The conclusions from the recent Mitratech survey on the in-house legal department will further the long-standing controversy on the proper roles of the corporation’s legal and compliance functions. This is particularly the case to the extent that the survey conclusions run counter to the perspective of those who argue for a clear separation between the two roles—and in particular for total independence of the compliance officer. Yet, as recent developments in the corporate world suggest, the failure to resolve this controversy can have disastrous risk-management implications for an organization. It is ultimately the governing board’s obligation to assure that clarity and effectiveness are brought to the general counsel/compliance officer roles and relationship.

The Mitratech survey, released on Sept. 9, focused on how corporate legal departments are responding to increased organizational compliance challenges and business risks. The market-wide survey included respondents from a broad cross-section of industry sectors, including financial services, energy and utilities, technology, manufacturing, insurance, health care, biotechnology, pharmaceuticals, apparel, automotive, consumer goods, nonprofit and retail. According to the survey, the median size of the respondents was 6,000 employees.
The survey identified five specific trends relating to the “intersection” of legal and compliance functions:

1. That the legal department “owns the enterprise compliance function” in 40 percent of the respondent entities, and maintains a portion of control of that function in another 24 percent of respondent organizations.

2. The legal department’s role is becoming more prominent as legal and compliance become more tightly intertwined.

3. In-house legal departments are adding staff to address growing compliance needs.

4. There are substantial variations in the extent to which legal departments have influence in certain sub-areas of enterprise compliance.

5. The in-house counsel is most likely to be involved in what the survey describes as “Incidents Management,” which conceptually involves reaction to specific incidents of legal noncompliance.

These survey conclusions are likely to be viewed with concern by compliance industry thought leaders, who have historically adopted a firm and inflexible position that the compliance office must be a separate organizational position staffed by someone other than the general counsel, and that the compliance officer must be “independent of” (i.e., not report to) the general counsel. These positions are based on interpretations of regulatory settlements entered into by the federal government (e.g., “Corporate Integrity Agreements”) and of the Federal Sentencing Guidelines. The independence position is grounded in a concern that the views and analysis of the compliance officer not be “blocked” or otherwise subject to the interpretation or influence of the general counsel. Such perspective attributes little value to the prophylactic impact of the general counsel’s ethical obligations.

These are legitimate concerns. It is certainly the case that the federal government views with great suspicion the potential for bias or conflict to arise when the general counsel has the ability to limit the internal or external reporting by the compliance officer. It is also true that recent amendments to the federal sentencing guidelines provide the compliance officer with unfettered reporting rights to the board, or key committee(s) thereof. It is also certainly true that many major corporations have adopted the “separate compliance position/independent compliance officer” structure, for good and valid reasons.

But it is equally true that corporations are not required by statute or regulation to adopt all or part of the “separate compliance position/independent compliance officer” structure (although many corporations maintain separate compliance functions because the responsibilities of the position are simply too extensive to be addressed by the general counsel). And, it is similarly true that an “independent” compliance office does not constitute an organizational “best practice.” As the Mitrachtech survey suggests, there is just too much disagreement on whether compliance officer independence helps, or hinders, effective legal and risk management practices for the concept to satisfy the rigorous standards of “best practice.”

This debate is exacerbated by the results of a new survey from the Society of Corporate and Compliance and Ethics (SCCE) and NYSE Governance Services. These results, not surprisingly, indicate that for a majority of respondents the compliance officer reports to someone (e.g., the CEO) or something (e.g., the board) other than the general counsel. In
commenting on the survey results, the SCCE’s CEO observed that an important factor in the effectiveness of a compliance plan is the prevention of conflict of interest. “Conflict of interest has been at the root of all major [compliance] failures.” Presumably one of the more prominent of those referenced conflicts is with the office of general counsel.

This debate is further exacerbated by concerns with efforts to expand the scope of the compliance officer’s authority and responsibility, especially where such efforts encroach on the traditional authority of the general counsel. This is particularly the case as it relates to tasks such as internal investigations, corporate governance support, and advice with respect to ethics and corporate responsibility. Additional controversy arises from the proper application of the attorney-client privilege, and the increasingly generic use of the word “compliance” as a shorthand reference to all matters affecting the organization’s compliance with laws. This can create substantial confusion at the board level.

Indeed, it may be implicit in the Mitratech survey results that many legal departments are “owning” all or portions of the compliance function, because they recognize that most compliance activities involve tasks for which a lawyer’s direct participation and analysis is necessary. As R. William “Bill” Ide and Crystal J. Clark observe, while a chief compliance officer need not be the general counsel, the general counsel must have ultimate responsibility for making legal decisions concerning an entity’s compliance with laws. Thus, while the Mitratech survey may well represent an accurate cross-section of industry practice, it is unlikely to resolve the basic debate about compliance officer independence.

The continuing inability to resolve this controversy carries with it significant risks to the organization. As several recent major corporate scandals have suggested, administrative confusion with respect to the identification, reporting and resolution of risk and compliance concerns (e.g., “siloing”) can lead to disastrous consequences. For example, the recent outside counsel report to the General Motors Co. board on the ignition-switch recall places the blame squarely on management-level neglect, inaction and abdication of responsibility. (Indeed, the report concluded that associate members of the GM in-house counsel staff failed to alert other company managers to lawsuits that could have helped the company address the problem.) The general counsel and the compliance officer must have clear organizational direction and authority to communicate, collaborate and coordinate in support of legal, compliance and other risk-management challenges. Disputes concerning roles, responsibilities and perceived levels of independence create dangerous barriers to the achievement of these objectives.

The governing board is obligated by its Caremark obligations to confront these risks by teaming with executive leadership to assure clarity between the roles of general counsel and chief compliance officer. Fundamental to this effort would be a determination by the board of the core focus of the compliance program; e.g., one of process management across the entire organizational compliance system (assisting business leaders in incorporating integrity processes within operations), or a broader portfolio of tasks and functions.

Specific areas of board attention would include adopting a written description of the respective roles and responsibilities of the general counsel and the compliance officer; establishing a protocol governing acceptable and appropriate communication and collaboration between the two positions; confirming the hierarchical position of the compliance officer (e.g., as a peer of, or as subordinate to, the general counsel); clarifying internal horizontal and vertical reporting rights and requirements; and assuring coordination on the engagement of outside counsel and application of the attorney client privilege.
Direct board “ownership” of the compliance/legal controversy enhances the likelihood of resolution, and increases the effectiveness of the organization’s risk and compliance management systems.

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