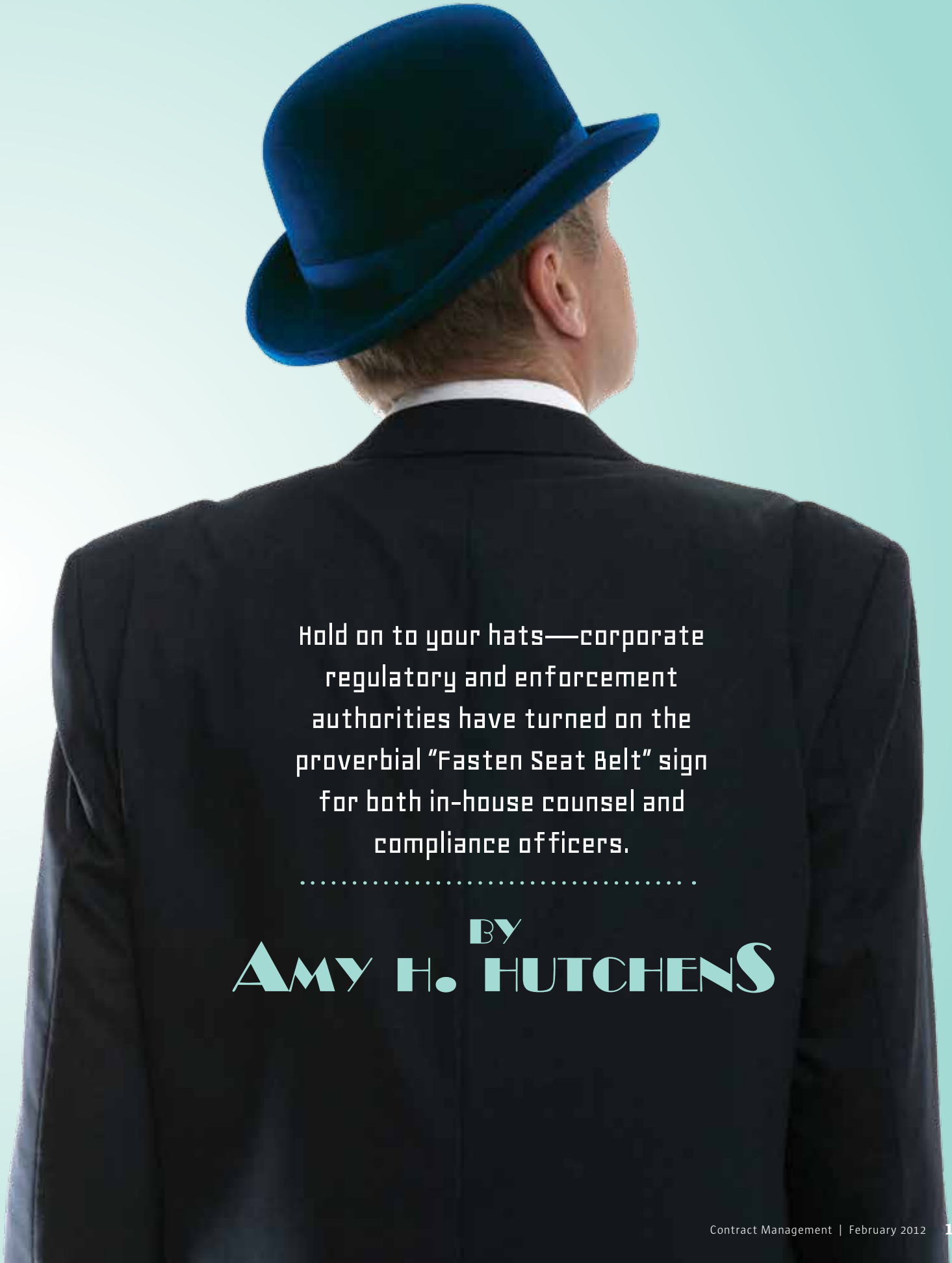




WEARING
TWO HATS

The Dual Roles of
In-house Counsel and
Compliance Officer



Hold on to your hats—corporate regulatory and enforcement authorities have turned on the proverbial “Fasten Seat Belt” sign for both in-house counsel and compliance officers.

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BY
AMY H. HUTCHENS

Imagine this
all-too-familiar scenario:

You have arrived at your dream in-house counsel job with a simple title of “general counsel,” or something to that effect. You are well positioned to defend the company and advise on a full spectrum of legal issues, ranging from labor and employment law to data security and contracts. It is your other title—chief compliance officer—that you may not have given much thought to until a colleague struts into your office with a request to draft the corporate code of conduct, otherwise known as the “not-so-legal legal document that no one really knows how to draft.” This raises the question: What is the role of chief compliance officer really all about for an in-house attorney?

