

PROTOCOLS FOR THE CHIEF GOVERNANCE OFFICER

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TABLE OF CONTENTS

INTRODUCTION	60
I. A BRIEF HISTORY FROM BEHIND THE CORPORATE VEIL.....	61
II. EVALUATING THE CGO: QUALIFICATIONS	
FOR THE COMPANY AND CANDIDATE	64
A. Do U.S. Companies Need Governance Officers?.....	64
1. <i>Sizing Up the Competition: CGO Benefits for Large and</i>	
<i>Smallcap Companies</i>	64
a. The Large Company (with a Hierarchal Legal	
Department)	64
b. Smallcap Companies with Market Capitalization	
above \$100 Million.....	65
2. <i>Advantages for Non-Profit and Quasi-Governmental</i>	
<i>Entities</i>	68
3. <i>Why the Bargaining Chip Does Not Warrant the Wait</i>	71
B. Requisite Qualifications for the CGO Candidate.....	78
1. <i>Advantages of Legal Education and Training</i>	79
2. <i>Integration of Law, Technology, and Intercompany</i>	
<i>Communications</i>	80
C. Benchmarks for Performance	82
III. BEYOND THE TITLE: DUTIES, ROLES, AND RESPONSIBILITIES.....	85
A. Independence to Ensure Good Governance Practices	86
B. Service at the Pleasure of the Board and its Committees	88
C. Internal Controls, Ethics and Conduct.....	93
D. Communications on Behalf of Stakeholders	96
IV. THE MULTIROLE CGO AS AN EFFECTIVE MODEL	
FOR CORPORATE GOVERNANCE.....	98
A. Corporate Secretary: A Convenient Combination.....	99
B. Chief Compliance Officer: Considerations of Size and Money ..	101
C. Associate General Counsel: An Added Bonus	103
CONCLUSION.....	105
APPENDIX A.....	107

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“[T]he title Chief Governance Officer and the special illumination of the role and responsibility of those who would serve in that position are the greatest furtherance of servant leadership since Robert K. Greenleaf wrote the original essay, ‘The Servant as Leader.’”¹

INTRODUCTION

The turn of the twenty-first century coincided with increased hope for business reforms in the United States. The ashes on Wall Street from former corporate titans Enron and WorldCom began to settle.² Congress’s prompt rollout of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley)³ created greater expectations for corporate responsibility.⁴ The corporate governance movement then took hold and spurred a series of institutional reforms.⁵ Compliance and governance officer positions began appearing among management and in boardrooms worldwide.⁶ But within a few short years, these reforms were overshadowed by fallout from the global credit crisis of 2008.⁷ This Article tracks the accelerated placement of management-side chief governance officers (CGOs) in the United States, and evaluates whether the position benefits companies, shareholders, and other stakeholders.⁸ In light of increased calls for regulatory oversight

1. Jim Tatum, *Advance Praise* to JOHN CARVER & CAROLINE OLIVER, CORPORATE BOARDS THAT CREATE VALUE, at iv (2002).

2. See generally, e.g., JOHN HENDRIKSE & LEIGH HENDRIKSE, BUSINESS GOVERNANCE HANDBOOK: PRINCIPLES AND PRACTICE 6 (2004); Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1, 2 (2002). For a detailed history of corporate governance in the United States, see Brian R. Cheffins, *Did Corporate Governance “Fail” During the 2008 Stock Market Melttdown? The Case of the S&P 500*, 65 BUS. LAW. 1, 5-18 (2009).

3. Pub. L. 107-204, 116 Stat. 745 (2002) (codified as amended in scattered sections of 15 U.S.C.).

4. See BART SCHWARTZ & AMY L. GOODMAN, CORPORATE GOVERNANCE: LAW AND PRACTICE § 14.05 (2004).

5. *Id.*

6. See A. Mechele Dickerson, *Privatizing Ethics in Corporate Reorganizations*, 93 MINN. L. REV. 875, 887 n.44 (2009) (citing Heather Brewer, *Snap Judgments: Add a Dash of CGO*, BUS. L. TODAY, Sept.-Oct. 2003, at 6, 7).

7. But see David A. Katz & Laura A. McIntosh, *Boards Play a Leading Role in Risk Management Oversight*, N.Y. L.J., Sept. 24, 2009, at 5 (equating risk management failures causing the collapse of Enron to the late-2000s decade financial crisis). See generally *infra* notes 94-95 and accompanying text.

8. “Management,” as used in this Article, refers solely to officers of a corporation and similar business associations. In addition, it should be noted that the title of officers considered to be the CGO can vary from company to company. CGOs wear many hats. They may carry the title of corporate governance officer, vice-president of governance, or a variation thereof.

following the economic downturn of 2008-2010, the Article explains why now—more than ever—businesses can benefit from a CGO-backed structure and culture.

Part One of this Article traces the development of the CGO position, distinguishing the CGO from other corporate compliance entities such as chief compliance officers, independent directors, and committees promulgated under Sarbanes-Oxley and self-regulatory organization (SRO) rules. Part Two evaluates scholarly proposals for the role of the CGO, weighing good governance practices against the dynamic needs of U.S. businesses. Parts Three and Four evaluate the duties, roles and responsibilities of the CGO, and the promise of hybrid position models. This Article concludes that a CGO offers safeguards for issuers⁹ and other entities against civil and criminal liability that warrant the position's adoption, especially in larger organizations.

I. A BRIEF HISTORY FROM BEHIND THE CORPORATE VEIL

There's little novelty to the CGO.¹⁰ After finding themselves pinned against a regulatory wall, U.S. businesses looked for a new face to depict internal governance reform.¹¹ Pharmaceutical giant Pfizer, Inc. came up with a cure in 1992: the chief governance officer.¹² But it took some time

9. See generally 17 C.F.R. § 205.2(h) (2008) (defining “issuer”).

10. In fact, the position has gained notoriety elsewhere in the world. See, e.g., HENDRIKSE & HENDRIKSE, *supra* note 2, at 112-13, 131-32 (recommending the position for business organizations in South Africa); Ulrich Steger & Preston Bottger, *The Corporate Governance Officer—From Company Secretary to Manager of Governance Process*, in LEADING IN THE TOP TEAM: THE CXO CHALLENGE 247 (Preston Bottger ed., 2008) (recommending the position for business organizations in the United Kingdom and United States).

11. For a further discussion of good governance practices, see, e.g., Robert B. Lamm, *The Emergence of the Corporate Governance Officer*, in CORPORATE GOVERNANCE: A GUIDE TO CORPORATE ACCOUNTABILITY 86, 86-87 (Henry A. Davis ed., Fall 2003) [hereinafter GUIDE].

12. Tamara Loomis, *Companies are Hiring Chief Governance Officers*, NAT'L L.J., May 5, 2003, at A15 [hereinafter Loomis, *Companies are Hiring*]; Tamara Loomis, *Scandals Spur Increase in Governance Officers*, *Law Firm Practice Groups*, N.Y. L. J., Apr. 24, 2003, at 1 [hereinafter Loomis, *Scandals Spur*]; see also *Corporate Governance: The Pfizer Way*, 2007 YOUNG LAW. INST. (ABA Bus. Law Section, Washington, D.C.), Mar. 17, 2007, at 12, available at <http://www.abanet.org/buslaw/ybl/nosearch/materials/2007/02.pdf> (stating that Pfizer, Inc. became the “[f]irst company to establish a corporate governance department” in 1992). Pfizer, Inc.’s position in developing good governance practices is further attested to by the recent decision of the ABA Business Law Section to entitle one of the seven programs at the 2007 Young Lawyer Institute “Best Practices—Corporate Governance: The Pfizer Way.” ABA Bus. Law Section, <http://www.abanet.org/buslaw/apps/updatedsearch/results.cfm?st=&sc=&sp=&sm=YL&sy=2007&ss=10> (last visited Jan. 17, 2009).

for the trend to catch on.¹³ In the absence of a “corporate enhancement” marketing blitz or celebrity endorsements, the position garnered less publicity than Pfizer’s other industry firsts.¹⁴ In fact, only a few U.S. companies followed Pfizer’s lead in the decade preceding Sarbanes-Oxley.¹⁵

The same corporate scandals that motivated legislators to pass Sarbanes-Oxley also precipitated a rise in CGO hiring.¹⁶ This led to some speculation that the position’s c-level evolution would stagnate.¹⁷ Instead, many embraced the CGO. Dr. John Carver, Ph.D., incorporated the CGO as a centerpiece of the Policy Governance model he created.¹⁸ Corporate governance rating systems and institutional investors began assessing the presence of a CGO in publicly traded companies.¹⁹ Today, governance officers are an integral part of business management infrastructures.²⁰

13. Loomis, *Companies are Hiring*, *supra* note 12; Loomis, *Scandals Spur*, *supra* note 12.

14. *But see* David W. Smith, *Corporate Governance: The Case for a Chief Governance Officer*, INSIGHTS: THE CORP. & SEC. L. ADVISOR, June 2000, at 2; Sigurd Ueland Jr., *Board Practices: It’s Time to Name a Chief Governance Officer*, DIRECTORS & BOARDS, Autumn 1996, at 46. *See generally*, e.g., Diedra Henderson, *Rise of Celebrity Testimonials Spurs FDA Scrutiny*, BOSTON GLOBE, Oct. 30, 2005, at A1.

15. Loomis, *Companies are Hiring*, *supra* note 12; Loomis, *Scandals Spur*, *supra* note 12.

16. *See* Lamm, *supra* note 11, at 86.

17. *See id.* Mr. Lamm feared, “linking corporate governance and the role of the CGO to scandals . . . risk[s] that corporate governance and the CGO’s role will be marginalized or forgotten.” *Id.*

18. *See*, e.g., JOHN CARVER & MIRIAM CARVER, ADJACENT LEADERSHIP ROLES: CGO AND CEO 4-10 (rev. and updated ed. 2009); CARVER & OLIVER, *supra* note 1, app. b, 127-29; CAROLINE OLIVER, GETTING STARTED WITH POLICY GOVERNANCE 9 (2009). For a further discussion of the Policy Governance model and the distinct nature of Dr. Carver’s proposal, *see infra* Parts II.A.2, III.B.

19. *See*, e.g., *Impact of Rating Systems on Corporate Governance*, CORP. DIRECTIONS (CCH, Inc.), July 15, 2003 (discussing rating system utilized by Moody’s Corporation); *see also* Bradley S. Rodos, Commentary, *Does Your Company Need a Chief Governance Officer?*, ANDREWS SEC. LITIG. & REG. REP., July 2, 2003, at 19, 20, *available at* WL, 9 No. 3 Andrews Sec. Litig. & Reg. Rep. 19 (discussing survey of institutional investors indicating importance of corporate governance practices) (citation omitted in original); *cf.* IRA A. JACKSON & JANE NELSON, PROFITS WITH PRINCIPLES 268 (2004) (listing role of CGO among “Characteristics of High-Performance Boards”). For a further discussion of governance rating systems, *see*, e.g., WALTER A. EFFROSS, CORPORATE GOVERNANCE: PRINCIPLES & PRACTICES §§ 10.01-.02, at 495-99 (2010); Lucian A. Bebchuk & Assaf Hamdani, *The Elusive Quest for Global Governance Standards*, 157 U. PA. L. REV. 1263 (2009); Andrea Esposito & Dan Konigsburg, *Measure for Measure: Why and How Standard & Poor’s Rates Corporate Governance Practices*, in GUIDE, *supra* note 11, at 111-15; Patrick S. McGurin, *Keeping Score: Rating Governance in the Post-Enron World*, in GUIDE, *supra* note 11, at 104-07.

20. *See* Monte Dube & Kerrin Slattery, *The Chief Governance Officer: To Have or Have Not?*, TRUSTEE MAG., June 2007, *available at* http://www.trustee.com/trustee_mag_app/jsp/articledisplay.jsp?dcrpath=TRUSTEEMAG/Article/data/06JUN2007/0706TRU_DEPT_Viewpoint (explaining that CGOs are “well-accepted and broadly adopted by Fortune

In terms of sheer numbers, CGO appointments rose almost tenfold in the year following enactment of Sarbanes-Oxley.²¹ More than one hundred CGOs now work for companies publicly traded on U.S. exchanges and in underlying markets.²² Few governance officers, however, received a clear description of their position.²³ As explained hereafter, the clear formulation and articulation of a CGO's duties are essential to the position's independence and success. The conduct and performance of a governance officer can, in turn, impact a company's bottom line.²⁴

500 companies"). Moody's Corporation interviews CGOs when analyzing corporate performance. See Kenneth A. Bertsch & Mark Watson, Moody's Investor's Service, A Rating Agency Perspective on US Corporate Governance, http://www.globalcorporategovernance.com/034_039.htm (last visited Sept. 14, 2009). Institutional investors should too. Compare Rodos, *supra* note 19, at 20 (predicting the CGO will influence institutional investment decision-making), with TIAA-CREF, RESPONSIBLE INVESTING & CORPORATE GOVERNANCE: LESSONS LEARNED FOR SHAREHOLDERS FROM THE CRISIS OF THE LAST DECADE (2010), available at http://www.tiaa-cref.org/about/press/about_us/releases/pdf/ricg_lessons_learned_past_decade.pdf (urging institutional investors to engage increased monitoring which requires "discussions with both the board and management in differing ways, and engagement with companies on issues of concern"), and Jayne W. Barnard, *Shareholder Access to the Proxy Revisited*, 40 CATH. U. L. REV. 37, 37 (1990) (anticipating institutional investors asking precise questions about internal operations) (citation omitted).

21. See Loomis, *Companies are Hiring*, *supra* note 12 (stating that approximately sixty CGOs were appointed as of the second quarter of 2003); Loomis, *Scandals Spur*, *supra* note 12 (same). A survey by the American Marketing Association of 52 public, 52 nonprofit, and 116 privately held business entities indicated that nearly one-third of public and nonprofit companies employed a CGO, compared with 12% of privately held companies. See AM. MKTG. ASS'N, AMA 2003 CORPORATE GOVERNANCE SURVEY 1 (2003), available at http://www.amanet.org/research/pdfs/Corp_Governance_srvy03.pdf.

22. See *infra* app. A. In 2006, a survey of 400 industry professionals indicated that 16% of companies had designated a CGO. Ian Sax, *Separation of Power*, CORP. SECRETARY, Jan. 2006, at 12. By comparison, 53% indicated that their company had a chief compliance officer. *Id.*

23. See Sax, *supra* note 22, at 12-13 (noting that only 7% of survey respondents indicated governance officers were given formal or specific job descriptions versus 28% percent of all chief compliance officers who were provided a formal description of their duties).

24. See *infra* notes 139-41 and accompanying text.

II. EVALUATING THE CGO:
QUALIFICATIONS FOR THE COMPANY AND CANDIDATE

A. Do U.S. Companies Need Governance Officers?

1. *Sizing Up the Competition: CGO Benefits for Large and Smallcap Companies*

a. The Large Company (with a Hierarchical Legal Department)

The size of a business association and the operational capacity of a company's legal department are two leading factors to consider before employing a CGO.²⁵ Incorporating a CGO into a larger company whose in-house attorneys are occupied with other duties can offer strategic advantages.²⁶ The CGO's position in the chain of command will help define the authority of the office and prompt respect from the bureaucracy below.²⁷ Publicly-traded companies wielding considerable amounts of equity often qualify as "larger companies."²⁸ Hence, largecap and midcap companies are more likely to benefit from a CGO than smallcap and microcap companies.²⁹

25. See Christopher Bates, *Sarbanes-Oxley Considerations*, 22 CORP. COUNS. REV. 123, 169 (2003) (asserting "larger, more complex, decentralized companies" stand to benefit more from a CGO than "[s]mall, centralized companies"); Michael W. Peregrine & James R. Schwartz, *Key Nonprofit Corporate Law Developments in 2004*, 14 HEALTH L. REP. at 169, 170, 173 (Feb. 3, 2005), available at <http://www.mwe.com/info/pubs/Bna0205.pdf> (emphasizing that the size of the corporation is a major factor of consideration before appointing a CGO, with the greatest need in larger business organizations). For a discussion of dual roles of the CGO and general counsel in publicly traded companies, see *infra* Part IV.C.

26. See Steven T. Taylor, *Workloads for Corporate Governance Attorneys Pile Up a Year After Sarbanes-Oxley*, Of Counsel, Sept. 2003, at 1, 18, available at WL, 22 NO. 9 Of Counsel 1 ("[F]or the larger companies where there are general counsel and [assistant GCs], it would make sense for somebody to have [the CGO] designation." (quoting David Fischer, a partner in the New York, N.Y. office of Loeb & Loeb LLP) (first alteration in original)).

27. Cf. Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 FORDHAM L. REV. 955, 957 (2005) (describing general counsel's role in a "large corporation" as "defined [by the] hierarchical position in a large bureaucratic organization").

28. See, e.g., Shane M. Shelley, *Entrenched Managers & Corporate Social Responsibility*, 111 PENN ST. L. REV. 107, 120 (2006) (calculating the size of a corporation based upon assets).

29. The terms largecap, midcap, smallcap, and microcap are roughly defined. Compare, e.g., STANDARD & POOR'S, S&P MIDCAP 400 at 1, available at http://www2.standardandpoors.com/spf/pdf/index/SP_MidCap_400_Factsheet.pdf (defining midcap as a company with market capitalization from \$750 million to \$3.3 billion for companies in the index), with Investopedia, Mid Cap, <http://www.investopedia.com/terms/m/midcapstock.asp> (last visited Nov. 2, 2009) (defining midcap as a company with market capitalization of \$2 billion to \$10 billion), and

In particular, market capitalization provides a key valuation tool for classifying a company's size.³⁰ The Securities and Exchange Commission (SEC or the Commission) identifies companies with market capitalizations of or exceeding \$700 million as larger companies,³¹ insofar as section 404 of Sarbanes-Oxley requires annual reporting of internal controls.³² Market capitalization fluctuations amidst the global financial crisis of 2008-2010, including temporary changes for delisting rules at the New York Stock Exchange (NYSE) and NASDAQ, warrant special consideration of a floor for considering appointing a CGO in public companies.³³

b. Smallcap Companies with Market Capitalization above \$100 Million

Gauging the benefits to smaller reporting companies is a bit more complicated. Companies that are small enough to operate without in-house counsel likely will not benefit from a CGO in the same way that larger companies do.³⁴ But is there a minimum threshold for prodding consideration of a CGO? Providing an exact number would certainly be difficult, especially given the diverse needs of U.S. businesses. To say the least, preexisting methods to measure smaller companies provide

InvestorWords.com, Market Capitalization, http://www.investorwords.com/2969/market_capitalization.html (last visited Feb. 13, 2010) (defining midcap as a company with market capitalization between approximately \$1 billion and \$5 billion and noting "the cutoffs between [market capitalization] categories are not precise or fixed").

30. See *infra* notes 36-43 and accompanying text.

31. See John L. Orcutt, *The Case Against Exempting Smaller Reporting Companies from Sarbanes-Oxley Section 404: Why Market-Based Solutions are Likely to Harm Ordinary Investors*, 14 *FORDHAM J. CORP. & FIN. L.* 325, 345 & n.85 (2009) (citing Exchange Act Rule 12b-2, 17 C.F.R. § 240.12b-2 (2008)). The amount excludes equity held by affiliates. 17 C.F.R. § 240.12-b2(1)(i).

32. Sarbanes-Oxley Act of 2002, Pub. L. 107-204, §§ 404-05, 116 Stat. 745, 789 (codified at 15 U.S.C. § 7262 (2006)); Management's Report on Internal Control over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports, Securities Act Release No. 8238, Exchange Act Release No. 47,986, Investment Company Act Release No. 26,068, 68 Fed. Reg. 36,636 (June 18, 2003).

33. See generally, e.g., Alejandro Lazo, *NYSE Eases Listing Rule; Minimum Market Value Lowered for Companies Amid Crisis*, WASH. POST, Jan. 24, 2009, at D02 (discussing changes to price per share and market capitalization rules while explaining that with "a big market decline . . . some perfectly good companies . . . face being delisted," and that "[i]t is just a recognition of the realities of the marketplace" (quoting Professor Richard Sylla, N.Y. Univ. Sch. of Bus.)).

