

Compliance and Legal Relationship

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DOJ and OIG: Compliance should be separate and independent of legal counsel.

A positive working relationship between the compliance officer and legal counsel is critical to maintaining an effective compliance program. Their roles and objectives are different but complementary. It is important that their roles and responsibilities do not overlap, as this can lead to the undesirable outcome of a “turf war.” There certainly are areas where the compliance officer should operate without the direct involvement of legal counsel; however, there are other areas where legal counsel needs to be involved, if not in charge.

The challenge lies in establishing written guidelines that delineate their respective roles and responsibilities before a major contentious issue arises. Such guidelines should explain how to coordinate efforts effectively. This process is analogous to establishing a treaty in that it requires some diplomacy and compromise. It is noteworthy that both the Department of Justice (DOJ) and Department Health and Human Services Office of the Inspector General (OIG) view legal counsel not as an independent gatherer of fact and evidence, but rather an advocate for the organization who is responsible for dealing with legal questions and violations. The role of legal counsel is to provide legal advice and not to act as the decision authority. In Corporate Integrity Agreements, the OIG clearly reinforces this position by including standard language stating that “[t]he Compliance Officer ***shall not be or be subordinate to the General Counsel***” (emphasis added).

In contrast, the compliance officer is charged with ensuring that the organization complies with regulatory and legal requirements as well as internal policies and bylaws. They have a duty to identify and manage regulatory risk with properly functioning internal controls. The compliance officer needs to have independent investigative power on matters related to compliance, including the authority to interview employees and managers, as well as unrestricted access to all documents and information that relate to compliance with laws and regulations. However, the legal counsel also has a role in compliance, in that they need to be consulted regarding any

suspected legal violation, investigation, or civil litigation matter. This may include determining what investigative steps would be appropriate and whether the investigation should be conducted at their direction.

Tip. As discussed above, it is advisable for the compliance officer to work with legal counsel to develop protocols that delineate their respective duties and responsibilities, particularly where they involve investigations of potential wrongdoing. Doing this in advance of any conflict may prevent tension and “turf issues.” The delineation, as described, should provide a foundation for such a document.

For more information on the relationship between legal counsel and compliance officers, contact Richard Kusserow at rkusserow@strategicm.com.