The Conundrum of Compliance Officer Liability

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ABSTRACT

As the compliance industry has boomed in the last decade, the chief compliance officer ("CCO") role has evolved in important ways. CCOs today enjoy ever-increasing prestige, power, and impact across a wide range of organizations and fields. However, numerous questions pertaining to CCO liability remain unanswered, making the extent to which they are at risk for personal liability for the acts and omissions of the organizations that they monitor essentially unknown. While the Securities and Exchange Commission ("SEC") has provided some guidance to determine when CCOs may be held personally liable, the guidance has so far largely failed to provide CCOs with a predictable or reliable basis for evaluating questions of personal liability. This Article posits that recent enforcement actions against CCOs in the financial sector are likely to have concerning ripple effects on various other industries in which compliance officers operate, prompting the need for an appropriate standard of care to determine when personal liability ensues. This Article carves out a novel framework for determining questions of CCO liability based on an adaptation of the business judgment rule. In doing so, this Article analyzes the role of the CCO through the lens of agency law by considering CCOs as both agents and employees of the organizations for which they work, the CCO's unique duties, and the CCO's impact on culture. Ultimately, this Article seeks to provide much-needed clarity about the standards of conduct to which CCOs should be held and when personal liability may ensue.

DOI: https://doi.org/10.15779/Z38PZ51N7V

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INTRODUCTION

The power of the compliance industry has increased tremendously over the last several years. Regulators, academics, corporations, and courts have each noted the invaluable contributions of an effective compliance department to adherence to regulations and to maintaining corporate and organizational well-being.[1] Over the past decade, CCOs have enjoyed a significant increase in employment opportunities, pay, and prestige associated with their position.[2] Given the relevance of legal knowledge and analytical skills to the job, attorneys have filled numerous compliance officer positions.[3] However, legal experience is not a requirement for the role, and the compliance field comprises professionals from many different settings and industries. The U.S. Bureau of Labor Statistics expects an increase of 4.6% in employment opportunities for compliance officers until 2032, projecting thousands more job openings in the coming years.[4] The future of compliance seems bright.

1. Veronica Root, *Coordinating Compliance Incentives*, 102 CORNELL L. REV. 1003, 1004 (2017) ("Compliance is king, and its subjects—regulators, prosecutors, courts, corporations, and academics—are quick to tout its power and potential for good."); *see also* David Orozco, *A Systems Theory of Compliance Law*, 22 U. PA. J. BUS. L. 244, 257 (2020) ("[T]he seeds of a new compliance law era have been sown.").

2. *See* Geoffrey P. Miller, *Compliance: Past, Present and Future,* 48 U. TOL. L. REV. 437, 438-39 (2017); *see also* Richard L. Cassin, *Will 'Compliance Officer' Become a Regulated Profession?* FCPA Blog (Sept. 24, 2020, 7:58 AM), https://fcpablog.com/2020/09/24/at-large-will-compliance-officer-become-a-regulated-profession/ (citing data showing that the average base pay for a chief compliance officer is nearly $150,000 per year and that many earn between $250,000 to $500,000 in base pay and up to $450,000 in additional compensation).

3. *See, e.g.,* Tanina Rostain, *General Counsel in the Age of Compliance: Preliminary Findings and New Research Questions*, 21 GEO. J. LEGAL ETHICS 465, 481 (2008) (discussing the vastly increased presence of attorneys in compliance functions); Daniel Sokol, *Teaching Compliance*, 84 U. CIN. L. REV. 399, 399-400 (2016) (noting the increased hiring of lawyers for compliance roles and the benefits of having a J.D. degree for the job).

4. *Compliance Officer Overview*, U.S. NEWS & WORLD REP., https://money.usnews.com/careers/best-jobs/compliance-officer (last visited March 1, 2024).

However, the steady rise in compliance-related employment opportunities has revealed one negative implication. Specifically, several cases in the financial sector have emerged that find CCOs may be held personally liable for the violations of their organizations. In recent years, there has been a notable increase in enforcement actions against CCOs and a heightened regulatory focus on holding such individuals personally liable for the compliance wrongs and failures of their organizations, thereby creating increased exposure for this particular career path.[5] In numerous recent cases resulting in personal liability for CCOs, regulators in the financial sector have increasingly facilitated an "atmospheric consideration" of individual, rather than organizational, accountability across industries.[6] As a result, many have described these trends as having a "chilling effect" that has deterred or discouraged qualified individuals from entering the compliance field altogether.[7]

The ever-increasing prominence of the compliance field and the uptick in enforcement actions against compliance officers in securities-related domains suggest that the risk of personal liability for CCOs in the financial sector is likely to seep into other industries in which the compliance function is present. As a result, it has become paramount to obtain clarity as to the appropriate standard of care to which CCOs are held to determine when personal liability might arise. To date, there is no uniform or consistent answer to this question. The lack of clarity not only complicates matters in the financial sector, but has the potential to touch all aspects of general business practice. This Article thus proposes a uniform liability threshold for determining questions of personal liability for CCOs upon which courts, regulators, and CCOs can rely. The proposed uniform liability threshold is based on a novel adaptation of the business judgment rule that seeks to shield CCOs from the harsh effects of a simple negligence standard, but imposes a fair expectation of liability for outright unlawful, unethical, or neglectful behavior. As part of this analysis, several factors will be considered, including the posture of CCOs as agents and employees of the organizations for

5. *See* NEW YORK CITY BAR ASS'N, REP. ON CHIEF COMPLIANCE OFFICER LIAB. 2, https://s3.amazonaws.com/documents.nycbar.org/files/Report_CCO_Liability_vF.pdf [hereinafter NYCBA REP.]; *see also* THE SEC. INDUS. ASS'N, WHITE PAPER ON THE ROLE OF COMPLIANCE 11 (2005), https://www.sifma.org/wp-content/uploads/2017/08/2005RoleofComplianceWhitePaper.pdf. (last visited May 15, 2023).

6. NYCBA REP., *supra* note 5, at 3; *see* Thaddeus J. North, Exchange Act Release No. 84500, 2018 WL 5433114, at *11 (Oct. 29, 2018); SFX Fin. Advisory Mgmt. Enter. Inc., Investment Advisers Act Release No. 4116 (June 15, 2015); Brown Bros. Harriman & Co., FINRA AWC No. 2013035821401 (Feb. 04, 2014); Complaint, United States v. Haider, No. 14-cv-9987 (S.D.N.Y. Dec. 18, 2014) (each focusing on the individual accountability of the compliance officer, rather than the organization as a whole).

7. Court E. Golumbic, *"The Big Chill": Personal Liability and the Targeting of Financial Sector Compliance Officers*, 69 HASTINGS L.J. 45, 45 (2017); Hester M. Peirce, Commissioner, Sec. Exch. Comm'n, When the Nail Fails—Remarks Before the National Society of Compliance Professionals (Oct. 19, 2020), https://www.sec.gov/news/speech/peirce-nscp-2020-10-19 [hereinafter Peirce Remarks] (sharing concerns that "the increasing specter of personal liability could cause talented individuals to forgo a career in compliance, among other negative effects.").

which they work; how the CCO's responsibilities compare to that of the organization's directors; the unique roles, responsibilities, and duties that are innate to the compliance function; and the crucial role that CCOs play in organizational culture.

Part I of this Article explores the current CCO liability landscape by taking a closer look at the recent wave of enforcement actions brought against CCOs by regulators in the securities field and the subsequent reactions of associations and communities engaged in the compliance field. Part I also analyzes three broad categories of liability under which the SEC has justified enforcement actions against CCOs, each of which center on establishing a clear basis of fault or inaction on the part of the CCO, and discusses the position of the SEC as it pertains to negligence-based liability.[8] Finally, Part I highlights the ways in which the SEC, despite offering some guidance, falls short of establishing a clear, consistent, and reliable basis for personal CCO liability.

Part II of this Article then proposes a novel and uniform analysis to judge CCO liability that is based on a modification of the business judgment rule, highlighting the need for an appropriate standard of care by which to determine questions of personal liability pertaining to CCOs that is applicable in all contexts and industries. This section discusses the proposed standard in detail, analyzing the numerous ways in which it captures the varied duties, obligations, and roles of compliance officers within an organization without compromising related regulatory and organizational interests. This section examines the unique role of the CCO through the tool of agency law, focusing on the fiduciary duties of CCOs, their similarities to and differences from directors and corporate officers, and their relationship to applicable regulators and their own organizations. This section analyzes the role of the CCO in facilitating organizational culture, including their potential for fostering ethics and diversity within organizations. Finally, this section concludes by addressing any anticipated obstacles to the arguments set forth herein.

I. CHIEF COMPLIANCE OFFICER LIABILITY

A. Enforcement Activity: Wrongfulness & Inaction

Compliance is "the processes by which an organization seeks to ensure that employees and other constituents conform to applicable norms—which can include either the requirements of laws or regulations or the internal rules of an organization."[9] Compliance is an essential function in any organization. Organizations without effective compliance and supervisory systems place themselves at excessive risk for liability. These systems are defenses to

8. *See* Peirce, *supra* note 7 (discussing how these categories comprise actual wrongdoings and failures of the compliance officer).

9. Geoffrey P. Miller, THE LAW OF GOVERNANCE, RISK MGMT., AND COMPLIANCE 3 (3rd ed. 2014).

organizational liability that may arise within a regulatory context and in the common law doctrine of *respondeat superior*, which holds organizations liable for the wrongful acts or crimes of their employees or agents.[10] CCOs are responsible for preventing and responding to regulatory concerns, ensuring adherence to applicable regulations, and maintaining relationships with governing bodies. CCOs are similar yet distinct from "gatekeepers," whose approval is needed to allow constituents of an organization to move forward with certain actions. CCOs monitor the effective implementation of the policies, internal systems, and procedures of an entity.[11] The key responsibilities of a CCO include preventing, detecting, and remediating legal infractions, ensuring that binding external regulations are met and that internal procedures, policies and rules are followed.[12] These responsibilities put CCOs at risk of being held personally liable if their organizations fall short. The specter of personal liability potentially deters qualified and motivated individuals from taking on CCO roles.[13]

CCOs manage the internal control functions of an organization and are responsible for ensuring that the organization follows applicable legal rules and regulations. By tasking their CCO with these responsibilities, rather than relying on top-down governmental control, organizations ideally become responsible for their own compliance in a more efficient and less intrusive, self-regulatory manner.[14] Historically, the compliance function was overseen by an organization's legal department, but it has become increasingly common to make compliance its own department.[15] In fact, regulators commonly prefer that the

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10. James Fanto, *The Governing Authority's Responsibilities in Compliance and Risk Management, As Seen in the American Law Institute's Draft Principles of Compliance, Risk Management, and Enforcement*, 90 TEMP. L. REV. 699, 705-06 (2018).

11. *See* Stavros Gadinis & Colby Mangels, *Collaborative Gatekeepers*, 73 WASH. & LEE L. REV. 797, 810 (2016) ("If gatekeepers realize that their client is violating the law, they can withhold their approval and prevent this wrongdoer from entering the financial system."); *see also* John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293, 1296-98 (2003) (additionally, lawyers, auditors, and accountants may be described as gatekeepers); *see also* Peter B. Oh, Gatekeeping, 29 J. CORP. L.735, 746 (2004) (discussing how gatekeepers grant or withhold support for various corporate actions).

12. *See* Miller, *supra* note 9.

13. NYCBA REP., *supra* note 5, at 1; *see also* Kristin Broughton, *Recruiting and Retaining Compliance Staff Is Key Risk for Banks, Regulator Says*, WALL ST. J. (May 20, 2019), https://www.wsj.com/articles/recruiting-and-retaining-compliance-staff-is-key-risk-for-banks-regulator-says-11558395878?mod=hp_minor_pos10 (noting how certain institutions are already experiencing "difficulties in attracting and maintaining qualified individuals to serve in the compliance function, which will be compounded if effective and qualified candidates leave the field.").

14. *See* James A. Fanto, *The Professionalization of Compliance: Its Progress, Impediments, and Outcomes*, 35 NOTRE DAME J.L. ETHICS & PUB. POLICY 183, 192 (2021) (discussing the role of compliance's internal controls within organizations); *see also* Miriam Hechler Baer, *Governing Corporate Compliance,* 50 B.C.L. REV. 949, 959-60 (2009) (discussing how the organizations need compliance officers, as internal players to an organization, to manage all of the various regulatory obligations and to guide employee behavior to ensure compliance).

