

12-27-2019

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Jennifer M. Pacella

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Recommended Citation

Jennifer M. Pacella, *Compliance Officers: Personal Liability, Protections, and Posture*, 14 Brook. J. Corp. Fin. & Com. L. ().

Available at: <https://brooklynworks.brooklaw.edu/bjcfcl/vol14/iss1/5>

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COMPLIANCE OFFICERS: PERSONAL LIABILITY, PROTECTIONS, AND POSTURE

Jennifer M. Pacella*

ABSTRACT

This Symposium Article will explore the evolving nature of the regulatory and enforcement landscape as it pertains to compliance officers, specifically regarding their susceptibility to personal liability. It will examine the posture of compliance officers in three contexts: i) as a possible target for enforcement activity by regulators; ii) as a quasi-professional subject to a current regime of “non-regulation”; and iii) as an employee in need of ample whistleblower protections, each of which create implications for a compliance officer’s risk of personal liability and protections as a constituent of the organization monitored. After considering the current guidance surrounding enforcement activity against chief compliance officers by regulatory agencies like the Securities and Exchange Commission (SEC) and Financial Crimes Enforcement Network (FinCEN), this Article will examine the lack of professional regulation of compliance officers and the various ways in which this poses liability risks, especially in instances where a compliance officer’s work overlaps with that of other regulated professions. Finally, this Article will analyze whistleblowing law developments interpreting the Dodd-Frank Act, particularly through the lens of how such developments affect compliance officers as potential employee-whistleblowers navigating issues of workplace culture and pressures from management.

INTRODUCTION

Attention from industry professionals, scholars, and commentators about the crucial role of compliance officers in facilitating optimal organizational governance has significantly increased in recent years.¹ While this rise in prominence has created beneficial consequences for compliance officers, such persons have also experienced a heightened risk of personal liability, particularly in light of increased enforcement activity by regulators like the Securities and Exchange Commission (SEC) and

* Jennifer M. Pacella is an Assistant Professor of Business Law and Ethics at Indiana University, Kelley School of Business. The author would like to thank Miriam Baer and James Fanto for the invitation to present this article as part of the annual Symposium of the Brooklyn Journal of Corporate, Financial & Commercial Law, and also thanks the various Symposium participants for their feedback.

1. James A. Fanto, *Advising Compliance in Financial Firms: A New Mission for the Legal Academy*, 8 BROOK. J. CORP. FIN. & COM. L. 1, 1–2, 13 (2013) (discussing the growth of the compliance industry and compliance officer positions); see, e.g., Geoffrey Parsons Miller, *Compliance: Past, Present and Future*, 48 U. TOL. L. REV. 437, 437 (2017) (discussing the increasing importance of the compliance officer role in recent years).

Financial Crimes Enforcement Network (FinCEN).² Enforcement activity of this kind has resulted from the willingness of regulators and prosecutors to hold compliance officers personally liable for the compliance violations and infractions of the organizations that they monitor.³ As a result, many compliance professionals and commentators have expressed apprehension about the “chilling effect” such enforcement activity has on the compliance profession as a whole, thus leading to the concern that many qualified individuals could be discouraged from entering the field altogether due to the risk of personal liability.⁴ As a means to allaying some of these fears, this symposium article assesses recent SEC guidance that provides much-needed direction as to the appropriateness of initiating enforcement actions against compliance officers. On a broader scale, this Article then considers how the current “non-regulation” of compliance officers may be more pressing than the threat of regulatory enforcement activity, given the inherent risks that stem from a lack of any professional oversight. Finally, this Article examines the posture of compliance officers as employees of their organizations and the ways in which their need for strong retaliation protections are threatened by recent developments in whistleblowing law, specifically in instances when compliance officers are also wearing the dual hat of inside counsel.

I. COMPLIANCE OFFICERS & REGULATORY ENFORCEMENT ACTIVITY

In recent years, regulatory enforcement activity against compliance officers for the compliance failures of their organizations has notably increased.⁵ The penalties imposed upon compliance officers in these actions run the gamut from fines to injunctions against continuing to work as compliance professionals.⁶ Such enforcement activity has tended to arise more commonly in situations involving violations of the Bank Secrecy Act

2. Court E. Golumbic, “*The Big Chill*”: *Personal Liability and the Targeting of Financial Sector Compliance Officers*, 69 HASTINGS L.J. 45, 51 (2017); Brian L. Rubin & Amy Xu, #CCOs Going Viral: *An Analysis of SEC and FINRA Enforcement Actions Against Compliance Officers*, July–Aug. 2017 PRAC. COMPLIANCE AND RISK MGMT. FOR THE SEC. INDUSTRY 11 (2017); see, e.g., Todd Ehret, *SEC Case Against Outsourced CCO Highlights Personal Liability Risk*, REUTERS (Sept. 7, 2017, 2:45 PM), <https://www.reuters.com/article/bc-finreg-cco-personal-liability/sec-case-against-outsourced-cco-highlights-personal-liability-risk-idUSKCN1BI2O1>.