There is no question that compliance is a top priority for in-house counsel.¹ Many in-house counsel wear “two hats”—common parlance for fulfilling two roles at the same time. Wearing the hats of both counsel and compliance officer can be challenging and rewarding at best, and can become a nightmare at worst. The complexity of fulfilling two roles is directly related to what those roles demand in a particular business, and what may be required by laws and regulation. Moreover, each role demands dramatically different skill sets. For some counsel, they may not see themselves wearing two hats as much as having two titles; for others, they may easily switch between roles, depending on the needs of the business. Another critical factor in the balancing game is how one wears the two hats: At the same time? Wear one hat, then the other? Or, is it a fluctuating and dynamic blend of each hat depending on the circumstances?

But let’s get real for a moment. In today’s business environment, is it realistic to expect a great general counsel to operate as a great compliance officer? Are the inherent conflicts reconcilable? Is executive management deprived of a valuable perspective when the roles are combined?

THE CHALLENGES OF UNIFICATION

Over the past decade, several cases highlight the challenges faced by organizations that had unified the roles of counsel and compliance officer.

Tenet Healthcare

In 2003, the Senate Finance Committee began an investigation into Tenet Healthcare’s corporate governance practices with respect to its federal healthcare programs. Tenet had a long history of fraud, including upcoding, overbilling, duplicate billing, kickbacks, providing medically unnecessary services, misrepresenting services, and falsifying medical records. In 1994, a Tenet employee, Christi Sulzbach, signed a “corporate integrity agreement” on behalf of Tenet with the Office of Inspector General of the U.S. Department of Health and Human Services and was subsequently promoted to chief compliance officer and general counsel. Widespread fraud continued for nearly a decade.

In September 2003, the then chairman of the Senate Finance Committee, Sen. Chuck Grassley (R-IA), wrote a letter to Tenet. He blasted Sulzbach for her dual roles:

Apparently, neither Tenet nor Ms. Sulzbach saw any conflict in her wearing two hats as Tenet’s general counsel and chief compliance officer. As general counsel, Ms. Sulzbach zealously defended Tenet against claims of ethical and legal noncompliance; e.g., the April 2001 *qui tam* suit, while as chief compliance officer, she supposedly ensured compliance by Tenet’s officers, directors, and employees. It doesn’t take a pig farmer from Iowa to smell the stench of conflict in that arrangement.²

Sulzbach left Tenet shortly after, citing outside pressure.³

WellCare

In 2007, WellCare followed suit. Thaddeus Bereday served as WellCare’s general counsel and chief compliance officer. Some 200 federal investigators descended upon WellCare in response to allegations of fraud, leading to the ouster of several corporate executives, including Bereday. When new corporate leadership assumed their roles, the general counsel and chief compliance officer became independent positions.⁴

These cases highlight how a combined general counsel/compliance officer role can deteriorate. Even so, the Department of Health



and Human Services Office of the Inspector General stopped short of requiring the roles to be separate, and instead, recommended independence because:

Free-standing compliance functions help to ensure independent and objective legal reviews and financial analyses of the institute's compliance efforts and activities. By separating the compliance function from the key management positions of general counsel or chief hospital financial officer (where the size and structure of the hospital makes this a feasible option), a system of checks and balances is established to more effectively achieve the goals of the compliance program.⁵

Compare this language with the standard language being used by the Office of the Inspector General in recent corporate integrity agreements, which have been entered between providers and the Office of the Inspector General. Most corporate integrity agreements dictate the role and position of the compliance officer in the organization. The standard language being used by the Office of the Inspector General is:

The compliance officer shall be a member of senior management of [provider], shall make periodic (at least quarterly) reports

regarding compliance matters directly to the board of directors of [provider], and shall be authorized to report on such matters to the board of directors at any time. *The compliance officer shall not be, or be subordinate to, the general counsel or chief financial officer.*⁶

This guidance represents the opinion of one government agency that compliance programs are more effective when the general counsel does not function as the compliance officer and when the compliance officer is seated at a high level in the organization. Where the earlier language clearly contemplates that it may not be an option for some organizations, and it makes room for a combined role, albeit with diminished checks and balances, the corporate integrity agreement language makes it quite clear that there is no room for a combined role. However, if there is substantial involvement by a compliance committee at the management level, this may mitigate the effect of the limited perspective of a dual-hatted counsel.⁷

More recently, this trend of separation has included a third element of a compliance committee. In many cases, it may be advisable to have both a chief compliance officer and a compliance committee. Some re-

cently proposed Office of the Comptroller of the Currency orders directed at major banks, and the proposed settlement agreements involving banks, government agencies, and certain states' attorneys general, show a pattern that points toward a separation of the roles and the creation of committees to oversee compliance.

