

National Society of Compliance Professionals (“NSCP”) *Firm and CCO Liability Framework*

To help ensure investor protection and market integrity through effective compliance functions at broker-dealers, investment advisers, and investment companies (together, “firm” and “firms”), the NSCP proposes this *Firm and CCO Liability Framework* (the “NSCP Framework”) to provide guidance to regulators, chief compliance officers (CCOs), and firms regarding potential CCO liability. As the premier financial industry organization that educates and advocates on behalf of compliance professionals, the NSCP is uniquely positioned to examine the practical challenges faced by CCOs as part of the larger governance structures at firms and to provide context that goes beyond the technical aspects of compliance.

Background: To highlight these challenges, the NSCP conducted multiple industry-wide surveys focusing on “CCO Liability”¹ and “CCO Empowerment”² with its 2000+ membership of CCOs and other compliance professionals. The results of the surveys demonstrated compliance professionals remain concerned that personal liability will be imposed in cases where:

- Compliance acted negligently rather than recklessly (53%);
- Compliance relied on inaccurate data from another employee (66%); and
- Compliance did not participate in the violations caused by the company or other executives (63%).

In addition, 72% of compliance professionals are concerned that regulators have expanded the role of compliance officers and the scope of their responsibilities in imposing personal liability; 70% believe the overall compliance function at their firms is under resourced; 35% reported insufficient resources to conduct compliance training; 20% reported insufficient authority to develop and enforce compliance policies and procedures at their firms; and 25% reported an inability to address compliance-related weaknesses and report concerns to senior management.

Imposing personal liability on a CCO who has not engaged in misconduct or obstruction shifts responsibility from business line personnel and management to the CCO. This could diminish the culture of compliance within firms and promote indifference to follow the rules by firm personnel. It could ultimately lead to firm-wide deficiencies being attributed to compliance, while benefitting management who failed to empower compliance. Although securities regulators have expressed support for CCO empowerment and the enhancement of compliance resources,³ NSCP’s surveys demonstrate that significant practical concerns still exist. In many firms, the compliance function continues to be viewed as a cost center, not receiving the proper support, resources, or authority to appropriately address compliance-related weaknesses.

To more effectively address potential CCO liability, the NSCP believes it is necessary to focus on the larger context of the compliance function within firms and to do so earlier in regulatory reviews, whether during examinations or enforcement investigations. While the NSCP supports the New York City Bar’s “Framework for Chief Compliance Officer Liability in the Financial Sector” and the recklessness standard it articulates,⁴ the NSCP believes that a framework focused on evaluating CCO liability based solely on the responsibilities and expectations of the position is only a partial solution. Careful consideration must be given to the full context in which the CCO functioned. As a result, the NSCP is advocating this Framework.

By bringing these concerns to the forefront, the NSCP hopes to (1) alleviate the uncertainty faced by compliance officers, (2) provide a framework that aligns with statements made by SEC and FINRA leadership and industry professionals, and (3) promote investor protection and market integrity, as set forth below:

¹ [NSCP CCO Liability Survey](#).

² [NSCP CCO Empowerment and Resources Survey](#).

³ See, e.g., SEC.gov | The Role of the CCO – Empowered, Senior and With Authority (<https://www.sec.gov/news/speech/driscoll-role-cco-2020-11-19>).

⁴ NYC Bar CCO Liability Report (https://s3.amazonaws.com/documents.nycbar.org/files/NYC_Bar_CCO_Framework.pdf).

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- **Firms:** Firms of all sizes and structures could use the Framework to empower their CCOs with the full responsibility, ability, and authority to develop, implement, and enforce appropriate policies and procedures. Although management may delegate certain functions, including compliance, ultimately, the firm is responsible for its own compliance obligations, and CCOs (in their compliance capacity) do not supervise business functions. In addition, firm leadership needs to continually assess whether the compliance program has adequate resources to support its compliance function.⁵
- **CCOs:** CCOs could use the Framework to communicate with firm leadership about their roles and authority to manage compliance programs specifically tailored to their firms.⁶
- **Regulators:** Regulatory examination and enforcement teams could use this Framework to evaluate failures identified during examinations or investigations and determine whether those failures should be referred to enforcement or formal charges should be brought against the CCO.

NSCP Framework: To evaluate potential CCO liability, the following questions should be considered by regulators where a firm may have violated securities laws. A “yes” answer to any of the questions below mitigates against CCO liability:

- Did firm management:
 - Fail to delegate to the CCO actual responsibility, ability, or authority to affect the violative conduct?
 - Fail to provide sufficient support (including, for example, adequate resources) for the CCO to affect the violative conduct?
 - Have the opportunity to review the policies and procedures related to the violative conduct?
 - Fail to respond appropriately to the violative conduct after becoming aware of it through the CCO or otherwise?
- Did the CCO:
 - Escalate the issue or violative conduct to firm management through a risk assessment, annual review, CEO certification meeting/report, or otherwise?
 - Consult with legal counsel (in-house or external) and/or securities compliance consultants and act consistently with the advice provided?
 - Reasonably rely on information from others in the firm or firm systems?
 - Otherwise act in good faith to affect the violative conduct?
 - Act reasonably, but violative conduct still occurred by the firm?

The NSCP believes the responses to these questions will help provide examination and enforcement teams with a framework through which to properly evaluate potential CCO liability where a firm may have violated securities laws. Please note, the Framework is not meant to provide a defense for firm liability where violative conduct occurred or where the CCO otherwise acted inappropriately.⁷

⁵ See, e.g., SEC.gov | The Role of the CCO – Empowered, Senior and With Authority (<https://www.sec.gov/news/speech/driscoll-role-cco-2020-11-19>).

⁶ *Id.*

⁷ See <https://www.sec.gov/news/speech/keynote-address-2015-national-society-compliance-prof-cereseney.html> (citing instances where (1) compliance personnel possessed supervisory responsibilities within a Firm’s supervisory system and demonstrated a wholesale failure to discharge those responsibilities that were clearly assigned to them; (2) compliance personnel affirmatively participated in misconduct; or (3) compliance personnel intentionally helped to mislead regulators).