3. See Ehret, *supra* note 2.

4. Golumbic, *supra* note 2, at 45. See also Susan Lorde Martin, *Compliance Officers: More Jobs, More Responsibility, More Liability*, 29 NOTRE DAME J.L. ETHICS & PUB. POL’Y 169, 169 (2015) (expressing the increasing concerns among compliance professionals of personal liability for the actions of their entities).

5. Golumbic, *supra* note 2, at 51.

6. See, e.g., *U.S. Dep’t of Treasury v. Haider*, No. CV 15-1518 (DSD/HB), 2016 WL 107940, at *1 (D. Minn. Jan. 8, 2016); Luke Trompeter, *Summary Narrative of Chief Compliance Officer Liability*, 6 AM. U. BUS. L. REV. 341, 347–48 (2017) (discussing the various penalties imposed against compliance officers).

(BSA) or instances of anti-money laundering.⁷ For example, Thomas Haider, the former chief compliance officer of MoneyGram International, Inc., incurred a \$1 million personal civil penalty after FinCEN successfully brought an enforcement action against him in 2016 for his alleged “willful failure” to ensure that the company had implemented and maintained an effective BSA compliance program and failed to punctually file suspicious activity reports with the agency.⁸ MoneyGram, the company itself, entered into a deferred prosecution agreement with the Department of Justice whereby the company admitted liability for participation in fraudulent schemes to induce business, as well as violations of the BSA.⁹ The FinCEN action led to Haider admitting and accepting responsibility for various compliance weaknesses that facilitated the company’s violations.¹⁰ Haider eventually settled the charges against him by agreeing to a \$250,000 fine and an injunction from performing any compliance duties for three years.¹¹

The statements that emerged from prosecutors and regulators involved in *Haider* demonstrate the growing perception of compliance officers as “essential partners” of law enforcement and regulatory agencies in the detection of fraud and other wrongdoing.¹² As such, regulators are increasingly keen to hold compliance officers accountable for failing to bring to light non-compliant behavior and violations of the law.

Compliance professionals occupy unique positions of trust in our financial system. When that trust is broken, it is important that we take action so that the reputations of thousands of talented compliance officers are not diminished by any one individual’s outlying egregious actions. . . [h]olding [the compliance officer] personally accountable strengthens the compliance profession by demonstrating that behavior like this is not tolerated within the ranks of compliance professionals.¹³

7. See Robert Axelrod, *Personal Liability Exposure for AML Compliance Officers: Lessons from Haider*, BLOOMBERG BNA (Sept. 8, 2017), <https://news.bloomberglaw.com/corporate-law/personal-liability-exposure-for-aml-compliance-officers-lessons-from-haider> (discussing recent enforcement actions against compliance officers in the anti-money laundering industry); Golumbic, *supra* note 2, at 51–53 (discussing actions against compliance officers in the BSA context).

8. *Haider*, 2016 WL 107940, at *1.

9. *Id.* As part of this agreement, MoneyGram agreed to forfeit \$100 million and hire a government-approved independent compliance monitor. See Golumbic, *supra* note 2, at 57–59 (discussing the charges against MoneyGram and Haider). See also 31 U.S.C. § 5318(h)(1) (2014) (outlining requirements of the BSA).

10. Press Release, Dep’t of Justice, Acting Manhattan U.S. Attorney Announces Settlement of Bank Secrecy Act Suit Against Former Chief Compliance Officer at Moneygram For Failure to Implement and Maintain an Effective Anti-Money Laundering Program and File Timely SARS (May 4, 2017), <https://www.justice.gov/usao-sdny/pr/acting-manhattan-us-attorney-announces-settlement-bank-secrecy-act-suit-against-former>.

11. *Id.*

12. *Id.*

13. Press Release, Dep’t of Justice, *supra* note 10.

As these words convey, regulators have strived to set an example for compliance personnel of the perils of non-effective compliance programs by harshly penalizing those who have failed to prevent large-scale fraud or significant violations of the law within their organizations.¹⁴ Such sentiments are consistent with the traditional notion that compliance officers occupy the “first line of defense” in the compliance function by standing on the front lines of an organization to detect, address, and avoid future instances of wrongdoing, fraud, or other violations of the law.¹⁵ From such a role, the compliance officer holds a position of both power and vulnerability. However, the most recent regulatory perceptions of compliance officers position them not at the first line of defense, a place in which employees and managers are arguably best poised to discover and elevate problems, but rather at the second line of defense, where compliance officers can work to remediate the issues first noted in the front lines and then further prevent them.¹⁶

The uptick in enforcement activity against compliance officers in recent years has given rise to what may be described as a palpable sense of apprehension among the media, commentators, and compliance officers themselves.¹⁷ Against this backdrop, some sources have claimed that not

14. Ehret, *supra* note 2 (noting the significant increase in regulatory actions against compliance officers that hold them personally liable). See, e.g., Patty P. Tehrani, *Do Compliance Officers Have a Growing Target on Their Backs?* COMPLIANCE & ENF'T (Sept. 28, 2017), https://wp.nyu.edu/compliance_enforcement/2017/09/28/do-compliance-officers-have-a-growing-target-on-their-backs/ (discussing the growing trend of personal liability for compliance officers due to heightened regulatory actions). See also Disciplinary Proceeding at 5, Dep't of Enf't v. Aegis Capital Corp., Smulevitz & McKenna, Order Accepting Offer of Settlement, No. 2011026386001 (Aug. 3, 2015) (settling an action between compliance officers and FINRA for the officers' alleged failure to establish and enforce a supervisory system within Aegis, a retail and institutional broker-dealer, that was “reasonably designed” to ensure compliance with SEC registration of securities and for failing to detect and investigate red flags relating to suspicious activity.).