THE CHANGING LEGAL LANDSCAPE

In recent years, other regulations have stopped short of requiring separate roles.⁸ The *Federal Acquisition Regulation (FAR)* requires "[a]ssignment of responsibility at a sufficiently high level...to ensure effectiveness of the business ethics awareness and compliance program and internal control system."⁹ This echoes the U.S. Federal Sentencing Guidelines requirement: "High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program."¹⁰

Certainly, a general counsel or chief compliance officer would fit the bill as high-level personnel within the corporation, and many general counsels manage effective programs. However, the legal landscape is always changing, and the increasing emphasis on transparency, self-reporting, and

mandatory disclosure proves problematic for attorneys bound by attorney-client privilege.

Recent legislation and regulations have encouraged corporations to self-report and cooperate with governmental enforcement agencies.¹¹ In some circumstances, self-reporting is encouraged by a “carrot” approach, including a possibility of expedited resolution and more leniency for self-reporting.¹² The carrot approach also encourages the waiver of attorney-client privilege in some circumstances by offering the possibility of a deferred prosecution agreement or nonprosecution agreement for full disclosure and cooperation. On the other hand, the “stick” deterrent for failure to disclose may result in harsher penalties, such as debarment from government contracting for failing to follow mandatory disclosure rules,¹³ or a higher culpability score under the U.S. Federal Sentencing Guidelines.

This trend is a challenge for dual-hatted in-house counsel. In-house attorneys are obligated by professional responsibility rules regarding attorney-client privilege. Few

in-house attorneys will feel comfortable defending an organization against allegations of wrongdoing or noncompliance, while, at the same time, advising the executive leadership to self-report the same misconduct, particularly when the self-reporting is not mandatory. Former Sen. Grassley may well have smelled the “stench of conflict” in this arrangement, as well. Even for counsel who are familiar with the “up the ladder” reporting requirements of Sarbanes-Oxley,¹⁴ the idea of mandatory reporting, such as that found in the *FAR*, is enough to make most in-house counsel shudder. Even with client consent, most in-house counsel would prefer to keep issues in-house and not take on the responsibility of reporting to an enforcement agency. Yet, in many situations, it may be appropriate for a compliance officer to recommend disclosure and full cooperation with governmental authorities. Ultimately, if a dual-hatted counsel remains in a legal role providing legal advice in defense of the company, the corporate leadership may be deprived of a legitimate compliance perspective—one that may prove to be more beneficial to

the organization. In his paper, “The Chief Compliance Officer vs. the General Counsel: Friend or Foe?” Jose Tabuena states: “In difficult situations, a [chief compliance officer’s] perspective about a controversial transaction or event would obviously go unnoticed, if that person was also serving as the [general counsel] who happened to agree with executive management.”¹⁵

As the whistleblowing landscape continues to change, the concerns of self-reporting are being compounded. The Wall Street Reform and Consumer Protection Act (Dodd-Frank) of 2010¹⁶ provides financial incentives to whistleblowers. Now more than ever, internal compliance programs need to be visible and reliable, and hotlines should not only be functional and effective, but inviting to employees. Though the rules provide that a whistleblower should utilize internal reporting processes first, there is no requirement to do so, and the financial incentive may unfairly tip the scales. From both a compliance and legal angle, the choice is clear: Companies want to hear the whistleblowers’ complaints before the government

IN-HOUSE COUNSEL V. COMPLIANCE OFFICER: TWO ATTORNEYS’ VIEWS

Akbar Hussain, corporate counsel for Elsevier, and Andrea Barton Reeves, vice president of administration for HARC, Inc., are two of the growing number of attorneys wearing “two hats.” While both say that the balance act has its challenges, there are certain similarities between the two roles that make the jobs compatible. “Business enablement and compliance are consistent in that they are grouped within risk management, which is ultimately the value proposition of an effective legal department,” says Hussain.

One area of potential conflict is in the timeliness of response. As an attorney with business-unit-level responsibilities (both Elsevier and its parent company have parallel and dedicated compliance departments), Hussain says he and his team are focused on client service, meaning prompt responses to inquiries. But while wearing the hat of compliance officer of first instance, he says he must ask questions that may slow down the process.

Barton Reeves says the roles of in-house counsel and compliance officer are particularly compatible in the healthcare field. “Many of the compliance issues we face have serious legal consequences if not properly addressed and monitored,” she says. Both Hussain and Barton Reeves say they work to integrate their roles into a single function, rather than trying to compartmentalize the two jobs. “My biggest challenge, like every other compliance officer, is keeping up with the plethora of rules and regulations around compliance issues, and getting our staff to adhere to the rules consistently,” says Barton Reeves. “My challenge is greater, because I do not have the luxury of focusing solely on compliance. We are making great progress, though. We have found that education is key in getting our staff to understand how important privacy and compliance is, and doing what they can to help us become more compliant as an organization.”