15. Michele DeStefano, *The Chief Compliance Officer*, THE PRACTICE (July/August 2016), https://clp.law.harvard.edu/knowledge-hub/magazine/issues/the-compliance-movement/the-chief-compliance-officer/; *see also* Donald C. Langevoort, *Getting (Too) Comfortable: In-House Lawyers,*

legal and compliance functions are separate because of the independence and autonomy that separation provides to the compliance function, the ability of the CCO to be unhindered by the attorney-client privilege, and the contributions of the CCO to the ethics of an organization.[16] Compliance departments that are separate from the legal function are also believed to "send a message" to the organization about the importance of the compliance function.[17] Ideally, separation facilitates a "group identification that cements values and norms around ethical behavior" that is believed to support "a culture of compliance."[18]

The prominence of the stand-alone compliance department has brought with it many important liability-based considerations that pertain to the roles and responsibilities of the individuals who comprise this function. Not only has criminal liability for corporate entities and federal criminal prosecution for compliance wrongs rapidly increased in recent years,[19] regulators have also consistently pursued enforcement actions directly against CCOs to punish fraud and wrongdoing.[20]

Such heightened enforcement activity has driven home an enforcement culture focused on individual accountability and "naming names," which, given the current uncertainty in the prevailing standards of personal liability and lack of regulatory guidance as to what prompts such findings of liability, has created anxiety and fear among compliance professionals.[21] The Department of Justice's ("DOJ") Yates Memo has contributed to an enforcement-heavy landscape by incentivizing business organizations to provide the DOJ with "all relevant facts about individual misconduct," in exchange for cooperation credit.[22] The Yates Memo encourages self-reporting by business organizations of the specific individuals involved in the misconduct "regardless of their position, status or seniority."[23] The extent to which the organization receives cooperation credit

Enterprise Risk, and the Financial Crisis, 2012 WIS. L. REV. 495, 500 (2012) (discussing the increasing separation of the legal and compliance functions and the various reasons for this separation).

16. Michele DeStefano, *Creating A Culture of Compliance: Why Departmentalization May Not Be the Answer*, 10 HASTINGS BUS. L.J. 71, 75, 122-24 (2014).

17. *Id.* at 124.

18. *Id.* at 124-25; *see also* Lauren B. Edelman & Mark C. Suchman, *When the "Haves" Hold Court: Speculations on the Organizational Internalization of Law*, 33 LAW & SOC'Y REV. 941, 981 (1999) (discussing the importance of directing an organization's attention and identity to compliance and ethical functioning).

19. Baer, *supra* note 14, at 963-64.

20. Golumbic, *supra* note 7, at 52-70; NYCBA REP., *supra* note 5, at 1.

21. Todd Ehret, *INSIGHT: Ten top concerns for U.S. compliance officers in 2019,* REUTERS (Jan. 18, 2019), https://www.reuters.com/article/bc-finreg-ten-top-compliance-concerns/insight-ten-top-concerns-for-u-s-compliance-officers-in-2019-idUSKCN1PC1JC; *see also* NYCBA REP., *supra* note 5, at 1 (noting that despite attempts on the part of regulators to reassure compliance officers, there is ample concern among compliance officers that their good-faith efforts and well-intentioned conduct may still receive punishment).

22. Memorandum from Sally Q. Yates, Deputy Att'y Gen., U.S. Dep't of Just. to the Assistant Att'y Gen., Antitrust Div. et al., *Individual Accountability for Corporate Wrongdoing* 3 (Sept. 9, 2015), https://www.justice.gov/archives/dag/file/769036/download.

23. *Id.*

depends on the timeliness, diligence, and thoroughness of the information provided.[24] Although the Yates Memo went into effect in 2015, DOJ Deputy Attorney General Lisa Monaco recently renewed its importance by reinforcing the DOJ's focus on white collar crime and enforcement to promote compliance and corporate accountability.[25]

The Financial Industry Regulatory Authority ("FINRA"), the SEC, and the U.S. Treasury's Financial Crimes Enforcement Network ("FinCEN") have been among the top regulators pursuing enforcement actions against CCOs in the financial industry.[26] The SEC has been especially committed to holding individuals accountable as one of its five "core principles" of enforcement, recognizing the important role personal liability plays in deterring wrongful conduct.[27] In 2020, the SEC individually charged wrongdoers personally in seventy-two percent of the standalone enforcement actions that it pursued.[28] In one notable action, the SEC successfully pursued an enforcement action against Bartholomew A. Battista, the CCO of BlackRock Advisors, LLC ("BlackRock"), an investment management company, as well as BlackRock itself.[29] This enforcement action resulted in a cease-and-desist order and a $60,000 civil

24. *Id*.

25. John Adams, et al., *Return to the Yates Memo: Deputy Attorney General Announces Tougher Approach to White Collar Enforcement,* JD SUPRA (Nov. 2, 2021), https://www.jdsupra.com/legalnews/return-to-the-yates-memo-deputy-5483780/.

26. *See generally* SEC v. Hope Advisors, LLC, No. 1:16-cv-01752-LMM, 2017 WL 6997134 (N.D. Ga. Nov. 28, 2017); Letter from Raymond James & Assoc., Inc., et al., to Dept. of Enf't Fin. Indus. Reg. Auth. ("FINRA"), *Financial Industry Regulatory Authority Letter of Acceptance, Waiver and Consent No. 2014043592001* (May 18, 2016), https://www.finra.org/sites/default/files/RJFS_AWC_051816_0.pdf; U.S. Dep't of the Treas. v. Haider, No. 15-1518, 2016 WL 107940 (D. Minn. Jan. 8, 2016) (order denying motion to dismiss); Blackrock Advisers, LLC and Bartholomew A. Battista, Investment Advisers Act Release No. 4065, 2015 WL 1776222 (Apr. 20, 2015) (order instituting administrative and cease-and-desist proceedings); AlphaBridge Capital Mgmt. LLC, et al., Investment Advisers Act Release No. 4135, 2015 WL 3982040 (July 1, 2015) (order instituting administrative and cease-and-desist proceedings); Dep't of Enf't v. Aegis Capital Corp. et al., Fin. Indus. Reg. Auth. Off. of Hearing Officers Disciplinary Proc. No. 2011026386001 (Aug. 3, 2015) (order accepting offer of settlement); SFX Fin. Advisory Mgmt. Enterprises, Inc., Investment Advisers Act Release No. 4116, 2015 WL 3653814 (June 15, 2015); Letter from Brown Bros. Harriman & Co., et al., to Dept. of Enf't Fin. Indus. Reg. Auth. ("FINRA"), *Financial Industry Regulatory Authority Letter of Acceptance, Waiver and Consent No. 2013035821401* (Feb. 4, 2014), https://docplayer.net/12485371-Financial-industry-regulatory-authority-letter-of-acceptance-w-aiver-and-consent-no-2013035821401.html (each alleging or imposing personal liability on a compliance officer).

27. Press Release, Sec. & Exch. Comm'n, SEC Enforcement Division Issues Report on FY 2018 Results (Nov. 2, 2018), https://www.sec.gov/news/press-release/2018-250. The other four core principles focus on "the Main Street investor," keeping pace with technological change and development, imposing remedies that effectively further enforcement goals, and continuously assessing the allocation of resources.

28. U.S. SEC. & EXCH. COMM'N, DIV. OF ENF'T 2020 ANN. REP. 1, 4 (Nov. 2, 2020), https://www.sec.gov/files/enforcement-annual-report-2020.pdf (noting that it charged a wide spectrum of individuals, including numerous CEOs and CFOs, accountants, auditors, and other gatekeepers).

29. *See* Blackrock Advisors, LLC and Bartholomew A. Battista, Investment Advisers Act Release No. 4065, 2015 WL 1776222 1, 12 (Apr. 20, 2015), https://www.sec.gov/litigation/admin/2015/ia-4065.pdf.

money penalty to be paid by Battista.[30] In this matter, the SEC found that BlackRock and Battista had failed to disclose a conflict of interest involving the outside business activities of one of its portfolio managers and had helped facilitate various compliance-related failures.[31]

The findings revealed that Battista knew about the portfolio manager's violations of the company's private investment policy and that these violations had not been reported to the fund's board of directors as required.[32] Battista's main area of fault as CCO was his failure to "design and implement[] written policies and procedures reasonably designed to prevent violations" of the pertinent statutes and legal rules—rather, Battista had approved numerous conflict-related, external activities in which BlackRock employees were engaged and failed "to recommend written policies and procedures to assess and monitor those outside activities and to disclose conflicts of interest."[33]

In addition, the SEC found that Battista violated the Investment Company Act by failing, as CCO, to provide a written annual report to the fund's board addressing each material compliance matter occurring since the date of the last report.[34] BlackRock was required to pay a $12 million fine, retain an independent compliance consultant, submit periodic reports on progress to the SEC, and adopt numerous remediation measures.[35] In addition, Battista faced personal liability, a $60,000 fine for which he was solely responsible, and an order finding that he caused violations of federal law.[36] This case is the first in which the SEC brought forth charges against a CCO for violations that involved failing to report a material compliance matter and sends a clear signal that the SEC is not afraid to hold CCOs liable not just for their own failings, but for those of their organization as well.[37]

In *SEC v. Hope Advisors, LLC*, the SEC brought an enforcement action against Dawn Roberts, the CCO of Hope Advisors, a registered investment adviser.[38] The SEC alleged that the CCO collaborated with other individuals in

30. *Id.*
31. *Id.* at 2.
32. *Id.*
33. *Id.* at 8.
34. *Id.* at 9 (a "material compliance matter" is defined as "any compliance matter about which the fund's board of directors would reasonably need to know to oversee fund compliance, and that involves, without limitation, a violation of the policies and procedures of its investment adviser.") (citing to 17 C.F.R. § 270.38a-1(a)).
35. *Id.* at 12-13; *see also* Press Release, Sec. & Exch. Comm'n, SEC Charges BlackRock Advisors With Failing to Disclose Conflict of Interest to Clients and Fund Boards, (Apr. 20, 2015), https://www.sec.gov/news/pressrelease/2015-71.html [hereinafter SEC BlackRock Press Release].
36. *Id.*
37. SEC BlackRock Press Release; *see also* Ed Beeson, *SEC Sends Warning to Compliance Chiefs With BlackRock Fin*e, LAW 360 (Apr. 22, 2015), https://www.law360.com/articles/646172/sec-sends-warning-to-compliance-chiefs-with-blackrock-fine.
38. Sec. & Exch. Comm'n v. Hope Advisors, LLC, No. 1:16-CV-01752-LLM, 2017 WL 6997134 *1, *1 (N.D. Ga. Nov. 28, 2017).

the organization to create a system of fraudulent trading that was designed to earn an incentive fee for fund managers, maintained a spreadsheet that tracked loss and account balances amounts in such a way as to facilitate the fraudulent scheme, and being aware of but failing to report improper activity even after the company's then-controller objected to the practices.[39] The SEC sought injunctive relief, disgorgement, and civil penalties for the CCO's alleged violations of federal law, fraud, and the aiding and abetting of fraud.[40] The SEC's action matter survived the CCO's motion to dismiss, despite the CCO's argument that the SEC failed to allege that she knowingly violated the securities laws.[41] The district court found that the defendant only needed to have a "general awareness" that her role was part of improper activity, which was clearly inferred in this matter "by the surrounding circumstances and expectations of the parties."[42] *SEC v. Hope Advisors, LLC* resulted in an administrative order against the CCO that imposed sanctions on her personally and suspended her for a period of time from her work.[43]

While the cases above provide examples of liability due to a compliance officer's actual wrongdoing or failure to implement proper and effective compliance systems, the main concern of this Article relates to the steady enforcement activity against compliance officers that teeters on the edge of negligence-based actions, thereby inciting even more concern and worry among compliance professionals who could face personal liability even when they lacked actual intent to violate the law.[44] The next section explores these situations and considers the broad variations of liability upon which regulators have relied to hold CCOs liable.

B. The Ranges of Liability and Negligence-Related Actions

In 2015, then-SEC Commissioner Luis Aguilar publicly recognized the compliance community's concerns around increased enforcement activity.[45] Aguilar emphasized that the SEC had no interest in seeking to hold liable those

39. *Id*. at *2.

40. *Id.*

41. *Id.* at *1-*2.

42. *Id*. at *2.

43. Dawn Roberts, Investment Advisors Act Release No. 5044, 2018 WL 4584246 *1, *1-*2 (Sept. 25, 2018), https://www.sec.gov/litigation/admin/2018/ia-5044.pdf.

44. *See* Matt Kelly, *New Report Stirs Old Fears of Compliance Officer Liability*, NAVEX GLOBAL (Feb. 25, 2020), https://www.navexglobal.com/blog/article/new-report-raises-old-fears-of-compliance-officer-liability/ (discussing such actions); *see also* NYCBA REP., *supra* note 5, at 14 ("[D]rawing a line between a compliance officer who made a mistake in good faith and those instances in which a compliance officer's failure to carry out policies rose beyond the level of simple negligence is quite difficult, and the risk of hindsight bias is particularly acute.").