15. See Press Release, Fin. Crimes Enf't Network, FinCEN Assesses \$1 Million Penalty and Seeks to Bar Former MoneyGram Executive from Financial Industry (Dec. 18, 2014), <https://www.fincen.gov/news/news-releases/fincen-assesses-1-million-penalty-and-seeks-bar-former-moneygram-executive> (statement of former SDNY U.S. Attorney Preet Bharara) (“[C]ompliance officers perform an essential function in our society, serving as the first line of defense in the fight against fraud and money laundering.”).

16. See, e.g., Hester Peirce, Commissioner, U.S. Sec. & Exch. Comm., Costumes, Candy, and Compliance: Remarks at the National Membership Conference of the National Society of Compliance Professionals (Oct. 30, 2018), <https://www.sec.gov/news/speech/speech-peirce-103018> (discussing how either the firm's internal audit function will step in to check the responsibilities of all constituents or the SEC will do so itself through a collaborative process between regulator and governed entity as a third line of defense).

17. Dawn Causey, *Who Should Have Personal Liability for Compliance Failures?*, ABA BANKING J. (Aug. 17, 2015), <http://bankingjournal.aba.com/2015/08/who-should-have-personal-liability-for-compliance-failures/>; Ben DiPietro, *SEC Action Stirs Concerns Over Compliance Officer Liability*, WALL ST. J. (June 24, 2015, 1:08 PM), <https://blogs.wsj.com/riskandcompliance/2015/06/24/sec-actions-stir-concerns-over-compliance-officer-liability/>; Rachel Louise Ensign, *How Compliance Officers Can Limit Personal Liability*, WALL ST. J. (Jan. 30, 2015, 1:43

only has there been a recent noticeable increase in the attrition of senior compliance officers, but potential rising stars in compliance have begun to consider alternative career paths.¹⁸ In 2015, the National Society of Compliance Professionals (NSCP), a non-profit membership organization of securities industry professionals “dedicated to serving and supporting compliance officials in the financial services industry in the U.S. and Canada,” wrote a letter to the former SEC Director of Enforcement, Andrew Ceresney, expressing concern over the increasing liability of compliance officers.¹⁹ In the letter, NSCP described compliance officers as “crucial instruments of investor protection [who] do not need the threat of enforcement action to do their jobs well.”²⁰ NSCP’s primary concern was that the liability standard imposed upon compliance officers would effectively become that of negligence, rather than intentional conduct, thereby resulting in findings that a compliance officer *should have known* that better procedures or judgments could have prevented the primary violation committed by the organization.²¹ NSCP requested that the SEC, “as a matter of policy,” decline to bring any proceedings against compliance officers based on any kind of negligence theory, which “is so amenable to liability by hindsight,” and, instead, resort to enforcement activity against them only when they have committed intentional or reckless behavior.²² The NSCP’s concern was centered around what is described as “a fundamental policy question [of] whether enforcement actions against compliance officers will motivate them to greater vigilance or risk a demoralizing belief that even exercising their best judgment will not protect them from the risk of a career ending enforcement action”²³

In an October 2018 opinion, the SEC reviewed and upheld a Financial Industry Regulatory Authority (FINRA) disciplinary action imposing

PM), <https://blogs.wsj.com/riskandcompliance/2015/01/30/how-compliance-officers-can-limit-personal-liability/>; see, e.g., Golumbic, *supra* note 2, at 70–71.

18. See Golumbic, *supra* note 2, at 49 (citing both a February 2016 article in the *Wall Street Journal* reporting that “the number of senior bank compliance executives who had left their jobs in 2015 was three times greater than in 2014” and a survey of Chief Compliance Officers of public companies, of which sixty percent “said they would think more carefully about future roles they might consider given the risk of personal liability”).

19. Letter from Lisa D. Crossley, Exec. Dir., Nat’l Soc. Compliance Prof’ls, to Andrew Ceresney, Dir. of Enf’t, U.S. Sec. & Exch. Comm. (Aug. 18, 2015), https://mfd.org/images/uploads/blog_files/NSCPCeresneyLetter.pdf.

20. *Id.*

21. See *id.* (emphasis added) (citing In the Matter of SFX Financial Advisory Management Enterprises, Inc., Administrative Proceeding File No. 3-16591 (June 15, 2015)); *In re* BlackRock Advisors, LLC, Administrative Proceeding File No. 3-16501 (April 20, 2015); *In re* Thomas R. Delaney II and Charles W. Yancey, Administrative Proceeding File No. 3-15873 (Initial Decision, March 18, 2015).