34. See Taylor, *supra* note 26, at 18 ("If the company is smaller and doesn't have a general counsel, it doesn't make sense to [designate a CGO]." (quoting David Fischer)). For a discussion of factors considered when deciding to employ in-house attorneys, see Sandra L. Etherton, *Time to Hire In-House Counsel?* (Etherton Law Group, LLC, Tempe, Ariz.), May 2001, <http://www.ethertonlaw.com/TimetoHire.pdf> (last visited Nov. 15, 2009).

ambiguous guidance (if any at all).³⁵ Section 404 of Sarbanes-Oxley, however, intersects with duties that fall within the domain of the CGO; parameters set forth by the SEC could provide a marker for determining governance officer needs. Those parameters, I contend, show that smallcap companies exempt from section 404 are the least likely to benefit from a CGO.

Definitions for section 404 are set forth, in part, in Rule 12b-2.³⁶ Under Rule 12b-2, which is promulgated pursuant to the Securities Exchange Act of 1934 (Exchange Act),³⁷ smaller public companies are identified as those companies that do not qualify for accelerated filing status.³⁸ In 2005, the SEC Advisory Committee on Smaller Public Companies (Advisory Committee) recommended defining “small” more precisely to include firms with a market capitalization under \$787 million.³⁹ The recommendation came following a thorough review of challenges facing companies with high and low market capitalization rates and offers guidance by its use of equity market capitalization instead of public float.⁴⁰ Public float, defined as the difference of market capitalization less equity held by affiliates, burdens companies with accounting for primary and secondary market purchases of officers, directors and controlling shareholders.⁴¹

35. See Orcutt, *supra* note 31, at 344 (explaining “no precise definition” exists). Professor Orcutt further elaborates that it is simply and unambiguously inaccurate to view small companies as a homogeneous group. In reality, the term small company encompasses a wide range of different types of companies For example, the Small Business Administration provides statistics for “small businesses”, which are generally defined as those business[es] having less than 500 employees. *Id.* at 350 (footnote omitted).

36. 17 C.F.R. § 240.12b-2 (2008).

37. Pub. L. 73-291, 48 Stat. 881 (1934) (codified as amended in scattered sections of 15 U.S.C.).

38. See Internal Control over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers and Newly Public Companies, 71 Fed. Reg. 76,580, 76,582 n.15 (Dec. 21, 2006) (to be codified at 17 C.F.R. 210, 228, 229, 240 & 249) (noting that although undefined, “the term ‘non-accelerated filer’ . . . refer[s] to an Exchange Act reporting company that does not meet the Exchange Act Rule 12b-2 definitions of either an ‘accelerated filer’ or a ‘large accelerated filer’”).

39. See ADVISORY COMMITTEE ON SMALLER PUBLIC COMPANIES, FINAL REPORT OF THE ADVISORY COMMITTEE ON SMALLER PUBLIC COMPANIES TO THE U.S. SECURITIES AND EXCHANGE COMMISSION, Securities Act Release No. 8666, at 1 n.1, 15-17 (Apr. 23, 2006), available at <http://www.sec.gov/info/smallbus/acspc/acspc-finalreport.pdf>.

40. *Id.* at 19.

41. See *id.* at 19 n.46. The author notes, however, that issuers must remain mindful of filing requirements for all officers and directors of the company, in addition to shareholders with more than a ten percent stake in any class of stock. See, e.g., Exchange Act § 16 (codified as amended at 15 U.S.C. § 78p (2006)).

The Advisory Committee suggested defining smallcap companies as those valued above \$128 million in market capitalization.⁴² Microcap companies, on the other hand, were considered those with less than \$128.2 million.⁴³ This \$128 million divide allows us to clearly distinguish the two categories. The Internal Revenue Service (IRS) frequently conducts tax audits on companies whose assets exceed \$100 million,⁴⁴ and a company with \$128 million in market capitalization will need *more than* \$100 million in assets to maintain its balance sheet *before calculating liabilities*.⁴⁵ Moreover, companies with smaller market capitalization levels are less likely to face litigation for compliance issues that might trigger scrutiny of internal governance practices at a larger company.⁴⁶ Therefore, companies with more than \$128 million in market capitalization stand to benefit from a governance officer.

Given the increased level of scrutiny companies face when valued between \$100 million and \$128 million, that range could provide a target for determining when public and private companies should consider appointing a CGO.⁴⁷ Smallcap companies often rely on senior management

42. See *id.* at 1 n.1, 5-8, 15-17 (distinguishing smallcap companies).

43. See generally *id.* at 1 n.1, 5 (defining microcap company).

44. The IRS Large and Mid-Size Business Division (LMSB) performs audits on companies whose assets exceed \$10 million. See TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, SYRACUSE UNIVERSITY, AUDITS OF LARGEST CORPORATIONS SLIDE TO ALL TIME LOW, <http://trac.syr.edu/tracirs/newfindings/v13/ & tbl.4> (2008). Federal tax audits of corporations with less than \$10 million in assets ranged from approximately 1% to 3% in 2007. *Id.* LMSB audits, on the other hand, occur annually at more than 10% of corporations. See *id.* Those with assets exceeding \$250 million faced audit rates exceeding 26% in 2007. *Id.*

45. See ROBERT W. HAMILTON & RICHARD A. BOOTH, BUSINESS BASICS FOR LAW STUDENTS §6.6 (4th ed. 2006) (identifying the relationship between assets, liabilities, and stockholders' equity); see also JOHN DOWNES & JORDAN ELLIOT GOODMAN, DICTIONARY OF FINANCE AND INVESTMENT TERMS 50 (defining "balance sheet") (illustrated 7th ed. 2006).

46. See John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1543 & n.23 (2006) ("[C]onventional wisdom has long been that companies with small market capitalizations are less likely to be sued in securities class actions." (citing Stephen J. Choi, *The Evidence on Securities Class Actions*, 57 VAND. L. REV. 1465, 1473-74, 1480-81 (2004))); see also *infra* notes 75-87 and accompanying text (weighing the use of the CGO as a bargaining tool in litigation).

47. See Michael W. Peregrine, James R. Schwartz & William W. Horton, *New Duties for the Nonprofit General Counsel in the Corporate Responsibility Environment*, 2 CORP. ACCOUNTABILITY REP. 1203, 1204 (Nov. 12, 2004), available at <http://www.mwe.com/info/pubs/newduties1104.pdf> (discussing benefits of the CGO appointment, although noting that the general counsel might be appropriate to designate as CGO). For example, a CGO is employed by The ASU Group, which is an insurance claims adjusting company with a 100% Employee Stock Ownership Plan. See Press Release, The ASU Group, Board Approves ESOP Stock Repurchase Plan (Sept. 14, 2009) (on file with author), available at <http://www.asugroup.com/?q=pr-repurchase-091409>.

for control as opposed to internal control structures.⁴⁸ These companies stand to benefit from a CGO who tailors compliance protocols to their company's short-term needs, rather than long-term development and Sarbanes-Oxley compliance goals within larger corporations.⁴⁹

2. Advantages for Non-Profit and Quasi-Governmental Entities

The position of CGO also rose to prominence among non-profit and quasi-governmental entities over the past decade, though larger organizations benefited most.⁵⁰ Among quasi-state agencies, public pension funds lead their peers in appointing governance executives.⁵¹ Four of the five largest U.S. public pension funds—the California Public Employees' Retirement System (CalPERS), the California State Teachers' Retirement System (CalSTRS), the New York State Common Retirement Fund (NYSCRF), and the Florida State Board of Administration (FSBA)—employ senior corporate governance officials.⁵²

Charities and other non-profit organizations with tax exemptions provided for under 26 U.S.C. § 501(c) also found use for the CGO in recent

48. See Orcutt, *supra* note 31, at 355 & n.123 (“[I]nternal control structures may be less useful for smaller companies since they tend to rely more heavily on top managers for control, who are likely able to override the controls irrespective of Section 404.” (citing HENRY N. BUTLER & LARRY E. RIBSTEIN, *THE SARBANES-OXLEY DEBACLE – WHAT WE’VE LEARNED; HOW TO FIX IT* 53-54 (2006))).

49. See Peter Ferola, *Internal Controls in the Aftermath of Sarbanes-Oxley: One Size Doesn't Fit All*, 48 S. TEX. L. REV. 87, 117 (2006) (“[L]arge companies are reliant on strong systems and controls to ensure that financial data is reliable. . . . [T]he smaller public company is less reliant on systems and detailed controls and more reliant on company level control or controls performed by senior management.” (citing INTERNAL CONTROLS SUBCOMMITTEE, PRELIMINARY REPORT OF THE INTERNAL CONTROLS SUBCOMMITTEE TO THE ADVISORY COMMITTEE ON SMALLER PUBLIC COMPANIES 18 (Dec. 7, 2005), available at <http://www.sec.gov/info/smallbus/acspc/pr-intcontrol.pdf> (internal footnote omitted))).

50. See, e.g., Peregrine & Schwartz, *supra* note 25, at 171 (explaining “[e]merging best practices related to such important concepts as . . . the role of the ‘chief governance officer’ (particularly in larger organizations)”).

51. See, e.g., Broc Romanek, *Inside Look at Public Pension Governance Officers with Cynthia Richson*, CORP. GOVERNANCE ADVISOR, July-Aug. 2004, at 33-34 (exploring the role and duties of a corporate governance officer at a public pension fund).

52. *AgreeYa Selects Rajan as VP*, SACRAMENTO BEE, Sept. 15, 2008, at B8 (identifying CalSTRS director of corporate governance); *CalPERS Names Manager to Track Performance*, SACRAMENTO BEE, Jan. 27, 2009, at B7; E-mail from Gianna M. McCarthy, Dir. of Corp. Governance, Div. of Pension Inv. & Cash Mgmt., N.Y. State Office of the State Comptroller, to author (Oct. 21, 2009, 09:12 EDT) (on file with author); sources cited *infra* note 144 (discussing the senior corporate governance officer of FSBA). See generally *The top 200 pension funds/sponsors – Pensions & Investments*, <http://www.pionline.com/apps/pbcs.dll/article?AID=/20090126/CHART/901209995/1/PENSIONFUNDDIRECTORY> (last visited Oct. 20, 2009) (identifying CalPERS, CalSTRS, NYSCRF, and FSBA as four of the top five pension funds or sponsors based on assets as of September 30, 2008).

years.⁵³ An example would be the U.S. Green Building Council (USGBC), which developed the Leadership in Energy and Environmental Design (LEED) rating standard for construction, has a CGO.⁵⁴ Hospitals and their managing organizations provide further examples of how governance guidance can benefit these types of entities.⁵⁵ Management-side governance officers offer advantages to hospitals, particularly those within large organizational systems.⁵⁶ By comparison, medical care trusts operated under the National Health Service (NHS) in the United Kingdom frequently appoint “clinical governance officers” at medical care facilities who emulate many duties of the CGO.⁵⁷ With eighty-five percent of U.S. hospitals designated as non-profit or government-owned entities, domestic stakeholders stand to benefit from changes to governance structure which have already occurred in many foreign and some domestic facilities.⁵⁸

While the governance structure utilized in larger medical systems closely resembles the model adopted in public companies,⁵⁹ some non-profit organizations have adopted a reform system which instead incorporates Dr.

53. See, e.g., Peregrine & Schwartz, *supra* note 2525.

54. See USGBC: Ethics Panel, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1791> (last visited Nov. 10, 2009) (“The [Ethics] Panel includes three board members, the USGBC Governance Officer and one additional staff person knowledgeable about LEED committee operations.”). See generally USGBC: LEED, <http://www.usgbc.org/leed/> (last visited Nov. 15, 2009).

55. See Dube & Slattery, *supra* note 20; Peregrine & Schwartz, *supra* note 25; CENTER FOR HEALTHCARE GOVERNANCE, BUILDING AN EXCEPTIONAL BOARD: EFFECTIVE PRACTICES FOR HEALTH CARE GOVERNANCE 21, 42-46 (2007), available at http://www.americangovernance.com/americangovernance/BRP/files/BRP_final.pdf.

56. For example, David W. Rowan, Esq. currently serves as the chief legal officer, chief governance officer, and secretary of the Cleveland Clinic. Cleveland Clinic Board of Governors, http://my.clevelandclinic.org/about/governance_leadership/board_of_governors.aspx (last visited Mar. 3, 2010).

57. Clinical governance reforms aim to increase internal accountability within the NHS medical system through improvements to both infrastructure and professional standards. Ash Samanta et al., *The Role of Clinical Guidelines in Medical Negligence Litigation: A Shift from the Bolam Standard?*, 14 MED. L. REV. 321, 345-46 (2006). The clinical governance officer position in many ways resembles the CGO office. See Nigel Starey, *What is Clinical Governance?*, WHAT IS (Hayward Med. Commc’ns, London, U.K.), May 2001, at 6, available at <http://www.medicine.ox.ac.uk/bandolier/painres/download/whatis/WhatisClinGov.pdf> (discussing integration of clinical and corporate governance practices). Compare, e.g., NORTH WEST WALES NHS TRUST, RESEARCH & DEVELOPMENT ANNUAL REPORT FOR THE FINANCIAL YEAR 2005-06 at 3 (2006) (indicating clinical governance officer oversaw ethics compliance), with *infra* Part III.C (analyzing combined roles for the CGO including oversight of ethics protocols).

58. See also sources cited *supra* note 55. In the United States, 85% of hospitals are operated as tax-exempt entities or owned by the government. See Scott Allen and Marcella Bombardieri, *Much is Given by Hospitals, More is Asked*, BOSTON GLOBE, May 31, 2009, at A1, available at http://www.boston.com/business/healthcare/articles/2009/05/31/much_is_given_by_hospitals_more_is_asked/ (stating that 15% of U.S. hospitals are investor-owned).

59. See generally sources cited *supra* note 25.

Carver's Policy Governance model.⁶⁰ Although the application of Dr. Carver's Policy Governance model to public companies is critiqued later in this Article,⁶¹ his model certainly shows merit for smaller non-profit organizations.⁶²

I hypothesize that recent changes by the IRS will increase demand for skilled governance staff, and CGO placement will then need to shift from a trustee/director role to a management-styled position, especially in larger non-profit corporations.⁶³ Over the next three years, many section 501(c) organizations will begin filing revised Form 990 with the IRS and various state authorities.⁶⁴ This will create additional pressure for accountants and legal counsel engaged by these entities.⁶⁵ Because Form 990 will face potential scrutiny by regulators and donors, preparation of the document should take into account compliance and public relations.⁶⁶ Given the potential consequences of a botched filing,⁶⁷ non-profit organizations that are unable to expand their payrolls may find it advisable to allocate

60. Religious organizations, for example, have implemented corporate-style reforms by appointing a CGO at both director and management levels. *Compare, e.g.*, UNITARIAN UNIVERSALIST ASS'N OF CONGREGATIONS, GOVERNANCE MANUAL § 3.6(3) & note (2009), available at http://www.uua.org/documents/boardtrustees/governancewg/policy_manual_3_process.pdf, and http://www.uua.org/documents/boardtrustees/governancewg/policy_manual_terminology.pdf (adopting Dr. Carver's Policy Governance model and appointing the CGO as chair of the board of trustees), with EPISCOPAL DIOCESE OF WASH., COMMITTEE GOVERNANCE POLICY 2 (2004), available at <http://governance.edow.org/site/1/docs/CommitteeGovPolicy.pdf> (identifying the duty of the governance officer to assist individual committee chairs with facilitating committee rotations).

61. See *infra* Part III.B.

62. Cf. Sharon O'Malley, *Does your board need a chief governance officer?*, GREAT BOARDS (Bader & Associates Governance Consultants, Potomoc, Md.), Fall 2004, at 1, 2 (arguing that a hospital's traditional CEO position are capable of performing the duties of a CGO within individual "hospitals and smaller systems . . . [b]ut [not] in more complex, multi-organizational systems"). *But see* Charney Associates: Our Clients, <http://www.bcharney.com/clientlist.htm> (last visited Nov. 15, 2009) (identifying clients of varying size that, in some instances, adopted principles advocated under Dr. Carver's Policy Governance model). See generally Charney Associates: About Policy Governance, <http://www.bcharney.com/governance.htm> (last visited Nov. 15, 2009).

63. See Peregrine & Schwartz, *supra* note 25.

64. Lisa A. Runquist & Michael E. Malamut, *The IRS's New Regulation of Nonprofit Governance*, BUS. L. TODAY, July-Aug. 2009, at 29-33.

65. See *id.* at 30.

66. See *id.* at 31 ("[D]onors, ratings agencies, and local tax and nonprofit governance regulators can be expected to review governance responses on Form 990."); see also *id.* at 30 ("The Form 990 is a public document and should be reviewed with public relations in mind. . . . [T]he form may be the organization's number one public relations document.").

67. See generally *id.* at 30 ("Accountants also cannot be expected to function as lawyers. Many of the questions, particularly those dealing with corporate governance, have legal implications that go way beyond matters of accounting and finance.").

governance duties to attorneys inside or outside the organization.⁶⁸ If Form 990 and governance guidance is allocated solely to outside counsel, the CGO designation suggested by Dr. Carver for a director or trustee offers benefits by keeping a governance-focused leader within the organization's ranks.⁶⁹ Larger organizations, however, appear more likely to benefit from the management-side model adopted by organizations such as USGBC, CalPERS, and the FSBA.

3. *Why the Bargaining Chip Does Not Warrant the Wait*

In the absence of a CGO-titled position, organizations often remain successful and respected corporate citizens. For example, YORK International Corp. (YORK), a leading manufacturer of climate control products, proudly announced the appointment of a CGO in December 2003.⁷⁰ Within two years, Johnson Controls, Inc. (a fellow NYSE-listed appliance manufacturer) acquired YORK without retaining YORK's CGO position.⁷¹ What happened afterwards? Johnson Controls was rated by *Forbes* as one of the "best managed big companies in the U.S." in January 2007.⁷² Likewise, Procter & Gamble made *Fortune's* top ten "Most Admired Companies" for four consecutive years after acquiring the Gillette Company—minus Gillette's CGO.⁷³ Given these examples, it could be

68. See Peregrine, Schwartz & Horton, *supra* note 47, at 1204 (recommending that the general counsel serve as CGO in nonprofit corporations); see also *infra* Part IV.C (advocating the appointment of a subordinate in the office of general counsel to focus on governance issues).

69. Dr. Carver's model emphasizes "title" as a tool for increasing good governance practices, while separating management and governance from the role of the CEO. See CARVER & OLIVER, *supra* note 1, at app. b, 127-29; see also *id.* at 38.

70. Press Release, YORK International Corp., YORK International Announces Key Executive Appointments (Dec. 8, 2003) (on file with author), available at <http://www.york.com/corp/news/newsitem.asp?cid=213>; accord *York International Announces Executive Appointments*, APPLIANCE MAGAZINE.COM, Dec. 9, 2003, <http://www.appliancemagazine.com/news.php?article=5536> (last visited Sept. 13, 2009).

71. Press Release, YORK International Corp., Johnson Controls to Acquire YORK for \$56.50 Per Share (Aug. 24, 2005) (on file with author), available at <http://www.york.com/corp/news/newsitem.asp?cid=271>.

72. See Joann Muller, *Control Freaks*, FORBES, Jan. 8, 2007, at 92.

73. See World's Most Admired Companies 2009: Full list—from FORTUNE, http://money.cnn.com/magazines/fortune/mostadmired/2009/full_list/ (last visited Oct. 6, 2009) (ranked 6th); America's Most Admired Companies 2008: Top 20 | Fortune, <http://money.cnn.com/magazines/fortune/mostadmired/2008/top20/index.html> (last visited Oct. 6, 2009) (ranked 8th); America's Most Admired Companies 2007: Top 20—FORTUNE, <http://money.cnn.com/magazines/fortune/mostadmired/2007/top20/index.html> (last visited Oct. 6, 2009) (ranked 10th); Fortune: Most Admired Companies: Top 20, <http://money.cnn.com/magazines/fortune/mostadmired/2006/top20/> (last visited Oct. 6, 2009) (ranked 4th). See generally Gillette Co., Current Report (Form 8-K), at 2 (Sept. 30, 2005) (listing CGO); Jenn Abelson, *P&G Expands Role of Gillette Chief*, BOSTON GLOBE,

argued that CGOs offer limited benefits to companies that have already implemented a functional system that promotes good governance practices, outstanding public relations, and high performance. It would also appear that CGOs are unappreciated and underutilized during merger and acquisition (M&A) activity.⁷⁴

Additionally, even if a company employs legal and compliance executives, it might consider the absence of a CGO position as a bargaining chip to mitigate harm from future mistakes.⁷⁵ Appointing a CGO from outside the company could be used to increase investor confidence in senior management and the board of directors after embarrassing mishaps.⁷⁶ One commentator noted the benefits of this remedy following alleged misconduct by management, deficiencies in governance practices, and

May 15, 2007, at C5, available at http://www.boston.com/business/globe/articles/2007/05/15/pg_expands_role_of_gillette_chief/ (discussing 2005 acquisition of Gillette and 2007 reorganization of Gillette operations at Procter & Gamble).