45. Luis A. Aguilar, Comm'r, Sec. & Exch. Comm'n, *The Role of Chief Compliance Officers Must Be Supported*, SEC. & EXCH. COMM'N (June 29, 2015), https://www.sec.gov/news/statement/supporting-role-of-chief-compliance-officers.html (noting that, in fact, most compliance officers do "take their job seriously and are a credit to the compliance community.").

"who [took] their jobs seriously and [did] their jobs completely, diligently, and in good faith to protect investors," as the agency strove to "strike[] the right balance" between encouraging actions taken in good faith and punishing and deterring misconduct.[46] Aguilar noted that the majority of SEC cases targeting CCOs involved CCOs who performed work outside the traditional duties of a compliance officer, such as simultaneously serving as a chief executive officer, general counsel, company president, or director, and who directly participated in the alleged misconduct, provided misleading information to regulators, or failed to perform compliance functions.[47] Aguilar also expressed that CCOs were not expected to handle the compliance function on their own and that the support and involvement of senior leadership is essential to help advocate a strong culture of compliance.[48]

Five years later, SEC Commissioner Hester Peirce echoed many of these sentiments and outlined the three broad categories of liability that have traditionally defined the SEC's motivation to pursue enforcement action against CCOs. In 2020, Peirce emphasized that the SEC has charged CCOs in the following three instances, when CCOs have: 1) participated in the underlying misconduct unrelated to their compliance duties; 2) obstructed or misled SEC staff; and 3) "exhibited a wholesale failure to carry out [their] responsibilities."[49] As many would agree, the first two categories are uncontroversial, given that they involve some aspect of scienter, or knowledge of one's unlawful acts. Cases that have addressed these actions include direct violations by compliance officers of the securities laws, intentionally failing to stop bad behavior within the entity, and creating false or backdated information.[50] The government or any federal regulator or agency could rely on numerous statutory provisions and regulations u in imposing liability in these contexts. Each provision or regulation requires some form of willful violation, manipulative behavior, or knowingly violating regulatory and statutory mandates.[51]

46. *Id.*

47. *Id.*

48. *Id.*

49. Peirce Remarks, *supra* note 7 (citing Andrew Ceresney, Dir., Div. of Enf't, Sec. & Exch. Comm'n, 2015 National Society of Compliance Professionals, National Conference: Keynote Address, SEC. & EXCH. COMM'N (Nov. 4, 2015), https://www.sec.gov/news/speech/keynote-address-2015-national-society-compliance-prof-cereseney.html).

50. *Id.*

51. *See, e.g.,* 15 U.S.C. § 77x (requiring a "willful violation" of SEC rules); 15 U.S.C. § 78j (imposing liability on anyone who "employs a manipulative device or makes a material misstatement or omission");18 U.S.C. §2 (aiding, abetting, counseling, inducing, or procuring an unlawful act as punishable by the DOJ); 31 U.S.C. § 5321 (describing how willful violation of reporting and record-keeping requirements for currency transactions are subject to penalties by FinCEN); 15 U.S.C. § 50 (stating that any person who willfully makes a false entry or statement in a corporation's accounts or records faces liability by the FTC); 12 U.S.C. § 1955 (imposing penalties by the Secretary of the Treasury for any "willful or grossly negligent violation" of the record-keeping requirements for U.S. financial institutions).

The third category of liability, however, creates substantial confusion. There are a number of negligence-based statutory and regulatory provisions upon which the SEC could rely in finding personal liability in such circumstances. Some examples include violations of the securities laws, such as an act or omission that a person "*knew or should have known* would contribute to such violation;"[52] the failure to "*reasonably* supervise" another person who violates a securities rule, law, or regulation;[53] or the failure to develop, administer, or monitor a compliance program at a banking entity.[54]

When pursing enforcement actions that fall within the negligence-based "wholesale failures" category, the SEC typically charges the CCO with aiding and abetting their company's violations.[55] This charge requires a showing that the "danger [was] so obvious that the [CCO] *must have been aware* of the danger"[56] or that the CCO caused the company's violation by committing "an act or omission the [CCO] *knew or should have known* would contribute" to the violation.[57] Thus, the SEC may impose personal liability simply by showing that a CCO behaved unreasonably, without showing that the CCO had a guilty mental state.[58] The SEC also often relies on another negligence-based standard, Rule 206(4) of the Investment Advisers Act, to seek redress against CCOs who work for investment advisers and fail to "[a]dopt and implement written policies and procedures" that are "reasonably designed to prevent violation of the [Investment Advisers] Act and the rules that the [SEC] has adopted under the Act."[59] For example, the SEC relied on Rule 206(4) of the Investment Advisers Act in the administrative proceeding against BlackRock and Battista discussed in the prior section.[60]

Cases that have incorporated negligence-based thresholds of liability, such as *United States v. Haider*, are telling. In *Haider*, Thomas Haider, the former CCO of MoneyGram International Inc., was held liable for failing to prevent MoneyGram's violation of the Bank Secrecy Act ("BSA").[61] The BSA requires

52. 15 U.S.C § 77h-1(a) (emphasis added).

53. 15 U.S.C § 78u-2(a)(1)(D) (emphasis added).

54. 17 C.F.R. § 255.20.

55. Howard v. SEC, 376 F.3d 1136, 1143 (D.C. Cir. 2004) (emphasis added).

56. *Id*.

57. KPMG v. SEC, 289 F.3d 109, 120 (D.C. Cir. 2002) (emphasis added); *see also* SFX Fin. Advisory Mgmt. Enter. Inc., Investment Advisers Act Release No. 4116 2015 WL 3653814 *1, at 1 (June 15, 2015) (finding that the CCO failed to conduct an annual compliance review where it was believed that knowledge of wrongdoing would have come to light).

58. KPMG, 289 F.3d at 120.

59. 17 C.F.R. § 275.206(4)-7(a); *see also* India McGee, *Where Do We Go from Here? Prosecutorial Concerns of Chief Compliance Officers*, 6 AM. U. BUS. L. REV. 277, 278 (2017) (discussing the SEC's reliance on this rule to impose personal liability against compliance officers).

60. *See* Blackrock Advisors, LLC, Investment Advisers Act Release No. 4065, Investment Company Act Release No. 31558 (Apr. 20, 2015), https://www.sec.gov/litigation/admin/2015/ia-4065.pdf.

61. *See* U.S. Dept. of Treasury v. Haider, 2016 WL 107940 *1, *1 (D. Minn. Jan. 8, 2016); *see also* NYCBA REP., *supra* note 5, at 12. MoneyGram International, Inc. was also held liable and entered into a

financial institutions to create programs aimed at anti-money laundering and to timely file suspicious activity reports with FinCEN.[62] Haider argued that he should not be personally liable for MoneyGram fraud department's collection of thousands of complaints from consumers who fell victim to fraudulent schemes because the BSA applies to financial institutions rather than individuals.[63] The district court for the Southern District of New York rejected his claim, finding that the plain language of the statute also subjected CCOs and employees like Haider to personal liability for designing and overseeing anti-money laundering programs, even if it was upper management that failed to adhere to the programs.[64] *Haider* thus holds that CCOs may be held personally liable when an organization fails to properly follow compliance programs. It also raises concerns about how CCOs should handle situations where noncompliant management causes or aggravates compliance failures. In *Haider*, for example, there was evidence that sales personnel within MoneyGram's fraud department rebuffed the CCO's efforts to terminate and discipline the parties who were responsible for the underlying misconduct.[65] Haider suggests, concerningly, that CCOs may be held personally liable if management overrules their preferred course of action or where CCOs cannot effectuate such action due to understaffing, limited resources, or an unsupportive culture.[66]

In another example, the SEC upheld FINRA sanctions against Thaddeus North, a CCO for Southridge Investment Group, LLC, for "fail[ing] to establish and maintain a supervisory system reasonably designed to achieve compliance with rules related to the review of electronic correspondence" in violation of various securities-related rules.[67] In his defense, North stated that he should not be liable for inadequate supervision given that the firm's vendor who was hired to archive communications and provide a platform to review them actually lacked the ability to archive the type of communications that were relevant for the review, thereby making North unaware that he had to search a separate repository to achieve proper compliance.[68] Thus, it seems the case largely rested on issues surrounding know-how of the applicable technology systems at play and the intricacies of how those systems operate. The SEC nonetheless noted the "unreasonableness" of his behavior of not paying enough attention to red flags and failing to perform duties for which he was directly responsible, and then went on to offer an important statement about the "vital" and "complex" role of

deferred prosecution agreement with the DOJ on charges that it aided and abetted wire fraud and willfully failed to implement an effective anti-money laundering program, which violated the BSA.

62. Haider, 2016 WL 107940, at *2.

63. *Id.*

64. *Id.; see also* NYCBA REP., *supra* note 5, at 12-13.

65. NYCBA REP., *supra* note 5, at 13.

66. *See id.*

67. The Application of Thaddeus J. N. for Review of Disciplinary Action Taken by FINRA, Securities Exchange Act Release No. 84500, 2018 WL 5433114 *1, *4 (Oct. 29, 2018).

68. *Id.* at *11.

compliance officers and the ways in which the agency's determinations about CCO liability centers on "principles of fairness and equity."[69]

> [I]n general, good faith judgments of CCOs made after reasonable inquiry and analysis should not be second guessed. [I]ndicia of good faith or lack of good faith are important factors in assessing reasonableness, fairness and equity in the application of CCO liability . . . [A]bsent unusual mitigating circumstances, when a CCO engages in wrongdoing, attempts to cover up wrongdoing, crosses a clearly established line, or fails meaningfully to implement compliance programs, policies, and procedures for which he or she has direct responsibility, we would expect liability to attach.[70]

These words clearly support an emphasis on the good faith intentions and judgments of the CCO, which would provide a shield from liability even if, in hindsight, those decisions turn out to be problematic.[71] In making these determinations, the SEC has also expressed that it does not automatically deem CCOs to be "supervisors," which would inflict supervisory liability given their legal or compliance responsibilities, and has dismissed actions against CCOs where another individual at the organization had responsibility for overseeing actions.[72] In addition, FINRA Rule 3110, issued in 2022, creates specific supervisory obligations on broker-dealer member firms and places the responsibility to meet these obligations on a firm's business management, rather than its compliance personnel.[73] However, CCOs may still face personal liability if they have been designated as having supervisory responsibilities "if the CCO has failed to discharge those responsibilities in a reasonable manner."[74] Therefore, questions of reasonableness will play a crucial role in determining regulatory actions against CCOs. Despite these regulatory sentiments, the degree to which CCOs "supervise" varies greatly across organizations, as some organizations afford CCOs significant independence with ample resources to perform duties and delegate responsibilities to a team while others are constrained by environments that largely dictate their actions and often wear more than one hat.[75] In addition, the FINRA rule only applies in the member

69. *Id*. at *9.

70. *Id.*

71. *Id.*

72. *Id.* at *11 (citing John H. Gutfruend, Exchange Act Release No. 31554, 1992 WL 362753, at *15 (Dec. 3, 1992)).

73. *FINRA Reminds Member Firms of the Scope of FINRA Rule 3110 as it Pertains to the Potential Liability of Chief Compliance Officers for Failure to Discharge Designated Supervisory Responsibilities*, FINRA, (Mar. 17, 2022), https://www.finra.org/rules-guidance/notices/22-10 ("The rule also requires each member firm to designate an appropriately registered principal or principals with authority to carry out the supervisory responsibilities of the member for each type of broker-dealer business in which it engages, to designate one or more appropriately registered principals in branch offices with authority to carry out the supervisory responsibilities assigned to that office, and to assign each registered representative to an appropriately registered person who is responsible for supervising that representative's activities.").

74. *Id.*

75. *See., e.g*., Eden Marcu, *One Person, Two Hats: Combining the Roles of Chief Compliance Officer and Chief Legal Officer*, 47 FLA. ST. U.L. REV. 705, 706 (2020); Deborah A. DeMott, *The Crucial but (Potentially) Precarious Position of the Chief Compliance Officer*, 8 BROOK. J. CORP. FIN. & COM. L. 56,

firm, broker-dealer context, and thereby does not cover all of the numerous CCOs across a wide range of industries. Therefore, it is exceedingly difficult to analyze this as a "one size fits all" situation. While there are certainly cases in which a "controlling person" under the securities laws who has "actual power or influence" over a controlled person has joint and several liability with the controlled person for unlawful behavior,[76] no such cases have ever directly involved a compliance officer.