22. Letter from Lisa D. Crossley, Exec. Dir., Nat’l Soc. Compliance Prof’ls, to Andrew Ceresney, Dir. of Enf’t, U.S. Sec. & Exch. Comm. (Aug. 18, 2015), https://mfd.org/images/uploads/blog_files/NSCPCeresneyLetter.pdf.

23. *Id.*

sanctions against a Chief Compliance Officer (CCO).²⁴ In the opinion, the SEC offered a fruitful examination of the various factors it would consider in determining whether to impose liability on compliance officers.²⁵ The SEC acknowledged that compliance officers play a “vital role in [its] regulatory framework,” whose role is complex and often faced with “difficult challenges.”²⁶ The SEC’s rationale for upholding the liability is analytically significant. Here, the compliance officer acted blatantly by ignoring red flags, repeatedly failing to perform his basic compliance duties, and failing to reasonably maintain and review compliance systems.²⁷ This opinion is notable because the SEC expresses its general view that “good faith judgments of chief compliance officers made after reasonable inquiry and analysis should not be second guessed,” even if such decisions turn out to be problematic “with hindsight.”²⁸ As such, the SEC acknowledges that negligence-related offenses will be non-actionable. While noting that a finding of liability against CCOs would always be fact-determinant, the SEC expresses that only certain “matter types” should dictate a straightforward determination resulting in personal liability. These “matter types” would include instances in which a CCO commits wrongdoing, attempts to cover up wrongdoing, or fails to meaningfully implement compliance programs.²⁹

This SEC opinion is also notable in that it takes the position that compliance professionals should not be considered supervisors merely because of their compliance roles.³⁰ Rather, the opinion highlights the supervisory responsibilities of the Chief Executive Officer (CEO), emphasizing that CEOs of brokerage firms are responsible for compliance “unless and until” that function is reasonably delegated to another.³¹ Even if the compliance responsibility is so delegated, CEOs have a continuing duty “to follow up and review” the delegated authority of compliance personnel to make sure it is being properly carried out.³² The perception that the CCO does not possess a de-facto supervisory role has been a popular point of

24. *In re* Thaddeus J. North for Review of Disciplinary Action Taken by FINRA, Release 34-84500 (Oct. 29, 2018).

25. *Id.*

26. *Id.*

27. *Id.* at 11.

28. *Id.* at 12.

29. *Id.*

30. *Id.* at 11 (citing Gutfruend, Exchange Act Release No. 34-31554, 1992 WL 362753, at *15 (Dec. 3, 1992) (“[E]mployees of brokerage firms who have legal or compliance responsibilities do not become ‘supervisors’ solely because they occupy those positions.”)).

31. *Id.* at 12.

32. *Id.* at 13 (citing Castle Sec. Corp., Exchange Act Release No. 39523, 1998 WL 3456, at *4 (Jan. 7, 1998)) (“It is not sufficient for the person with the overarching supervisory responsibilities to delegate supervisory responsibility to a subordinate, even a capable one, and then simply wash his hands of the matter until a problem is brought to his attention. . . . Implicit is the additional duty to follow-up and review that delegated authority to ensure that it is being properly exercised.”).

contention for many years among commentators and observers.³³ While the SEC has been consistently clear on its position that compliance personnel do not become supervisors merely because they occupy roles in the compliance function,³⁴ it is important to recall that such actions are always fact-specific and supervisory liability is likely to apply if the CCO is found to have possessed the necessary degree of responsibility and authority to directly impact the behavior of the individuals, employees, or other constituents of an organization who may have unlawfully acted.³⁵

SEC staff has also been exceedingly vocal in emphasizing the same type of cautionary framework against imposing liability on compliance officers.³⁶ “The overwhelming majority” of cases that the SEC has brought against CCOs involve situations in which such persons “crossed a clear line by engaging in affirmative misconduct or obstructing regulators, or who wore multiple hats.”³⁷ The reference to compliance officers wearing “multiple hats” is intended to comprise those who serve simultaneously as CEO, Chief Financial Officer (CFO), or other positions within an entity that could create confusion or an enhanced liability risk due to the crossing over of professional responsibilities between disciplines.³⁸ SEC Commissioner Hester Peirce, at a 2018 NSCP conference, echoed these concerns. She explained the complications of compliance officers who wear “multiple hats at the firm” and the importance of delineating responsibilities in the compliance function, especially between the CCO and CEO roles.³⁹ Furthermore, Peirce warned of the dangers when this kind of line blurring occurs: “[i]t may not be clear what hat someone is wearing when a violation occurs,” thereby leading to an increased likelihood that personal liability against a compliance officer will ensue.⁴⁰ As the next Part explores, the lack

33. See Martin, *supra* note 4, at 189 (noting that the issues of whether a chief compliance officer is a supervisor and has fulfilled supervisory responsibilities reasonably “have been the most contentious issues for more than twenty years”).

34. See, e.g., *Frequently Asked Questions About Liability of Compliance and Legal Personnel at Broker-Dealers Under Sections 15(b)(4) and 15(b)(6) of the Exchange Act*, U.S. SEC. & EXCH. COMM. (Sept. 30, 2013), <https://www.sec.gov/divisions/marketreg/faq-cco-supervision-093013.htm>; Monson, Investment Company Act Release No. 28323, 2008 WL 2574441, at *5 (June 30, 2008); Huff, Exchange Act Release No. 29017, 1991 WL 296561, at *4 (Mar. 28, 1991).