74. *But see* Terence J. Gallagher, *The Role of Corporate Governance Officers in M&A*, M&A LAWYER, Sept. 2001, at 14, available at WL, 5 NO. 4 M & A Law. 14 (describing the role of a surviving corporation's CGO and corporate governance department during M&A activity). Surviving corporations typically take a company's shares, but not its CGO, following M&A activity. For example, NYMEX Holdings Corp. d/b/a the New York Mercantile Exchange was acquired by CME Group, Inc. d/b/a the Chicago Mercantile Exchange which has not yet appointed a governance officer. *Compare, e.g.*, NYMEX Holdings, Inc., Annual Report (Form 10-K), at 97 (Mar. 5, 2007) (identifying the position of senior vice president — corporate governance and strategic initiatives), with CME Group-Management Team, <http://investor.cmegroup.com/investor-relations/management.cfm> (last visited Nov. 2, 2009). Oclaro Inc. formed following the merger between Bookham Inc. and Avanex Corporation. *See* Oclaro Company Overview, http://www.oclaro.com/company_overview.php (last visited Nov. 2, 2009). Although Avanex Corporation had a CGO, Oclaro does not. *Compare* Oclaro Inc., Code of Business Conduct and Ethics (2008), available at <http://investor.oclaro.com/governance.cfm>, and Oclaro Management Team, http://www.oclaro.com/management_team.php (last visited Nov. 2, 2009), with Avanex Corp., Code of Business Conduct and Ethics (2007), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=102241&p=irol-govconduct>. In addition, Keyspan Corp., which had a CGO, was acquired by National Grid plc d/b/a National Grid USA less a governance officer. *See generally, e.g.*, John J. Bishar Profile – Forbes.com <http://people.forbes.com/profile/john-j-bishar/6912> (indicating Mr. Bishar previously served as CGO of Keyspan Corp. and now serves as the senior advisor to the general counsel of National Grid USA) (last visited Nov. 3, 2009).

75. *See generally, e.g.*, CAROLYN KAY BRANCATO & CHRISTIAN A. PLATH, THE CONFERENCE BOARD, CORPORATE GOVERNANCE BEST PRACTICES: A BLUEPRINT FOR THE POST-ENRON ERA 29 (2002) (explaining CGO's centralized role will assure that other corporate officers' governance duties "do not 'fall between the cracks'").

76. *See* Rodos, *supra* note 19, at 19 (explaining that company outsiders "remain free of the corporate scandal that affected [Tyco, Computer Associates and Walt Disney Co.] and forced them to hire CGOs"); Loomis, *Scandals Spur, supra* note 12, at 1; Loomis, *Companies are Hiring, supra* note 12, at A15.

issuing corrective financial restatements.⁷⁷ Given predictions by a leading independent research firm that financial restatements are likely to increase in the coming year,⁷⁸ the CGO will offer further value to companies whose shares are traded on open markets in the United States.

Many of the aforementioned events will also prompt litigation by shareholders and other private litigants. Waiting to appoint a CGO until such a time might appear to be a viable strategy. A 2005 settlement following alleged financial misconduct at TXU Corporation included the designation of a c-level governance officer.⁷⁹ A similar condition was imposed on Qwest Communications a year earlier to settle multiple derivative actions brought in Colorado state court.⁸⁰ These provisions are consistent with settlements requiring general improvements to corporate governance structures which other courts have approved.⁸¹ As the U.S. Court of Appeals for the Third Circuit observed, policy arguments support permitting such a settlement whereas “corporations that have admitted to fraudulent activity can have a hard time attracting and keeping investors unless they make some affirmative efforts to ensure that such fraud will not occur again.”⁸²

77. Rodos, *supra* note 19, at 20 (identifying benefits of CGO action following “a corporate scandal, earnings restatement or criticisms as to the lack of independence or other corporate governance issues”).

78. *See generally* Press Release, Glass, Lewis & Co., Glass Lewis Releases 2008 Financial Restatement Data (Mar. 19, 2009) (on file with author), *available at* <http://www.glasslewis.com/downloads/1059-101.pdf> (elaborating that renewed efforts by the SEC to inspect financial reporting standards may trigger a “surge” in restatements).

79. *Schwartz v. TXU Corp.*, No. 3:02-CV-2243-K, 2005 WL 3148350, at *8-9 (N.D. Tex. Nov. 8, 2005) (approving class action settlement); *see also* Stephen Taub, *TXU Agrees to Major Governance Changes*, CFO.COM, Jan. 26, 2005, <http://www.cfo.com/article.cfm/3597873?f=search> (last visited Nov. 16, 2009).

80. *See In re Qwest Commc'ns Int'l, Inc. Secs. Litig.*, 232 F.R.D. 375, 375-76 & n.1 (D. Colo. 2004) (discussing settlement of consolidated derivative cases in *Strauss v. Anschutz*, No. 02-cv-8188 (Colo. Dist. Ct.-2nd June 25, 2004) (Manzanares, D.J.) (order approving settlement)) (citation omitted in original); Stephen Taub, *Qwest Agrees to Governance Changes in Settlement*, COMPLIANCE WK., June 29, 2004, <http://www.complianceweek.com/article/515> (last visited Mar. 4, 2010) (listing governance changes in the settlement of a Colorado derivative action, including the appointment of a CGO); *see also* Jonathan D. Glater, *The Better the Audit Panel, the Higher the Stock Price*, N.Y. TIMES, Apr. 9, 2005, at C4 (interviewing CGO appointed at Qwest Communications, Inc.).

81. *See, e.g., In re Cendant Corp. Litig.*, 264 F.3d 201, 246-47 (3d Cir. 2001) (affirming approval of settlement that required the company to elect independent directors, hold annual board elections, and prohibited the repricing of employee stock grants without shareholder approval).

82. *Id.* at 247; *cf. Nuts and Bolts After Sarbanes-Oxley*, CORP. DIRECTIONS (CCH, Inc.), July 15, 2003 (“Regulators want to see someone with that title and the corporate secretary may be a logical choice.” (summarizing the presentation of Michael H. Ullmann, then associate general counsel and secretary at Johnson & Johnson, Inc.)). *See generally* Robert B. Thompson, *Collaborative Corporate Governance: Listing Standards, State Law,*

A better approach avoids litigation altogether. Companies should appoint a CGO to proactively develop governance protocols to hedge risks that arise,⁸³ for example, from the release of ameliorative information.⁸⁴ The effectiveness of a CGO will ultimately hinge on the strategic approach used to implement governance protocols.⁸⁵ It will be the individual or team that develops and oversees governance protocols, and not the title itself, that ultimately benefits the organization.⁸⁶

Unfortunately, companies with poor corporate governance ratings—those that may desperately need a CGO—are the most likely to evade CGO appointments and similar governance reforms.⁸⁷ These companies risk losing out on more than just governance ratings.⁸⁸ Their board members

and Federal Regulation, 38 WAKE FOREST L. REV. 961, 962 (2003) (noting the SEC has expanded beyond its focus of disclosure into the realm of “direct regulation of officer responsibilities for corporate governance” (citing Robert B. Thompson & Hillary A. Sale, *Securities Fraud as Corporate Governance: Reflections upon Federalism*, 56 VAND. L. REV. 859, 877-78 (2003))). In addition, the CGO has been suggested to Congress as one officer, among others, who may effectively assist boards with adopting evaluation systems. *See Corporate Governance and Executive Compensation: Hearing Before the S. Comm. on Finance*, 107th Cong. app. at 67 (2002).

83. *See* PHIL HAYLOR, COMPUTER STORAGE: A MANAGER’S GUIDE 9 (2006) (discussing governance issues, including appointment of the CGO, as impetus to “push[] ahead of the competition”); Loomis, *Companies are Hiring*, *supra* note 12 (identifying two approaches to corporate governance, with the latter attempting to “stay[] ahead of the curve”); Loomis, *Scandals Spur*, *supra* note 12 (same).

84. *See supra* notes 77-78 and accompanying text.

85. Corporate governance and strategy are often intertwined. *See, e.g.*, NYMEX Holdings, Inc., Annual Report (Form 10-K), at 97 (Mar. 5, 2007) (identifying a “Senior Vice President – Corporate Governance and Strategic Initiatives”); 4C Controls, <http://www.4ccontrols.com/management.html> (last visited Nov. 10, 2009) (listing among management a “Vice President, Corporate Governance and Strategy”). Also, the National Urban League appointed a chief governance officer as recently as 2005. *See* NAT’L URBAN LEAGUE, ANNUAL REPORT 18 (2005), *available at* <http://www.nul.org/sites/default/files/2005AnnualRpt.pdf>. Currently, the organization’s chief officer of innovation oversees governance issues. *See* National Urban League, <http://www.nul.org/who-we-are/executive-leadership/executive-staff> (last visited Oct. 6, 2009) (identifying Patrick Gusman as both the senior vice-president of strategy and innovation, and chief officer of innovation).

86. In the context of health organizations, this has been recommended by pro-CGO commentators. *See* Dube & Slatterly, *supra* note 20.

87. *See* Taylor, *supra* note 26, at 18 (indicating that “a company with a very low corporate governance score . . . [is] more likely to be more resistant” to CGO appointments (quoting Laurie Smilan, co-chair of the securities litigation and enforcement department at Latham & Watkins LLP, Renton, Va.)). *But see, e.g.*, EFFROSS, *supra* note 19, § 10.02, at 498 & nn.13-18 (citing failures both “qualitatively and empirically [to prove] whether corporate governance ratings have been and are accurate predictors of corporate performance”) (citations omitted); Cheffins, *supra* note 2, at 33 & nn.153-54 (suggesting that the unreliability of governance rating indices for gauging corporate profits may stem from the unique circumstances of each company’s corporate governance).

88. *See, e.g.*, Howard Sherman, *Corporate Governance Ratings, IR – and the IRO*, INVESTOR RELATIONS UPDATE (GovernanceMetrics Int’l, New York, N.Y.) Oct. 2008, at 22,

owe fiduciary duties under state corporation law and are obligated to exercise oversight under Sarbanes-Oxley, and assigning governance duties to company employees does not relieve directors of these obligations.⁸⁹ An independent CGO, however, can facilitate informed decision-making by the board of directors.⁹⁰ Many boards already look to attorneys and outside consultants for guidance.⁹¹ Given the complexity of issues facing modern boards, competent CGOs provide not only words of advice, but also an additional set of eyes and ears—or even a nose—that directors can rely on.⁹²

The CGO also offers an additional tool to balance compliance with public relations, which requires politicking inside and outside the company.⁹³ The importance of corporate public relations was brought to the

available at http://www.gmiratings.com/news/IR_Update_Oct2008.pdf (explaining that corporate governance has become an issue of “investment discipline” and encouraging CFOs and investor relations officers communicate with CGOs).

89. See, e.g., *Grimes v. Donald*, No. CIV. A. 13358, 1995 WL 54441, at *8-9 & n. 6 (Del. Ch. Jan. 11, 1995) (noting that Del. Code Ann. tit. 8 § 141(a) “expressly permits a board of directors to delegate managerial duties to officers of the corporation,” but that “while a board may delegate powers subject to possible review, it may not abdicate them” under Delaware law), *aff’d* 673 A.2d 1207 (Del. 1996); Dube & Slattery, *supra* note 20 (noting that although the CGO can implement governance protocols, “no board can abdicate its oversight responsibility to any individual” under Sarbanes-Oxley); Bates, *supra* note 25, at 169 (asserting that “delegation does not absolve the board or its committees from their oversight roles” under Sarbanes-Oxley).

90. See MARK WATSON & KEN BERTSCH, MOODY’S INVESTORS SERV., DO BOARDS OF DIRECTORS NEED MORE DIRECT STAFF SUPPORT? 3 (2006) (explaining that either a board secretary or CGO are valuable resources for the board of directors), *available at* <http://www.moody.com/moodys/cust/research/MDCdocs/01/2006100000426429.pdf>.

Although the particular deficiencies in staffing for boards may be fulfilled by a board secretary, a CGO “may be useful . . . if it enhances the independent resource available to the board.” *Id.*

91. See, e.g., Tom Perkins, Op. Ed., *The ‘Compliance’ Board*, WALL. ST. J., Mar. 2, 2007, at A11 (observing that compliance board directors “listen[] to consultants and attorneys before deciding matters”).

92. See Bates, *supra* note 25, at 168 (“A governance officer can assist with some of the mounting responsibilities of the board and audit committee.”); *cf.* Perkins, *supra* note 91 (noting that Mr. Perkins once uncovered inappropriate auditing services based upon what he described as an instinctive “smell-factor”). Mr. Perkins feared transformation of corporate boards from “guidance” boards to “compliance” boards: compliance boards preoccupy themselves with Sarbanes-Oxley compliance, but remain oblivious to the operational understanding necessary within the corporation to root out dysfunction and corruption. Perkins, *supra* note 91; see also EFFROSS, *supra* note 19, §1.09 at 25-26 (citations omitted); Robert Charles Clark, *Corporate Governance Changes in the Wake of the Sarbanes-Oxley Act: A Morality Tale for Policymakers Too*, 22 GA. ST. U. L. REV. 251, 271 (2005) (arguing for a “mixed board” chaired by an independent director and comprised of “a substantial minority of insiders who really know the company’s business is invaluable”).

93. See Dube & Slattery, *supra* note 20 (describing the CGO’s internal duties as “politically sensitive” and noting that the CGO requires “the political savvy to facilitate resolution of issues and governance improvements with stakeholders and executives senior to the CGO in the organization”); Ulrich Steger & Gertrud Erismann-Peyer, *Oiling Board*

fore after the economy tumbled into a recession by 2008 and the U.S. government took legislative action.⁹⁴ In some instances, expenditures linked to government funds were highly controversial due to perceived personal excesses.⁹⁵ Corporate America felt the scolding hand of the rest of America.⁹⁶

The mere presence of a CGO does not guarantee that a company will avoid a public relations disaster. The CGO may even contribute to a business's loss of face. While no individual has yet earned the title of America's first rogue CGO, the closest contender would be the former CGO of Krispy Kreme Doughnut Corp., who also served as the company's chief financial officer (CFO).⁹⁷ In March 2009, the SEC filed a complaint against three Krispy Kreme executives, including the company's CFO/CGO, for

Processes: The Dynamic Evolution from "Company Secretary" to "Corporate Governance Officer", PERSP. FOR MANAGERS (IMD Int'l, Lausanne, Switz.), Jan. 2009, at 4, available at http://www.imd.ch/research/publications/upload/PFM169-LR_Steger-Erismann.pdf (recommending CGOs remain cognizant of the law and politics).

94. See, e.g., American Recovery and Reinvestment Act (ARRA) of 2009, Pub. L. No. 111-5, 123 Stat. 115; Emergency Economic Stabilization Act (EESA) of 2008, Pub. L. No. 110-343, 122 Stat. 3765.

95. Although not prohibited by the EESA, Pub. L. No. 110-343, 122 Stat. 3765, there was a great deal of controversy surrounding the bonuses issued to executives at American International Group, Inc. (AIG). See, e.g., Dana Milbank, *Scolding the Bonus Babies*, WASH. POST, Mar. 17, 2009, at A3, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/16/AR2009031602593.html>. Likewise, a number of banks receiving funds from the Troubled Asset Relief Program (TARP) funds cut private jets from their fleets after outrage over corporate officers' use of this mode of transportation. See Laura Strickler, *TARP Banks: Downsizing Their Jets*, CBS NEWS, Mar. 25, 2009, http://www.cbsnews.com/stories/2009/03/25/cbsnews_investigates/main4893176.shtml. In response, one attorney's op-ed recently appeared with a subtitle exhorting Wall Street firms: "Just wait until bureaucrats get their hands on your expense accounts." See Victoria Toensing, Op. Ed., *Welcome, Businessmen, to Government Oversight*, WALL ST. J., Mar. 30, 2009, at A23, available at <http://online.wsj.com/article/SB123837566881968123.html> (elaborating on concerns facing recipients of TARP funds).

96. See, e.g., Naftali Bendavid, *Rage at Government for Doing Too Much and Not Enough*, WALL ST. J., Oct. 13, 2009, at A5.

97. See Amended Complaint at 5, 11-12 & illus., *Smith v. Krispy Kreme Doughnut Corp.*, No. 1:05CV00187 (M.D.N.C. July 1, 2005) (naming Randy J. Casstevens as a defendant and alleging that the company "not only mastered the art of cooking doughnuts – it also cooked the books") (citation omitted), available at http://www.erisafraud.com/Portals/7/documents/KKD_AmdComplaint070305.pdf; *Krispy Kreme Governance Exec Resigns; CFO Named*, COMPLIANCE WK., Jan. 6, 2004, <http://www.complianceweek.com/article/71> (last visited Mar. 4, 2010) [hereinafter *Krispy Kreme*]. The company settled the claims for \$4.75 million in early 2007. See *Smith v. Krispy Kreme Doughnut Corp.*, No. 1:05CV00187, slip op. at 7 (M.D.N.C. Jan. 10, 2007) (granting final judgment and order of class action settlement), available at <http://www.kellersettlements.com/documents/KKDFinalOrder.pdf>.

violations of federal securities laws.⁹⁸ Although the CFO/CGO quickly settled with the SEC without admitting or denying any wrongdoing, he picked up a tab of approximately \$94,000.⁹⁹ This serves as a prime example why the function of CGO and CFO should not be intertwined.¹⁰⁰

However, there are other examples of questionable conduct in corporate America where the CGO was not accused of misconduct. American International Group, Inc. (AIG) had a CGO,¹⁰¹ but suffered both from its overleveraged investments and the public relations fiasco that followed disclosure of executive spending habits.¹⁰² Countrywide had one too.¹⁰³ Adelphia Communications Corp. appointed a former Assistant U.S. Attorney as its CGO following scandals that rocked the company, but still dissolved.¹⁰⁴

98. See Complaint for Injunctive and Other Relief, SEC v. Livengood, No. 1:09CV00159 (M.D. Fla. Mar. 4, 2009) (alleging violations by Randy S. Casstevens), available at <http://www.sec.gov/litigation/complaints/2009/comp20923.pdf>.

99. *In re* Randy S. Casstevens (CPA), Exchange Act Release No. 59,803, at 2 (Apr. 21, 2009), available at <http://www.sec.gov/litigation/admin/2009/34-59803.pdf>.

100. See also S. RAO VALLABHANENI, CORPORATE MANAGEMENT, GOVERNANCE, AND ETHICS BEST PRACTICES 25 (2008) (recommending against placing the CGO under the supervision of a CFO).

101. At the time AIG appointed a CGO, the insurer's

image ha[d] been tarnished by the biggest civil settlement ever made to regulators by a U.S. financial-services company. That . . . \$1.64 billion agreement resolved allegations that it used deceptive accounting practices to mislead investors and regulatory agencies. Five years of financial results [were] restated.

The firm . . . eliminated its so-called contingent commissions, which were payments made by insurers to have business steered their way. Meanwhile, a corporate governance officer and independent financial practices consultant [were] hired and a \$1.1 billion after-tax charge taken to boost reserves.

Andrew Leckey, *AIG Still Aches from Hits to Its Reputation*, CHI. TRIB., Mar. 26, 2006, at C9.

102. See, e.g., David Lazarus, *Facing up to the Downturn*, L.A. TIMES, Oct. 8, 2008, available at <http://articles.latimes.com/2008/oct/08/business/fi-lazarus8>; Jeanine Poggi, *AIG Deconstructed: Philamlife*, THESTREET.COM, June 15, 2009, <http://www.thestreet.com/story/10512831/1/aig-deconstructed-philamlife.html> (last visited Sept. 28, 2009).

103. See, e.g., Countrywide Financial Corp., Current Report (Form 8-K) Ex. 10.12, at 3 (June 20, 2006) (signature of the company's CGO), available at <http://www.sec.gov/Archives/edgar/data/25191/000095014806000063/v21535exv10w12.htm>. See generally, e.g., Cheffins, *supra* note 2, at 29 & n.143 (citing the SEC's civil suit against the company's former CEO) (citations omitted).

