



# Conspicuous Compliance

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## In This Issue

CCO as Pathfinder – pg 1

Show Me! - pg 2

Think Hedge Clause,  
not Santa Clause - pg 3

Who We Are – pg 4

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## CCO as Pathfinder

A number of appropriate nouns come to mind when describing the role of the CCO – activist, champion, motivator, resource, sounding board, advisor, educator, communicator, and yes, the dreaded enforcer – they all fit. Regulators would agree with all the above, and then some. The SEC's Lori Richards addressed the role of the CCO during her opening remarks before CCO Outreach National Seminar attendees in November, 2007:

*"We all know that a CCO's job is never really "done" – I'm not talking about the difficulty you have in putting your hat on and going home at 5pm, or the difficulty that you have in putting aside the compliance worries that keep you up at night – these are things that just "come with the job" of CCO. I'm speaking here in a broader sense – your job is never really "done" because the compliance programs you administer are never really "done" – they must continue to identify **new** risk areas, to develop means to address those **new** compliance risk areas, to address **new** products and **new** lines of business, to continue to identify **new** compliance tests, to implement **new** technologies, and of course, to be able to implement **new** regulations and **new** firm policies."*

The image of an hour glass with an unending supply of sand comes to mind. It is hard not to notice the term "new" in these remarks - what does **new** really mean in the context of compliance? A glimpse inside the dictionary puts forward several variations on the themes of "unfamiliar" and "without precedence."

SEC references to "**new**" introduce a vital perspective to the role of the CCO - that of PATHFINDER. A PATHFINDER is someone who discovers routes through unexplored territory and illuminates the way through expert guidance. Your firm must navigate the regulatory and reputation risks associated with opening a new market, rolling out a new product, addressing a new rule or perhaps installing a new technology. The CCO has responsibility to proactively discern the compliance hurdles and facilitate the navigation of uncharted waters to ensure that the ethical and compliant route is followed.

The role of PATHFINDER is difficult, lonely, and certainly does not come with a "How To" book. But vital? No question about it!

## **comport365™**

*"comport365™ was designed to assist multitasking CCOs, whether solely dedicated to the compliance function or managing dual operational and compliance responsibilities. This vital tool complements our client service offerings with the singular objective of helping investment advisers and broker-dealers efficiently manage their compliance capital by ensuring the timely and effective implementation of the compliance program."*

*Betsy Rathz  
Architect, comport365™*

## **Show Me!**

We have all done it – wasted valuable time searching for a document, a file, or an email that captures that very important compliance finding, action, or communication. Each day, the CCO has the opportunity to advance the compliance agenda of the firm. Certainly the effort and the activity is there, the real question is - can you produce the audit trail to prove it? The SEC or NASD examination, office inspection, annual review and certification are all about the **EVIDENCE** – demonstrate to all interested parties that you do what your policy and advertising say that you do.

Producing the evidence of compliance just got easier! We have developed and released **comport365™** - a tool that will fully and efficiently enable you to demonstrate that your compliance program does what it is designed to do - identify, manage, document, and communicate regulatory and business risks to the firm.

### **comport365™ ...**

- Schedules, captures and tracks critical compliance events and related records in one secure venue
- Searches, reports and communicates compliance events ... such as
  - Policy, procedure, and internal control testing
  - Office inspections
  - Meetings with compliance relevance
  - Compliance training
  - CCO notes and communications

This compliance tool is designed to capture virtually any activity performed or monitored by the CCO in the course of implementing the compliance program across the investment advisory or broker/dealer enterprise. The tool simplifies the annual compliance review, office inspection, and CCO certification processes while offering "touch of button" access to all compliance activities. Communications and file attachment capability truly posits **comport365™** as the singular compliance venue.

Benefits to the CCO and the firm:

- (1) Compliance event capture via calendar functionality
- (2) Recurrent event scheduling
- (3) HRL's compliance rationale for testing a wide array of policies
- (4) Automated e-mail notice of deadlines and events
- (5) Search and custom report capability
- (6) Event file attachment capability
- (7) Flexible user access – administrator, view only, event request
- (8) Enterprise consolidation of multiple line of business activity
- (9) Web-based subscription service accessed via HRL secure site

HRL welcomes an opportunity to demo **comport365™** – right at your desktop. Contact us for more information at (724) 934-0129.

SEC:  
Adjusting its View on  
the Investment  
Advisory Contract  
Hedge Clause ...

*The SEC now states that the use of hedge clauses limiting an adviser's liability to acts of gross negligence or willful malfeasance, when coupled with a non-waiver disclosure, would not constitute a per se violation of Sections 206(1) and 206(2) of the Investment Advisers Act. The SEC has moved to a "facts and circumstances" protocol for evaluation of hedge clause rule conformance.*



## Think Hedge Clause, not Santa Clause

The SEC has issued new guidance relative to the use of a hedge clause in an investment advisory contract. A hedge clause is a contract provision seeking to limit or entirely avoid an investment adviser's civil liability for various types of conduct or omissions arising from the advisory relationship. Use of certain hedge clauses may violate SEC rules, specifically antifraud provisions, if the advisory contract leads a client to believe that the client has waived a right of action the client may have under state or federal securities law or common law, or if the contract otherwise misleads the client as to the nature of those rights.

New SEC guidance suggests that the acceptability of a hedge clause depends upon all of the surrounding facts and circumstances, including:

- ✓ The form and content of the particular hedge clause;
- ✓ Any oral or written communications between the adviser and the client about the hedge clause; and
- ✓ The particular circumstances of the client.

For advisory contracts with "unsophisticated" clients, the SEC would consider additional factors, such as:

- ✓ Whether the hedge clause is written in plain English;
- ✓ Whether the hedge clause is individually highlighted and explained during the in-person client meeting;
- ✓ Whether additional disclosure is provided to explain the instances in which the client may still have a right of action; and
- ✓ Whether there is any involvement of a sophisticated intermediary who assisted the client in dealing with the adviser, and if so, the nature and extent of such assistance.

In light of this new guidance, advisers should review their client advisory contract language to ensure that any use of a hedge clause meets the new standards articulated by the SEC. The sections of the contract most relevant to this issue include "client indemnification" and "non-waiver of rights."

**To view the SEC No-Action letter issued to Heitman Advisors, go to:**  
**<http://www.sec.gov/divisions/investment/noaction/2007/heitman021207.pdf>**

**HORRIGAN RESOURCES, LTD. ("HRL")**

**WHO WE ARE**

***HRL helps investment advisers and broker-dealers lighten the regulatory compliance burden so they can focus on gathering assets and serving clients. HRL delivers compliance expertise and solutions - such as risk assessments and audits, policy/procedure development, training and continuing education, planning tools, as well as on-call consulting resources - scaled to fit the unique operating needs of each client. HRL's professional experience spans decades working with major financial service enterprises in the critical areas of compliance, sales management, trading, portfolio management, and training.***

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