35. See Gutfruehd, Exchange Act Release No. 34-31554, 1992 WL 362753, at *15 (Dec. 3, 1992); see also Martin, *supra* note 4, at 190 (discussing the various theories of supervisory responsibility and how the SEC has interpreted them for compliance officers).

36. See Andrew Ceresney, Dir., Div. of Enf’t, U.S. Sec. & Exch. Comm., Keynote Address at the 2015 National Society of Compliance Professionals, National Conference (Nov. 4, 2015), <https://www.sec.gov/news/speech/keynote-address-2015-national-society-compliance-prof-ceresney.html>.

37. *Id.*

38. *Id.* (discussing one case in which the SEC charged a chief compliance officer who was simultaneously a co-portfolio manager who had “affirmatively misled the fund administrator and auditor about asset values”).

39. Peirce, *supra* note 16.

40. *Id.*

of compliance officer regulation by any distinct professional governing body facilitates this susceptibility to personal liability and makes it more likely that compliance officers may violate the professional disciplinary rules of other disciplines into which they may cross over.

II. THE “NON-REGULATION” OF COMPLIANCE OFFICERS

When the lines are blurred between the compliance function and other critical functions in an organization, compliance officers are vulnerable to personal liability in ways that are fundamentally different from the SEC or FINRA-imposed disciplinary actions discussed in Part I. This vulnerability speaks to the broader and further-reaching issue of compliance officers’ overall professional regulation. Numerous compliance officers, especially in smaller entities, are also responsible for functions outside of their compliance role and commonly embody the dual functions of compliance officer and general counsel.⁴¹ The focus of this Article is not to describe the conflicts of interest and other tensions inherent when the compliance function overlaps with another organizational function, as several other authors have already explained,⁴² but to shed light on a larger question that speaks to the root of a compliance officer’s potential for liability: that is, who exactly regulates compliance officers?

As it stands, there is currently no governing body or entity, neither state, federal, nor otherwise, that regulates the professional conduct or actions of compliance officers. The absence of any kind of regulatory framework in this context is problematic for compliance officers, as it gives rise to a susceptibility to personal liability because clear expectations and guidelines for professional behavior are altogether lacking. Thereby, this blurs lines between the roles and duties of compliance officers and that of other constituents within an organization. As Professor James Fanto has acknowledged, the failure to understand the distinctions between the roles of various parties in organizational contexts creates risks of vicarious liability.⁴³ These risks stem from the perception that compliance officers may be executives themselves who are responsible for the wrongdoing of

41. See generally Amy E. Hutchens, *Wearing Two Hats: In House Counsel and Compliance Officer*, 29 ACC DOCKET 66 (2011) (discussing the many compliance officers who are also general counsel of organizations); Paul E. McGreal, *Corporate Compliance Survey*, 71 BUS. LAW. 227, 251 (2016) (discussing the conflicts that emerge when the CCO is also the CEO).

42. Donald C. Langevoort, *Getting (Too) Comfortable: In-House Lawyers, Enterprise Risk, and the Financial Crisis*, 2012 WIS. L. REV. 495, 500 (2012) (noting the debate as to whether the compliance function should be separated from the legal function). See, e.g., Michele DeStefano, *Creating A Culture of Compliance: Why Departmentalization May Not Be the Answer*, 10 HASTINGS BUS. L.J. 71, 137 (2014) (discussing the pros and cons of separating the compliance and legal functions).

43. James A. Fanto, *The Uncertain Professional Status of Compliance*, FINANCIAL COMPLIANCE ISSUES, CONCERNS, AND FUTURE DIRECTIONS 75, 75–76 (Maria Krombia-Kapardis ed., 2019).

the organization's agents, rather than "independent professionals" who offer advice and guidance to executives—"[t]o lump compliance officers with managers and executives . . . is to fail to understand the distinction between the organizational roles of the different parties."⁴⁴

Compliance officers are not required to be licensed, certified, or regulated in any particular manner, unlike other professional fields such as law or medicine,⁴⁵ which are granted a certain degree of autonomy and discretion in their various undertakings. This "non-regulation" of compliance officers also results in administrative agencies (like the SEC described above), as opposed to professional self-regulatory organizations, acting as the only vehicle to impose liability, determine penalties, and make decisions as to whether compliance officers may continue to work in the field. Such a situation does not align squarely with the growing reality that compliance officers are continuously yielding increased prestige, obtaining higher salaries, and receiving more widespread recognition that their roles are esteemed, respectable, and worthy of a certain amount of deference or self-regulation.⁴⁶

Although various organizations, such as the Society of Corporate Compliance and Ethics (SCCE), provide "certifications" for compliance professionals through continuing education credits and, somewhat surprisingly, the passing of an exam,⁴⁷ these certifications are simply voluntary and may give a prospective compliance officer a competitive advantage in the job market. The SCCE certification process is certainly comprehensive—it involves work experience or an educational requirement prior to being eligible to sit for the certification exam, the completion of twenty board-approved continuing education credits, and a passing score on the exam.⁴⁸ If this process is successfully navigated, a candidate will earn certification by the "Compliance Certification Board (CCB)."⁴⁹ The CCB, headquartered in Minneapolis and founded in 1999 by the Health Care Compliance Association, provides accreditation to compliance-focused university programs and also oversees seven compliance and ethics certification programs consisting of certifications in various sectors of compliance, including healthcare, privacy, research, and ethics.⁵⁰ Traditionally, the CCB has been active in certifying compliance

44. *Id.*

45. *See id.* at 68.