Despite this fact, determining that a CCO has a supervisory role is not out of the question given the particular nature of a CCO's job duties in monitoring organizations and taking preventative measures to ensure adherence to the law.[77] For example, the SEC has attempted to charge the general counsel of a broker-dealer, Theodore Urban, for "fail[ing] reasonably to supervise" a registered representative of the firm after Urban was alerted to possible wrongdoing, tried to investigate and intervene, and ultimately failed to stop the misconduct.[78] While this case involved general counsel, rather than a compliance officer, the SEC relied on a theory of liability that would apply to both positions, which states that a senior legal or compliance officer may be held liable for a failure to affirmatively investigate and prevent misconduct that such officer had reason to suspect was occurring.[79] In doing so, the SEC appears to have expanded "supervisory liability" to cover a situation where the officer neither committed illegal acts nor aided or abetted them and did not directly supervise the actual wrongdoer, thereby creating secondary liability and causing the burden to shift to the supervisor to prove that supervision had been adequate.[80] While Urban ultimately met his burden of proof in this case, future legal and compliance officers would need to prove that they reasonably investigated any and all allegations of possible misconduct and took sufficient steps to prevent the

71 (2013); Paul E. McGreal, *Corporate Compliance Survey*, 68 BUS. LAW. 163, 177 (2012) (each discussing the varying degrees of power and autonomy across compliance officer positions, including the common possibility that they are wearing more than one hat by simultaneously being in charge of compliance, legal counsel, and executive officer duties).

76. *See* Poptech v. Stewardship Credit Arbitrage, LLC, 792 F. Supp. 2d 328 (D. Conn. 2011); In re Dura Pharm. Inc., 452 F. Supp. 2d 1005 (S.D. Cal. 2006); Wiley v. Hughes Capital Corp., 746 F. Supp. 1264 (D.N.J. 1990); Babst v. Morgan Keegan & Co., 687 F. Supp. 255 (E.D. La. 1988); Durham v. Kelly, 810 F. 2d 1500 (9th Cir. 1987) (each holding that a "controlling person" has direct or indirect management power or influence over another, thereby justifying liability).

77. *Chief Compliance Officer Liability Chart*, 6 AM. U. BUS. L. REV. 355, 355 (2017).

78. Theodore W. Urban, Release No. 402, 2010 WL 3500928 *1, *1 (Sept. 8, 2010).

79. *Id* at *47*; see also* Jaclyn Jaeger, *SEC Warns: Don't Mess with Compliance Officers*, COMPLIANCE WEEK (Sep. 20, 2013), https://www.complianceweek.com/sec-warns-dont-mess-with-compliance-officers/3850.article.

80. Ropes & Gray LLP, *United States: Legal And Compliance Officers Left In Doubt About Their Personal Liability*, MONDAQ (Feb. 21, 2012), https://www.mondaq.com/unitedstates/compliance/165458/legal-and-compliance-officers-left-in-doubt-about-their-personal-liability.

misconduct, "including the possibility that they must resign or report to the SEC if their efforts, however vigorous, are not supported by senior management."[81]

The cases discussed in this section confound the compliance community due to their potential to reach a strikingly broad range of CCO activities. It is unclear, for example, whether personal liability would attach if a CCO's organization provides the CCO with insufficient resources to timely design and adopt compliance policies, giving rise to the question of *who* is at fault for this issue—the organization or the CCO.[82] Thus, a CCO feasibly could be held liable for occurrences like lacking resources to do their job, which could lead to negligence, or advising a business team that opts to ignore the compliance function and not taking enough action to thwart or stop their wrongful behavior. There are numerous examples that may prompt personal liability, all of which are broadly housed in the negligence realm. Given these numerous uncertainties and the lack of official guidance and jurisprudence on issues which inform questions of personal liability, the time is ripe to consider one consistent approach to CCO liability. The next section proposes a new lens from which to tackle these very questions.

II. PROPOSING A STANDARD OF CARE FOR CHIEF COMPLIANCE OFFICERS

A. An Adaptation of the Business Judgment Rule

The recent regulatory response to CCOs and the string of enforcement actions against them in the financial sector, as well as the complete lack of official guidance or jurisprudence on this topic, is likely to create an alarming ripple effect into various other industries in which compliance officers operate, eventually reaching into all areas of business practice that stem beyond areas governed by the SEC and other financial regulators.[83] The current lack of clarity to determine personal liability questions will only continue to lead to confusion, anxiety, and a risk of heightened personal liability for compliance professionals due to their unawareness of the exact consequences of their duties and obligations. For this reason, it is time to establish an appropriate standard of care for CCOs to determine questions surrounding their personal liability that may be applied in all sectors.

This Article adapts the business judgment rule to propose a novel standard that regulators and courts can rely on for determining whether CCO personal

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81. *Id.*

82. Matt Kelly, *New Report Stirs Old Fears of Compliance Officer Liability*, NAVEX GLOBAL (Feb. 25, 2020), https://www.navexglobal.com/blog/article/new-report-raises-old-fears-of-compliance-officer-liability/.

83. *See* James Fanto, *Paternalistic Regulation of Public Company Management: Lessons from Bank Regulation*, 58 FLA. L. REV. 859, 860 (2006) (discussing the ways in which the Sarbanes-Oxley Act of 2002 and federal regulation of public firm management has, in many ways, prompted a federal regulation of other areas more broadly).

liability is warranted, thereby articulating a standard of care that can be applied to CCOs across different industries. This proposed standard avoids imposing liability for simple negligence; rather, it imposes liability in instances of actual wrongdoing. This standard of care would protect CCOs from liability as long as they use good faith efforts to ensure that their activities are conducive to establishing functional compliance systems and creating an ethical culture, even if those activities turn out to be ignored by the organization or rogue upper management. This standard would judge whether a CCO exercised due care and good faith; avoided conflicts of interest in the creation of compliance programs, systems, and processes; and facilitated optimal organizational culture. If a CCO were to face liability for actions within their organization, courts and regulators could evaluate their level of culpability pursuant to this standard. Under the proposed standard, if the evaluation results in a finding that the CCO acted recklessly, knowingly, or manipulatively, then courts and regulators could impose liability. At the same time, the standard would guard against personal liability for instances of mere negligence or situations in which upper management or other critical players within an organization resisted the CCO's efforts.

Since this standard of care is focused on considerations of due care and good faith, it naturally becomes more difficult to apply negligence-based rationales to impose liability where CCOs take affirmative steps to implement effective compliance systems and foster an ethical culture surrounding those systems. Taking such steps is, in many ways, the opposite of the type of "unreasonable behavior" that is the cornerstone of ordinary negligence.[84] Questions of unreasonableness or carelessness are arguably unrelated when CCOs strive to create compliance systems that adequately prevent and address concerns and make efforts to educate and disseminate information pertaining to those systems within the organization, as these acts often demonstrate the CCO's commitment, passion, and zeal. Therefore, objective negligence-based questions about what CCOs "should have done" or "should have known" arguably lose their place in an analysis of CCO personal liability. This is especially important given that courts and regulators ultimately making decisions about CCO personal liability may not know about the intricacies and specifics of a CCO's industry.

The proposed standard of care is similar, yet notably distinct, from the business judgment rule that has traditionally applied to directors. While the exact definition of the traditional business judgment rule differs somewhat from state

84. *See* Diane Fenner and James A. Morris, Jr., et al., Litigating Tort Cases § 60:27, § 23:4 (Thomson West, October 2023) (noting that a defendant's unreasonable behavior gives rise to negligence liability when that conduct results in injury and that "the negligence standard, [is] the workhorse liability rule of tort law that is designed to assign liability to *unreasonable* behavior and excuse behavior that is reasonable.").

to state,[85] there are some consistent, overarching features of the rule. Under the rule, courts grant directors, and arguably officers,[86] considerable discretion in their actions and decision-making. As long as they have acted reasonably, honestly, in good faith, and with due diligence, courts will not second-guess their actions and will shield them from personal liability.[87] More specifically, the following factors typically lead to the application of the business judgment rule: the action in question was of a managerial capacity; the director was unconflicted without personally benefitting from the decision; and the director exercised due care while acting in good faith, driven by an honest desire to benefit the organization.[88] If decisions and behaviors have been handled in this manner, courts will not typically challenge the substance of those decisions or actions under the duty of care, even if they ultimately have undesirable consequences.[89]

The business judgment rule focuses on the decision-making process rather than the ultimate decision.[90] In the field of compliance, a focus on *process* is essential to the work of a CCO. CCOs should be shielded from ordinary negligence-based liability as long as they implement compliance processes that have been carefully weighed, balanced, and considered through the use of good faith and due care, even if it turns out that rogue actors or management within the organization chose to ignore or disregard those processes. As discussed, equally important as the process is the proper facilitation of an organizational culture that is conducive to ensuring the process is successful.

Some of the most common rationales for the business judgment rule are that it encourages innovation, thoughtfulness, and calculated risk-taking for an organization's leaders, limits unjustified liability exposure and litigation, and restricts intrusion by the courts given that "judges are generally not business experts."[91] As such, the rule offers a buffer from ordinary negligence by

85. Michael P. Battin, *Bank Director Liability Under FIRREA*, 63 FORDHAM L. REV. 2347, 2388 (1995).

86. The question of whether corporate executive officers are covered by the business judgment rule is explored in the next subsection.

87. Citron v. Fairchild Camera & Instrument Corp., 569 A.2D 53, 64 (Del. 1989).

88. F.D.I.C. v. Stahl, 89 F.3d 1510, 1516 (11th Cir. 1996)*; see also* Ryan Scarborough & Richard Olderman, *Why Does the FDIC Sue Bank Officers? Exploring the Boundaries of the Business Judgment Rule in the Wake of the Great Recession*, 20 FORDHAM J. CORP. & FIN. L. 367, 368 (2015).

89. ROBERT C. CLARK, CORPORATE LAW 124 (Francis A. Allen et. al. 1986); *see also* David Rosenberg, *Galactic Stupidity and the Business Judgment Rule*, 32 J. CORP. L. 301, 304 (2007) (noting that the business judgment rule "will not allow review of director decisions that, in retrospect, are . . . 'substantively wrong, or degrees of wrong extending through 'stupid' to 'egregious' or 'irrational,' as long as the process used was rational or the decision made in good faith") (quoting *In re Caremark Int'l Inc. Derivative Litig*., 698 A.2d 959, 967 (Del. Ch. 1996)).

90. Steven Chasin, *Insider v. Issuer: Resolving and Preventing Insider Trading Compliance Policy Disputes*, 50 UCLA L. REV. 859, 875 (2003).

91. Gregory Scott Crespi, *Should the Business Judgment Rule Apply to Corporate Officers, and Does It Matter?*, 31 OKLA. CITY U. L. REV. 237, 241, 244 (2006) (discussing the policy rationales behind the rule); *see also* Dana Brakman Reiser, *Decision-Makers Without Duties: Defining the Duties of Parent Corporations Acting as Sole Corporate Members in Nonprofit Health Care Systems*, 53 RUTGERS L. REV. 979, 999 (2001)*; see also* Rosenberg, *supra* note 89, at 302 ("[T]he deference displayed towards the

imposing liability only for the scienter-based behavior of gross negligence,[92] thereby protecting individuals when they act with honest intentions and in good faith. While undoubtedly there are fundamental differences between *directors* and *compliance officers*, the rationales supporting the business judgment rule are heavily grounded in policy that draws parallels between the two roles.

For instance, one of the most common policy justifications of the business judgment rule is that it encourages corporate leaders to take business risks without fear of repercussion. This justification may be even more relevant for corporate *officers* (as opposed to directors), as officers work in day-to-day operations and full-time within the organization, have better access to information than directors, and influence much of the landscape of corporate decision-making.[93] While one would not necessarily associate the job of a compliance officer, which is heavily focused on preventative and precautionary practices, with taking any risks whatsoever, the deeper rationale behind this policy justification may also be extended to CCOs. At the end of the day, CCOs are subject to the same daily "pressures and politics" as other members of the entity—perhaps even more so given that their main reporting line is usually to the board of directors.[94] As a result, they may certainly face resistance from members of upper management or directors who intend to persist down an unlawful road, have gone rogue, or choose to ignore the CCO who is attempting

decisions of corporate directors [in the business judgment rule] arises not from a belief that directors are always right, or even always honorable, but from a belief that "'investors' wealth would be lower if managers' decisions were routinely subjected to strict judicial review'") (quoting FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 93 (1991)).

