

Compliance Corner

By Compliance Professionals, For Compliance Professionals.



In-House Counsel and Compliance Officer—A Dual Role?

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As compliance obligations grow increasingly complex, many organizations turn to lawyers to safely navigate the path. Some even choose to combine the roles of in-house counsel and compliance officer into a single position equipped to take a global view in balancing the company's obligations and interests. Conventional wisdom on the appropriateness of this approach is divided and there is no one answer.

There are several arguments in favor of synthesizing the roles of in-house counsel and compliance officer. First, as governing statutes, rules, and regulations grow increasingly complex and burdensome, compliance work requires greater expertise. A legal background provides a strong advantage in interpreting and applying these ever-evolving requirements in real time. Companies may wish to have a legal professional review new policies and procedures related to compliance and having an attorney as the drafter streamlines the process. Further, tasking a single individual with both maintaining the company's compliance program as well as providing legal representation, such as contract drafting and review, ensures compliance is "sewn into" the process. For instance, instead of working to revise an already-drafted agreement to address compliance concerns, such considerations can be incorporated organically. Finally, particularly for smaller organizations with limited resources, combining the positions is cost-effective. It is not unusual in such settings for employees to wear many hats, and staff may be accustomed to balancing competing interests to pragmatically address concerns.

The most obvious critique of the dual role is the potential for conflict of interest. The legal function typically defines what is permissible, while the compliance function sets parameters for what is advisable. Indeed, Corporate Integrity Agreements (CIAs) require that the compliance officer not report to the general counsel. This position may present a rather low opinion of legal ethics, but is understandable in the context of a CIA, which is put in place when the process has already broken down. A further concern is that combining these roles requires too much of the attorney. In a company lacking a true commitment to compliance, this professional may be put in impossible situations—with the added concern that, in addition to potential criminal and civil penalties, compliance violations have implications for a lawyer's good standing with the applicable Bar Association.

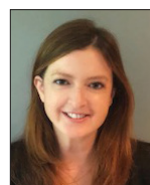
Important Considerations

Whether you are a corporate decision maker determining the appropriateness of the dual role for your organization, or a professional considering such a position, it is important to weigh the following factors:

- **The size of the organization and scope of the work.** Is it feasible for one person to perform both roles well? Is there any support staff, and if so, is it appropriately scaled to the size of the company? It may seem safer to combine the roles at a smaller organization, but a one-person dual department may struggle while the same position operates to great success in a larger workplace with more institutional oversight.

- **Reporting.** To whom would the compliance officer/in-house counsel report? What level of access—and candor—does this person have in addressing the Board of Directors? Compliance cannot function in a vacuum, and reporting is key for all professionals in the field. It becomes even more paramount for a person taking on the dual role, who must be in a position to raise issues with a company's highest decision makers.
- **Financial investment.** While not dispositive, a comprehensive program, particularly one that demonstrates significant expenditures, is a sign of a genuine commitment to compliance. Consider various forms of investment, from salaries and software, to educational opportunities, conference attendance, guides, and other resources. Is the company open to consulting with outside counsel on certain issues, despite the additional expense?
- **Where the rubber meets the road.** Has the company ever confronted a client or vendor for a compliance-related issue, or been reprimanded itself? Look also for the company's internal files on past compliance-related incidents. Who was involved in the remedial measures? Where do reports come from—only first-line employees? Only senior management? Involvement from a broad range of employees indicates a cultural buy-in, while limited "pockets" of compliance should raise questions about the program's visibility and effectiveness and confidence in the company's non-retaliation policy.

The primary tension between a compliance officer and in-house counsel exists because a compliance officer must keep the company compliant, while in-house counsel seeks to protect and defend the company against claims that it has not been compliant. For that reason, the roles should only be combined at an organization committed to taking ownership of—rather than seeking to hide—any issues. Evaluating the appropriateness of the dual role requires some organizational soul-searching, including an honest assessment of a company's genuine commitment to compliance.



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