46. *See* Parsons Miller, *supra* note 1, at 438–39.

47. *Become Certified*, SOCIETY OF CORPORATE COMPLIANCE AND ETHICS, <https://www.corporatecompliance.org/certifications/become-certified> (last visited Sept. 16, 2019).

48. *Id.*

49. *Id.*

50. *The Compliance Certification Board welcomes Pacific University (Ore.) to its growing list of accredited university programs*, PR NEWSWIRE (Oct. 11, 2012), <https://www.prnewswire.com/news-releases/the-compliance-certification-board-welcomes-pacific-university-ore-to-its-growing-list-of-accredited-university-programs-173714341.html>.

professionals only in the healthcare compliance space, but certification has recently gained momentum in other areas outside of healthcare. As the CCB's president has stated: “[c]ompliance is compliance regardless of where you work; only the risk areas are different.”⁵¹

While there are plenty of voluntary opportunities for aspiring compliance officers to earn various credentials, these credentials are certainly not mandatory or dictated by any particular licensing or governing body that regulates professionals engaged in the compliance function. As such, the field of compliance has been described as containing some but not all of the defining features of a profession, as it is void of government-approved or mandated control by a collective body of fellow compliance officers.⁵² Instead, many compliance officers find themselves in a position of overlap with other types of long-established disciplines that already enjoy the various benefits of a known professional status. One of the most fitting examples of this kind of overlap is with the legal profession.

Over the last decade, there has been a notable influx of lawyers into the compliance function.⁵³ Today, compliance is known to be a “J.D. Advantage” job in which legal training and expertise, although not required, is highly desirable given the benefits to organizations of skills typically possessed by those trained in law, such as interpreting and analyzing legal mandates, rules, and statutes.⁵⁴ As a result, many compliance officers who, although may not be “practicing law” in the course of their compliance work, still possess a law degree and law license, although they may not be practicing law in the course of their compliance work, are admitted and answerable as attorneys in their respective state jurisdictions of admission.⁵⁵ As explored in a subsequent article, these situations place individuals in an

51. Roy Snell, *Debbie Troklus Discusses the Progression—and Importance—of Credentialing for Compliance Professionals: Tips for How to Prepare and Test for A Wide Range of Certifications*, 13 J. HEALTH CARE COMPLIANCE 25, 58 (2011) (discussing how many compliance professionals who obtain the healthcare-specific certification go on to obtain certifications in other facets of compliance). See also Sharon L. Taylor, *Being A Compliance Officer Is No Easy Job, but for Those in A Rural Setting, It's Probably Only Part of Your Job*, 17 J. HEALTH CARE COMPLIANCE 17, 20 (2015) (discussing the importance of CCB certification in the healthcare compliance sector).

52. See Fanto, *supra* note 43, at 68, 73 (discussing that one of the defining features of “professional status” is that of “monopoly of practice” granted to the specific field by the government).

53. See Jennifer M. Pacella, *The Regulation of Lawyers in Compliance*, WASH. L. REV. (forthcoming 2020).

54. Felix B. Chang, Foreword, *Rethinking Compliance*, 84 U. CIN. L. REV. 371, 371–72 (2016) (noting the surge of “JD plus” jobs in corporate compliance subsequent to the financial crisis); *Detailed Analysis of JD Advantage Jobs*, NALP (May 2013), https://www.nalp.org/jd_advantage_jobs_detail_may2013 (noting the influx of J.D. Advantage jobs after the 2008 recession); see also Dana A. Remus, *Out of Practice: The Twenty-First-Century Legal Profession*, 63 DUKE L.J. 1243, 1270 (2014) (noting that a law license is a desirable component to the hiring process for compliance officers).

55. See Pacella, *supra* note 53.

especially vulnerable position given that the full spectrum of an attorney's jurisdictional and ethical rules may be triggered even in the course of carrying out non-legal compliance work.⁵⁶ Such would be the case in the likely event that the compliance function is perceived as a "law-related service," which pursuant to the American Bar Association's Model Rules requires lawyers to adhere to all of the professional conduct rules even when they are providing a non-legal function that is not the practice of law.⁵⁷ Given the inherent differences between the compliance function and the legal function, specifically as they pertain to ethical duties that are specific to an attorney's representation of his or her client, compliance officers who are required to follow the entire regulatory scheme of the legal profession for their work in compliance risk heightened personal liability.⁵⁸ In light of these considerations, compliance officers must be mindful of the potential detrimental effects that they may experience when subject to an overlapping regulatory scheme, such as that of the legal profession. In these situations, compliance officers may find themselves thrust into adherence with the regulations of another discipline that may not align with their own. Consequently, this is likely to lead to a continued lack of full professional status causing compliance officers to "operate at the periphery of the legal profession as a related, somewhat technical occupation or 'semi-profession.'"⁵⁹ Due to these complications, it would ultimately benefit compliance officers to have the opportunity to be members of a distinct professional regulatory body, whether self-regulatory or otherwise, devoted solely to the compliance function. This type of body would then be instrumental in setting forth a clear set of expectations for compliance officers to follow in their daily work that more precisely fit the unique responsibilities and duties that are descriptive of the compliance function.