104. See, e.g., Adelphia Commc'ns Corp., Annual Report (Form 10-K), at 5 (Mar. 29, 2006) (describing the role of the CGO). See generally, e.g., *In re* Adelphia Commc'ns Corp., 327 B.R. 143, 150-51 (Bankr. S.D.N.Y. 2005), *aff'd sub nom.* Ad Hoc Adelphia Trade Claims Comm. v. Adelphia Commc'ns Corp., 337 B.R. 475 (S.D.N.Y. 2006); Barry Meier, *Corporate Conduct: The Overview; 2 Guilty in Fraud at a Cable Giant*, N.Y. TIMES, July 9, 2004, at A1.

Although their CGOs could not likely have prevented follies at the companies, these examples remind us that every CGO must remain watchful of internal corporate conduct and its effect on external perceptions of the company, particularly given the increased scrutiny on internal operations and a regulatory environment that demands corporate accountability.¹⁰⁵ Rebuke by the public of bonuses paid to AIG executives shows the great care companies must undertake to avoid the ire of critics.¹⁰⁶ In such a climate, an ideal executive to review and announce findings of compensation payouts would be the CGO.¹⁰⁷

B. Requisite Qualifications for the CGO Candidate

The relevant qualifications of a CGO depend on the individual needs of the company.¹⁰⁸ No formula will work for *every* company.¹⁰⁹ But some models will prevail over others. For example, some authorities suggest a financial and accounting background.¹¹⁰ Other authorities recommend a legal background.¹¹¹ This latter group expands the pool of candidates beyond attorneys to their unlicensed subordinates and other compliance professionals.¹¹²

105. See generally, e.g., Katz & McIntosh, *supra* note 7, at 5.

106. See, e.g., Bendavid, *supra* note 96 (“Public frustration over Wall Street failures that led to the financial crisis was typified by the uproar over bonus payments to American International Group Inc. executives.”).

107. The CGO, for example, would be in a position to mitigate harm to a firm’s reputation where executives were unjustly enriched by their misconduct. See *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 351 F. Supp. 2d 334, 377 n.30 (D. Md. 2004) (noting that a Dutch company’s CGO labeled bonuses paid to executives following overinflated earning statements as “unjustly received”).

108. See *Impact of Rating Systems on Corporate Governance*, *supra* note 19. For a further discussion of the duties, roles, and responsibilities of the CGO, see *infra* Part III.

109. See, e.g., Lamm, *supra* note 11, at 88 (noting that “one size does not fit all”).

110. See Rodos, *supra* note 19, at 19 (recommending, at very least, an “understanding” of corporate accountancy).

111. WILLIAM E. KNEPPER & DAN A. BAILEY, LIABILITY OF CORPORATE OFFICERS AND DIRECTORS § 1.04[5] (7th ed. 2002 vol. 1 & 12th release 2006); Robert Eli Rosen, *Resistances to Reforming Corporate Governance: The Diffusion of QLCCs*, 74 FORDHAM L. REV. 1251, 1307 (2005) (“A chief governance officer is ‘often a legally trained executive who oversees a company’s corporate governance issues and acts as a liaison with the board and with investors.’” (quoting Loomis, *Companies are Hiring*, *supra* note 12)).

112. For example, Disney promoted a former paralegal who had served as vice-president of the company to the position in 2007. See Loomis, *Companies are Hiring*, *supra* note 12; Loomis, *Scandals Spur*, *supra* note 12. But see, e.g., *infra* note 124 and accompanying text (elaborating on one company’s requirement that the CGO hold a license to practice law). In the event a paralegal is considered for a position in California, see CAL. BUS. & PROF. CODE §§ 6450-56.

I. Advantages of Legal Education and Training

A candidate with legal education and training offers practical benefits to the company.¹¹³ An SEC rule, promulgated pursuant to section 307 of Sarbanes-Oxley,¹¹⁴ mandates that counsel report “up the ladder.”¹¹⁵ Professional responsibility rules also obligate a CGO serving in a legal capacity to make such a report.¹¹⁶ Under the SEC rule, an attorney must first report violations to the chief legal officer or chief executive officer (CEO), and thereafter to the board of directors where the officer’s response was not reasonable or timely.¹¹⁷ These rules incentivize full disclosure to the board of directors.¹¹⁸ The attorney-CGO’s ability to invoke protective privileges may also provide limited benefit.¹¹⁹ Nevertheless, such matters should be brought to the attention of the senior legal counsel.¹²⁰ Moreover,

113. See, e.g., Dube & Slattery, *supra* note 20 (listing among CGO qualifications “legal training in corporate formalities, including board meeting process and corporate recordkeeping, conflict-of-interest practices and policies, and . . . [implementing] governance improvements”); see also *infra* Part IV.C.

114. Pub. L. 107-204, § 307, 116 Stat. 745, 784 (2002) (codified at 15 U.S.C. § 7245 (2006)).

115. See 17 C.F.R. § 205.3(b)(4) (2008).

116. Section 1.13(b) of the American Bar Association Model Rules of Professional Conduct would require the attorney-CGO to comply with “legal ethics (and not just § 307 of Sarbanes-Oxley in the case of securities attorneys) requir[ing] the lawyer to go up the corporate ladder and report misconduct by the corporation’s agents to the board.” See John C. Coffee Jr., *Can Lawyers Wear Blinders? Gatekeepers and Third-Party Opinions*, 84 TEX. L. REV. 59, 71 & n.39 (2005).

117. See 17 C.F.R. § 205.3(b)(3)-(4); see also SEC v. Spiegel, Inc., No. Civ. A. 03 C 1685, 2003 WL 22176223, at *44 (N.D. Ill. Sept. 15, 2003) (discussing “up-the-ladder” reporting of section 307 of Sarbanes-Oxley).

118. *But see Report of the New York City Bar Association Task Force on the Lawyer’s Role in Corporate Governance—November 2006 [Excerpted for Publication in The Business Lawyer]*, 62 BUS. LAW. 427, 463-64 (2007) (stating ambiguities in the SEC’s rule promulgated pursuant to section 307 of Sarbanes-Oxley “may not be sufficiently clear to encourage reporting up when it is appropriate” (construing 17 C.F.R. § 205.2(e))).

119. Although jurisdictions permit attorney-client privilege where a defendant sought or planned to seek legal advice, the party attempting to exercise the privilege bears the burden of persuasion. See *Va. Elec. & Power Co. v. Westmoreland-LG & E Partners*, 526 S.E.2d 750, 755 (Va. 2000) (citing *Commonwealth v. Edwards*, 370 S.E.2d 296, 301 (Va. 1988)). But without a joint-defense agreement, application of attorney-client privilege should be viewed as the rare exception rather than a rule. *Cf. United States v. Weissman*, 195 F.3d 96, 98-100 (2d Cir. 1999) (holding that statements by a CFO to general counsel not made under a joint defense agreement were properly admitted). The *Weissman* case arose from a dispute over whether a joint defense agreement had been entered into, and subsequent accusations by the government that the defendant had committed perjury by raising the claim. See generally *United States v. Weissman*, 22 F. Supp. 2d 187, 190 & n.2 (S.D.N.Y. 1998), *aff’d* 195 F.3d 96 (2d Cir. 1999).

120. Such an arrangement may also preserve confidentiality of any materials prepared thereafter pursuant to the work product privilege. See *Edwards v. Whitaker*, 868 F. Supp. 226, 228-30 (M.D. Tenn. 1994). See generally FED. R. CIV. P. 26(b)(3). *Edwards* involved

the CGO can work to ensure “effective policies [are] in place to prevent and detect fraud” and mitigate criminal sanctions under some state and federal laws.¹²¹

Some corporations already embrace this approach by placing the CGO’s responsibilities at the intersection of compliance and legal counseling.¹²² The CGO of Sunoco, Inc. (Sunoco), a Fortune 100 corporation, wields both legal and governance roles.¹²³ Longstanding S&P 500 firm Pitney Bowes requires that its CGO hold “a law degree and demonstrated expertise in statutory and regulatory requirements relating to matters of corporate governance, New York Stock Exchange listing standards, the Sarbanes-Oxley Act of 2002, Delaware corporation law, and securities law compliance.”¹²⁴ Also, when Krispy Kreme Doughnut Corp.’s controversial CGO abruptly left the company in January 2004, the company quickly transferred governance duties to the company’s general counsel to compensate for the staffing transition.¹²⁵

2. *Integration of Law, Technology, and Intercompany Communications*

In addition to a license to practice law, other professional skills should be considered including information technology (IT) knowledge and public

documents drafted by a chief compliance officer working under the supervision of general counsel. 868 F. Supp. at 228-30. Although the district court found that subsequent disclosure of those documents to outside parties waived attorney-client privilege, it held that some of the documents were protected under the work product privilege. *See id.*

121. Rodos, *supra* note 19, at 20. This comes as little surprise considering the susceptibility of even independent directors, *see* Eric Dash, *Study Finds Outside Directors Also Got Backdated Options*, N.Y. TIMES, Dec. 18, 2006, at C2, or those who many hope answer to a higher power, *see* Tim Padgett, *Pilfering Priests*, TIME, Feb. 26, 2007, at 46; Alan Gomez, *Bishops Look at Fleecings of Flocks*, USA TODAY, Feb. 19, 2007, at 3A (noting the dilemma faced by religious institutions weighing corporate-style reforms).

122. *See, e.g., supra* note 111 and accompanying text; *infra* notes 123-25 and accompanying text.

123. *See* Matt Kelly, *Q&A with Sunoco’s Chief Governance Officer*, COMPLIANCE WK., Sept. 21, 2004, <http://www.complianceweek.com/article/1148> (last visited Mar. 4, 2010).

124. Amy C. Corn, *Chief Corporate Governance Officer Position Description*, in SECOND ANNUAL DIRECTORS’ INSTITUTE ON CORPORATE GOVERNANCE: WHAT BOARD MEMBERS NEED TO KNOW TO BE EFFECTIVE TODAY & TOMORROW 727, 730 (Ira M. Millstein & Ralph C. Ferrara eds., 2004). *See generally, e.g., S&P Picks and Pans: Toyota, Bank of America, Verizon, Pitney Bowes, Fred’s*, BUS. WK., Feb. 6, 2009, http://www.businessweek.com/investor/content/feb2009/pi2009026_997773.htm (last visited Sept. 24, 2009) (indicating Pitney Bowes, Inc. is a member of the S&P 500).

125. *Krispy Kreme, supra* note 97. *See generally supra* notes 96-98 and accompanying text.

relations skills. A tech-savvy CGO offers advantages to a company,¹²⁶ particularly with regard to monitoring internal controls and maintaining information security.¹²⁷ At least one analyst has recommended a company's chief information officer (CIO) for the CGO post.¹²⁸ But IT hurdles are merely one obstacle the CGO must overcome. Although large companies, or those requiring high levels of information security, may find that appointing subordinate IT governance officers will assist the CGO with technological objectives,¹²⁹ appointing a CIO may lack the practical advantages of an attorney, compliance specialist, or experienced corporate secretary.¹³⁰

Other management positions can better prepare individuals for the CGO role. For example, the senior CGO of Florida's State Board of Administration transitioned from the pension fund's director of investment services and communications.¹³¹ Given the benefits of a CGO knowledgeable in public relations and communications, a chief communications officer or investor relations officer could be a viable candidate.¹³² In any event, successful implementation of internal control

126. See HAYLOR, *supra* note 83, at 9 (noting CGOs role in working with "corporate information and technology executives in order to meet new legislative requirements"); FREDERICK D. LIPMAN & L. KEITH LIPMAN, CORPORATE GOVERNANCE BEST PRACTICES: STRATEGIES FOR PUBLIC, PRIVATE, AND NOT-FOR-PROFIT ORGANIZATIONS 131 (2006) (recommending creation of an additional IT corporate governance committee that includes technology experts and the CGO); CHARLES CRESSON WOOD, INFORMATION SECURITY ROLES & RESPONSIBILITIES MADE EASY 116-17 (2d ed. 2005) (discussing role of CGO in terms of maintaining information security).

127. See WOOD, *supra* note 126, at 116.

128. See Peter Abrahams, *CIO as Chief Governance Officer*, BLOOR RESEARCH, June 16, 2005, available at <http://www.it-analysis.com/business/compliance/content.php?cid=7940> (arguing that "[g]overnance and compliance are just two sides of the same coin").

129. See VALLABHANENI, *supra* note 100, at 304 (listing among best practices the appointment of an IT security governance officer, who reports to the IT corporate governance officer, who thereupon should report to the CGO).

130. See WOOD, *supra* note 126, at 116 (distinguishing between roles of the CGO and technology officers); cf. Press Release, Int'l Ass'n of Privacy Prof'ls, Sun Microsystems' Chief Governance Officer Michelle Denny Wins 2009 Goodwin Procter-IAPP Privacy Vanguard Award (Sept. 17, 2009) (on file with author), available at <http://www.reuters.com/article/pressRelease/idUS201081+17-Sep-2009+BW20090917> (indicating the CGO of Sun Microsystems, Inc. formerly served as chief data strategy and privacy officer, and senior legal counsel for privacy before that).

131. See *At Deadline: 10 Firms up for Florida Pools*, PENSIONS & INVESTMENTS, Jan. 21, 2008, <http://www.pionline.com/apps/pbcs.dll/article?AID=/20080121/PRINTSUB/291882976> (last visited Sept. 28, 2009) (identifying Michael P. McCauley as the FSBA's director of investment services and communications); *infra* note 144.

132. See generally *infra* Part III.D. The American Society of Radiologic Technologists currently employs a "chief communications and governance officer" and Comcast Corporation previously combined these roles in at least one vice president position. See Press Release, Am. Soc'y of Radiologic Technologists, ASRT Announces Title Changes and Promotions (Feb. 27, 2009) (on file with author), available at

functions will often depend on the expertise of general counsel, technology officers, public relations teams, and outside consultants.¹³³

C. Benchmarks for Performance

Appointing a CGO has been labeled a best practice.¹³⁴ Nevertheless, substantive valuation of the position and its influence on general corporate governance practices are important to consider.¹³⁵ Certain criteria allow the board of directors to assess potential holes in governance oversight by evaluating a CGO's performance. Gauging CGO performance may seem difficult to conceptualize, but it is possible.¹³⁶ Current markers used to measure the success of independent oversight committees of the board of directors offer guidance.¹³⁷ This requires weighing whether operations yielded maximum profits against whether risks were minimized when compared to industry competitors.¹³⁸ Cost savings to the company become more apparent when viewing the CGO as a way to mitigate harm, similar to

<https://www.asrt.org/Content/News/PressRoom/PR2009/asrtannoun090227.aspx>; Women in Cable Telecommunications—Philadelphia: About the 2008 Liberty Award Recipients, <http://www.wictphiladelphia.org/Aboutthe2008LibertyAwardRecipients.htm> (last visited Oct. 10, 2009) (stating Rebecca Scilingo had served as the Comcast's vice president of governance, communications and program management office).

133. See Matt Kelly, *Q&A with VP Governance, Internal Audit at Polycom*, COMPLIANCE WK., June 21, 2005, <http://www.complianceweek.com/article/1837> (last visited Mar. 4, 2010). Donald Floyd, the CGO at Polycom, Inc., noted in 2005 about the perceived limitation of computer tools available to assist with infrastructure management. *Id.* Polycom, Inc. adopted a Web-based compliance training program from an outside vendor to remedy that tech deficiency. *Id.*

134. See, e.g., Dube & Slattery, *supra* note 20 (referring to the CGO position as a “best practice” solution[]); Ryan A. Murr, *How to Avoid Corporate Governance Issues by Establishing an Effective Compliance Program*, in BEST PRACTICES FOR CORPORATE GOVERNANCE AND COMPLIANCE: LEADING LAWYERS ON IMPLEMENTING COMPLIANCE PROGRAMS, WORKING WITH IN-HOUSE COUNSEL, AND RESPONDING TO ONGOING CONCERNS (INSIDE THE MINDS) 115-36 (2008) (“The governance committee will, in most cases, want to appoint a corporate governance officer or compliance committee and develop a method for internal reporting of violations and concerns, including reporting on an anonymous basis . . .”).

135. See generally JACKSON & NELSON, *supra* note 19, at 268 (listing role of CGO among “Characteristics of High-Performance Boards” and describing CGOs as “internal advocates and champions for good governance practices”).

136. See Grant Adamson, *A Staff of One: A CGO's Challenges Revealed*, COMPLIANCE WK., Nov. 14, 2006, <http://www.complianceweek.com/article/2857> (last visited Mar. 4, 2010).

137. See *id.*

138. One CGO has recommended evaluations by the board of directors based in “metrics [that] strive to answer the key questions that the audit committee needs answered; namely, ‘Have we [the company] appropriately minimized our risks and maximized opportunities?’ or ‘How does our risk profile compare to our peers?’” *Id.*

an insurance policy.¹³⁹ The CGO shields the corporation from insider misconduct that would lead to a restatement of earnings.¹⁴⁰ The company then avoids market losses triggered by media, analyst, and investor critiques of the company's governance strategies.¹⁴¹ These factors show the potential benefits to a company's profits and shareholder dividends.¹⁴²

The telltale sign of a currently-successful CGO will be that individual's grooming for service as a future board member or CEO.¹⁴³ Conversely, a CGO may become a governance guru sought by institutional investors and other companies utilizing governance ratings.¹⁴⁴ With the potential for industry competition, a company should be mindful when weighing compensation packages and appropriate equity incentives.¹⁴⁵ In

139. See Rodos, *supra* note 19, at 20 (describing the CGO as a form of "insurance" that pays for itself by avoiding misconduct by insiders that would require a restatement of earnings).

140. *Id.*

141. *Id.*

142. See MATTEO TONELLO, THE CONFERENCE BOARD, REPUTATION RISK: A CORPORATE GOVERNANCE PERSPECTIVE 6 & nn.5-6 (2007) (identifying links between corporate reputation, stock price, and investment decisions) (citing Roger C. Vergin & M. W. Qoronfleh, *Corporate reputation and the stock market*, BUS. HORIZONS, Jan.-Feb. 1998, at 19, and MEASURES THAT MATTER, CTR. FOR BUS. INNOVATION, ERNST & YOUNG 8 (1997)) (pin cites omitted in original). See also, *id.* at 6 (noting that "[c]orporations ranked high in reputation benefit[ed] from an average annual stock price increase of 20.1 percent, whereas the shares of the 10 companies ranked lowest in reputation suffered an average annual decline of 1.9 percent").

143. See, e.g., Medivation, Inc., Proxy Statement (Schedule 14A), at 5 (May 1, 2006) (listing experience in governance with public companies as one of four qualifications to be considered for nominees to the board of directors); Tessera Techs., Inc., Proxy Statement (Schedule 14A), at 8 (Apr. 7, 2006) (same); *Who's Coming and Going in Governance?*, COMPLIANCE WK., Jan. 23, 2007, <http://www.complianceweek.com/article/3041> (last visited Mar. 4, 2010) (noting the appointment of Michael Adams, former CGO and Secretary, as a director at LaPolla Industries); Matt Kelly, *Schering-Plough's Corporate Secretary Talks Governance*, COMPLIANCE WK., Aug. 23, 2005, <http://www.complianceweek.com/article/1913> (last visited Mar. 4, 2010) (discussing appointment of Pfizer CGO Peggy Foran to board of MONY Group Inc., which was subsequently acquired by AXA Financial, Inc.).

144. See, e.g., *Who's Coming and Going in Governance?*, COMPLIANCE WK., Sept. 12, 2006, <http://www.complianceweek.com/article/2730> (last visited Mar. 4, 2010) (reporting that Cynthia Richardson, the former CGO of the Ohio Public Employees Retirement System, left "to take the helm" at the Investor Responsibility Research Center Institute). Another notable case of competition occurred between then-\$159 billion FSBA and then-\$164 billion CalSTRS in an effort to recruit Michael P. McCauley. See Mark Glover, *CalSTRS Names Corporate Governance Officer*, SACRAMENTO BEE, Apr. 24, 2008, at D3 (valuing CalSTRS pension fund); Barry B. Burr, *"Rising Stars" Recognized by Millstein Center*, PENSIONS & INVESTMENTS, June 23, 2008, at 26 (valuing FSBA pension fund). Mr. McCauley, however, remained at the FSBA. See Glover, *supra*, at D3 (anticipating Mr. McCauley's start date as June 1, 2008); *AgreeYa Selects Rajan as VP*, *supra* note 52, at B8 (identifying Anne Sheehan as CalSTRS's director of corporate governance to start work in October 2008).

