

Legal?  
Compliance?  
Both?  
Neither?

# Agenda

- Compliance History
- Where We Stand Now – Compliance vs. Legal
- Common Differentiation Methods
- Specific Examples
- Wrap-up

# A brief history...

- Why do compliance departments exist?
  - Sentencing guidelines
  - Political pressure
  - Industry specific reasons
- Where do they report?
  - Legal
  - CEO
  - Other
- Why does the government want an independent CCO?
  - True believers in efficacy
  - My cynical take...

## Various perspectives

- “The lawyers tell you whether you can do something, and compliance tells you whether you should” (former OIG Chief Counsel Lew Morris (2009))
- “Neither Tenet nor (it’s GC) saw any conflict in her wearing two hats as Tenet’s General Counsel and Chief Compliance Officer...it doesn’t take a pig farmer from Iowa to smell the stench of conflict in that arrangement” (Sen. Charles Grassley)

## Various perspectives

- “The general counsel should have primary responsibility for assuring the implementation of an effective legal compliance system...” (ABA Task Force on Corporate Responsibility (2003))
- “It is ludicrous to suggest, as some do, that the GC only worries about what is legal and the chief compliance officer worries about what is right. The “what is right” set of issues is at the center of the role of the modern, broad gauged general counsel...” (Ben Heineman – “Don’t Divorce the GC and the Chief Compliance Officer”, HLS Program on Corporate Governance, December 2010)

# Current state of affairs

- CCO independence varies by industry
  - Health care
  - Financial services
  - Government contractors
- CCO scope varies even within industry, and over time within companies
- Similar themes within legal
- Classic differentiation: Legal tells you what the law is, compliance tells you how to follow it

# Some possible divisions of labor...

| Compliance              | Legal  | Neither                |
|-------------------------|--|------------------------|
| Prosecutorial avoidance | Prosecutorial avoidance<br>(not structural though) |                        |
| Policy shop             | Policy shop  | Policy shop            |
| Process and procedure   | Process and procedure                              | Process and procedure  |
| Internal audit adjunct  |  | Internal audit adjunct |
| Commercial counseling   | Commercial counseling                              | Commercial counseling  |

\*These can be agnostic of reporting structure

# Where do these go?\*

- Government contracting
  - TAA
  - Overpayments
- Health care
  - HIPAA/BAA
  - Sunshine Act
  - Interactions with healthcare providers
- FCPA
  - Training
  - New vendors
- What else?

## UK Modern Slavery Act

- Companies must supply a slavery and human trafficking statement covering:
  - Policies related to slavery
  - Supply chain diligence
  - Supply chain risks
  - Training
  - Belief in program efficacy



# Finally...

- What do we really know, anyways?
- Satisfy the government
- Be clear internally & continue the conversation
- Good luck