

Who Does Your Chief Compliance Officer Report To?

There is an ongoing debate in the compliance arena as to whom a Chief Compliance Officer (CCO) should report. Should the CCO report to the Board of Directors or appropriate Board committee such as an Audit Committee or Compliance Committee? Or can a CCO report to a company's General Counsel (GC) but have access to the Board of Directors for periodic, but no less than annual, reporting? Is there any specific guidance from the Foreign Corrupt Practices Act (FCPA) or any of the US government interpretations such as the US Sentencing Guidelines, Deferred Prosecution Agreement to which the DOJ and recalcitrant companies have entered into or Opinion Releases? Is one approach more right or more wrong than the other?

US companies are reported to take both approaches. A recent survey released by the Society of Corporate Compliance and Ethics, entitled "*The Relationship Between the Board of Directors and the Compliance and Ethics Officer*", dated April 2010, reported that of the publicly traded companies reporting only 41% had their CCO report directly to the Board of Directors. If the CCO did not report to the Board of Directors, the survey found such position could report to not only the GC but also the Chief Financial Officer (CFO) and other senior level positions within a company. The report concluded with two perspectives from its findings. First that as the proposed change in the US Sentencing Guidelines would require "a direct" relationship between a CCO and a Board of Directors, most publicly traded companies do not meet this obligation. Second, many compliance reports are "heavily vetted" before they are delivered to the Board of Directors so that it may be hard to for a Board to garner a true picture of a company's compliance program.

I. US Sentencing Guidelines

Under the 2010 Amendments to the US Sentencing Guidelines which are now proposed to Congress, §8B2.1 (b)(2)(C) requires:

Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program. Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program. To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.

Commentators have weighed in on this amendment. In a recent White Paper entitled "*U.S. Sentencing Commission Amends Requirements for an Effective Compliance and Ethics Program*", the law firm of Gibson, Dunn and Crutcher noted that this amendment "could be problematic for corporations that vest overall responsibility for compliance in a

senior member of management” such as the GC, while having operational responsibility of the company’s compliance function detailed to a subordinate to the GC. They raised the concern that such a reporting structure might allow the GC to act as a “filter in deciding which conduct warrants reporting” to the Board of Directors, if the CCO reported. This would also imply there was a problem if a GC, rather than Board of Directors, performed an annual evaluation or in some other manner controlled the actions of the CCO.

II. Opinion Release 04-02

Through the mechanism of the Opinion Release 04-02 the Department of Justice (DOJ) may have provided prior guidance. The Opinion Release dealt with certain Requestors which were desired in order to acquire a business that had admitted to FCPA violations. As part of the proposed purchase of this “Newco”, the Requestors agreed that this Newco would adopt a rigorous anti-corruption compliance code which would include the following element:

- (B) The assignment to one or more independent senior Newco corporate officials, who shall report *directly* to the Compliance Committee of the Audit Committee of the Board of Directors, of responsibility for the implementation and oversight of compliance with policies, standards, and procedures established in accordance with Newco’s Compliance Code; [emphasis supplied]

III. Industry Debates

There has been debate in the FCPA compliance world as to what this requirement specifies. At the recent Compliance Week 2010 Annual Conference, a panel consisting of representatives from the US Sentencing Commission indicated that they believed that this section only required that CCOs have *access* to a company’s Board of Directors. Such a requirement could be fulfilled through a reporting structure whereby a CCO reported to a GC but had access to report to the Board of Directors, even if the CCO went to the Board of Directors with the GC present, such as reporting structure was in compliance with the proposed Sentencing Guidelines.

However, at the same conference, Assistant Attorney General, Criminal Division for the Department of Justice, Lanny Breuer said that a CCO should have *direct* access to a company’s Board of Directors suggesting that the CCO not have to report through a GC but report directly to the Board. Breuer opined that the change in the Sentencing Guidelines implies that the CCO should now report directly to the Board of Directors and not through another person, whether the GC, CFO, Head of Internal Audit or any other person in an organization.

For yet a third perspective at the same conference, the question was put to a panel of members who sit on various Boards of Directors on multi-national US corporations, they responded that, as Board members, they only wanted the information to come to them so

they could fulfill their obligations as Board members, they were not too concerned how it was presented to them or who did so. Further they were not concerned who the CCO reported to or which company officer or employee in the corporate structure evaluated the CCO.

A recent webcast by the firm of Ernst and Young further delineated this dichotomy. When posed the question of to whom should the CCO report to; either directly to the Board or the GC, panelists Brian Loughman and Jeff Taylor both indicated that it was important for the CCO to report directly to the Board. Such a reporting structure made a much more positive impression on the Board (Loughman) and that less filter of the CCO's information gave a stronger message to the Board (Taylor) than if the CCO reported through the GC. Loughman added that the change in the Sentencing Guidelines mandated this reporting structure. However, panelist Amy Hawkes responded that she did not believe the issue of who the CCO reported to was as important if there the appropriate 'tone at the top' by the Board. By this she explained that if the Board was committed to a compliance culture, it did not matter whether the CCO reported directly to the Board or to the Board through the GC.

This direct reporting approach is utilized by Halliburton, to which I posed the following question, "Who does the Chief Compliance Officer report to in your Company and why does your company utilize this approach?" Susan Ponce, Senior Vice President and Chief Ethics and Compliance Officer of Halliburton responded, "*At Halliburton, the Chief Ethics and Compliance Officer reports directly to the company's Board of Directors, advising both the Audit Committee and the full Board on all matters relating to legal compliance issues. We structured the CEC Office that way in order to leave no doubt that the CECO has direct, independent and unfettered access to our Board and support from board members and our senior executives.*"

The answer to the initial question posed appears to have two correct responses. The guidelines and debate goes both ways. The key is in the actual reporting. As long as the CCO reports on a regular basis to the Board, both lines of authority are appear to be acceptable.

So which approach does your company utilize?

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provided attribution is made to the author. The author can be reached at tfox@tfoxlaw.com.

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