a supervised person) responsible for administering the policies and procedures that you adopt under paragraph (a) of this section.	A CCO could be liable for providing investment advice to clients unless they adopt designated policies and procedures
Money & Finance			
31 C.F.R. § 10.36(a)-(b)		**(a)** Any individual subject to the provisions of this part who has (or individuals who have or share) principal authority and responsibility for overseeing a firm's practice governed by this part, including the provision of advice concerning Federal tax matters	A CCO may be liable if he or she willfully, recklessly, or through gross incompetence (1) does not take reasonable steps to ensure that the firm has adequate procedures governing Federal tax matters or (2) does not take reasonable steps to ensure that

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		and preparation of tax returns, claims for refund, or other documents for submission to the Internal Revenue Service, must take reasonable steps to ensure that the firm has adequate procedures in effect for all members, associates, and employees for purposes of complying with subparts A, B, and C of this part, as applicable. In the absence of a person or persons identified by the firm as having the principal authority and responsibility described in this paragraph, the Internal Revenue Service may identify one or more individuals subject to the provisions of this part responsible for compliance with the requirements of this section. **(b)** Any such individual who has (or such individuals who have or share) principal authority as described in paragraph (a) of this section will be subject to discipline for failing to comply with the requirements of this section if— **(1)** The individual through willfulness, recklessness, or gross incompetence does not take reasonable steps to ensure that the firm has adequate procedures to comply with this part, as applicable, and one or more individuals who are members of, associated with, or employed by, the firm are, or have, engaged in a pattern or practice, in connection	those procedures are properly followed. Additionally, a CCO may be held liable if he or she knows or should know that an employee does not comply and the CCO willfully, recklessly, or through gross incompetence fails to take prompt action to correct the noncompliance.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		with their practice with the firm, of failing to comply with this part, as applicable; **(2)** The individual through willfulness, recklessness, or gross incompetence does not take reasonable steps to ensure that firm procedures in effect are properly followed, and one or more individuals who are members of, associated with, or employed by, the firm are, or have, engaged in a pattern or practice, in connection with their practice with the firm, of failing to comply with this part, as applicable; or **(3)** The individual knows or should know that one or more individuals who are members of, associated with, or employed by, the firm are, or have, engaged in a pattern or practice, in connection with their practice with the firm, that does not comply with this part, as applicable, and the individual, through willfulness, recklessness, or gross incompetence fails to take prompt action to correct the noncompliance.	
31 C.F.R. § 501.701	OFAC and DOJ	(1) Persons who **willfully** violate any provision of TWEA or any license, rule, or regulation issued thereunder, and persons who willfully violate, neglect, or refuse to comply with any order of the President issued in compliance with the provisions of TWEA shall, upon conviction, be fined not more than	A CCO who knowingly participates in the violation of the TWEA or associated rules and regulations, and any CCO who willfully violates, neglects, or refuses to comply with any order

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		$1,000,000 or, if an individual, be fined not more than $100,000 or imprisoned for not more than 10 years, or both; and **an officer, director, or agent of any corporation who knowingly participates** in such violation shall, upon conviction, be fined not more than $100,000 or imprisoned for not more than 10 years, or both. … (3) The Secretary of the Treasury may impose a civil penalty of not more than $65,000 per violation on any person who violates any license, order, or regulation issued under TWEA.	thereunder may be fined up to $100,000 or imprisoned for up to 10 years or both. Additional Comments 1. OFAC adopted enforcement guidelines in 2009. 74 Fed. Reg. 57593 (Nov. 9, 2009) *available at* https://www.gpo.gov/fdsys/pkg/FR-2009-11-09/pdf/ E9-26754.pdf. The factors that will be considered are: 1. Willful or reckless violation; 2. Concealment; 3. Pattern of conduct; 4. Prior notice that the practice was illegal; 5. Management involvement; 6. Person's level of awareness of the conduct (actual knowledge or reason to know); 7. Harm to sanctions program objectives; 8. Commercial sophistication; 9. Size of operations and financial conditions; 10. Volume of transactions; 11. Sanctions history; 12. Adequacy of compliance program; 13. Remedial response; 14. Cooperation with OFAC, including voluntary self-disclosure and agreement to tolling agreement;

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			15. Future compliance/deterrence effect; 16. Other relevant factors on a case-by-case basis. A person who has received a prepenalty notice has the right to respond in writing within 30 days. A person also has the right to an agency hearing to present defenses.
31 C.F.R. § 1010.820	FinCEN	(c) For any **willful** violation of any recordkeeping requirement for financial institutions—except for violating the requirement that each person having financial interest in a foreign account keep specific records—the Secretary may assess upon any domestic financial institution, **and upon any partner, director, officer, or employee** thereof who willfully participates in the violation, a civil penalty not to exceed $1,000 per violation. (e) For any **willful** violation of the prohibition on structuring transactions to avoid currency reporting requirements, the Secretary may assess upon any person a civil penalty not to exceed the amount of coins and currency involved in the transaction with respect to which such penalty is imposed. The amount of any civil penalty assessed under this paragraph shall be reduced by the amount of any forfeiture to the United States in connection with the transaction for which the penalty was imposed.	A CCO who willfully violates any recordkeeping requirement may be assessed a CMP of up to $1000. A CCO who willfully violates the prohibition on steering may be assessed a CMP of up to the amount of money involved in the transaction. A CCO who willfully participates in the violation of any reporting requirements for foreign accounts or transactions may be assessed a CMP of the greater of $25,000 or the amount involved in the transaction up to $100,000.