III. COMPLIANCE OFFICER PROTECTIONS AS "EMPLOYEES"

While the previous Parts considered the unique posture of compliance officers as it relates to their risk for personal liability from a regulatory and professional standpoint, this Part explores the posture of compliance officers as actual employees of their organizations. While the job descriptions, reporting channels, and persons responsible for the hiring and firing of compliance officers differ across industry and size of entity, at the end of the day, compliance officers are employees of the organizations that

56. *Id.*

57. *Id.* (arguing that the compliance function can be reasonably categorized as a "law-related service," thus triggering the application of ABA's Professional Rule of Conduct 5.7 and the problematic effects of such for compliance officers).

58. *Id.*

59. *See Fanto, supra* note 43, at 82.

they monitor.⁶⁰ As a result, they are subject to the same organizational pressures and politics that all employees face, including the risk of retaliation when their views misalign with the desires of management. For these reasons, their protections as potential whistleblowers, especially in light of their reporting duties, are worthy of increased focus.

Recent developments in whistleblower law have a far-reaching negative effect on all employees, while also negatively impact compliance officers. Specifically, the 2018 Supreme Court decision in *Digital Realty Trust v. Somers* held that only individuals who report directly to the SEC, as opposed to internally within their organizations, are eligible for whistleblower protections from retaliation under the Dodd-Frank Act.⁶¹ This decision analyzes two subsections of Dodd-Frank: first, section 78u-6(h) which prohibits retaliation against “a whistleblower” when he or she (i) provides information to the SEC, (ii) initiates, testifies in, or assists in any SEC investigation or judicial or administrative action based on this information, or (iii) “makes disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 [and other federal laws]”; and, second, subsection (a)(6) which defines a “whistleblower” as “any individual who provides, or [two] or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.”⁶²

In *Digital Realty*, the Supreme Court simply gave effect to the statute’s plain meaning of the definition of whistleblower as requiring a direct report to the SEC, even though, as various courts and scholars have argued,⁶³ this interpretation disregards the third prong of section 78u-6(h) which provides retaliation protections for “disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (SOX) [and other federal laws].”⁶⁴ The whistleblower provisions of SOX, which are incorporated by reference in Dodd-Frank, are explicit in their protection of both internal and external whistleblowers from retaliation.⁶⁵ Hence, there is a strong argument for

60. 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).

61. See *Digital Realty Trust v. Somers*, 138 S. Ct. 767, 778 (2018). Compare *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 153–55 (2d Cir. 2015), and *Somers vs. Digital Realty Trust, Inc.*, 850 F.3d 1045, 1050 (9th Cir. 2017) (both holding that whistleblowers who report internally are protected from retaliation under Dodd-Frank), with *Asadi v. G.E. Energy*, 720 F.3d 620, 630 (5th Cir. 2013) (finding that only whistleblowers who have externally reported to the SEC are protected under the Dodd-Frank whistleblower program).

62. 15 U.S.C. § 78u-6(h)(1)(A), (a)(6) (2010).

63. See, e.g., Jennifer M. Pacella, *Inside or Out? The Dodd-Frank Whistleblower Program’s Antiretaliation Protections for Internal Reporting*, 86 TEMP. L. REV. 721, 746 (2014).

64. *Digital Realty*, 138 S. Ct. at 770.

65. Sarbanes-Oxley’s whistleblower provisions state that employees who report “to a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)” will be protected from retaliation as whistleblowers. 18 U.S.C. § 1514A(a)(1)(A)–(C) (2019).

ambiguity in the language of Dodd-Frank warranting *Chevron* deference to the SEC's interpretation of the statute, which has always stated that internal whistleblowers are protected from retaliation under Dodd-Frank for this reason.⁶⁶ In light of the Supreme Court's decision, the SEC is now in the process of amending its regulations interpreting the Dodd-Frank whistleblower program to conform the definition of "whistleblower" to that reached in *Digital Realty*, which is notably more limiting in that it protects only those who report directly to the SEC.⁶⁷

