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## **New Guidance on Compliance Officer "Independence"**

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New comments from a senior government official make it clear that the Department of Justice (DOJ) does not require the separation of corporate compliance and legal functions, nor does it proscribe compliance officer-to-general counsel reporting relationships. Rather, DOJ's focus appears to be on more substantive factors, such as whether the compliance function is well designed, is applied in good faith, and operates effectively. This is a critical distinction, as many health system boards are grappling with complex enterprise risk management challenges that require coordination amongst executives with risk oversight responsibilities.

According to media reports,<sup>[1]</sup> the comments were made Wednesday by James Koukios, senior deputy chief of the fraud section of DOJ's criminal division, at the annual meeting of the Association of Corporate Counsel. Mr. Koukios was reportedly speaking on a panel discussion debate on whether the compliance function can appropriately be overseen by the corporation's legal department—a highly controversial topic.

As reported by the media, Mr. Koukios stated that decisions on separating the compliance and legal functions, and the reporting relationship of the compliance officer (e.g., to the chief executive officer or to the general counsel) "should be made on a case by case basis, and tailored to a company's circumstances."<sup>[2]</sup> He also was reported to have said that "regardless of whether compliance falls under the purview of the legal department, it's important that the people overseeing a company's compliance function be able to show that they have a direct line of communication to the board of directors, and to the company's audit [or presumably a similar] committee."<sup>[3]</sup>

Mr. Koukios' reported comments suggest that DOJ's position is not as rigid as some (e.g., compliance industry thought leaders) would have health systems believe. This is good news to health system governing boards, who in increasing instances are seeking greater flexibility to structure legal and compliance functions in a more coordinated manner, consistent with broader enterprise risk management concepts.

To be sure, health industry corporate integrity agreements with the Department of Health and Human Services Office of Inspector General typically mandate GC/CCO position separation and an "independent" reporting relationship for the CCO (i.e., not to the GC).<sup>[4]</sup> Certainly, such position separation and reporting independence have long been championed in good faith by the compliance industry as essential to effective compliance programs. Indeed, many sophisticated health systems do separate the compliance and legal functions and have them led by different executives. Many health systems also have the compliance officer report to the chief executive officer or chief operating officer instead of the general counsel. These are certainly valid, meritorious approaches.

Yet, the issue historically has been extremely controversial. This is in part because of the intense compliance industry characterization of separation and independence as "best practice," if not an actual legal mandate. It is also in part due to increasing concerns within health system legal departments with the need to break down structural barriers within the management team in order to increase the effectiveness of risk management programs, enhance the coordination of board

reporting on legal and compliance matters, and preserve application of the attorney-client privilege in internal investigations. It is also due in part, admittedly, to unfortunate instances in which both legal and compliance officers have committed acts of malfeasance.

It is important to understand that support for the "independent" compliance officer rests on two questionable presumptions.

First is that a reporting relationship from the compliance officer to the general counsel presents a conflict-of-interest risk arising from the general counsel's traditional role as a member of the management team. The expressed concern is that the general counsel could somehow block or otherwise restrict the compliance officer from providing her unvarnished conclusions to executive leadership and the board.<sup>[5]</sup> Incidents of general counsel misconduct are used to support this view. (Note that similar incidents of compliance officer misconduct do not seem to receive equal weight.)

Second is the concern with excessive assertion of the attorney-client privilege; i.e., that the general counsel would seek to assert a blanket privilege to all matters involving compliance activity and thus restrict otherwise appropriate government investigative efforts.<sup>[6]</sup> In this regard, the new *Kellogg Brown & Root* decision<sup>[7]</sup> calls into question the traditional view that internal investigations conducted under the authority of compliance will be protected by the attorney-client privilege, even when the results of the investigation are communicated to the general counsel.

These two concerns can be fairly addressed in the context of a compliance officer-to-general counsel reporting relationship. The conflict-of-interest concerns are readily resolved by providing the compliance officer with a futility bypass mechanism, similar to what is set forth in the amended federal sentencing guidelines.<sup>[8]</sup> The attorney-client privilege concern can be addressed through the adoption of board-approved protocols on when the privilege is to be asserted in internal investigations, and when it should not be asserted.<sup>[9]</sup>

These concerns also could be reduced through an appropriate level of respect from both the government and the compliance industry for the prophylactic effect of the lawyer's Rules of Professional Conduct; a level of respect which is currently, and disappointingly, lacking.<sup>[10]</sup>

Mr. Koukios' comments do not, of course, have the force of law or formal DOJ policy. They are not binding on HHS/OIG. Nor are the comments intended to suggest that one compliance structure practice is better than another; compliance industry leaders should feel free to promote structural and reporting relationships they think work best.

Yet, by his focus on the substance of compliance program effectiveness, rather than on the form of reporting relationships, Mr. Koukios helps direct the discussion towards the more critical concern—how to make the compliance program as effective as possible. That is, how can compliance officers and general counsel work collaboratively to build and maintain a comprehensive organizational and coordinated organization risk and compliance program, in which the board may have confidence. This is a critical concern with governance, which is attempting to identify and manage an exploding universe of organizational risks, and requires collaboration—not isolation or siloing—amongst their risk and compliance managers.

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<sup>[1]</sup> Lisa Shuchman, *DOJ Wants Compliance Independent, If Not Separate*, Corporate Counsel, Oct. 29, 2014, available at

<http://www.corpcounsel.com/home/id=1202674971997?kw=DOJ%20Wants%20Compliance%20Independent%2C%20If%20Not%20Separate&et=editorial&bu=Corporate%20Counsel&cn=20141030&src=EMC-Email&pt=Daily%20Alert>.

[2] *Id.*

[3] *Id.*

[4] See, e.g., Corporate Integrity Agreement between The Office of Inspector General, Department of Health and Human Services and Extencicare Health Services, Inc., *available at* [https://oig.hhs.gov/fraud/cia/agreements/Extencicare\\_10032014.pdf](https://oig.hhs.gov/fraud/cia/agreements/Extencicare_10032014.pdf).

[5] Donna Boehme, *When Compliance and Legal Don't See Eye to Eye*, Corporate Counsel, May 8, 2014.

[6] See, e.g., Michael Volkov, *Redefining the Relationship of the General Counsel and Chief Compliance Officer*, *available at* [http://www.rand.org/content/dam/rand/proceedings\\_pubs/conf\\_/CF300/CF322/RAND\\_CF322.p](http://www.rand.org/content/dam/rand/proceedings_pubs/conf_/CF300/CF322/RAND_CF322.p).

[7] No. 14-5055 (D.C. Cir. June 27, 2014).

[8] U.S. Sentencing Commission Guidelines Manual § 8 B2.1(b)(2)(A); see also Michael W. Peregrine and Joshua Buchman, *Sentencing Guidelines Amendments Affect Corporate Compliance* *Sentencing Guidelines Amendments*, National Law Journal, July 19, 2010.

[9] Michael W. Peregrine and Joshua Buchman, *Managing the General Counsel/Compliance Officer Relationship*, AHLA Connections (American Health Lawyers Association), October 2011; R. William "Bill" Ide and Crystal J. Clark, *The Chief Legal Officer's Critical Role in the Compliance Function*, Corp.. L. & Accountability Rep. (June 27, 2014).

[10] See, e.g., Michael W. Peregrine, *The Increasingly Problematic Coordination of 'Legal' and 'Compliance': New Pressures on the Board; Best Practices for Resolving Tasks*, Bloomberg/BNA Corporate Responsibility Reporter, August 15, 2014.

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