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(f) For any **willful** violation of any reporting requirement for financial institutions under this chapter, **except** 1) reports on foreign financial accounts, 2) reports on transactions with foreign financial agencies, and 3) for violating the requirement that each person having financial interest in a foreign account keep specific records, the Secretary may assess upon any domestic financial institution, **and upon any partner, director, officer, or employee thereof who willfully participates** in the violation, a civil penalty not to exceed the greater of the amount (not to exceed $100,000) involved in the transaction or $25,000. (g) For any willful violation of any requirement of 1) reports on foreign financial accounts, 2) reports on transactions with foreign financial agencies, and or 3) for violating the requirement that each person having financial interest in a foreign account keep specific records, the Secretary may assess upon any person, a civil penalty: (1) In the case of a violation involving reports of transactions with foreign financial agencies, a civil penalty not to exceed the greater of the amount (not to exceed $100,000) of the transaction, or $25,000; and	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		(2) In the case of a violation involving reports of foreign financial accounts or involving a failure to report the existence of an account or any identifying information required to be provided with respect to such account, a civil penalty not to exceed the greater of the amount (not to exceed $100,000) equal to the balance in the account at the time of the violation, or $25,000. (h) For each negligent violation of any requirement of this chapter, committed after October 27, 1986, the Secretary may assess upon any financial institution a civil penalty not to exceed $500 per violation.	
31 C.F.R. § 1010.840	FinCEN and DOJ	(a) Any **person** who **willfully violates** any provision of the Bank Secrecy Act or related regulations may, upon conviction thereof, **be fined not more than $1,000 or be imprisoned not more than 1 year, or both**. Such person may, in addition, if the violation is of the recordkeeping requirements of the Bank Secrecy Act, and if the violation is committed in furtherance of the commission of any violation of Federal law punishable **by imprisonment for more than 1 year, be fined not more than $10,000 or be imprisoned not more than 5 years, or both.** (b) Any **person** who **willfully violates** any provision of the Currency and Foreign Transactions Reporting provisions of the Bank Secrecy Act may, upon	A CCO who willfully violates any provision of the Bank Secrecy Act or related regulations shall be fined between $10,000 and $500,000 and imprisoned for up to 10 years, or both, depending on the specific provision violated and any connection to other criminal activity. Additional Comments 1. FinCEN has authority to investigate financial institutions and their partners, directors, officers, and employees for violations of the BSA pursuant to 31 C.F.R. § 1010.810, which grants FinCEN "[o]verall authority for enforcement and compliance, including coordination and

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		conviction thereof, **be fined not more than $250,000 or be imprisoned not more than 5 years, or both.** (c) Any **person** who **willfully violates** any provision of the Currency and Foreign Transactions Reporting provisions of the Bank Secrecy Act, where the violation is either (1) Committed while violating another law of the United States, or (2) Committed as part of a pattern of any illegal activity involving more than $100,000 in any 12–month period, may, upon conviction thereof, **be fined not more than $500,000 or be imprisoned not more than 10 years, or both**. (d) Any **person** who **knowingly** makes any false, fictitious or fraudulent statement or representation in any report required by this chapter may, upon conviction thereof, **be fined not more than $10,000 or be imprisoned not more than 5 years, or both.**	direction of procedures and activities of all other agencies exercising delegated authority under this chapter." This includes compliance with the requirements for the filing of Suspicious Activity Reports ("SARs") as required by 31 U.S.C. § 5318(g).
MODEL RULES OF PROFESSIONAL CONDUCT			
Rule 1.6	State Bar	(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly	This rule places an obligation on lawyers to maintain client confidences. In doing so, it encourages the client to trust the lawyer, which is the "hallmark of the client-lawyer relationship."

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		authorized in order to carry out the representation or the disclosure is permitted by paragraph (b). (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services; (4) to secure legal advice about the lawyer's compliance with these Rules; (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to	Ann. Model Rules of Prof'l Conduct r. 1.6 cmt. 2 (Am. Bar Ass'n 2015). This rule not only applies to matters communicated in confidence by the client, but also to all information relating to the representation, no matter the source. Id. at cmt. 3. Thus, this rule may impose liability on CCOs who are lawyers if those CCOs disclose confidential information to a regulator in the course of reporting corporate misconduct. However, this rule does not necessarily preclude a lawyer, or a CCO who is a lawyer, from disclosing otherwise confidential information. A lawyer may disclose otherwise confidential information in any of the following circumstances: 1. "To prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services"; 2. "To prevent, mitigate or rectify injury to the financial interest or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services."

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		allegations in any proceeding concerning the lawyer's representation of the client; (6) to comply with other law or a court order; or (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client. (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.	Rule 1.6(b)(2)-(3).
Rule 1.13	State Bar	(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents. (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is	A CCO, who is a lawyer, is employed or retained by an organization, he or she represents the organization itself and not the individuals who act for it. Thus, if a CCO: [K]nows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization,

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law. (c) Except as provided in paragraph (d), if (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law; and (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization. (d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an	then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Rule 1.13(b). The lawyer may report such harm if after they have referred the matter to a higher authority the higher authority fails to address the issue in a timely manner and the lawyer reasonably believes that the violation is reasonably certain to result in substantial harm to the corporation. Id. In considering whether to disclose information under this rule, a lawyer should consider the following non-exhaustive list of factors: (1) the seriousness of the violation, (2) the consequences of the violation; (3) the responsibility in the organization and the motivation of the person involved; and (4) the policies of the organization. Rule 1.13 cmt. 4.

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		organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law. (e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal. (f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing. (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule	

Citation	Regulator	Statutory Text	Potential Impact on CCOs
		1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.	
Rule 4.1	State Bar	In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.	A CCO who is a lawyer may face liability for making false statements or failing to disclose a material fact when disclosure is necessary to avoid assisting in a criminal or fraudulent act by the client.