145. See Lamm, *supra* note 11, at 87 (advocating normal executive compensation for CGOs).

the event a company does not foresee long-term retention of an individual in management, it should remain mindful of regulatory limitations for compensation, such as the \$120,000 per year cap on compensation set by NYSE and NASDAQ rules, for independent directors.¹⁴⁶ The board will need to balance the CGO's compensation, the CGO's ability to implement a cost-efficient reporting system which minimizes operational expenses, and the interest of shareholders who stand to benefit from the corporation's profitability.

The CGO will likely be charged with assisting the audit committee to facilitate internal controls.¹⁴⁷ While internal controls directly evaluate financials, the system's effectiveness indirectly monitors the reliability of the CGO and other executives. Internal controls are designed to ensure compliance and impute responsibility, if necessary.¹⁴⁸ Ironically, one casualty of such a system might be the CGO. If blame shifts to the CGO, problems can be addressed twofold. First, the board's decision to publicly admonish the CGO will deter reckless conduct by the individual.¹⁴⁹ Second,

146. See generally *supra* note 143 and accompanying text. Under independent director requirements for NASDAQ and NYSE listed companies, a CGO's earnings exceeding \$120,000 in a twelve-month period during the past three years disqualifies him or her from service as an independent director at the company. NASDAQ STOCK MARKET, INC., NASDAQ MANUAL Rule 5605(a)(2)(B) (2009) available at http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp_1_1_4_2&manual=%2Fnasdaq%2Fmain%2Fnasdaq-equityrules%2F; NYSE, INC., NEW YORK STOCK EXCHANGE LISTED COMPANY MANUAL § 303A.02(b)(ii) (2009) available at http://nysemanual.nyse.com/LCMTTools/PlatformViewer.asp?selectednode=chp_1_4_3&manual=%2Fflcm%2Fsections%2Fflcm-sections%2F. But see NYSE, INC., NEW YORK STOCK EXCHANGE LISTED COMPANY MANUAL § 303A.02 cmt (2009) (excluding any period where employee merely served as an "interim" executive officer). Therefore, the CGO and any immediate family member or housemate of the CGO must have been compensated less than this amount if the CGO is to remain at the company as an independent director. See NASDAQ STOCK MARKET, Inc., NASDAQ MANUAL Rule 5605(a)(2); NYSE, Inc., NEW YORK STOCK EXCHANGE LISTED COMPANY MANUAL § 303A.02(b) & cmt. But see, e.g., NASDAQ Stock Market, Inc. Staff Interpretative Letter 2008-22, available at <http://www.nasdaq.com/about/StaffInterpretativeLetters2008.pdf> (acquiescing to appointment of independent director whose father was former CEO on grounds that payment of non-discretionary retirement benefits to the director's father were exempt from Rule 5605(a)(2)(B)).

147. See *infra* Part III.C.

148. See generally Lawrence A. Cunningham, *The Appeal and Limits of Internal Controls to Fight Fraud, Terrorism, Other Ills*, 29 J. CORP. L. 267, 314-20 (2004) (identifying the "legal view of internal controls encourag[ing] their use as devices to assign blame and promote accountability" and evaluating its impact on corporate governance reforms).

149. For example, Sarbanes-Oxley expanded liability for breaches of fiduciary duties of care, loyalty and good faith to officers in order "[t]o deter management misconduct and to provide shareholders a remedy for skirting or stealing . . ." Peter Ferola, *The Role of the Audit Committees in the Wake of Corporate Federalism: Sarbanes-Oxley's Creep Into State Corporate Law*, 7 J. BUS. & SEC. L. 143, 155 (2007) (citation omitted). Also, "the board of directors in fact actively monitors and rewards or punishes management, an objective of the

if board action extends beyond mere censure, a new CGO can revive a governance-centered approach to internal practices and assist the board with its investigation of oversight flaws.¹⁵⁰ Unfortunately, even a previously-successful CGO may falter and thereafter deflect blame to subordinates or employees uninvolved in events triggering concern by the board of directors.¹⁵¹ Therefore, general counsel and board members tasked with reviewing a CGO's performance must remain wary of scapegoating the CGO while also carefully evaluating facts during an internal investigation.¹⁵²

III. BEYOND THE TITLE: DUTIES, ROLES, AND RESPONSIBILITIES

While the CGO moniker fits nicely within the “alphabet soup” of officer titles,¹⁵³ the position's function provides the greatest value to business organizations.¹⁵⁴ The possible duties of a CGO, although expansive, can be framed into core tenets, which include:

monitoring model of board function.” Dierdre A. Burgman & Paul N. Cox, *Corporate Directors, Corporate Realities and Deliberative Process: An Analysis of the Trans Union Case*, 11 J. CORP. L. 311, 357 (1986).

150. See generally Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107, 1125 & n.74 (2006) (acknowledging duty of corporate monitors, but criticizing the failure to blame the significant number of employees who “participated in, knew of, or willfully ignored the massive misconduct occurring within their companies”).

151. See Melvin A. Eisenberg, *The Board of Directors and Internal Control*, 19 CARDOZO L. REV. 237, 247 (1997) (“[I]t is often difficult to fix blame on an individual member of a [management] team. . . . [H]igher-ranking managers are . . . expert[s] at deflecting blame to lower-ranking managers. Managers also know that they often will . . . [leave] before a problem comes home to roost.”).

152. See generally Ann Foerschler, Comment, *Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct*, 78 CAL. L. REV. 1287, 1289 & n.8 (1990) (citing J. BRAITHWAITE, *CORPORATE CRIME IN THE PHARMACEUTICAL INDUSTRY* 308 (1984)); John L. Hill, Note, *Freedom, Determinism, and the Externalization of Responsibility in the Law: A Philosophical Analysis*, 76 GEO. L.J. 2045, 2067 (1988) (criticizing “fall guy” calamities resulting in the sacrifice of corporate management “even when their conduct and stewardship has been beyond reproach” simply because the corporation suffered “an economic slump, internal agitation, or a public relations debacle”).

153. See Brewer, *supra* note 6, at 7 (referring to the CGO as “[a] new set of initials [that] has joined the already murky waters of the corporate alphabet soup”).

154. CARVER & OLIVER, *supra* note 1, app. b, at 127-29 (emphasizing “title” as a tool for increasing good governance practices). Some companies may articulate corporate governance as “strategy management,” charging a chief strategy management officer “to communicate corporate strategies, reinforce strategy priorities among executives, serve as the ‘guardian of the [strategy] scorecard . . . [who] standardizes the terminology and measurement definitions across the organization . . . and ensure[] the . . . data.” Rosen, *supra* note 111, at 1307 (quoting Robert S. Kaplan & David P. Norton, integrity of the *The Office of Strategy Management*, HARV. BUS. REV., Oct. 2005, at 72, 76); see, e.g., National Urban League, <http://www.nul.org/who-we-are/executive-leadership/executive-staff> (last

- formulating protocols and instituting systems which improve governance standards;
- assessing, recording, and reporting compliance weaknesses and regulatory violations;
- acting as a liaison between the board of directors and management; and
- actively evaluating and improving good governance strategies and best practices.¹⁵⁵

Individual tasks undertaken by a CGO can vary from company to company. Public companies seeking to enhance their corporate governance rating may seek to proactively adapt practices for the transition from the Corporate Governance Quotient (CGQ) to the Governance Risk Indicators (GRId) rating system.¹⁵⁶ When these duties are balanced between independence and accountability, the CGO's role can be defined more succinctly through the company's bylaws, departmental policies, or employee contracts.¹⁵⁷ The section that follows discusses the interplay of the core role with day-to-day duties and responsibilities.

A. Independence to Ensure Good Governance Practices

Appointing a CGO can begin or revive strong governance practices for public, private, and non-profit corporations.¹⁵⁸ To sustain those practices, a

visited Oct. 6, 2009) (identifying the individual assigned as senior vice-president of strategy and innovation, and chief officer of innovation, as responsible for the Governance Team).

155. See, e.g., BRANCATO & PLATH, *supra* note 75, at 29; Lamm, *supra* note 11, at 87 (recommending that a CGO's duties include "1) developing and assisting in the implementation of governance policies, systems, and practices; 2) engaging in internal and external communications regarding governance; and 3) implementing continuous improvement in governance"); Rodos, *supra* note 19, at 19 (identifying a variety of responsibilities that can be delegated to the CGO); Bates, *supra* note 25, at 168-69 (listing typical duties); see also Dube & Slattery, *supra* note 20 (identifying a series of employment tasks which the authors describe as "broad, diverse and politically sensitive").

156. See, e.g., "Governance Risk Indicators": *What RiskMetrics Group's New Governance Risk Assessment Tool Means to Public Companies*, WSGR ALERT (Wilson Sonsini Goodrich & Rosati, P.C., Palo Alto, Cal.), Feb. 2010, at 1, http://www.wsg.com/publications/pdfsearch/wsgalert_risk_assessment_tool.pdf (last visited Mar. 3, 2010).

157. See, e.g., HSBC Fin. Corp., Current Report (Form 8-K), at 5 (Dec. 28, 2006); O.I. CORP., CODE OF BUSINESS CONDUCT AND ETHICS 11 (2004), <http://www.oico.com/documentlibrary/2573corp.pdf> (last visited Nov. 15, 2009); *infra* notes 158, 160-61 and accompanying text. *But cf.* *Impact of Rating Systems on Corporate Governance*, *supra* note 19 (indicating CGO job descriptions are never alike (reiterating statements made by Robert B. Lamm)).

158. See Lamm, *supra* note 11, at 89 (proclaiming that appointing a CGO can "ensure that corporate governance has no finish line"). One commentator also explained that while some companies utilize a CGO as a conduit between the board and management, no matter

CGO must maintain the support of other officers and directors.¹⁵⁹ Credibility of the CGO with these two groups will often determine the CGO's success.¹⁶⁰ Thus, the CGO can build trust internally through candid communications with other officers and cooperative efforts to address governance or compliance issues.¹⁶¹ But the CGO's effectiveness also hinges upon maintaining independence.¹⁶² Fortunately, the CGO's task of developing trust and maintaining independence are not mutually exclusive.¹⁶³

Current practices of in-house counsel offer guidance on the degree of autonomy required to successfully serve as a governance officer.¹⁶⁴ In-house lawyers "must exercise professional judgment in the interests of the corporate client, independent of the personal interests of the corporation's officers and employees' or the lawyer's own personal interests."¹⁶⁵ Given the heightened pressure placed on governance officers by federal agencies, private litigants, and state regulators since Sarbanes-Oxley, the CGO's employment agreement should contain competitive compensation,¹⁶⁶

what the position's "role" or "parameters" may be, independence must remain as a priority to "afford the board 'competitive sources of information' to respond to the gaps in knowledge that may be presented to the board." Rosen, *supra* note 111, at 1307 (quoting Eisenberg, *supra* note 151, at 246).

159. See sources cited *supra* note 158.

160. BRANCATO & PLATH, *supra* note 75, at 29.

161. See *id.* ("The CGO needs to be able to work well with management and board members, foster a sense of trust among them, and be able to communicate effectively both internally and externally.").

162. Bates, *supra* note 25, at 169.

163. See Stephen Taub, *Charting the Rise of the Chief Governance Officer*, COMPLIANCE WK., Nov. 18, 2003, <http://www.complianceweek.com/article/620> (last visited Mar. 4, 2010) (reporting that the appointment of Boeing Co.'s CGO occurred based upon performance as president of the company's shared services group and trustworthiness in the eyes of the board, management and investors).

164. The author notes that in addition to professional responsibilities, the CGO and general counsel share a strong resemblance in terms of reporting structures. The general counsel's "dual reporting structure" to the CEO and board of directors, see E. Norman Veasey & Christine T. Di Guglielmo, *The Tensions, Stresses, and Professional Responsibilities of the Lawyer for the Corporation*, 62 BUS. LAW. 1, 10 (2006), resembles the structure suggested in this Article to report to the board of directors and general counsel, see *supra* Part II.C.1. See also *supra* Part II.B.1.

165. See Veasey & Di Guglielmo, *supra* note 164, at 9 & nn.19-20 (citing *Report of the American Bar Association Task Force on Corporate Responsibility*, 59 BUS. LAW. 145, 157 (2003)) (internal footnote omitted).

166. See, e.g., Joseph A. Guillory, Note, *The Audit Committee "Financial Expert" Requirement and the Internal Control Attestation: Effective Contributions to Corporate Governance?*, 94 KY. L.J. 585, 596 (2005) ("In order to attract qualified individuals who are willing to take on the increased scrutiny placed on corporate governance officers after Sarbanes-Oxley, director compensation has risen dramatically." (citing Larry Cata Backer, *Surveillance and Control: Privatizing and Nationalizing Corporate Monitoring After Sarbanes-Oxley*, 2004 MICH. ST. L. REV. 327, 339 (2004))).

standard indemnification,¹⁶⁷ and adequate directors and officers (D&O) liability insurance coverage.¹⁶⁸ The CGO should be focused on the task at hand and not be burdened with the cost of retaining competent counsel during the middle of an internal investigation. This will enable the CGO to more effectively act on behalf of the shareholders' best interests.¹⁶⁹

B. Service at the Pleasure of the Board and its Committees

Because governance issues and liability arising therefrom fall on the shoulders of the board of directors, a governance officer's role should be defined in a manner that separates governance functions from the domain of the CEO and other members of senior management.¹⁷⁰ This runs counter to

167. Statutes often limit the extent of indemnity coverage a corporation may extend. See, e.g., DEL. CODE ANN. tit. 8, § 145 (2008), amended by 77 Del. Laws ch. 14 § 3 (2009); MODEL BUS. CORP. ACT § 8.56 (2002); Dennis R. Honabach, *Smith v. Van Gorkom: Managerial Liability and Exculpatory Clauses—A Proposal to Fill the Gap of the Missing Officer Protection*, 45 WASHBURN L.J. 307, 324-26 (2006) (identifying seven states that authorized exculpatory provisions to permit corporations to protect officers from civil claims for breach of the duty of care, and noting that Delaware expanded the chancery court's jurisdiction to corporate officers in 2004).

168. See Sean J. Griffith, *Uncovering a Gatekeeper: Why the SEC Should Mandate Disclosure of Details Concerning Directors' and Officers' Liability Insurance Policies*, 154 U. PA. L. REV. 1147, 1171 & nn.78-79 (2006) ("Corporate managers insist on D&O insurance to protect their personal wealth from the risk of shareholder litigation, making such coverage necessary to attract qualified persons to board service and executive-level employment."). There should, of course, be some limit to the extent of coverage. See Lyman P.Q. Johnson, *Corporate Officers and the Business Judgment Rule*, 60 BUS. LAW. 439, 468 & n.227 (2005); see also Peter Margulies, *Legal Hazard: Corporate Crime, Advancement of Executives' Defense Costs, and the Federal Courts*, 7 U.C. DAVIS BUS. L.J. 2, ¶ 30 (2006) (explaining that liability insurers sometimes "limit the moral hazard problem by excluding coverage of intentional acts, including violent crime or fraud"). However, some commentators assert that Johnson, *supra*, erred by failing to consider the "insured v[er]sus insured" exclusion which limits coverage where the corporation pursues claims against an officer. See Lawrence A. Hamermesh & A. Gilchrist Sparks III, *Corporate Officers and the Business Judgment Rule: A Reply to Professor Johnson*, 60 BUS. LAW. 865, 871 & n.42; Honabach, *supra* note 167, at 329 n.143.

169. See Griffith, *supra* note 168, at 1171 & n.77 ("Because Side A [liability] coverage protects individuals, it can be justified on the basis of individual risk aversion."); Honabach, *supra* note 167, at 325 (advocating legislative amendments authorizing corporations to include indemnity exculpatory clauses because "corporate officers face a substantial risk of liability litigation" which creates a "specter likely [to] have undesirable consequences on officer behavior and, in turn, on corporate performance"); cf. Clifford G. Holderness, *Liability Insurers as Corporate Monitors*, 10 INT'L REV. L. & ECON. 115, 116 (1990) (advocating liability insurance for independent directors "whose relative independence of management is likely to make them more effective representatives of shareholders" on grounds that such a policy "promotes internal monitoring").

170. See CARVER & OLIVER, *supra* note 1, at 37 (recommending designation of governance duties to the CGO by separating shared functions of management and governance traditionally held by the CEO); cf., e.g., *Someone to Watch over Them*,

the model in many U.S. companies that the CGO report directly to the CEO.¹⁷¹ Instead, to avoid “turf battles” with other c-level officers, the CGO should serve under the direction and at the pleasure of the board.¹⁷² Insofar as section 307 of Sarbanes-Oxley creates an “up the ladder” reporting structure for securities compliance, the CGO should report primarily to the board of directors on governance issues.¹⁷³ For legal and administrative matters, however, the CGO should report first to the chief legal officer, and thereafter to the board of directors.¹⁷⁴

Dr. Carver’s Policy Governance model makes a noteworthy recommendation that the CGO replace the CEO’s traditional role chairing the board of directors.¹⁷⁵ This proposal differs from the management-side CGO position adopted by U.S. corporations in recent years.¹⁷⁶ While the

ECONOMIST, Oct. 17, 2009, at 78 (charting the separation of the CEO position from the chair of a corporation’s board of directors).

171. See Sax, *supra* note 22, at 17 (identifying in chart that 160 chief compliance officers and CGOs reported to the CEO out of 398 respondents (40%)). This number, however, may be misleading since only 16% of all respondents had a CGO, whereas 53% had a chief compliance officer. See *id.* at 12.

172. Mark R. Gilbert, James Lundy & Lane Leskela, *A Chief Governance Officer Could Give You an Advantage*, GARTNER RES. (Gartner, Inc. Stamford, Conn.), Aug. 5, 2003, at 2-3, available at <http://www.gartner.com/resources/116600/116667/116667.pdf> (recommending a CGO report to the board of directors “to avoid turf battles”); accord KNEPPER & BAILEY, *supra* note 111, § 1.04[5] (recommending CGO report to the board of directors); R. William Ide, *Post-Enron Corporate Governance Opportunities: Creating a Culture of Greater Board Collaboration and Oversight*, 54 MERCER L. REV. 829, 858 (2003) (advocating policy that a CGO meet “in executive session” with the company’s Governance Committee on a periodic basis); see also Bates, *supra* note 25, at 169 (explaining that “a direct reporting line to the board is worth considering”); cf. Rodos, *supra* note 19, at 19 (recommending reporting to both the board and senior management).

173. See, e.g., *infra* note 229 (identifying the reporting structure for the CGO of Sunoco, Inc., who reports to general counsel on legal issues and to the board of directors on all other issues). Compare KNEPPER & BAILEY, *supra* note 111, § 1.04[5] (stating the CGO should report directly to the board of directors), and Rodos, *supra* note 19, at 19 (recommending reporting to both the board and senior management), with VALLABHANENI, *supra* note 100, at 25 (suggesting the CGO report to either the designated chief legal officer, general counsel, or CEO, but not the CFO or chief audit executive), and Lamm, *supra* note 11, at 87 (explaining why the CGO should report directly to general counsel, who in turn reports to the CEO, in part because “ministerial issues” that arise for the CGO as an employee of the corporation do not warrant the full attention of the board or individual directors). *Contra* WOOD, *supra* note 126, at 116 (recommending the CGO report directly to the CEO); Steger & Bottger, *supra* note 10, at 258 (recommending the CGO report to the CEO or the non-executive chair).

174. See *supra* note 173.

175. CARVER & OLIVER, *supra* note 1, app. a, at 123-24 (recommending the CGO serve as chair of the board of directors “at the behest of the board”).

176. See Posting of John Carver to <http://forum2.carvergovernance.com/ubb/Forum2/HTML/000003.html> (Aug. 19, 2003, 11:32 EST) (“While the staff officer CGO could potentially serve a useful function, my fear is that it is be [sic] destined to be just

Policy Governance model has received praise from members of the financial and legal industries,¹⁷⁷ BP p.l.c. (one of the most notable companies to adopt the model) appointed a management-side vice president to serve as CGO.¹⁷⁸ Placing a chief governance officer as head of the board of directors risks weakening the CGO's independence and ultimate accountability to the board in a public company. Furthermore, it removes the opportunity for a check-and-balance system offered by "up the ladder" reporting from an attorney CGO for securities law issues under section 307 of Sarbanes-Oxley.¹⁷⁹ Given the lack of empirical data to support Dr. Carver's proposal,¹⁸⁰ I respectfully conclude that little reason exists to change from the status quo of placing the CGO among management.