92. *See, e.g.,* Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985) ("[T]he concept of gross negligence is also the proper standard for determining whether a business judgment reached by a board of directors was an informed one."); Tomczak v. Morton Thiokol, Inc., No. 7861, 1990 WL 42607, at *12-13 (Del. Ch. 1990) (noting that gross negligence means "reckless indifference to or a deliberate disregard of the whole body of stockholders" in the corporate context) (citing *Allaun v, Consolidated Oil Co.,* 147 A. 257, 261 (Del. Ch. 1929)); Rabkin v. Philip A. Hunt Chem. Corp., 547 A.2d 963, 970 (Del. Ch. 1986) (explaining that gross negligence means "reckless indifference" or actions "without the bounds of reason") (citing Gimbel v. Signal Cos., Inc., 316 A.2d 599, 615 (Del. Ch. 1974); Gimbel v. Signal Cos., Inc., 316 A.2d 599, 615 (Del. Ch. 1974), *aff'd* 316 A.2d 619 (Del. 1974) (defining gross negligence as "reckless indifference to or a deliberate disregard of the whole body of stockholders" or actions that are "without the bounds of reason").

93. *See* Dynamics Corp. of Am. v. CTS Corp., 794 F.2d 250, 256 (7th Cir. 1986) (stating that the business judgment rule is "a sensible policy of judicial noninterference with business decisions made in circumstances free from serious conflicts of interest between management . . . and the corporation's shareholders" and protects business decision-making)*; see also* Lawrence Hamermesh & Gilchrist Sparks, *Corporate Officers and the Business Judgment Rule: A Reply to Professor Johnson*, 60 BUS. LAW. 865, 870 (May 2005) ("Full time work and better information, which go hand in hand, may if anything make it difficult for an officer to claim ignorance or reliance on others as a defense, thereby accentuating, rather than reducing, a reluctance to take risks in the face of a negligence-based liability rule.").

94. *See* Jennifer M. Pacella, *Compliance Officers: Personal Liability, Protections, and Posture*, 14 BROOK. J. CORP. FIN. & COM. L. 23, 34 (2019) (discussing how CCOs are "subject to the same organizational pressures and politics that all employees face"); *see also* Kathleen M. Boozang & Simone Handler-Hutchinson, *"Monitoring" Corporate Corruption: DOJ's Use of Deferred Prosecution Agreements in Health Care*, 35 AM. J.L. & MED. 89, 108 (2009) (explaining that a challenge in relying on CCOs for corporate self-regulation is that compliance officers are ultimately "employees of the company which they monitor and audit").

to implement certain policies, procedures, and measures. When persons beyond the CCO may not have the best interests of the organization at heart, the fear of ordinary negligence liability becomes even more problematic for a CCO, who is tasked with facilitating adherence to rules and regulations. In addition, risk management, risk assessment, and the implementation of risk-based strategies are all crucial aspects of the CCO's work.[95] CCOs, as stewards of the internal control function, allocate their departments' resources based on an assessment of the underlying compliance risks while taking account of the business pressures facing organizations.[96]

Another very important policy rationale of the business judgment rule, historically applied to directors, is to preserve their role in the governance of the organization. Thus, other constituents of the organization are expected to concede more governance and decision-making power to the board itself.[97] CCOs, however, also play a crucial role in the governance of an organization and, in recent years, the recognition of their value in this context has skyrocketed. Historically, compliance was described as "a bit of a backwater" lacking any real specialization—"[c]ompliance officers tended to work in cubicles and performed a sort of glorified bookkeeping task, making sure that forms were filled out and boxes checked."[98] In current times, the compliance function and the compliance officer's role are now exponentially more valued and prestigious. This has resulted in compliance officers receiving higher salaries, central corporate governance duties, a crucial voice in the strategic decisions of an organization, and often a direct reporting line to the CEO, the board itself, or a board committee like the Audit, Risk, or Compliance Committee.[99] In light of this prominent position, it is imperative that the CCO is well-positioned to inform and influence the board and upper management when responding to issues of concern or possible non-compliance.

Though an increasingly high number of lawyers are entering the compliance field,[100] it is crucial to recognize the distinct role of an organization's legal department from the compliance unit. The general counsel of an organization and its CCO are each responsible for ensuring adherence to laws, regulations, rules, and industry standards, but these roles diverge in how they achieve this

95. *See* COMM. OF SPONSORING ORGS. OF THE TREADWAY COMM'N, INTERNAL CONTROL – INTEGRATED FRAMEWORK: FRAMEWORK AND APPENDICES 182-86 (May 2013) (explaining the balance between internal controls, compliance, and enterprise risk management).

96. *See* Geoffrey P. Miller, *Compliance: Past, Present and Future*, 48 U. TOL. L. REV. 437, 437 (2017).

97. *See* Hamermesh & Sparks, *supra* note 93, at 875 (noting that this effect often causes management to become too "top heavy").

98. Miller, *supra* note 96, at 437.

99. *Id*. at 438-39.

100. Jennifer M. Pacella, *The Regulation of Lawyers in Compliance*, 95 WASH. L. REV. 947, 948 (2020).

objective.[101] While a lawyer has a duty to represent a client's best interests, the CCO is firmly committed to preventing, detecting, and managing non-compliance and misconduct[102]—the role of the lawyer is more *ex post*, while the compliance officer's work is more *ex ante*. In this way, compliance has more commonly been considered to be a management function, as opposed to a legal function, which is integral to the overall governance of the entity and also relied upon by the board to ensure implementation and maintenance of operations in a way that aligns with the organization's values and objectives.[103]

While the compliance and legal departments need to communicate and maintain good working relationships with each other, regulators have long preferred that the two be separate and distinct functions, rather than housed in the same department.[104] Given the distinct roles and responsibilities between an organization's lawyers compared to its compliance team, clear communication and collaboration between the CCO and the board become even more essential and conducive to an effective compliance and governance system. In addition, the 2010 revisions by the U.S. Sentencing Commission to the Federal Sentencing Guidelines, which allow a corporation to receive a three-level downward departure at sentencing for maintaining an effective compliance and ethics program, make this kind of collaboration between the board and CCOs essential to mitigating penalties for violations.[105] One of the eligibility requirements for leniency is that the corporation's CCO must have direct access to the board of directors to promptly foster voluntary reporting of the offense to government authorities.[106]

101. *See* José A. Tabuena & Jennifer L. Smith, *The Chief Compliance Officer Versus the General Counsel: Friends or Foes? Tensions Can Exist Between the Two, So Define the Roles and Learn to Strike a Balance*, 8 J. HEALTH CARE COMPLIANCE 23, 25 (2006).

102. *Id*. ("While the lawyer must focus on what will result in success in legal battles, the compliance professional wants to prevent the very mistakes that result in legal battles. . . ."). Though it is often the case that a lawyer representing an organization as a whole pursuant to Rule 1.13 of the American Bar Association's Model Rules of Professional Conduct (Model Rule 1.13) is likely to take on preventative duties as well. *See* Jennifer M. Pacella, *Conflicted Counselors: Retaliation Protections for Attorney-Whistleblowers in an Inconsistent Regulatory Regime*, 33 YALE J. ON REG. 491, 517 (2016) (discussing the unique duties of lawyers bound by Model Rule 1.13).

103. Tabuena & Smith, *supra* note 101, at 25-26; Christine Parker, *Lawyer Deregulation via Business Deregulation: Compliance Professionalism and Legal Professionalism*, 6 INT'L. J. LEGAL PRO. 175, 183-86 (1999) (addressing how the compliance function is more akin to a management role, rather than a legal one, due to its focus on instituting norms within an organization, rather than only making sure that the law is being followed).

104. *See* Robert C. Bird & Stephen Kim Park, *The Domains of Corporate Counsel in an Era of Compliance,* 53 AM. BUS. L.J. 203, 205 (2016) (discussing the relationship between the compliance and legal departments); *see also* DeStefano, *supra* note 16, at 74–75 (discussing how regulators prefer that organizations separate their legal and compliance functions).

105. *See* U.S. SENT'G GUIDELINES MANUAL § 8B2.1 (U.S. SENT'G COMM'N 2012); *see* Andy Liu & W. Stanfield Johnson, *Fraud, Debarment and Suspension—Part 1: Fraud*, 2011 Gov't Contracts Year in Rev. Br. 20 (Thomson Reuters 2011).

106. Andy Liu & W. Stanfield Johnson, *Fraud, Debarment and Suspension—Part 1: Fraud*, 2011 Gov't Contracts Year in Rev. Br. 20 (Thomson Reuters 2011).

Since a CCO is an officer, to make the argument that some variation of the business judgment rule should apply to CCOs, it is necessary to consider the law's position as to whether the rule applies solely to directors or also encompasses corporate officers of an organization. The ample scholarly attention to the question of whether the business judgment rule applies with equal force to both directors and officers is less clear than one would hope and sparse case law only addresses the issue in dicta.[107] There have been no cases from Delaware courts definitively holding that the business judgment rule also applies to officers and the issue has never been squarely before the court.[108] In addition, the inclusion of corporate officers within the protections of the business judgment rule is not well-settled in every jurisdiction.[109] While both the American Law Institute's Principles of Corporate Governance and the Model Business Corporation Act apply the business judgment rule to officers in the same manner as it applies to directors, a position that academics and practitioners have widely supported,[110] the lack of case law and precedent on this topic is striking. While it is beyond the scope of this Article to propose a definitive position on this question, the next section posits that the question of whether the business judgment rule applies to officers as well as directors does not bear on whether CCOs may be subject to a modified version of the rule. Instead, principles of agency law better address the applicability of the modified business judgment rule that this Article proposes.[111] Specifically, this Article examines possible CCO fiduciary duties and obligations and whether CCOs should be considered

107. *See, e.g.*, Lyman P.Q. Johnson, *Corporate Officers and the Business Judgment Rule*, 60 BUS. LAW. 439, 440-44 (2005) (citing *Kelly v. Bell*, 254 A.2d 62 (Del. Ch. 1969) (broadly stating that both directors and officers are covered under the business judgment rule but addressing only directors in the decision)).

108. *See* Deborah A. DeMott, *Corporate Officers as Agents*, 74 WASH. & LEE L. REV. 847, 864 (2017) ("The vibrancy of debate surrounding officers' liability owes much to the absence of definitive resolution from Delaware courts themselves."); *see also* Lyman Johnson & Dennis Garvis, *Are Corporate Officers Advised About Fiduciary Duties?*, 64 BUS. LAW. 1105, 1107 (2009) (noting that Delaware courts have left unanswered important doctrinal questions related to the fiduciary duties of officers); Brandon J. Stout, *Corporate Directors (and Officers) Making Business Judgments in Tennessee: The Business Judgment Rule*, 44 U. MEM. L. REV. 455, 475-6 (2013) ("Despite its well-developed case law on a myriad of corporate issues, Delaware lacks clear, mature law on the issue of whether and in what matter the business judgment rule should apply to corporate officers.").

109. *See* Ryan Scarborough & Richard Olderman, *Why Does the FDIC Sue Bank Officers? Exploring the Boundaries of the Business Judgment Rule in the Wake of the Great Recession*, 20 FORDHAM J. CORP. & FIN. L. 367, 380-393 (2015) (examining the range of business judgment protections afforded to bank officers in Georgia, California, and Florida).

110. AM. L. INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 4.01 cmt. c (1994) ("Sound public policy points in the direction of holding officers to the same duty of care and business judgment standards as directors, as does the little case authority that exists on the applicability of the business judgment standard to officers, and the views of most commentators support this position."); *see also* AM. BAR. ASS'N, MODEL BUS. CORP. ACT ANN., § 8.42 cmt., at 8-265 (5th ed. 2020) ("[T]he business judgment rule will normally apply to decisions within an officer's discretionary authority.").

111. *See generally* Lyman P.Q. Johnson & David Millon, *Recalling Why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597 (2005) (relying on agency law to discuss the differences between officers and directors and how the differences affect their duties and liability).

"agents" of their organizations subject to standards of ordinary negligence.[112] In the next section, this Article takes the position that CCOs may best be described as "non-agent fiduciaries."[113]

B. The Unique Duties and Obligations of Compliance Officers

While it is undisputed in the law that corporate officers are agents,[114] whether a CCO can be characterized as an agent of the organization is less clear given that a CCO's role does not fit squarely within traditional notions of agency. The fundamental relationship between the CCO and the organization is distinct from the relationship between other corporate officers and the organization. Most importantly, it may be argued that CCOs essentially represent *both* the interests of the regulator and the organizations that they monitor.[115] While representing the best interests of the organization itself is inevitably a crucial part of this position, it is not the primary focus of the CCO's work, as it might be for a chief executive officer or the general counsel, since the CCO is also responsible for representing the interests of the regulator.[116]

This reality exists because the compliance function's goal is to proactively ensure that the organization meets the demands of the respective regulator(s) in the industry. A CCO's duties include activities such as establishing procedures, policies, and systems to ensure adherence to the law; preventing instances of misconduct; providing adequate and remedial responses to red flags; and proactively reporting or informing regulators of organizational problems.[117] The reporting aspect of the compliance function is especially relevant in this context. It is incumbent upon the CCO to self-report instances of non-compliance or non-conformities with the law, regulations, or the expectations of regulators in the industry so that cooperation credit, leniency, and remedial measures may be sought to lessen possible penalties.[118] In this way, the compliance function is keenly focused on "neutral fact finding" and ensuring that the organization is

112. *Id.* at 1637 ("[A]gency law imposes an ordinary negligence standard of care that is tougher than the 'gross negligence' standard applicable to corporate directors.").