Hussain says another challenge in this dual role is the continuous need to update his skills and knowledge to meet both roles. “There is a need to contextualize the black letter of the law, especially the dynamic state of data privacy laws and regulations, with the practicalities of our business,” he said. “I am seeking to achieve a fluency in the issue-spotting nature of this exercise as it arises in a transaction.”

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hears them. Again, this poses a challenge to in-house counsel. Among the demands of managing litigation, advising on employment law issues and regulatory compliance concerns, drafting and reviewing contracts, and responding to client needs, in-house counsel will need to ensure “far more nimble and responsive investigative, triage, analytical, and governance capabilities” to ensure effectiveness in compliance program governance.¹⁷

One immediately apparent issue for whistleblowers is that attorneys often seem intimidating to average employees, particularly employees who do not deal

with counsel in their day-to-day operations. A second concern for in-house counsel is that creating a feeling of trust among the corporate employees is paramount to encouraging internal reporting. This requires that in-house counsel be visible and accessible within the organization, getting out of the office and establishing relationships. In larger or more global companies, this is not realistic. There are few in-house counsels who would agree that they have enough time to address the legal needs of an organization, much less impact corporate culture. Where the attorney advises on employment law matters, such as discipline and terminations, it is even more

difficult to establish a relationship of trust to encourage internal whistleblowing. This is where an in-house counsel must tap into nonlegal skills to be the most effective.

A DUAL-HATTED ATTORNEY NEEDS MORE THAN LEGAL SKILLS

In organizations where there simply aren't resources for an independent compliance officer, in-house counsel are most frequently the first-choice alternative. However, management of an effective compliance program requires additional skills. The skills required of an in-house counsel are more widely understood than those required of a good compliance officer.

Compliance, as anticipated by the Federal Sentencing Guidelines and other legislation, such as Sarbanes-Oxley, should be a “program” that needs management. Program management, coordination across functions or divisions, and implementation of major initiatives are skills required of a good compliance officer, and not necessarily essential to the in-house practice of law. In larger corporations, the legal department may also be managed like a program; however, in smaller organizations, where it is more common to find dual-hatted attorneys, there may not be enough time or resources for the attorney to effectively manage a compliance program, even with more third-party compliance resources available to give guidance and supplement internal initiatives.

When it is necessary to have an in-house counsel function as the compliance officer, it is essential that the attorney have strong interpersonal skills, the ability to listen, and discretion.¹⁸ They must be able to be proactive as well as reactive.¹⁹ In addition, it is essential that in-house counsel know how to conduct a thorough and proper investigation.

In many circumstances, it is unrealistic to expect a general counsel of a smaller organization to conduct investigations and risk assessments; draft a code of conduct; design, develop, and even deliver educa-



tional programs for adult learners; and draft policies and procedures—all of which are tasks necessary for a legitimate compliance program. As the saying goes, “It takes a lot of paper to prove you don’t have just a paper program.” One solution to this challenge is to have the attorney manage these processes internally, but have the work performed by other functions, or even by third-party vendors. According to a recent survey by the Ethics Resource Center, 56 percent of ethics and compliance function respondents report directly to the general counsel, which means that about half of the respondents perform compliance functions at a level subordinate to the general counsel. However, even the attorney who maximizes personnel resources will still have to balance the two roles, and will face the challenges of conflicts and the consequences of the silent compliance voice when defaulting to professional responsibility obligations of the legal profession.

There is little doubt that the importance of the corporate compliance officer hat has increased in the past decade, and continues to increase. Dodd-Frank is the most recent challenge for corporate compliance officers, but surely will not be the last. Similarly, the role of in-house counsel is growing. There appears to be more litigation, regulatory enforcement, desire to save on outside counsel costs, and pressure on in-house counsel to be involved in business operations.

Regardless of how an organization or individual decides to wear the two hats, one thing is certain: Corporate regulatory and enforcement authorities have turned on the proverbial “Fasten Seat Belt” sign for both in-house counsel and compliance officers. As the duties for both roles continue to expand, dual-hatted in-house counsel will need to rise to the occasion, either by showing the agility to adjust to the changing demands or by educating executive leadership about the importance of independence, both for the in-house attorney and for the compliance officer. Ladies and gentleman, hold on to your hats. **CM**

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ENDNOTES

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14. *Public Law* 107-204.
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16. *Public Law* 111-203.
17. McGovern, et al., see note 11.
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