Dr. Carver correctly notes that identifying a chair on the board of directors with a title that includes the word "governance" promotes governance ideals.¹⁸¹ But a better approach to achieve this goal would be to designate an independent director as the director of governance.¹⁸² This would permit the CGO to accomplish more objectives on behalf of the company.¹⁸³ Such a director could, for example, chair the governance committee and thereby oversee responsibilities for analyzing board

another part of the current flurry of tinkering with corporate governance rather than reforming it.").

177. See, e.g., *Back cover* to OLIVER, *supra* note 18 (quoting John Zinkin, CEO, Securities Industry Development Corp.) (quotation omitted); *Back cover* to JOHN CARVER, *BOARDS THAT MAKE A DIFFERENCE* (3d ed. 2006) (quoting Andrew J. Guilford, former president of the State Bar of California) (quotation omitted).

178. See generally Jeremy Booker, Vice President Corporate Governance, BP p.l.c., Speech at the International Policy Governance Association (IPGA) Conference (June 12, 2004), available at <http://www.policygovernanceassociation.org/downloads/Booker-Address.doc>. Most, if not all, of the for-profit entities which have adopted Dr. Carver's Policy Governance model are business cooperatives. See Charney Associates: Our Clients, <http://www.bcharney.com/clientlist.htm> (last visited Oct. 24, 2009).

179. See *supra* notes 114-17 and accompanying text.

180. OLIVER, *supra* note 18, at 28 (stating "no real research exists" to prove the efficacy of the Policy Governance model).

181. See generally CARVER & OLIVER, *supra* note 1, at 38 (arguing that the title of CGO should be reserved for the "chair" which "would have much more than a cosmetic effect and would powerfully reinforce a distinctive governance mentality"); *id.* at app. b, 127-29 (asserting the value of title).

182. For example, in the TXU Corp. settlement, a separate "director of corporate governance," was created in conjunction with the appointment of a CGO. See Taub, *TXU Agrees to Major Governance Changes*, *supra* note 79. Given the ineffectiveness of mere "title" approaches, the TXU Corp. settlement offers a less extreme means of enhancing governance practices while avoiding a mismatch of CGO-management and CEO-director roles.

183. See KNEPPER & BAILEY, *supra* note 111, § 1.04[5] ("The concept is that a governance committee will probably be comprised of independent directors and, certainly, chaired by one.").

committee assignments and considering appropriate director rotations.¹⁸⁴ The CGO could then advise the director of governance on questions of protocol.¹⁸⁵

The company's qualified legal compliance committee (the QLCC), if required, should certainly review CGO performance. Because most companies choose the audit committee to serve as the QLCC,¹⁸⁶ this relationship will be assumed for the discussion that follows. In addition, another committee composed of a majority of independent directors should carefully evaluate internal conflicts (upon consultation with legal counsel),¹⁸⁷ as well as overall performance.¹⁸⁸ The QLCC operates under the control of independent directors.¹⁸⁹ An additional independent committee

184. See KNEPPER & BAILEY, *supra* note 111, § 1.04[5] (recommending the governance committee first “survey and recommend a redesign of board committee assignments” upon creation); see also WOOD, *supra* note 126, at 116 (elaborating on importance of assuring no conflicts of interest exist within the management structure).

185. This arrangement conveniently coincides with the NYSE listing requirement for a nominating/governance committee to be comprised entirely of independent directors. See NYSE, INC. NEW YORK STOCK EXCHANGE LISTED COMPANY MANUAL § 303A.04(a) (2009), available at http://nysemanual.nyse.com/LCMTTools/PlatformViewer.asp?selectednode=chp_1_4_3&manual=%2Ffcm%2Fsections%2Ffcm-sections%2F; cf. NASDAQ STOCK MARKET, INC., NASDAQ MANUAL Rule 5605(e)(1)(B) (2009), available at http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp_1_1_4_2&manual=%2Fnasdaq%2Fmain%2Fnasdaq-equityrules%2F.

186. See Rosen, *supra* note 111, at 1259 & n.38.

187. In the face of conflicts of interest, the duty of loyalty might be breached, see Lyman P.Q. Johnson, *The Audit Committee's Ethical and Legal Responsibilities: The State Law Perspective*, 47 S. TEX. L. REV. 27, 34 (2005), regardless of whether the director was fulfilling board or committee duties, cf. *id.* at 39 (noting that directors' fiduciary duties apply to their audit committee service). As previously discussed, *supra* Part II.C, the CGO's expertise in governance matters will likely attract offers from competitors. See generally *supra* notes 134-39 and accompanying text. The CGO can also elicit offers for positions on the board of directors of other companies. See, e.g., Arbor Realty Trust, Inc., Proxy Statement (Schedule 14A), at 5 (Apr. 16, 2007) (indicating the CGO of KeySpan Corp. served as a member of the board of directors of Arbor Realty Trust, Inc. while fulfilling duties at KeySpan Corp.); Psychiatric Solutions, Inc., Proxy Statement (Schedule 14A), at 4 (May 4, 2004) (stating that the CGO of Lifepoint Hospitals, Inc. served as a director of Psychiatric Solutions, Inc.). In the event a CGO should undertake such a venture, the individual and corporation must first exercise a high level of scrutiny to screen for any conflicts of interest that may arise.

188. A company classified as an “issuer” by the SEC under 17 C.F.R. § 205.2(h) (2008) may appoint a committee to serve as its designated QLCC under 17 C.F.R. § 205.2(k) (2008). See generally Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 8185, Exchange Act Release No. 47,276, Investment Company Act Release No. 25,919, 68 Fed. Reg. 6296 (Feb. 6, 2003).

189. See NYSE, INC., NEW YORK STOCK EXCHANGE LISTED COMPANY MANUAL § 303A.07(b) (2009) (indicating the audit committee must comply with independence requirements set forth under section 303A.02 of the Listed Company Manual and Exchange Act Rule 10A-3(b)(1) (17 C.F.R. § 240.10A-3(b)(1))), available at http://nysemanual.nyse.com/LCMTTools/PlatformViewer.asp?selectednode=chp_1_4_3&manual=%2Ffcm%2F

relieves the QLCC of some oversight burden while providing a means to conduct the due diligence necessary to evaluate CGO performance.¹⁹⁰ Concurrently, the chief legal officer should monitor the CGO on a regular basis given its supervisory role in the reporting structure for legal compliance issues.¹⁹¹

ctions%2F1cm-sections%2F; see also NASDAQ STOCK MARKET, INC., NASDAQ MANUAL Rule 5605(c)(2)(B) (2009) (allowing exception for one non-independent director on audit committee in rare circumstances), available at http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp_1_1_4_2&manual=%2Fnasdaq%2Fmain%2Fnasdaq-equityrules%2F.

190. See *Ide*, *supra* note 172, at 858 (advocating policy that a CGO meet “in executive session” with the company’s Governance Committee on a periodic basis). A nominating/governance committee, comprised of independent directors as required under NYSE listing standards might be well suited for this task. If the QLCC is unavailable due to its designation as a QLCC, another committee (e.g., a non-QLCC audit committee) would be a fine alternative. See generally *supra* sources cited *supra* note 172. A survey by Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates indicated that approximately 10% of 165 identified issuers with a QLCC between 2003-04 fit into this category. See Rosen, *supra* note 111, at 1259 n.38 (stating ten percent of the survey’s respondents indicated that a nominating or governance committee was designated as a QLCC for purposes of 17 C.F.R. § 205.2(k)).

191. See AMYLIN PHARMS. INC., CORPORATE GOVERNANCE COMMITTEE CHARTER (2006), available at <http://www.amylin.com/investors/corporate-governance/corporate-governance-committee-charter.htm> (authorizing the corporate governance committee to meet with “any employees or consultants . . . including . . . the General Counsel”); JOHNSON CONTROLS, INC., CORPORATE GOVERNANCE COMMITTEE CHARTER (2006), available at http://www.johnsoncontrols.com/publish/us/en/about/governance/board_committee_charters/corporate_governance.html (requiring periodic updates to the committee from general counsel about implementation of the company’s ethics program); cf., e.g., CA, INC., CORPORATE GOVERNANCE COMMITTEE CHARTER (2008), available at <http://investor.ca.com/documentdisplay.cfm?DocumentID=4190> (funding and empowering the committee to enlist “independent legal counsel or other advisors to assist [with] carrying out its responsibilities”).

This would conveniently fit with previous recommendations that “the board of directors should establish a practice of regular, executive session meetings between the general counsel and a committee of independent directors.” *Report of the American Bar Association Task Force on Corporate Responsibility*, 59 BUS. LAW. 145, 163 (2003). Moreover, the arrangement would address the concern that

executive officers and other employees of public companies may succumb to the temptation of maximizing their own wealth or control at the expense of long-term corporate well-being.” [B]ecause of such temptation, our system of corporate governance “has relied upon the active oversight and advice of . . . outside directors, outside auditors and outside counsel.” In the view of the Task Force, however, “the exercise by such independent participants of active and informed stewardship of the best interests of the corporation has in too many instances fallen short.”

Lawrence A. Hamermesh, *Corporate Responsibility in Real Time: The Work (So Far) of the ABA Task Force on Corporate Responsibility*, DEL. LAW., Spring 2003, 18, 20 (quoting *Preliminary Report of the American Bar Association Task Force on Corporate Responsibility*, 58 BUS. LAW. 189, 193-94 (2002)) (emphasis added) (internal footnotes omitted).

Even if the board of directors is unable to allocate its full attention to the CGO, the audit committee or QLCC should at a minimum carefully review performance of the CGO on an annual basis.¹⁹² Particular concerns for the designated committee in these circumstances may include ensuring that the CGO properly exercises assigned duties overseeing internal oversight, complaint, and reporting procedures.¹⁹³ Moreover, a governance/nominating committee consisting of independent directors should still regularly meet with the CGO to evaluate the CGO's performance.¹⁹⁴

C. Internal Controls, Ethics and Conduct

A typical role for the CGO involves oversight of internal controls within the company.¹⁹⁵ Federal and state regulations may require disclosure of these and other governance protocols.¹⁹⁶ In such an environment, the

192. See LIPMAN & LIPMAN, *supra* note 126, at 175 (recommending the audit committee interview, at least annually, the CGO and other executive officers); *Audit Committees Must Be Aware of New Liability Risks*, 6 CORP. GOVERNANCE REP., (BNA) 144, at 144 (Dec. 1, 2003), available at WL, 6 BNA CGR 12 d21 (listing the CGO among officers the audit committee should evaluate annually and urging against the presence of other officers because "prosecutors have known for many years that subordinates do not talk freely when their bosses are present" (quoting Frederick D. Lipman, lead author of BNA's "Audit Committees" Corporate Governance Manual portfolio)).

193. See Gibson, Dunn & Crutcher LLP, *Audit Committees—10 Key Issues to Consider Now*, in THIRD ANNUAL DIRECTOR'S INSTITUTE ON CORPORATE GOVERNANCE 719, 723 (Ira M. Millstein, Betsy S. Atkins & Richard H. Koppes eds., 2005), available at <http://www.gibsondunn.com/Publications/Pages/AuditCommittees10KeyIssuesToConsiderNow.aspx>.

194. See *Ide*, *supra* note 172, at 858 (advocating policy that a CGO meet "in executive session" with the company's governance committee on a periodic basis); *supra* notes 103-06 and accompanying text.

195. WOOD, *supra* note 126, at 116; WILLIAM E. KNEPPER & DAN A. BAILEY, *LIABILITY OF CORPORATE OFFICERS AND DIRECTORS*, § 17.07[5] (7th ed. 2002 vol. 2 & 12th release 2006) [hereinafter KNEPPER & BAILEY – LIABILITY].

196. Sarbanes-Oxley requires corporate management to report that appropriate internal controls are in place and any amendments to a company's internal ethics code for senior financial officers. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 404, 406, 116 Stat. 745, 789-90 (codified as amended at 15 U.S.C. §§ 7262, 7264 (2006)). Public and private firms with government contracts must also navigate a regulatory regime under federal law and the Federal Acquisition Regulation. See generally, e.g., Sandeep Kathuria, *Best Practices for Compliance with the New Government Contractor Compliance and Ethics Rules Under the Federal Acquisition Regulation*, 38 PUB. CONT. L.J. 803, 804-05, 829-55 (2009). Nonprofit organizations are now required to disclose to federal and many state governments information regarding governance practices. See generally Runquist & Malamut, *supra* note 64, at 29-33 (discussing the Governance, Management, and Disclosure section of IRS Form 990).

Moreover, state law subjects directors to liability for failure to implement appropriate internal controls. *In re Caremark Int'l, Inc. Deriv. Litig.*, 698 A.2d 959, 968-70 (Del. Ch.

CGO would be in a position to assist an audit committee with implementing and monitoring internal controls.¹⁹⁷ In fact, internal controls, combined with “encouragement of high ethical standards,” are a leading factor considered by institutional investors when evaluating potential investments.¹⁹⁸ With these shareholder interests at stake, the CGO should both assess the risk of compliance vulnerabilities and formulate plans and procedures to avert exploitation of systemic flaws.¹⁹⁹

In addition, the CGO serves as an ideal candidate to enforce the company’s ethics, conduct, and insider trading rules.²⁰⁰ Placing oversight of these operations within a CGO-led corporate governance department provides opportunity to formulate new practices and amend current rules.²⁰¹ This task requires the CGO to enforce the guidelines directly, or oversee a department staffed by ethics officers to ensure the company’s adherence to the standard of due care.²⁰² In doing so, especially in recent startup companies, the CGO may wish to oversee the initial establishment of internal guidelines and coordinate implementation of procedures to

1996) (“[A] director’s obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards.”); accord *In re* Tower Air, Inc., 416 F.3d 229, 238-39 (3d Cir. 2005) (citing *Caremark*, 698 A.2d at 967-70); *Kenney v. Koenig*, 426 F. Supp. 2d 1175, 1182 (D. Colo. 2006) (citing *Caremark*, 698 A.2d at 970); *Pereira v. Cogan*, 294 B.R. 449, 530 (S.D.N.Y. 2003) (citing *Caremark*, 698 A.2d at 970), *vacated on other grounds sub nom.* *Pereira v. Farace*, 413 F.3d 330 (2d Cir. 2005).

197. See *Murr*, *supra* note 134, at 115-36 (recommending, inter alia, a corporation’s governance committee or audit committee appoint a CGO and develop methods for internal reporting of violations and concerns on an anonymous basis). See generally 15 U.S.C. 78j-1(m)(4)(A) (2006).

198. See Peter Clapman, *Governance Activism at TIAA-CREF*, in *GUIDE*, *supra* note 11, at 60.

199. See Rodos, *supra* note 19, at 19.

200. KNEPPER & BAILEY – LIABILITY, *supra* note 195, § 17.07[5]

201. See WOOD, *supra* note 126, at 116-17 (suggesting the CGO as an alternative to an ethics officer writing a code of conduct).

202. See WOOD, *supra* note 126, at 116. For example, Temple-Inland Inc. successfully utilized a CGO to oversee an ethics department. See Adamson, *supra* note 136.

(1) review conflicts of interest,²⁰³ (2) adhere to the internal ethics code,²⁰⁴ and (3) meet obligations of governance-related laws and regulations.²⁰⁵

The CGO's objectives should include implementing policies that both promote and enhance good governance practices at the company.²⁰⁶ In 2003, for example, Pitney Bowes appointed a CGO with a mission "to create a reporting structure in which certain corporate units with key responsibilities in the areas of policy and regulatory compliance would be under the same umbrella."²⁰⁷ Communicating with others companies' CGOs to determine effective governance practices can be an effective method to achieve the type of goals that Pitney Bowes set forth.²⁰⁸ Outside corporate governance consultants are another helpful resource.²⁰⁹ By consulting other governance gurus, the CGO can rely on professional opinions related to technical matters already tested for costs and benefits, and tailor those guidelines to the specific operational needs of the business.²¹⁰ This approach will particularly assist with forming reporting systems and internal controls in non-linear management structures.²¹¹ Additionally, collaboration with traditional competitors can improve efficiencies within an otherwise decentralized and bureaucratic environment and ultimately help the company's bottom line.²¹²

203. See D. ROGER GLENN, CORPORATE RESPONSIBILITIES OF PUBLIC COMPANIES IN 2003 B-14 (2003), available at <http://www.eapdlaw.com/files/News/3f954838-f7b1-453c-a90f-48d50099e5a7/Presentation/NewsAttachment/8efd3598-256d-4eb2-b504-4a05ca281c63/media.180.pdf> (empowering the CGO, with the support of either general counsel or a relevant vice president, to provide waivers for conflicts arising under a company's business conduct and ethics code); Anadarko Petroleum Corp., Proxy Statement (Schedule 14A), at E-13 to -14 (Mar. 13, 2003) (requiring same as well as reporting of ethics violations to the CGO or governance committee).

204. KNEPPER & BAILEY – LIABILITY, *supra* note 195, § 17.07[5].

205. KNEPPER & BAILEY, *supra* note 111, § 1.04[5].

206. Although some of these materials may be prepared by the board of directors, the role of the CGO remains essential to keeping up-to-date the "extensive documentation controlling the actual operations of the board and its committees, including committee charters and policies on topics ranging from delegations of authority to audit committee approval of audit and non-audit services, as required under Sarbanes-Oxley." Lamm, *supra* note 11, at 88.

207. *Defining the Role of the Chief Governance Officer*, COMPLIANCE WK., Aug. 19, 2003, <http://www.complianceweek.com/article/506> (last visited Mar. 4, 2010) (quoting Amy C. Corn, chief governance officer, vice-president, and corporate secretary of Pitney Bowes).

208. See WOOD, *supra* note 126, at 117; Loomis, *Companies are Hiring*, *supra* note 12; Loomis, *Scandals Spur*, *supra* note 12.

209. BRANCATO & PLATH, *supra* note 75, at 29.

210. See Rodos, *supra* note 19, at 19.

211. See generally PETRI MÄNTYSAARI, COMPARATIVE CORPORATE GOVERNANCE: SHAREHOLDERS AS A RULE-MAKER 23-26 (2006) (comparing divisional and matrix management structures in the U.S. and abroad).

212. Cf. Barnard, *supra* note 20, at 99 (noting the CGO's communication function between these layers of corporate infrastructure could remedy "the process of corporate

D. Communications on Behalf of Stakeholders

Coinciding with the CGO's role establishing an internal reporting structure is the need to propagate mediums for communication within the company.²¹³ Effective mediums should not point solely to the CGO.²¹⁴ Instead, the CGO should work to ensure that other executive officers are effectively communicating with the CEO and board of directors.²¹⁵ The CGO may do so, for example, by participating in the formulation of performance evaluations of the board of directors.²¹⁶

One CGO explained methods undertaken to improve communications at Temple-Inland, Inc. under the banner of a "compliance task force" that met quarterly and represented various units and service groups within the company.²¹⁷ The task force utilized regular communications with heads of the corporation's business units "to gauge whether the business unit leaders have identified risks that may not be adequately addressed, or to which we [may have] dedicated insufficient (or excessive) resources," resulting in constructive feedback to the CGO.²¹⁸

governance . . . characterized by a proliferation of special committees, advisory committees, and other task groups which tend to diffuse responsibility for decisionmaking"). The use of decentralized governance fluctuates not only between current companies, but also between current and prior eras. Compare, e.g., Érica Gorga & Michael Halberstam, *Knowledge Inputs, Legal Institutions and Firm Structure: Towards a Knowledge-Based Theory of the Firm*, 101 NW. U. L. REV. 1123, 1134-35 & nn.33-37 (2007) (explaining that "[c]ontemporary CEOs and management theorists champion the value of decentralized decision-making" and how "many of the most successful corporations" have recently shifted to decentralized governance models) (citations omitted), with Roe, *supra* note 152, at 635 & n.196 (2003) (explaining that the decentralized "multidivisional, or M-form, structure . . . had its theoretical heyday during the age of the conglomerates") (citing OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* 136-41 (1975)).

