

CORPORATE COUNSEL

'Compliance 1.0' Ain't Dead Yet

A response to 'The Compliance Strategist'

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In her [recent “Compliance Strategist” column](#), the well-respected and knowledgeable Donna Boehme describes as “fatally flawed” a relationship in which the compliance officer reports, for hierarchy purposes, to the general counsel. She presents this model (Compliance 1.0) as antithetical to effective compliance programs, the byproduct of the self-interested, and suggests that those organizations that continue to apply such a model are “ridiculous.” She argues, in essence, that the only acceptable model is one in which “compliance is freed from the legal department” (e.g., Compliance 2.0).

I don't agree. There's another perspective—one less extreme in its approach, one that is less corrosive to the compliance officer-general counsel relationship, one that accurately represents the totality of recent developments. Simply, the answer is just not as black and white as Boehme's column contends, and I think it is misleading to suggest otherwise.

The column makes three principal arguments:

Argument No. 1

Compliance 2.0's thoughtful adoption by large, highly sophisticated international corporations is strong evidence of the benefits of that structure. Fair enough—many leading corporations have made a considered decision to assure that the compliance officer is independent of (i.e., does not report to) the general counsel. And when such highly regarded corporations make major decisions on their compliance and legal functions, other corporations should take note—for all the right reasons.

However, many other leading corporations have made a similarly thoughtful decision to maintain a different reporting relationship. With respect to the compliance officer-general counsel relationship, corporations should be guided by what structure makes the most sense for their specific compliance effectiveness. If that's Compliance 2.0, terrific; if it's not, there may be valid reasons for doing something different.

Indeed, [a senior U.S. Department of Justice official recently was quoted](#) as stating that the government neither mandates the separation of compliance and legal functions, nor does it proscribe compliance officer-to-general counsel reporting relationships. According to the comments, the government's focus is on more substantive facts such as the design of the compliance program, whether it is applied in good faith and if it operates effectively. And that makes perfect sense.

Corporations are not required by statute or regulation to maintain the "independence" of the compliance officer. And, as many new surveys suggest, there is simply too much disagreement on whether compliance officer independence helps, or hinders, effective legal and risk management practices to mandate a singular approach. Corporations are not required to adopt particular reporting relationships but rather should focus on how such relationships foster the most effective possible compliance program.

Argument No. 2

The General Motors Co. ignition-switch controversy (and the [alleged conduct of its legal department](#)) evidences the harm that can result "when legal drives compliance." That would be a powerful argument indeed if it was based on facts, as opposed to inference or speculation.

The comprehensive independent counsel review of the controversy ([Anton Valukas' report](#)) identifies a wide range of actions, inaction and organizational culture failures that contributed to the fundamental breakdown in GM's risk management. Indeed, one of the Valukas Report's most stunning revelations was that the GM general counsel was not informed by his subordinates of the ignition-switch issue until the latest possible moment. And the report makes a number of useful recommendations on enhancements to the role of the "Global Ethics and Compliance Center." But it's simply not accurate to suggest, as Boehme's column does, that the relationship between GM's legal and compliance departments was a major contributing cause to the breakdown. That was just *not* a focus of the Valukas Report.

Argument No. 3

The preference of government regulators for independence is further proof of Compliance 2.0's merits. Fair enough—many regulatory settlements entered into by the federal government (e.g., a Corporate Integrity Agreement) require the corporation to maintain a separate compliance function staffed by someone other than the general counsel, and that the compliance officer must be independent of the general counsel. The government is concerned with the potential for conflict to arise when then general counsel has the ability to limit the internal or external

reporting or other activity of the compliance officer. The government also is concerned with the potential for excessive application of the attorney-client privilege by the general counsel.

It is certainly very reasonable for a corporation to consider—or even be guided by—regulatory settlements in designing its compliance officer-general counsel relationship—and many do so, for good and valid reasons. But there certainly is no *obligation* to do so, especially when the corporation in good faith determines that other arrangements will better assure compliance program effectiveness.

In this regard, it must be recognized that the government’s concerns can be readily addressed by the corporation in two ways: 1) By adopting the Federal Sentencing Guidelines recommendation that compliance officers have an independent right to report directly to the board (or to the board’s compliance committee); and 2) By adopting board-approved protocols that reasonably articulate when the privilege is to be asserted in internal investigations, and when it should not be asserted.

We need to move the compliance discourse onward and upward, to a respectful and practical discussion on enhancing the effectiveness of corporate compliance programs and board risk-management practices. We need to focus on meaningful and productive ways to foster the compliance officer-general counsel relationship. We need to recognize that corporations have, by law, the freedom to make a decision on compliance and legal functions that they in good faith determine to be best suited for their particular circumstances. This isn’t a “them vs. us” situation (or even 1.0 vs. 2.0), and it serves no useful purpose to approach the discussion that way. We can, we should and we must move beyond that if we are to serve the interests of corporate compliance with law and regulation.

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