113. *Infra* notes 116-135.

114. *See* Lyman Johnson, *Having the Fiduciary Duty Talk: Model Advice for Corporate Officers (and Other Senior Agents),* 63 BUS. LAW. 147, 148–49 (2007) (noting that the primary common law source for officer duties among the states is the law of agency).

115. *See* James Fanto, *Dashboard Compliance: Benefit, Threat, or Both?*, 11 BROOK. J. CORP. FIN. & COM. L. 1, 5 (2016) (discussing how compliance officers are essentially guardians of regulatory obligations); *see also* Pacella, *supra* note 100, at 981 (echoing the same).

116. *See* Pacella, *supra* note 100, at 981.

117. Fanto, *supra* note 115, at 5-9.

118. Pacella, *supra* note 100, at 969; *see also* Symposium, *Panel IV: Compliance Officer Empowerment*, 6 AM. U. BUS. L. REV. 255, 273 (2017) (discussing the need to incentivize individuals, including compliance officers, to self-report violations).

representing the best interests of all stakeholders, which extends beyond the internal constituents of an organization to external parties.[119]

In addition, CCOs must ensure that they maintain "a comfortable middle ground between independence and familiarity"—being "too close" to the employees they monitor may jeopardize their ability to prevent wrongdoing, while being too far-removed from the employees will make them "no better suited than their government counterparts to grasp the firm's internal dynamics."[120] Therefore, CCOs would be ideally positioned with some sort of middle ground in this context, while corporate officers would tend to be more critically engaged with employees. When viewed from this perspective, it becomes clear how a CCO's role differs from that of a corporate officer like a CEO, the latter of which is firmly committed to the company's performance and success and may not be as motivated to voluntarily divulge information to regulators.[121]

Furthermore, while corporate officers are subject to some amount of control by their principal (i.e., the organization) regarding the manner and means of their performance, the CCO has certain independence requirements that bear special consideration. CCOs require a certain degree of independence from management to determine what went wrong when problems emerge and are often the parties to communicate with external constituencies to "furnish credible assurances about the quality of the firm's compliance systems and controls."[122] Through years of regulation and enforcement decisions, the SEC and self-regulatory organizations have also viewed CCOs as possessing their own distinct authority and decision-making powers that are independent of the organizational hierarchy.[123] Notably, these regulators expect the CCO to have a "seat at the table with [management] and ultimately to report to the top decision-making body."[124] This kind of independence is especially possible given the strong regulatory preference that the compliance function be housed separately from the legal department, with systems in place where the CCO's reporting line is not directly to the general counsel but instead to directors.[125] This setup allows the CCO to

119. Pacella, *supra* note 100, at 984; *see also* Michele DeStefano, *Compliance and Claim Funding: Testing the Borders of Lawyers' Monopoly and the Unauthorized Practice of Law*, 82 FORDHAM L. REV. 2961, 2974-80 (2014) (describing the unique characteristics of the compliance function).

120. Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 988 (2009).

121. *See* Serena Hamann, *Effective Corporate Compliance: A Holistic Approach for the SEC and the DOJ*, 94 WASH. L. REV. 851, 866–67 (2019) (discussing the conflict between a CCO being required to report to regulators, even with respect to the actions of corporate officers, and the risk of retaliation for doing so); *see also* Fanto, *supra* note 115, at 5 (discussing how compliance officer guard regulatory interests to ensure that organizations meet these external requirements).

122. DeMott, *supra* note 75, at 65-66.

123. James A. Fanto, *The Vanishing Supervisor*, 41 J. CORP. L. 117, 123 (2015).

124. *Id.*

125. *See* DeStefano, *supra* note 15, at 122 (discussing the separation of the compliance and legal functions); *see also* Alexandra Foster, *Where the CCO Fits in the C-Suite: A Corporation's Moral*

possess a certain kind of "political and personal power and influence" that ensures effective performance of duties.[126]

In this way, CCOs are arguably more akin to directors than regular corporate officers. Directors are not, in fact, either as a body or as individuals, considered to be agents of the corporation or its shareholders.[127] Agency rules provide that an agent owes the principal a duty of obedience under which the principal controls the agent and has power to direct the actions of the agent—"[c]orporate directors depart radically from this model," given their ultimate decision-making power. They are not subject to anyone's direct control or supervision by anyone, including the shareholders, for most decisions.[128] When agents breach their duties, it naturally follows that the principal is entitled to various remedies, including a tort action for losses that the agent has caused.[129] Corporate officers, as agents, owe a myriad of fiduciary duties, including a duty of ordinary care, good conduct, obedience, and disclosure of required information (e.g., conflicts of interest), all of which are judged by simple negligence when breached.[130] While there are some differences across the fifty states, all states are consistent in describing the duty of care of officers, which is that they must perform their respective functions in good faith and in such a way that they reasonably believe to be in the best interests of the corporation, with the care that an ordinarily prudent person would reasonably be expected to exercise in a like position and under similar circumstances.[131]

Compass, 6 AM. U. BUS. L. REV. 175, 178 (2017) (discussing the ways in which the government provides incentives for corporations to separate their general counsel department from the compliance function).

126. *See* DeStefano, *supr*a note 15 at 125.

127. *See* RESTATEMENT (SECOND) OF AGENCY § 14 C (AM. L. INST. 1958) ("A board of directors differs from an agent…."); *see also* U.S. v. Griswold, 124 F.2d 599 (1st Cir. 1941) ("The directors of a corporation for profit are 'fiduciaries' having power to affect its relations, but they are not agents of the shareholders since they have no duty to respond to the will of the shareholders as to the details of management."); Arnold v. Soc'y for Sav. Bancorp, 678 A.2d 533, 539-40 (Del. 1996) ("Directors, in the ordinary course of their service as directors, do not act as agents of the corporation . . . . A board of directors, in fulfilling its fiduciary duty, controls the corporation, not *vice versa*."); Johnson & Millon, *supra* note 111, at 1605 ("[N]either the board of directors as a body, nor individual directors, are agents of either the stockholders or the corporation. . . ."); Dalia Tsuk Mitchell, *Status Bound: The Twentieth Century Evolution of Directors' Liability*, 5 NYU J.L. & BUS. 63, 131 (2009); Margaret M. Blair & Lynn A. Stout, *Specific Investment: Explaining Anomalies in Corporate Law*, 31 J. CORP. L. 719, 738 (2006) ("[U]nder the rules of corporate law, directors are not 'agents' of either subgroups of shareholders or shareholders as a class, nor of any other class of investors.").

128. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 290–91 (1999) (citing Robert C. Clark, *Agency Costs versus Fiduciary Duties, in* PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS 55, 56 (John W. Pratt & Richard J. Zeckhauser eds., 1985)).

129. Johnson & Millon, *supra* note 111, at 1628 ("In effect, breach of these duties enables the corporation to assert that it is the victim of wrongdoing by the very persons who were to act on its behalf.").

130. *Id*. at 1630-31; *see also* David Orozco, *Compliance by Fire Alarm: Regulatory Oversight Through Information Feedback Loops*, 46 J. CORP. L. 97, 116 (2020) (discussing the ways in which executive officers can commit "intentional oversight or negligence that results in compliance failures").

131. PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 4.01(a) (AM. L. INST. 1994); *see also* Omnibank of Mantee v. United S. Bank, 607 So. 2d 76, 84 (Miss. 1992) (discussing the overarching characteristics of the duty of care and duty of loyalty).

In contrast, scholars have considered directors not as agents of shareholders but instead as "independent hierarchs" who not only serve shareholders' interests, but also the interests of the corporate structure itself, thereby possessing a type of "non-agent fiduciary" role similar to trustees, executors, or guardians.[132] While directors may not be agents, they undoubtedly still owe fiduciary duties to the organization.[133] Their duties encompass the duty of loyalty and duties of care and good faith, but the culpability standard is more lenient than that of gross negligence, thereby reaffirming why the business judgment rule is applicable to them.[134]

In a similar vein, CCOs, while not a precise fit for an agency relationship, also owe fiduciary duties to the organizations for which they work. In that way, they may also be said to be "non-agent fiduciaries." In fact, case law and scholars have each expressed that while not on the board of directors, CCOs owe the same fiduciary duties to the corporation as corporate directors.[135] The main duties in this context include a duty of loyalty to advance the best interests of the organization and a duty to act in good faith with honesty and diligence.[136] As it pertains to compliance specifically, the Delaware Chancery Court's decision *In re Caremark International Inc. Derivative Litigation* established that directors have a fiduciary duty to monitor that includes ensuring that their organizations have designed and implemented effective compliance programs.[137] This decision was further affirmed in *Stone v. Ritter*.[138] In addition, the 2008 decision of *Miller v. McDonald* makes it clear that directors and CCOs alike must diligently ensure that the organization implements and maintains a reasonable compliance system and takes affirmative actions like reporting or implementing remedial actions to mitigate the negative effects of wrongdoing and avoid liability.[139] The 2019 Delaware Supreme Court decision in *Marchand v. Barnhill* also emphasizes

132. *See* Stephen Bainbridge, *Directors are fiduciaries but they are not agents*, PROFESSORBRAINBRIDGE.COM (Aug. 25, 2015), https://www.professorbainbridge.com/professorbainbridgecom/2015/08/directors-are-fiduciaries-but-they-are-not-agents.html ("Directors thus are a type of non-agent fiduciary, as are "trustees, . . . executors, guardians, . . . partners and joint adventurers, and attorneys . . . " (quoting Chisholm v. Western Reserves Oil Co., 655 F.2d 94, 97 (6th Cir. 1981))); *see also* Blair & Stout, *supra* note 128, at 288.

133. Johnson & Millon, *supra* note 111, at 1606.

134. *Id.* at 1631; *see also* DeMott, *supra* note 108, at 848-9 (discussing the ways that directors are fiduciaries in different ways than officers).

135. John B. McNeece IV, *The Ethical Conflicts of the Hybrid General Counsel and Chief Compliance Officer*, 25 GEO. J. LEG. ETHICS 677, 687 (2012); *see* Gantler v. Stephens, 965 A.2d 695, 708-09 (Del. 2009).

136. Johnson, *supra* note 114, at 154. Interestingly, the U.K. High Court of Justice held that a company's compliance officer owed the same fiduciary duties to the company as do the directors. *See* ODL Securities Limited v. McGrath [2013] EWHC 1865 (Comm).

137. *See In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 972 (Del. 1996).

138. *See* Stone v. Ritter, 911 A.2d 362, 373 (Del. 2006); *see also* Bird & Park, *supra* note 104, at 228–29 ("With *Caremark* and *Stone,* compliance requirements took direct aim at the highest levels of the organization and imposed upon them an affirmative duty to act.").

139. *See* Miller v. McDonald (*In re* World Health Alts., Inc.), 385 B.R. 576, 591-92 (Bankr. D. Del. 2008).

courts' willingness to allow cases alleging that directors have breached their compliance duties to move forward, as relatively few had proceeded past the motion to dismiss stage prior to this case.[140] In *Marchand,* an ice cream company experienced a listeria outbreak that caused three deaths and, relying on allegations set forth in the complaint, the court allowed the case to proceed beyond the motion to dismiss.[141] In coming to this decision, the court highlighted the lack of a board committee overseeing food safety or any board-level process or protocol to manage food safety concerns, thereby providing sufficient reason to call into question the directors' compliance duties.[142] The jurisprudence described above makes it clear that the commitment to an effective compliance function is a collective effort. If compliance officers remain passive in the face of a problematic activity or fail to inform directors of problems, courts may find them liable of breaching fiduciary duties and committing bad faith and unreasonable business judgment,[143] thereby solidifying the important collective role of directors and CCOs in corporate governance and compliance. The variation of the business judgment rule discussed herein would safeguard CCOs during any difficult times in which they may be faced with directors who are breaching their *Caremark* duty and not acting in the best interests of the organization whether for self-gain or other reasons. In such situations, if the CCO can demonstrate due care, good faith, and the absence of conflicts of interest in creating and enforcing compliance programs and systems within the organization, personal liability would not attach to them as it would to the rogue directors.

In addition, CCO efforts at facilitating optimal organizational culture also play an important role in the analysis since written policies and programs have little meaning without an organizational commitment to adhere to and enforce them. While CCOs, as individuals, obviously cannot be responsible for the entire culture of an organization, they stand to be important stewards in taking steps to facilitate a healthy organizational culture. In that vein, the next section will address further duties, responsibilities, and obligations of CCOs when it comes to creating optimal organizational culture and will highlight the important role of culture to the compliance function.