213. Rodos, *supra* note 19, at 19-20 (noting that the "belie[f] that a CGO has sufficient power and independence" can promote internal reporting of misconduct); cf. Worth D. MacMurray, *Applied Governance: Beyond Compliance*, STRATEGY BUS., Winter 2003, at 3, 4-5 (advocating a "hands-on, business-oriented CCO" reporting directly to and receiving a budget directly from a business's governance committee).

214. See generally NICHOLAS BEALE, *CONSTRUCTIVE ENGAGEMENT: DIRECTORS AND INVESTORS IN ACTION* 162 (2005) (emphasizing importance of communication among officers, with properly defined roles).

215. See *id.*

216. See BRANCATO & PLATH, *supra* note 75, at 29 (describing CGO duties to include "assisting with board and director performance evaluations"); Richard M. Steinberg, Op. Ed., *Self-Assessment for the Board: What Works, What Doesn't*, COMPLIANCE WK., Aug. 23, 2005, <http://www.complianceweek.com/article/1917> (last visited Mar. 4, 2010) (recommending evaluations for board members and committees through either a questionnaire formulated by the CGO or general counsel, or interviews conducted by the CGO, corporate secretary, lead director, or nominating/governance committee).

217. Adamson, *supra* note 136.

218. *Id.*

The merits of this approach are significant. By meeting with unit leaders, the CGO can facilitate a trickle down of information from senior officials to their subordinates about risks for liability to the corporation and its board of directors.²¹⁹ Because the needs of each company will differ,²²⁰ the CGO must focus attention on communicating through a variety of outlets. This includes providing access to information through the company's internal network, communications system, and website; establishing educational programs throughout the company that promote governance protocols; and authoring governance reports in company newsletters, annual reports, and similarly distributed materials.²²¹

In light of the CGO's obligation to report directly to the board of directors, the best CGOs keep the board apprised of governance and performance issues facing the company.²²² The CGO can further enhance the lines of communications between management²²³ and investors.²²⁴ In

219. For a further discussion on the CGO mitigating potential liability for board members, see *supra* notes 75-86 and accompanying text.

220. See Lamm, *supra* note 11, at 88 (proclaiming that for communicating governance protocols "as in so many areas, one size does not fit all").

221. See, e.g., BRANCATO & PLATH, *supra* note 75, at 29 (listing various internal and external communications roles); Steger & Bottger, *supra* note 10, at 249, 259-62; Lamm, *supra* note 11, at 89 (noting the increased frequency of companies promoting governance reforms and accomplishments in "their annual reports and proxy statements" filed with the SEC and explaining "[t]he CGO is often involved (or should be) in preparing these filings" with the SEC).

222. See *Implementation of the Sarbanes-Oxley Act of 2002, Hearings Before the S. Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. 177 (2003) (statement of Brian P. Anderson, CFO, Baxter International Inc.) ("Working with our [CGO] the Board continually discusses [the company]'s governance practices, changing our policies when necessary and identifying areas where we need to improve our performance."); *Q&A with the Laclede Group's Chief Governance Officer*, COMPLIANCE WK., Feb. 1, 2005, <http://www.complianceweek.com/article/1488> (last visited Mar. 4, 2010) (explaining duties as the "go to" person for the board of directors on governance issues, "get[ting] the information they want" and providing explanations in response to "questions on anything, whether it's specific to the company or some latest development in the newspaper" (quoting Mary Kullman, CGO and corporate secretary of The Laclede Group, Inc.)). See generally *supra* notes 173-74 and accompanying text (recommending the CGO report directly to the board of directors except on legal and administrative issues).

223. Lamm, *supra* note 11, at 88; see also Rodos, *supra* note 19, at 19 (recommending reporting to both the board and senior management). In short, keeping open communications may help alleviate concerns of corporation traditionalists about the CGO's role as an "independent" officer.

224. KNEPPER & BAILEY, *supra* note 111, § 1.04[5]; WOOD, *supra* note 126, at 116. The CGO's communications with investors and the general public should balance "between governance and interference" like management and shareholders balance these objectives under proxy rules. Cf. Nell Minow, *Proxy Reform: The Case for Increased Shareholder Communication*, 17 J. CORP. L. 149, 151 (1991) ("Shareholders must have enough information But the system must protect the corporation (including the shareholders)

particular, the CGO can keep close communications with those having the largest influence on stakeholders: media outlets, governance rating systems, hedge funds, institutional investors, and controlling shareholders.²²⁵ Pfizer's former CGO performed this role by

maintaining individual contact with institutional investors and by being active in their trade associations. [The CGO] also kept in contact with other activist groups. These relationships proved invaluable when a question arose that needed to be explained to institutional investors. It also allowed [the CGO] to keep them advised of what was happening at Pfizer both in its business and its community activities.²²⁶

Serving as the corporation's spokesperson to investors on governance issues places the CGO in a prime position to address their concerns and improve internal practices within the corporation.²²⁷

IV. THE MULTIROLE CGO AS AN EFFECTIVE MODEL FOR CORPORATE GOVERNANCE

Although duties of a corporate governance officer may be spread across different departments, a team-oriented approach is needed to overcome bureaucratic processes.²²⁸ At the outset, duplication will result if

from the excessive costs, even anarchy, which would result from too much information and authority.”).

225. See Lamm, *supra* note 11, at 89 (explaining that “[t]he CGO needs to engage in virtually constant communication with those responsible for corporate governance in institutions that own the company’s stock”); see also Cheffins, *supra* note 2, at 14-15 (tracing the rise of shareholder activism among hedge fund managers); GovernanceMetrics International: Info for Rated Companies, <http://www.gmiratings.com/RatingProcess.aspx> (last visited Oct. 27, 2009) (listing the CGO first among typical contacts by the governance rating agency). Controlling shareholders are, of course, stakeholders themselves. Institutional investors who hold shares in the company are too.

226. Corporate Governance Officers Help Ensure Compliance with Good Governance Practices, CORP. GOVERNANCE BULL. (Investors Responsibility Research Ctr., Inc., Washington, D.C.), Nov. 2002, available at LEXIS (under the default “Search,” “by Source,” “Legal” hierarchy, click on “Secondary Legal,” then click on “Combined Legal Newsletters,” and then type “Corporate Governance Officers Help Ensure Compliance with Good Governance Practices” as search terms).

227. See BRANCATO & PLATH, *supra* note 75, at 29.

228. See *id.* at 29 n.22 (noting that “formal designation is less important than . . . function[]” and that a company should, in any event, make sure that “governance functions are coordinated among departments”); *Talking Compliance, Ethics with Sun’s Chief Compliance Officer*, COMPLIANCE WK., Dec. 9, 2003, <http://www.complianceweek.com/article/503> (last visited Mar. 4, 2010) (indicating the response of David Farrell, vice-president and chief compliance officer of Sun Microsystems, Inc., when asked if a CGO worked at the company, that corporate governance tasks were spread around as a “team effort” between numerous internal departments and offices); see also Sherman, *supra* note 88, at 23 (highlighting the financial benefits of cooperation between CFOs, investor relations officers, and CGOs).

the CGO becomes entangled in an inefficient overlap of responsibilities.²²⁹ Other members of corporate management may venture on “parallel paths” that derail or delegitimize the CGO’s authority.²³⁰ Management, undoubtedly focused on its heavy load of tasks, need not be caught up in frivolous disputes over supervisory duties.²³¹ Therefore, merging management positions or underlying departments may reduce inefficiencies otherwise created by overlapping responsibilities.²³² The benefits and detriments of combining the CGO with compliance, secretary, and legal counsel positions are discussed below.²³³

A. Corporate Secretary: A Convenient Combination

A company’s current corporate secretary can likely complete many, if not all, of the tasks that face a CGO. In fact, many CGOs already share this role.²³⁴ The corporate secretary’s duty to ensure creation of new board committees and charters makes this arrangement a convenient option.²³⁵ In

229. See Joanne Sammer, *It’s Not Easy Being GC; Privileges, Positions Under Siege*, COMPLIANCE WK., Feb. 8, 2005, <http://www.complianceweek.com/article/1519> (last visited Mar. 4, 2010) (quoting Michele Coleman Mayes, then senior vice-president and general counsel of Pitney Bowes).

230. See *id.* (“There is a danger that these executives and other executives could be operating on parallel paths without realizing it. . . . It is important that confusion not be an excuse for problems occurring.” (quoting Michele Coleman Mayes)).

231. See *supra* note 172 and accompanying text.

232. Cf. *supra* note 133 and accompanying text (discussing “turf battles”).

233. See *infra* Parts IV.A-C. Although the discussion that follows evaluates the pairing of CGO responsibilities with another office, some companies give the CGO even more responsibilities. For example, Sunoco combines the roles of chief governance officer, assistant general counsel overseeing securities regulation, and corporate secretary but separates the function of CGO from chief compliance officer. See Kelly, *Q&A with Sunoco’s Chief Governance Officer*, *supra* note 123 (quoting Ann C. Mulé, chief governance officer, assistant general counsel, and corporate secretary of Sunoco). Under the Sunoco model, the chief compliance officer, who is also an attorney, oversees ethics compliance issues, including whistleblower provisions of Sarbanes-Oxley. *Id.* This results in the CGO reporting to the board on most issues, but to the general counsel on legal issues. *Id.* When Sarbanes-Oxley duties of the CGO and chief compliance officer overlap, the officers “play . . . by ear” who carries the responsibilities. *Id.* (quoting Ann C. Mulé).

234. The role of corporate secretary was frequently shared with a CGO position based upon a non-exhaustive search of issuers registered with the SEC. See *generally infra* app. A (listing issuers with a designated CGO).

235. See Gallagher, *supra* note 74, at 14 (“The designation of the corporate secretary as the corporate governance officer seems appropriate since one of the prime functions of the corporate secretary is to act as the liaison between shareholders, management and the board of directors.”); *Enhanced Leadership Roles for Corporate Secretaries*, CORP. DIRECTIONS (CCH, Inc.), July 30, 2002 (“There currently is an enormous opportunity for the corporate secretary to develop a role as chief governance officer The secretary also has a role in maintaining the integrity of process in creating new board committees and charters.”) (identifying statements of Christopher Swieca, then chief governance and administrative

addition, corporate secretaries are often acquainted with corporate governance issues including, but not limited to: “corporate housekeeping”; addressing the delicate nature of interactions between individual directors, the board, and committees; and communications between the corporation and shareholders.²³⁶ Statutes generally permit a corporate secretary to hold more than one officer position.²³⁷

Furthermore, if a corporate secretary already serves as the “go to” person on governance issues, a company would be ill-advised to create a new overlapping structure that weakens the effectiveness of both positions.²³⁸ Therefore, it may be appropriate in these situations to either create the joint position of “corporate secretary and chief governance officer,” or promote the current secretary to a newly defined CGO position (provided the company is not currently recovering from a scandal or accusations of poor corporate governance).²³⁹ If the corporate secretary already fulfills multiple roles or oversees numerous reporting duties for multiple subsidiaries, the CGO could alternatively serve within the corporate secretary’s department.²⁴⁰

The c-level stamp certainly “gives more credit to the role.”²⁴¹ Amy C. Corn, CGO of Pitney Bowes, elaborated upon these and other benefits from appointing a secretary/CGO hybrid:

Since a good corporate secretary will typically be engaged in assisting the Board in staying current with best practices in governance, and because corporate secretaries who are also attorneys will typically be very active in assisting the Board and se-

officer of Banyan Strategic Realty); *see also* Corn, *supra* note 124, at 732 (advocating that the “Corporate Secretary’s role [is] to provide assistance by appropriate means, either by crafting a specific proposal, or by creating a guide for Director discussion where a specific proposal may not be appropriate”).

236. Lamm, *supra* note 11, at 87.

237. *See, e.g.*, DEL. CODE ANN. tit. 8, § 142(a) (2008) (requiring functions of secretary to be performed by some officer, regardless of title, and permitting officers to hold more than one position); MODEL BUS. CORP. ACT § 8.40(c)-(d) (2002) (same with some differences in language).

238. *See Nuts and Bolts After Sarbanes-Oxley, supra* note 82 (noting that “if you currently are the ‘go-to guy’ on corporate governance matters by default, it may undercut your authority for someone else to be named chief governance officer” (summarizing the presentation of Michael H. Ullmann, then associate general counsel and secretary at Johnson & Johnson, Inc.)).

239. *See Q&A with the Laclede Group’s Chief Governance Officer, supra* note 222 (emphasizing the experience of becoming the “go to” person for the board of directors on governance issues while serving as CGO and secretary (quoting Mary Kullman, CGO and corporate secretary of The Laclede Group, Inc.)). *See generally* Rodos, *supra* note 19, at 19-20 (recommending appointment of a CGO following a corporate scandal or restatement of earnings).

240. *See* Lamm, *supra* note 11, at 87.

241. *Q&A with the Laclede Group’s Chief Governance Officer, supra* note 222 (quoting Mary Kullman).

nior management with regulatory compliance matters, including those flowing from Sarbanes-Oxley and the revised listing standards, it makes sense to expand the Corporate Secretary's role to include accountability for specific areas of legal and policy compliance.²⁴²

Corporate secretaries are often the point persons for institutional investors.²⁴³ Peter Clapman, the senior vice-president of TIAA-CREF, one of America's largest private pension systems, has also noted that corporate secretaries already serve as a preferred contact by institutional investors.²⁴⁴ In light of frequent communications between corporations and institutional investors, combining the CGO and corporate secretary titles would preserve the existing conduit between shareholders, management, and the board of directors.²⁴⁵

B. Chief Compliance Officer: Considerations of Size and Money

Some businesses employ a CGO focused on both compliance and governance issues.²⁴⁶ These CGOs may oversee Sarbanes-Oxley, NYSE, NYSE Amex Equities (AMEX), and NASDAQ compliance.²⁴⁷ Although these duties are often assigned to chief compliance officers,²⁴⁸ appointing a

242. *Defining the Role of the Chief Governance Officer, supra* note 207 (quoting Amy C. Corn, chief governance officer, vice-president, and corporate secretary of Pitney Bowes). Ms. Corn's experience was also shared during the Practising Law Institute's Second Annual Directors' Institute on Corporate Governance in 2004. *See generally* Corn, *supra* note 124, at 727 (providing the CGO position description used by Pitney Bowes).

243. *See* Peter Clapman, *Governance Activism at TIAA-CREF, in* GUIDE, *supra* note 11, at 59.

244. *Id.* (noting TIAA-CREF generally discussed governance issues "with the [board of directors chair], CEO, chief financial officer, or corporate secretary" and that other institutional investors often consulted with independent directors). Furthermore, corporate secretaries are a typical contact for governance rating agencies. *See* GovernanceMetrics International, *supra* note 225. Institutional investors often rely upon governance rating systems. *See id.*

245. *See generally* Rosen, *supra* note 111, at 1307 (describing the CGO's role as "an effective conduit between [the board of directors] and management"); *supra* note 20 and accompanying text.

246. Rodos, *supra* note 19, at 20 ("[I]t may be possible to expand the roll [sic] of the compliance officers in these industries to include oversight of corporate governance issues.").

247. For example, Dow Jones member Eastman Kodak Company (Kodak) appointed a CGO in July 2003 to oversee the redesign of the company's internal framework, including the structure of the board of directors. *See* Makoto Toda & William McCarty, *Corporate Governance Changes in the Two Largest Economies: What's Happening in the U.S. and Japan?*, 32 SYRACUSE J. INT'L L. & COM. 189, 217 (2005). The Kodak CGO position combines both financial and legal compliance to improve the company's approach to corporate governance. *Id.*

248. *See, e.g.,* Rodos, *supra* note 19, at 20 (analogizing CGO with CCO common in the banking, brokerage, and health care industries); MacMurray, *supra* note 213, at 3 (discussing CCOs and their "equivalent" CGOs and chief ethics officers); *see also* KNEPPER

CGO to oversee complex exchange listing requirements sometimes works. For example, Dow Jones member Eastman Kodak Company (Kodak) appointed a CGO in July 2003 to oversee redesign of the company's internal framework, including structure of the board of directors.²⁴⁹ The Kodak CGO position combined both financial and legal compliance to improve the company's approach to corporate governance.²⁵⁰

On the other hand, Unifi, Inc. created two separate positions but chose to select the same person.²⁵¹ This is less advisable for larger companies despite the previous adoption by Rohm and Haas Company.²⁵² Budgetary limitations, however, may warrant such an arrangement for smallcap companies (similar to Unifi, Inc.).²⁵³ Under both models, the joint compliance and governance officer oversaw programs traditionally reserved for compliance officers, such as an ethics and compliance hotline.²⁵⁴ This arrangement avoided the pitfalls of overlapping jurisdiction which might otherwise force a "play by ear" in both departments.²⁵⁵ However, it also risks blurring the priority of governance against compliance needs within the company.

& BAILEY – LIABILITY, *supra* note 195, § 17.07[5] (citing 17 C.F.R. § 270.38a-1) (identifying SEC requirement to maintain a CCO for mutual funds). Other companies, such as Sunoco, may choose to maintain separate compliance officers. *See Kelly, supra* note 123.

249. *See Toda & McCarty, supra* note 247, at 217.

250. *Id.*

251. *See Unifi, Inc., Annual Report (Form 10-K), at 26 (Sept. 11, 2009) (listing biography of Charles F. McCoy).*

252. *But see* Melissa Klein Aguilar, *Q&A With Rohm and Haas' Governance, Compliance Head*, COMPLIANCE WK., Aug. 8, 2006, <http://www.complianceweek.com/article/2668> (last visited Mar. 4, 2010) (indicating Rohm and Haas Company utilized a single management member to serve as chief compliance officer and CGO (quoting Gail Granoff, chief compliance and governance officer at Rohm and Haas)). *See generally* Heidi N. Moore, *Dow Chemical: Banks Lost 50% of Market Value*, WALL ST. J. DEAL J., Feb. 3, 2009, <http://blogs.wsj.com/deals/2009/02/03/dow-chemical-rohm-haas-is-worth-more-than-we-are/> (indicating Rohm and Haas had approximately \$10.8 billion in market capitalization prior to the acquisition by Dow Chemical Company); History of Rohm and Haas, http://www.rohmhaas.com/wcm/about_us/history.page, under Timeline, click on "Present" (indicating The Dow Chemical Company acquired Rohm and Haas Co. in April 2009) (last visited Nov. 15, 2009); *supra* notes 31-32 (providing parameters suggested by the SEC for defining a largecap company).

253. Unifi, Inc., based on its market capitalization rate, is a smallcap company as defined in this Article. *See supra* Part II.A.1.b; *infra* app. A.

254. *See EthicsPoint – Rohm and Haas Company*, <http://www.rhethic.com> (last visited Oct. 12, 2009). To ensure stability, it may be appropriate to limit access to a complaint hotline to the CGO and another senior reporting official, such as the chair of the audit committee or other designated independent director. *See ENGlobal Corp., Annual Report (Form 10-K) Ex. 99.4, at 1-2 (Mar. 25, 2004).*

255. *See Kelly, Q&A with Sunoco's Chief Governance Officer, supra* note 123 (identifying the overlapping duties of Sarbanes-Oxley compliance between a CGO and chief compliance officer, requiring both to "play . . . by ear" who would carry the responsibilities (quoting Ann C. Mulé, CGO, assistant general counsel, and corporate secretary for Sunoco)).

C. Associate General Counsel: An Added Bonus

General counsel already frequently double as corporate secretary.²⁵⁶ In fact, some companies combine legal, governance, and secretary roles into one position.²⁵⁷ Others may combine legal, compliance, and governance positions.²⁵⁸ The role of the CGO as an attorney-at-law and counselor-at-law can offer additional benefits.²⁵⁹ Some companies adopted this model at onset of appointing a CGO, including Qwest Communications, Inc. after scandals rocked the company.²⁶⁰ A separate CGO would free the general counsel from micromanaging the intersection of compliance and governance duties, permitting a skilled professional to focus on issues where the general counsel may likely face liability.²⁶¹

But there are several reasons for separating the function of CGO from *the* general counsel during typical operations. First, the general counsel would remain available to pickup governance duties during the switch from one CGO to the next.²⁶² Second, not appointing the company's chief legal officer as CGO avoids potential conflicts of interest.²⁶³ The duties of actors involved in ensuring good governance practices are "often about gatekeeping."²⁶⁴ Similar to an attorney's duty to appropriately report corporate wrongdoing, the CGO resembles a gatekeeper by ensuring proper

256. Veasey & Di Guglielmo, *supra* note 164, at 8 ("Although the duties of general counsel and corporate secretary are discrete and these positions are often held by different persons, the general counsel sometimes fills the increasingly complex role of corporate secretary." (citing Sally R. Weaver, *Ethical Dilemmas of Corporate Counsel: A Structural and Contextual Analysis*, 46 EMORY L.J. 1023, 1035 (1997))); Lamm, *supra* note 11, at 87 ("Increasingly, the corporate secretary is a lawyer; this is appropriate and generally desirable . . . under Sarbanes-Oxley.").