The Supreme Court held that Dodd-Frank's definition of a whistleblower is clear as to *who* is eligible for protection while the reference to SOX in the third prong of subsection (h) covers individuals who make a disclosure both to the SEC and internally but are retaliated against because of the non-SEC disclosure—"[t]hat would be so, for example, where the retaliating employer is unaware that the employee has alerted the SEC."⁶⁸ This reasoning, however, ignores the practical reality that employee-whistleblowers and especially compliance officers are not likely to make both types of disclosures, as internal reporting channels benefit the entity significantly more on an organizational level than do external reports.⁶⁹ The *Digital Realty* decision is likely to negatively impact compliance officers in the course of carrying out regular job duties, specifically those pertaining to an organization's internal reporting function—an essential part of the compliance function. A compliance officer is uniquely positioned to report concerns either to the CEO or the Board of Directors,⁷⁰ each of which may have interests that are averse to the organization as a whole, especially if wrongdoing is present. As such, compliance officers, out of fear of retaliation, may be swayed to adhere to the desires of management who may not wish to address the problems.⁷¹

In addition, as discussed earlier, many compliance officers simultaneously serve in the capacity of the organization's lawyer. In a situation where a compliance officer wears the dual hat of general counsel, he or she has required internal reporting obligations pursuant to Model Rule of Professional Conduct 1.13, which applies when lawyers represent organizations as clients, and requires them to report up-the-ladder to the

66. See Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,304 (June 13, 2011) (codified at 17 C.F.R. pts. 240, 249) (citing 18 U.S.C. § 1514A(a)(1)(C) (2019)).

67. See Exchange Act Release No. 34-83557 (proposed July 16, 2018), <https://www.sec.gov/rules/proposed/2018/34-83557.pdf>.

68. *Digital Realty*, 138 S. Ct. at 777–79.

69. *Why Whistleblowers Wait: Recommendations to Improve the Dodd-Frank Law's SEC Whistleblower Awards Program*, GOV'T ACCOUNTABILITY PROJECT (Feb. 1, 2016), at 16, https://www.whistleblower.org/sites/default/files/GAP_Report_Why_Whistleblowers_Wait.pdf.

70. James A. 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 TEMPLE L. REV. 699, 720–22 (2018).

71. Pacella, *supra* note 53, at 35.

“highest authority” of the organization (usually the board of directors) any knowledge in their possession that an officer, employee, or other constituent of the organization is violating either the law or a legal obligation to the organization.⁷² The rule also provides for a permissive disclosure option in which a lawyer may reveal the information externally without client consent if the highest authority of the organization has failed to act on the lawyer’s report and the lawyer reasonably believes that the violation is reasonably certain to create substantial injury to the organization.⁷³ The same internal reporting duties are required pursuant to SOX for attorneys who represent organizations that appear and practice before the SEC.⁷⁴ These mandatory up-the-ladder reporting rules have been adopted by all fifty states and essentially require inside counsel to act as internal whistleblowers by ultimately reporting to the board when they know that an officer or other individual is violating the law or some obligation to the organization.⁷⁵ Given the *Digital Realty* decision, the strong whistleblower protections of Dodd-Frank would exclude both lawyers and compliance officers from retaliation protections, specifically when they operate in both contexts, for having made the very types of internal reports that are required by their professional ethical rules (and by the SEC, if SOX applies).⁷⁶

Even if a compliance officer is not wearing the dual hat of general counsel, he or she may still be subject to the internal reporting obligations of Rule 1.13. Given possible triggering of other professional conduct rules, non-legal “law-related services” rendered would hold compliance officers to the full spectrum of attorney professional conduct rules.⁷⁷ The practical results of these realizations is that compliance officers and lawyers, just like any other employee of an organization, are deprived of the reassurance that their internal disclosures will be protected in the unfortunate event of any retaliation against them, thereby creating a reluctance to raise issues on an internal level, especially among organizations that facilitate cultures of silence and hostility towards those who raise such concerns. As the landscape of whistleblowing law continues to develop, a compliance officer’s posture as an employee of an organization should take into account

72. MODEL RULES OF PROF’L CONDUCT r. 1.13 (AM. BAR ASS’N 2018).

73. *Id.*

74. 17 C.F.R. § 205(c) (2003). See Jennifer M. Pacella, *Conflicted Counselors: Retaliation Protections for Attorney-Whistleblowers in an Inconsistent Regulatory Regime*, 33 YALE J. ON REG. 491, 497–504, 533–34 (2016) (noting the application of the SOX internal reporting requirement is broad and also applies to the work of an attorney that would involve preparing documents to be filed with the SEC).

75. See Pacella, *supra* note 74, at 519 (discussing adoption of the rule in some form by all 50 states).

76. *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 151 (2d Cir. 2015).

77. See Pacella, *supra* note 53.

any alternative ways in which such persons may be empowered, encouraged, and protected.

CONCLUSION

This Symposium Article has examined the posture of compliance officers in three contexts: as targets for enforcement activity by regulators; as non-regulated, quasi-professionals; and as employees who need ample whistleblower protections, each of which have an impact on a compliance officer's risk of personal liability and protection as a constituent of an organization. While the SEC has now provided enhanced clarity regarding the extent to which compliance officers will be personally liable for the violations their organizations commit, the current status of compliance officers as a growing body of non-regulated professionals and their vulnerability as whistleblowers leaves them in a state of limbo. As these issues continue to develop further, organizations, regulators, and compliance officers alike should be cognizant of any efforts that may be taken to ensure that the compliance function is implemented as effectively as possible while empowering the very individuals to which the task is entrusted.