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140. *See* Marchand v. Barnhill, 212 A.3d 805, 824 (Del. Sup. Ct. 2019); *see also* Katherine L. Henderson, Brad Sorrels & Lindsay K. Faccenda *"Bad" v. "Bad-Faith" Oversight: Navigating the Risks of Potential Oversight Liability Following Marchand v. Barnhill*, WILSON SONSINI (Feb. 26, 2021), https://www.wsgr.com/en/insights/bad-v-bad-faith-oversight-navigating-the-risks-of-potential-oversight-liability-following-marchand-v-barnhill.html.

141. *Marchand*, 212 A.3d at 805-07.

142. *Id*.

143. *See, e.g.,* Stanziale v. Nachtomi (*In re* Tower Air, Inc.), 416 F.3d 229, 234 (3d Cir. 2005) (finding directors liable for similar failures).

C. Considerations for Organizational Culture

Organizational culture is crucial both from an operational and social standpoint and CCOs play an important role in instilling a healthy culture of compliance within an organization. They work together with the senior leadership of the organization to create and nurture an environment that ideally emphasizes honesty, integrity, and a commitment to these values in achieving compliance.[144] It is challenging to succinctly define culture, and to measure the quality of the culture of a place, because of the various ways that different groups conceptualize it—"[t]here are many different types of culture that can potentially serve to be the 'right' culture depending on the nature of the organization's goals and its industry, thus making it challenging to generalize what constitutes 'good' culture."[145] Despite these challenges, culture tends to be defined as a sort of shared learning and value base of a group that guides its internal integration and external responses.[146] Executive leadership and management experts have also defined culture as the "deeply felt system of shared values and assumptions, conveyed through stories, myths, and legends, that explains how members of the organization think, feel, and act," thereby creating norms of conformity that are willingly accepted by the members of the organization.[147] No matter how you define it, culture is everything. While organizations may have the most seemingly ideal compliance policies and procedures on the books, such materials are simply meaningless if they are not put into practice.

Organizational climate and culture are even more impactful than informal systems of compliance for how they directly affect employee perceptions of what is considered to be appropriate behavior.[148] The CCO's role is front and center to these considerations, given their oversight of and engagement with the daily operations of an entity, with employee training and education, and as the

144. *See* Fanto, *supra* note 10, at 707–08 (2018) ("Compliance officers also train and educate board members, executives, managers, employees, and agents in all these procedures. This education includes activities promoting the organization's ethical standards that help define its culture."); *see also* Gates Garrity-Rokous & Harold F. Baker, *Solving Ethical "Decoupling": A Programmatic Approach to Ensuring Both Compliance and Ethics*, 48 U. TOLEDO L. REV. 453, 463 (2017) (discussing the important role that compliance officers play in reinforcing a culture of integrity); David Orozco, *Strategic Legal Bullying*, 13 N.Y.U. J.L. & BUS. 137, 188 (2016) (discussing how "integrity-based compliance practices can help to establish a corporate culture that prevents legal bullying from taking root."); Aguilar, *supra* note 45.

145. Eugene Soltes, *Unsubstantiated Allegations and Organizational Culture*, 43 SEATTLE U.L. REV. 413, 426 (2020).

146. *See id.* at 425-26 (noting also that "Marvin Bower, the management consultant who helped lead the transformation of McKinsey and Company" offered a "considerably more concise definition [by] describ[ing] culture simply as "the way we do things around here").

147. Cheryl L. Wade, *Corporate Compliance That Advances Racial Diversity and Justice and Why Business Deregulation Does Not Matter*, 49 LOY. U. CHI. L.J. 611, 622 (2018).

148. *See* David Hess, *Ethical Infrastructures and Evidence-Based Corporate Compliance and Ethics Programs: Policy Implications from the Empirical Evidence*, 12 N.Y.U. J.L. & BUS. 317, 350–51 (2016).

gatekeepers of workplace codes of conduct.[149] As one practitioner put it, "highly effective compliance officers know and understand that culture is the iceberg and that failure to identify, diagnose, and cultivate the iceberg can sink any organization. The iceberg didn't really sink the Titanic. It was the failure to see the iceberg that sunk the Titanic."[150] As a figure in management, the CCO helps facilitate a culture ideally comprised of open-door policies for reporting, empowerment of employees to raise concerns, effective processes for the receipt of red flags or concerns, transparency, a commitment to properly addressing internal reporting, and encouraging would-be whistleblowers to come forward.[151] The compliance programs that CCOs create also generate internal social norms that facilitate and encourage law-abiding behavior by imposing a sense of pressure to follow those norms, lest discipline or punishment be imposed for straying from expectations.[152]

Besides creating an environment firmly committed to a healthy, ethical culture, another area in which the compliance function stands to make a significant impact lies within endeavors to promote diversity, equity, inclusion, and belonging within organizations, which is certainly an area of current heavy focus across the United States. Culture is essential for these efforts because upper management must be committed to fostering a culture that is diverse, equitable, and inclusive for any real progress to be made in this context. Studies have shown that successful organizations make these efforts a strategic priority by tasking senior leaders with accountability for diversity, equity, and inclusion more

149. *See* James A. Fanto, *Surveillant and Counselor: A Reorientation in Compliance for Broker-Dealers*, 2014 B.Y.U. L. Rev. 1121, 1147 (2014) ("[C]ompliance officers promote the 'culture' of compliance in the firm by conducting training in professional and ethical standards as well as by producing and administering a code of ethical conduct for the firm."); *see also Creating A Culture of Compliance in Financial Services*, THOMSON REUTERS (Nov. 29, 2020), https://legal.thomsonreuters.com/en/insights/articles/creating-a-culture-of-compliance ("The proper delegation of power and oversight to a chief compliance officer helps financial firms incubate cultures that reward employees for 'doing the right thing' and reporting wrongdoing to the correct channels."); Jay Rosen, *What is the CCO's Role in Strengthening the Organization's Culture of Ethics?* CORP. COMPLIANCE INSIGHTS (Oct. 2, 2019), https://www.corporatecomplianceinsights.com/cco-role-culture-ethics/ ("[T]he CCO …. [should] be proactive in the role of shaping ethical culture, separate and apart from the CCO role in investigations, root cause analysis or ongoing monitoring."); Robert C. Bird, *Caremark Compliance for the Next Twenty-Five Years*, 58 AM. BUS. L.J. 63, 108 (2021) ("Chief Compliance Officers are associated with ethical values and ethical leadership, and can be important vectors for fostering a culture of integrity.").

150. L.T. Lafferty, *The Habits of Highly Effective Compliance Officers from Effectiveness to Greatness in Your Program Activities*, 12 J. HEALTH CARE COMPLIANCE 11 (2010).

151. *See* Jennifer M. Pacella, *Facilitating the Compliance Function*, 71 RUTGERS U.L. REV. 579, 581–82 (2019) (discussing the major components of effective compliance systems).

152. Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 960 (2009); *see also* Veronica Root Martinez, *Complex Compliance Investigations*, 120 COLUM. L. REV. 249, 255 (2020) ("Those striving to create effective ethics and compliance programs spend a great deal of time on developing appropriate structures to house, manage, and support compliance efforts so that they will effectively prevent and detect wrongdoing within firms.").

broadly than other organizational functions.[153] Therefore, the commitment to such efforts is ideally shared across key players in upper management, comprising directors, the CCO, and members of the C-suite. While there has not been active scholarly debate on the role of the compliance function in this very context to date, one fascinating analysis has examined the adequacy of diversity programs, efforts, and discourse among U.S. companies by focusing on the problem of racial homogeneity in business organizations, which is reflective of the larger problem of racism and discrimination across the country and world.[154] Public corporations may be said to "provide a promising locus for cultural transformation when it comes to race and racism," which has been seen in prior examples, such as public sexual harassment lawsuits against powerful, corporate men that have had the effect of transforming internal organizational norms and then also impacting the nation and the various developments in the wake of the #MeToo movement.[155] In addition, breaking norms from a lack of diversity serves to disrupt "groupthink," or conformity of thought, that often facilitates systemic non-compliant and unethical behavior.[156]

These issues are not just the domain of the legal or human resources departments, which address the aftermath of unlawful behavior like sexual discrimination and harassment. Rather, the compliance function stands to play a significant role in the prevention of these acts and the creation of business cultures that are non-discriminatory, ethical, and safe.[157] Compliance programs have the ability to significantly impact an organization's level of progress in addressing diversity, equity, and inclusion issues by being vocal about the importance of these issues in culture; establishing systems for information dissemination and reporting that monitors compliance with anti-discrimination law and respect for all persons; and fighting to end any employee conduct that is discriminatory or generally harmful to the organization and the various types of people who comprise the organization.[158]

153. *Creating a Culture of Diversity, Equity, and Inclusion: Real Progress Requires Sustained Commitment,* HARV. BUS. REV. ANALYTIC SERV. at 2 (Sept. 9, 2021), https://hbr.org/resources/pdfs/comm/trusaic/CreatingDEIculture.pdf.

154. Wade, *supra* note 147, at 612 ("Continuing discrimination and racism are the genesis of a lack of diversity among corporate directors, executives, business leaders, employees, and suppliers. Persisting bias also explains the inferior service many consumers of color receive.").

155. *Id.* at 613 (noting that, in the private sector, the alleged harassers were quickly fired and the response to accusations of sexual misconduct was quick and timely); *see also* Todd Ehret, *INSIGHT: Ten Top Concerns for U.S. Compliance Officers in 2019*, FIN'L. REG. FORUM, REUTERS (Jan. 18, 2019), https://www.reuters.com/article/bc-finreg-ten-top-compliance-concerns/insight-ten-top-concerns-for-u-s-compliance-officers-in-2019-idUSKCN1PC1JC (discussing the role of compliance in conduct risk and sexual harassment prevention).

156. Steven A. Ramirez, *Diversity and Ethics: Toward an Objective Business Compliance Function*, 49 LOY. U. CHI. L.J. 581, 600 (2018).

157. Ehret, *supra* note 155.

158. Wade, *supra* note 147, at 624.

There is always a question of how to achieve optimal organizational culture. One such model proposed by ethics scholar, Timothy Fort, known as "Total Integrity Management," blends various components of culture that ideally help create true ethical behavior.[159] This model combines notions of "hard trust" to articulate and ensure compliance with the requirements of external legal rules, requirements, and internal policies; "real trust" to establish a system of social capital, good will, incentives, and acknowledgments within the organization to facilitate and encourage good behavior; and "good trust" to convey aspirational goals demonstrating a passion for doing the right thing and a commitment to ethical behavior.[160] A CCO has the capacity to be in the best position to facilitate each of these components. The "hard trust" aspect is already a natural part of the job since it is essentially about following rules to avoid punishment,[161] which is unquestionably in the domain of the compliance function. In addition, this component accounts for top-down, external mandates that regulators impose on governed organizations. "Real trust" is also an inherent part of the goals of compliance since it can be boiled down to "putting your money where your mouth is"—if an entity claims to be committed to certain ethical or compliance goals, then it should actually do so when put to the test.[162] Finally, while "good trust" is more aspirational, it should accompany any properly-functioning compliance system since it encompasses truly "caring about ethics" and working to create an environment in which people are sincerely concerned about doing the right thing.[163]

CCOs are well-positioned within their organizations to try to achieve each of these components and, in fact, also often appropriately hold the title of "Chief Ethics and Compliance Officer," as opposed to "Chief Compliance Officer."[164] CCOs should use good faith efforts and due care to the strongest extent possible to ensure that their organizations have healthy cultures through actions like transparency, dissemination of compliance policies, programs and expectations throughout the organization, a good "tone at the top," accountability, and safe employee options for self-reporting. Clear efforts to do so would guard against any arguments that attempt to hold the CCO liable for an

159. TIMOTHY L. FORT, THE VISION OF THE FIRM: ITS GOVERNANCE, OBLIGATIONS, AND ASPIRATIONS: A TEXTBOOK ON THE ETHICS OF ORGANIZATIONS 198-210 (2d ed. 2017).

160. Joshua E. Perry & Timothy L. Fort, *PISC in the Wind? Holding Healthcare Organizations Liable for Publicly Issued Statements of Conduct*, 70 AM. U.L. REV. 167, 210 n. 143 (2020) (discussing the Total Integrity Management model).

161. Fort, *supra* note 159, at 202.

162. *Id.* at 204 ("[W]hen a crunch time comes, you deliver on ethics rather than weaseling out of commitments.").

163. *Id.* at 206 (noting that good trust may be the most important element, even though it is often a "badly neglected area of business ethics").