257. See, e.g., Kelly, *Q&A with Sunoco's Chief Governance Officer*, *supra* note 123 (quoting Ann C. Mulé, CGO, assistant general counsel, and corporate secretary for Sunoco). For a further discussion of the Sunoco model, see *supra* note 233.

258. Letter from Gail P. Granoff, Chief Compliance & Governance Officer & Assistant Gen. Counsel, Rohm & Haas Co., to Pamela A. Long, Assistant Dir., Div. of Corp. Fin., SEC (Sept 3, 2008) (on file with author), available at <http://www.sec.gov/Archives/edgar/data/84792/000095012308010543/filename10.htm>.

259. See *supra* Part II.B.1.

260. See generally Glater, *supra* note 80, at C4 (interviewing Qwest Communication, Inc.'s CGO).

261. See generally Sheri Qualters, *As Liability Grows, GCs Get Nervous*, NAT'L L.J., Sept. 25, 2006, at 8.

262. Cf. *Krispy Kreme*, *supra* note 97 (noting transition of governance duties from Krispy Kreme CGO Randy Casstevens to the corporation's general counsel following Mr. Casstevens' departure).

263. Rosen, *supra* note 111, at 1307 (advocating the CGO as an alternative to general counsel the latter likely facing greater conflicts of interest).

264. Roe, *supra* note 152, at 622-23.

reporting procedures exist within the corporation.²⁶⁵ But the CGO's "gatekeeping" role, in relation to internal operations, contrasts starkly with the duties of a chief legal officer.²⁶⁶

Third, attorney-client privilege, which might otherwise protect communications, may be waived. Linking legal counseling and compliance consulting creates a risk that communications that might otherwise be privileged cannot be protected from disclosure.²⁶⁷ Privilege doctrines do not extend to "routine compliance monitoring, [which] itself [is] subject to examination by the SEC."²⁶⁸ Termination of the general counsel-CGO may risk exposing information that might otherwise be privileged,²⁶⁹ as would any acts on part of the corporation that trigger liability under a federal whistleblower statute.²⁷⁰

265. *Cf. id.* at 623 (explaining duty imposed on corporate attorneys and accountants by the SEC).

266. By the same account, "[a]n issuer's chief legal officer (or the equivalent thereof) is a supervisory attorney" as defined under 17 C.F.R. § 205.4(a) (2008). Even if the CGO is an attorney—but not serving as the equivalent of a "chief legal officer"—the CGO may not be obliged to adhere to the SEC standards of professional conduct when following directions of the Senior General Counsel. *See* 17 C.F.R. § 205.5(a) (defining "subordinate attorney" as "[a]n attorney who appears and practices before the Commission . . . (other than under the direct supervision or direction of the issuer's chief legal officer (or the equivalent thereof))"). But other instances may subject an attorney to 17 C.F.R. § 205.6(a) civil penalties if the company enjoys "an attorney-client relationship," *see* 17 C.F.R. § 205.2(a)(2)(i), given that the definition of "appearing and practicing before the Commission" includes "[t]ransacting any business with the Commission, including communications in any form," *id.* § 205.2(a)(1)(i), "[a]dvising an issuer as to whether information or a statement, opinion, or other writing is required under [federal securities regulations in relation to documents] filed with or submitted to" the SEC, *id.* § 205.2(a)(1)(iv), and being "directed by an issuer to investigate evidence of a material violation reported [to the SEC] under [subsection] (b)(1), (b)(3), or (b)(4), *id.* § 205.3(b)(5). The SEC has indicated that this latter provision applies to all in-house attorneys. *See* Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 8185, Exchange Act Release No. 47,276, Investment Company Act Release No. 25,919, 68 Fed. Reg. *6296, at 6308 (Feb. 6, 2003) ("Paragraph (b)(5) addresses circumstances in which those to whom evidence of a material violation is reported direct others, either in-house attorneys or outside attorneys retained for that purpose, to investigate the possible violation.").

267. *See* DeMott, *supra* note 27, at 981 (citing Lori A. Richards, Director, Office of Compliance Inspections and Examinations, U.S. Sec. & Exch. Comm'n, Speech by SEC Staff: The New Compliance Rule: An Opportunity for Change (June 28, 2004), <http://www.sec.gov/news/speech/spch063004lar.htm> (identifying concerns of combining functions of a chief compliance officer with the general counsel).

268. *Id.*

269. *See* RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.03 cmt. f & rep. cmt. f (Tentative Draft No. 2, 2009) (citing authorities); Alex B. Long, *Retaliatory Discharge and the Ethical Rules Governing Attorneys*, 79 U. COLO. L. REV. 1043, 1065 & n.113, 1072 & nn.149-50 (2008) (citing authorities).

270. *See generally* Willy v. Admin. Review Bd., 423 F.3d 483, 495 (5th Cir. 2005) (applying federal common law of attorney-client privilege in claim brought under national environmental whistleblower provisions to permit utilization of confidential documents).

The attorney-CGO, when privy to information indicating a material misrepresentation of information, will be required to report that information to the general counsel, QLCC, or board of directors.²⁷¹ Although there are practical reasons that support the CGO reporting to the general counsel, the CGO's role may be best described "not so much a wise counselor, as an effective conduit between [the board of directors] and management."²⁷² If an attorney-CGO best suits a company, who might provide a pool of candidates? Law firms specializing in commercial and corporate matters recently began creating corporate governance practice groups.²⁷³ Additionally, it may be possible to lure attorneys from the SEC or a self-regulatory organization (SRO) familiar with compliance issues, such as the Financial Industry Regulatory Authority, Inc. (FINRA) or the Public Company Accounting Oversight Board (PCAOB).²⁷⁴

CONCLUSION

The CGO offers benefits to public and non-public companies alike. In the hope of instituting genuine reforms that go beyond applying a trendy title, companies should carefully formulate a CGO's role to address governance hurdles arising in the wake of Sarbanes-Oxley and the market meltdown of 2008. Although financial and legal growth may accompany selection of a competent CGO supported by an experienced staff, the

For a further discussion of the divergent views of courts weighing the rights of attorney whistleblowers under federal and state law, see Kim T. Vu, Note, *Conscripting Attorneys to Battle Corporate Fraud Without Shields or Armor? Reconsidering Retaliatory Discharge in Light of Sarbanes-Oxley*, 105 MICH. L. REV. 209, 215-18 (2006).

271. This provision applies to attorneys representing a company subject to the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 307, 116 Stat. 745, 784 (codified as amended at 15 U.S.C. § 7245 (2006)). Under the provision, Congress empowered the SEC to promulgate rules to first report "to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof)," and thereafter to either the Audit Committee or other committee consisting of solely of independent directors, or the entire board of directors. The Commission took the liberty to require, in either of the former events, that the chief legal officer must be notified. See SEC Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, 17 C.F.R. § 205.3(b)(1) (2008); see also VALLABHANENI, *supra* note 100, at 25 (suggesting the CGO report to either the designated chief legal officer, general counsel, or CEO); Lamm, *supra* note 11, at 87 (recommending that the CGO report to general counsel).

272. Rosen, *supra* note 111, at 1307; see also Peregrine, Schwartz & Horton, *supra* note 47, at 1204 (recommending that the general counsel serve as CGO in nonprofit corporations).

273. See generally Anthony Lin, *Corporate Governance Practice Groups Spawn from Troubled Waters*, N.Y. L. J., Aug. 12, 2002, at 1.

274. The PCAOB functions as the SRO "auditor of auditors," serving public companies with hundreds of auditors and employees across the United States. Donna M. Nagy, *The SEC at 70: Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status*, 80 NOTRE DAME L. REV. 975, 978, 1021-22 (2005).

individual filling the c-level shoes should be trustworthy enough to engage governance issues beyond mere up-the-ladder reporting. With a vast frontier of Sarbanes-Oxley liability on the horizon, the CGO's role in directing the board away from haphazard decision-making should benefit the company's bottom line.

APPENDIX A

PUBLICLY TRADED COMPANIES WITH A DESIGNATED CHIEF GOVERNANCE OFFICER, SENIOR GOVERNANCE OFFICER, CORPORATE GOVERNANCE OFFICER, VICE-PRESIDENT OF GOVERNANCE, OR SIMILAR CGO TITLE AS OF THE CLOSE OF TRADING NOVEMBER 16, 2009

The following business organizations are listed on the New York Stock Exchange (NYSE), NYSE Amex Equities (AMEX), and NASDAQ; or trade over-the-counter (OTC) in secondary U.S. markets. OTC data includes pink sheet (PK) and OTC Bulletin Board (OTCBB) listings. Some non-U.S. companies identified in the table below are listed through an American Depository Receipt (ADR). Market capitalization (Market Cap) values are provided per class of common or preferred stock and are listed in millions of U.S. dollars.²⁷⁵

COMPANY	EXCHANGE/OTC	SYMBOL	MARKET CAP (IN MILLIONS)
4C Controls, Inc.	OTCBB	FOUR.OB	\$15.90
Acxiom Corporation	NASDAQ	ACXM	\$987.45
Air Products & Chemicals, Inc.	NYSE	APD	\$17,800.00
American Express Co.	NYSE	AXP	\$49,280.00
American International Group, Inc.	NYSE	AIG	\$682.00

275. The author identified the companies with chief governance officers listed in the table based upon a non-exhaustive search of Google, <http://www.google.com> (last visited Nov. 15, 2009), SEC EDGAR Full Text Search, <http://searchwww.sec.gov/EDGARFSCClient/> (last visited Nov. 15, 2009), and SEC.gov Document Search, <http://search.sec.gov/secgov/index.jsp> (last visited Nov. 15, 2009).

NYSE and AMEX symbol information was obtained from the NYSE: Listings Directory, http://www.nyse.com/about/listed/lc_ny_overview.html (last visited Nov. 16, 2009) and NYSE Amex: Listings Directory, http://www.nyse.com/about/listed/lc_altus_overview.shtml (last visited Nov. 16, 2009). ADR, OTC pink sheets, and OTCBB information was obtained Yahoo Finance, <http://finance.yahoo.com> (last visited Nov. 16, 2009).

Market Cap values were obtained primarily from Google Finance: Portfolio, <http://finance.google.com> (last visited Nov. 16, 2009). Market Cap for NYSE stock with symbols AHTPRA and DDRPRI were obtained from AOL Money & Finance, <http://finance.aol.com/quotes/ashford-hospitality-trust-inc-prfd-a/aht-a/nys>, and <http://finance.aol.com/quotes/developers-diversified-realty-corp-prfd-i/ddr-i/nys> (last visited Nov. 16, 2009).

	NYSE	AFF	\$392.70
	NYSE	AVF	\$4,810.00
	NYSE	AIGPRA	\$808.66
Ameriprise Financial, Inc.	NYSE	AMP	\$9,890.00
	NYSE	AMPPRA	\$200.32
Amylin Pharmaceuticals, Inc.	NASDAQ	AMLN	\$1,830.00
Anadarko Petroleum Corp.	NYSE	APC	\$31,580.00
Aon Corp.	NYSE	AOC	\$11,210.00
Apache Corp.	NYSE	APA	\$33,750.00
Ashford Hospitality Trust, Inc.	NYSE	AHT	\$316.71
	NYSE	AHTPRD	\$94.51
	NYSE	AHTPRA	\$33.91
Bank of New York Mellon Corp., The	NYSE	BK	\$32,700.00
Barclays PLC (ADR)	NYSE	BCS	\$60,170.00
Baxter International Inc.	NYSE	BAX	\$33,070.00
BB&T Corp.	NYSE	BBT	\$17,070.00
BHP Billiton Ltd. (ADR)	NYSE	BHP	\$211,790.00
BHP Billiton plc (ADR)	NYSE	BBL	\$175,470.00
Black Hills Corp.	NYSE	BKH	\$937.65
Boeing Co.	NYSE	BA	\$38,130.00
BP p.l.c. (ADR)	NYSE	BP	\$185,230.00
CA, Inc.	NYSE	CA	\$11,600.00
Cameco Corp. (USA)	NYSE	CCJ	\$11,780.00
Capital One Financial Corp.	NYSE	COF	\$17,950.00
Celanese Corp.	NYSE	CE	\$354.55
	NYSE	CEPR	\$4,260.00
Chevron Corporation	NYSE	CVX	\$157,710.00
Cisco Systems, Inc.	NASDAQ	CSCO	\$138,270.00
CMS Energy Corporation	NYSE	CMS	\$3,340.00
Comcast Corporation	NASDAQ	CMCSA	\$991.76
	NASDAQ	CMCSK	\$559.03

	NYSE	CCW	\$513.89
	NYSE	CCT	\$45,250.00
	NYSE	CCS	\$44,920.00
	NYSE	CCZ	\$402.71
Comerica, Inc.	NYSE	CMA	\$4,310.00
Denny's Corporation	NASDAQ	DENN	\$225.09
Deutsche Bank AG	NYSE	DB	\$48,000.00
	NYSE	DUA	\$435.77
	NYSE	BDG	\$11.96
	NYSE	OLO	\$7.11
	NYSE	DPU	\$507.36
Developers Diversified Realty Corp.	NYSE	DDR	\$2,050.00
	NYSE	DDRPRH	\$143.08
	NYSE	DDRPRG	\$138.45
	NYSE	DDRPRI	\$120.36
Devon Energy Corporation	NYSE	DVN	\$31,530.00
Dollar Tree, Inc.	NYSE	DLTR	\$4,410.00
Dow Chemical Company, The	NYSE	DOW	\$33,020.00
Eastman Kodak Co.	NYSE	EK	\$1,120.00
Edison International	NYSE	EIX	\$10,950.00
El Paso Corporation	NYSE	EP	\$7,270.00
ENGlobal Corp.	NASDAQ	ENG	\$83.42
Exelon Corp.	NYSE	EXC	\$31,260.00
Fentura Financial, Inc.	OTC	FETM	\$4.50
Fleetwood Enterprises, Inc.	OTC	FLTWQ.PK	\$2.16
	OTC	FLTW	\$0.71
Foster Wheeler Ltd.	NASDAQ	FWLT	\$4,280.00
Gannett Co. Inc.	NYSE	GCI	\$2,720.00
Gartner, Inc.	NYSE	IT	\$1,920.00
General Mills, Inc.	NYSE	GIS	\$22,120.00
Great Florida Bank	NASDAQ	GFLB	\$14.29

	OTCBB	GFLBB.OB	\$1.82
Guaranty Financial Group, Inc.	NYSE	GFGFQ	\$56.11
	OTC	GFCJ.PK	\$4.08
H.J. Heinz Co.	NYSE	HNZ	\$13,310.00
	NYSE	HNZPR	\$5.82
Harleysville Group, Inc.	NASDAQ	HGIC	\$879.65
Hawaiian Electric Industries, Inc.	NYSE	HE	\$1,790.00
Herley Industries, Inc.	NASDAQ	HRLY	\$152.36
Hershey Co., The	NYSE	HSY	\$2,060.00
	OTC	HSYFB.PK	\$8,820.00
Imperial Sugar Co.	NASDAQ	IPSU	\$182.40
Indymac Bancorp Inc.	OTC	IDMCQ.PK	\$6.26
	OTC	IDMPQ.PK	\$1.20
Ingersoll-Rand plc	NYSE	IR	\$11,920.00
Integrus Energy Group, Inc.	NYSE	TEG	\$2,960.00
Koninklijke Ahold N.V. (ADR)	OTC	AHONY.PK	\$15,940.00
Krispy Kreme Doughnuts, Inc.	NYSE	KKD	\$259.75
Laclede Group, Inc.	NYSE	LG	\$714.23
LaPolla Industries Inc.	OTCBB	LPAD.OB	\$24.62
Legg Mason	NYSE	LM	\$5,070.00
	NYSE	LMI	\$857.67
Lifepoint Hospitals Inc.	NASDAQ	LPNT	\$1,670.00
Mexico Fund, Inc.	NYSE	MXF	\$369.56
Morgan Stanley	NYSE	MS	\$46,530.00
	NYSE	MSPRA	\$756.80
Motorola, Inc.	NYSE	MOT	\$20,110.00
National Australia Bank Ltd. (ADR)	OTC	NABZY.PK	\$55,220.00
National Penn Bancshares, Inc.	NASDAQ	NPBC	\$718.98
	NASDAQ	NPBCO	\$53.84
Nelnet, Inc.	NYSE	NNI	\$841.48
New York Community Bancorp, Inc.	NYSE	NYB	\$4,120.00

New York Times Company	NYSE	NYT	\$1,380.00
	OTC	NYTAB.PK	\$1,290.00
Nexen, Inc.	NYSE	NXY	\$13,230.00
	NYSE	NXYPRB	\$430.37
Northwest Natural Gas	NYSE	NWN	\$1,170.00
Pacific Gas and Electric Co. (a subsidiary of PG&E Corp.)	AMEX	PCG.PR.A	\$109.51
	AMEX	PCG.PR.B	\$28.03
	AMEX	PCG.PR.C	\$8.62
	AMEX	PCG.PR.D	\$61.85
	AMEX	PCG.PR.E	\$35.53
	AMEX	PCG.PR.G	\$31.71
	AMEX	PCG.PR.H	\$21.26
	AMEX	PCG.PR.I	\$18.62
PEPCO Holdings, Inc.	NYSE	POM	\$3,500.00
Pfizer, Inc.	NYSE	PFE	\$144,770.00
PG&E Corp.	NYSE	PCG	\$15,800.00
Philippine Long Distance Telephone (ADR)	NYSE	PHI	\$3,870.00
	OTC	PHTCF.PK	\$10,230.00
Pitney Bowes, Inc.	NYSE	PBI	\$3.54
	NYSE	PBIPR	\$15.05
	OTCBB	PBOWP.OB	\$5,180.00
Polycom, Inc.	NASDAQ	PLCM	\$1,980.00
Prudential Financial, Inc.	NYSE	PRU	\$22,720.00
	NYSE	PHR	\$836.16
	NYSE	PFK	\$58.95
Public Service Enterprise Group Inc.	NYSE	PEG	\$16,050.00
Qwest Communications, Inc.	NYSE	Q	\$6,510.00
Range Resources Corp.	NYSE	RRC	\$7,720.00
Rayonier, Inc.	NYSE	RYN	\$3,260.00
Safeway, Inc.	NYSE	SWY	\$9,450.00
Satyam Computer Servs. Ltd. (ADR)	NYSE	SAY	\$3,520.00

Schering-Plough Corp.	NYSE	SGP	\$2,420.00
Selective Insurance Group	NASDAQ	SIGI	\$823.72
	NYSE	SGZ	\$572.33
Service Corp. International	NYSE	SCI	\$1,900.00
Southern California Edison Co.	AMEX	SCE.PR.B	\$17.39
	AMEX	SCE.PR.C	\$21.46
	AMEX	SCE.PR.D	\$30.42
	AMEX	SCE.PR.E	\$26.29
Sprint Nextel Corp.	NYSE	S	\$9,860.00
Standex Int'l Corp.	NYSE	SXI	\$226.74
Sun Microsystems, Inc.	NASDAQ	JAVA	\$6,520.00
Sunoco, Inc.	NYSE	SUN	\$3,090.00
Superior Industries Int'l, Inc.	NYSE	SUP	\$405.63
Swift Energy Company	NYSE	SFY	\$880.26
Temple-Inland, Inc.	NYSE	TI	\$1,880.00
Trico Marine Services, Inc.	NASDAQ	TRMA	\$116.30
Tyco Int'l Ltd.	NYSE	TYC	\$17,530.00
Unifi, Inc.	NYSE	UFI	\$192.38
Valeant Pharmaceutical Int'l	NYSE	VRX	\$2,770.00
Verizon, Inc.	NYSE	VZ	\$86,160.00
Walt Disney Co., The	NYSE	DIS	\$57,060.00
Western Gas Partners, LP	NYSE	WES	\$1,070.00
Wi-Tron Inc.	OTC	WTRO.PK	\$0.05