164. *See* Fanto, *supra* note 14, at 200 (noting that some organizations use the "CECO" (Chief Ethics and Compliance Officer) title, rather than CCO, to highlight that the compliance officer also has ethical responsibilities); *see* also Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 942–43 (2017) (discussing the prevalence of such roles).

organization that may have turned corrupt due to actions of the other corporate officers.

The above considerations each demonstrate the essential role that CCOs play in management, organizational governance, and development of culture, all of which contribute significantly to developing a robust and meaningful compliance function. When determining questions of personal liability, the considerations discussed herein relating to the role of the CCO in fostering ethical culture should be part of the discussion. Clear efforts in this context help to remove uncertainty about unreasonableness or carelessness, as they often inherently reveal commitment, passion, and zeal on the part of the CCO. The next and final section will respond to any counterarguments to this Article's position, ultimately asserting that the establishment of a standard of care for CCOs proposed is a necessary starting point.

D. Counterarguments & Considerations

One of the first obstacles to overcome is the question: why give CCOs more protection? Enhanced liability protections for CCOs are justified because, in addition to their role within the organization, they are serving an important public purpose. CCOs are widely believed to act as the "moral conscience of the firm" and, as discussed, facilitate a critical role in ethical culture.[165] The CCO may be aptly described as a "private sector cop pursuing a public goal," ensuring that key players within the organization are aligned with and pursuing "the public's clearly stated-demands" through ensuring adherence to regulations and law.[166]

That is especially true in the financial sector, in which Congress first required banks to establish a compliance officer position to oversee the institution of an anti-money laundering compliance program.[167] The SEC then required the designation of a chief compliance officer to administer compliance policies and programs that govern investment advisors and investment companies, and self-regulatory organizations like FINRA required broker-dealers to institute a chief compliance officer to facilitate compliance departments and provide guidance to

165. *See, e.g.*, Bird & Park, *supra* note 104, at, 205–06 & n. 16 ("As one author colorfully explains, '[i]f one were to stage a retelling of Shakespeare's *Hamlet* in a modern corporate boardroom, chances are the most likely source of the 'conscience of the king' would not be the company's general counsel, but the chief compliance officer instead.'" (quoting John G. Browning, *Why Chief Compliance Officers are More Important than Ever*, D CEO (June 24, 2013), https://www.dmagazine.com/publications/d-ceo/2013/july-august/why-chief-compliance-officers-are-more-important-than-ever/)); Fanto, *supra* note 14, at 230 (noting that compliance officers "serve public purposes in ensuring that the organization complies with law and regulation").

166. William W. Bratton, *Collected Lectures and Talks on Corporate Law, Legal Theory, History, Finance, and Governance,* 42 SEATTLE U.L. REV. 755, 787 (2019) (stating that, in a sense, compliance officers "wield[ ] delegated public authority").

167. *See* 31 U.S.C. § 5318(h) (under this section, financial institutions are required to establish anti-money laundering programs to be run by a compliance officer).

boards and management.[168] CCOs in the financial sector have long been referred to by law enforcement and regulatory officials as "essential partners" to instituting compliance measures with relevant laws and regulations.[169] Unlike any other individual in a corporate setting, the CCO is thus a steward of the public policy purposes behind the various industry-specific regulations at play. In the financial sector, CCOs help foster integrity by working to prevent violations that would harm not only the organization, but its investors and market participants.[170] Beyond the financial sector, CCOs serve a similar public purpose in the numerous ways that statutes and regulations across all other industries affect society, whether related to the environment, public health and safety, healthcare, technology, or any other sectors in which CCOs operate.[171]

An additional obstacle to this Article's position relates to burdens of proof and how exactly a CCO would demonstrate the use of due care, good faith, and the absence of conflicts of interest in the creation of compliance programs, systems, and processes, and in striving to facilitate optimal organizational culture. To clarify, just as the business judgment rule operates for directors in most jurisdictions, courts would not call upon CCOs to account for their actions or decisions in the absence of a showing of abuse of discretion, fraud, bad faith, illegality, or some other wrongdoing, unless a party challenging the actions of the CCO is able to prove such actions.[172] If a party successfully proves wrongdoing, it would then be incumbent upon CCOs to prove that their process of the action or decision-making was unconflicted and supported by due care and good faith. As stated earlier, the focus on process is essential to the compliance function overall.[173] In taking on this burden, the CCO could utilize a "reasonable belief" standard to demonstrate that both objectively and subjectively, they utilized processes to implement and enforce a successful compliance function.[174]

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168. Fanto, *supra* note 14, at 193 (citing 17 C.F.R. § 275.206(4)-7 (2020) and 17 C.F.R. § 270.38a-l (2020), which govern investment advisors and investment companies, and FIN. INDUS. REGUL. AUTH., INC., RULE 3130, ANNUAL CERT. OF COMPLIANCE & SUPERVISORY PROCESS, https://www.finra.org/rules-guidance/rulebooks/finra-rules (last visited Aug. 1, 2023), which govern broker-dealers).

169. Golumbic, *supra* note 7, at 45.

170. Aguilar, *supra* note 45.

171. *See, e.g.,* Luke Trompeter, *Summary Narrative of Chief Compliance Officer Liability*, 6 AM. U. BUS. L. REV. 341, 341–42 (2017) ("Businesses now rely heavily on their Chief Compliance Officers . . . to ensure their business practices adhere to the increasingly numerous laws and regulations that apply to their operations."); Roy Snell, *In the Eye of This Global Financial Storm, Compliance Professionals Likely Will Be Seen As Part of the Solution*, 10 J. HEALTH CARE COMPLIANCE 3, 4 (2008) (discussing the existence of compliance officers across all industries).

172. *See, e.g.,* Ad Hoc Comm. of Equity Holders of Tectonic Network, Inc. v. Wolford, 554 F. Supp. 2d 538, 555–56 (D. Del. 2008); Intl. Ins. Co. v. Johns, 874 F.2d 1447, 1461 (11th Cir. 1989); *In re* Trinsum Grp., Inc., 466 B.R. 596 (Bankr. S.D.N.Y. 2012).

173. *See supra* Section II.A.

174. The "reasonable belief" standard is used in multiple legal contexts, including, commonly in whistleblower anti-retaliation statutes. *See* 18 U.S.C. § 1514A(a)(1) (2012) (affording statutory protection against employment discrimination for employees that provide information regarding conduct they "reasonably believe[]" violates certain federal laws and regulations); 17 C.F.R. § 240.21F-2(d)(1)(ii)

This standard would encompass both a subjective, genuine belief that their actions were taken in good faith and that, objectively, a similarly situated officer with comparable training, experience, and background would have utilized the same processes.[175]

Examples of actions that would support this standard, to name a few, would involve utilizing what are commonly deemed to be "best practices" within the compliance function, including making informed decisions; conducting reasonable investigations; ample communication with or self-reporting to the applicable regulator, if relevant; efforts to disseminate information about the compliance function and requisite compliance policies and programs throughout the organization; and encouraging internal reporting of concerns and red flags.[176] There are a number of resources available to help guide organizations as to the duties of CCOs and the structure of compliance programs that consist of codes, guidelines, and general best practices, all of which could be referenced depending on the industry to determine if the CCO utilized good faith and due care in implementing the compliance function.[177] While it may be presumed that efforts with respect to helping facilitate an ethical culture may be difficult to prove, the same considerations are largely still applicable. If CCOs have taken actions like those described above that are largely descriptive of best practices, they are arguably already taking steps to help ensure a healthy organizational culture. CCOs may take a few extra steps if they find themselves faced with rogue upper management or directors. For example, at that particular stage, the decision to self-report to the applicable regulator would be prudent to both safeguard the organization by being eligible for leniency, to work with the government to institute a remediation plan, and also as a means for the CCO to document the existence of an uncooperative board or officer(s) that may be thwarting successful implementation of the entity's compliance program.[178]

The final consideration, while more of a misconception than a counterargument, is the notion that CCOs are already safeguarded as members of an established profession that has clear professional conduct expectations,

(2011) (explicitly requiring individuals seeking whistleblower retaliation protection to "reasonably believe" that the information they provide relates to a federal securities law violation).

175. *See* Jennifer M. Pacella, *Silencing Whistleblowers by Contract*, 55 AM. BUS. L.J. 261, 307 (2018) (discussing the reasonable belief standard and its components).

176. *See, e.g.,* McNeece, *supra* note 121, at 682 n.31 (citing Lawrence B. Pedowitz et al., *A Firm-Wide Culture Of Compliance: Seven Best Practices That Can Make A Difference*, 18 INSIGHTS 15, 16-21 (2004)) (noting that the seven "best practices" in compliance are: "[setting] the proper tone at the top," "[communicating] the compliance message throughout the organization," "[creating] an inventory of regulatory and reputation risks," "[establishing] an 'Early Warning' System," "[conducting] specialized training for supervisors," "[ensuring] that information is promptly surfaced," and "[using] internal discipline effectively").

177. *See* Fanto, supra note 10, at 701 n.13 (referencing INT'L. ORG. FOR STANDARDIZATION, NO. 19600, COMPLIANCE MGMT. SYS. GUIDELINES (1st ed. 2014) and NAT'L CTR. FOR PREVENTATIVE LAW, CORP. COMPLIANCE PRINCIPLES (1996) as examples of these resources).

178. *See* Pacella, *supra* note 100, at 969 (discussing the benefits of self-reporting).

which serve as a guide to avoid personal liability. This notion is false. Currently, no governing body or entity, whether state, federal, or otherwise, regulates the professional conduct or actions of CCOs.[179] While organizations like the Society of Corporate Compliance and Ethics provide "certifications" for compliance officers in an effort to position them well in the field, none of these organizations are official regulators of compliance officers.[180] While CCOs may increasingly and collectively feel that they all share a professional social identity, they are lacking in the "most distinguishing feature of established professions," the granting by the government, usually through a state licensing entity, of the authority and monopoly of practice to distinguish compliance from other activities.[181] As Professor James Fanto has stated, "[t]he *federal* government, through its regulators, may require that a certain kind of organization have a chief compliance officer, but it does not require that only those with specific educational credentials be eligible for that position or for other compliance officer roles."[182]

As such, CCOs are currently positioned in an unknown universe in terms of their professional regulation and expected norms of professional behavior. They are neither officially regulated nor subject to any known set of binding expectations to guide their behavior, therefore further compounding their exposure to personal liability because no governing entity prescribes expectations in terms of their unique duties, conduct, or roles. In my previous research, I have highlighted the ways in which this lack of regulation actually prompts an even greater risk of personal liability as it pertains to the common situation of lawyers who are also CCOs and therefore subject to a regulatory regime as attorneys that does not precisely fit the duties comprising the compliance function.[183] In this way, individuals who wear "both hats" of general counsel and CCO can often find themselves torn between two conflicting sets of expectations, which heightens the risk of personal liability.[184] For these reasons, it is even more important that a consistent and definitive standard of care, as described in this Article, be instituted when determining questions of personal liability for CCOs.

CONCLUSION

The compliance industry's recent boom era has brought several novel questions and issues to the forefront, not the least of which pertains to the extent to which CCOs will be personally liable for the compliance-related violations of

179. Pacella, *supra* note 94, at 30.
180. *Id.* at 31-32.
181. Fanto, *supra* note 14, at 212.
182. *Id.*
183. Pacella, *supra* note 100, at 950.
184. *Id.*

the organizations that they monitor. This uncertainty has led to growing anxiety and concern among compliance professionals, academics, and commentators on the issue, especially pertaining to the risk that CCOs will be dissuaded from pursuing jobs in the fields due to the risk of personal liability.[185] This Article has focused on the SEC's recent enforcement actions against CCOs, arguing that such actions are a springboard for CCO personal liability to reach into other sectors and industries. It has explored the SEC's stance on when personal liability may be appropriate—the agency's minimal guidance has further confounded the problem, thereby highlighting the dire need for specific, consistent, and reliable guidance in this area.

As a solution, this Article has proposed an adaptation of the business judgment rule for regulators and courts to adopt in determining whether and when CCOs should be held personally liable for compliance violations, thereby articulating a much-needed standard of care for the position. This rule would evaluate whether the CCO has practiced due care and good faith in the absence of any conflicts of interest in the creation and implementation of the compliance systems and also whether those same principles were utilized in their attempts at facilitating good organizational culture.[186] That standard would help protect CCOs, who serve an important public purpose, even if their efforts are ultimately ignored or not followed by the organization or a rogue upper management. The standard of care analysis discussed herein considers the fiduciary duties of CCOs; their similarities to directors and differences from other corporate officers; and their relationship to applicable regulators and their own organizations. It is the author's hope that the institution of a reliable and consistent standard of care for CCOs would ensure the continued future success of the compliance function, which is one of the most important organizational governance tools across all industries.

185. *See supra* Section I.A.
186. *See supra* Section II.C.