

White Collar Update: The Department of Justice Retains Compliance Counsel Expert

November 18, 2015

On Friday, November 13, NYU Law's Program on Corporate Compliance and Enforcement hosted a roundtable discussion featuring the Department of Justice's Criminal Division Fraud Chief Andrew Weissmann and the Fraud Section's newly retained Compliance Counsel Hui Chen. NYU Professor Jennifer Arlen moderated the discussion. Ms. Chen most recently worked as Global Head for Anti-Bribery and Corruption at Standard Chartered Bank, Assistant General Counsel at Pfizer, Inc., and Director of Legal Compliance for the Greater China Area at Microsoft Corporation. She also previously served as a Trial Attorney at DOJ and as an Assistant U.S. Attorney in the Eastern District of New York. Below is an overview of the program. [Linked here is a transcript of the public portion of the discussion, which was recorded.](#)

- **Role of Compliance Counsel:** In describing the role and purpose of the Fraud Section's Compliance Counsel, Mr. Weissmann noted the reference to compliance in two factors within DOJ's [Principles of Federal Prosecution of Business Organizations](#) ("Filip Factors"), namely factors five and seven, which address adequate preexisting compliance and adequate remediation.¹ These sentiments echo recent [remarks](#)² by Assistant Attorney General Leslie Caldwell that Compliance Counsel will help Fraud Section prosecutors evaluate compliance programs and design remedial compliance measures to be incorporated into corporate resolutions. Mr. Weissmann noted that the Fraud Section routinely retains experts in a range of fields from accounting to forensics, and that the use of a compliance "expert" would serve a similar function. He also opined that the Department's compliance expert would help companies that "get it" distinguish their compliance programs from those that exist merely on paper, and noted that having Compliance Counsel – who would have involvement in all compliance reviews – would bring consistency to the Fraud Section's view of compliance matters.
- **Ms. Chen's Approach to Compliance:** Ms. Chen articulated her views on compliance and the framework through which she approaches compliance programs, noting that she hopes to engage in a dialogue with the compliance community and solicit feedback about where challenges and realistic solutions lie. Ms. Chen stressed that an effective compliance program will look different across companies and industries, and will depend on the nature, size, and regional emphasis of the business, as well as its corporate personality. She further emphasized that compliance is dynamic and that what constitutes a good compliance program will evolve over time. In her view, the mark of a good program is a consistent effort to engage in the "constant struggle" of compliance, with the aim

¹ Factors five and seven concern "the existence and effectiveness of the corporation's pre-existing compliance program" and "the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies," respectively. *Principles of Federal Prosecution of Business Organizations*, U.S. Attorneys' Manual § 9-28.300 (revised November 2015).

² Assistant Attorney General Leslie R. Caldwell, Remarks at the SIFMA Compliance and Legal Society New York Regional Seminar (Nov. 2, 2015).

of creating a real program that reaches ground-level operatives. Ms. Chen focused on four primary areas of a compliance program.

- Thoughtful Design: Whether a program addresses the root causes of problems; whether a corporation's stakeholders have ownership over their respective pieces of the program; and the level of communication with stakeholders in designing a program.
- Successful Operation: Whether a program designed to prevent or remediate conduct has been operationalized into the daily life of the corporation. Ms. Chen emphasized that ground-level employees are the "front-line gatekeepers" who help operationalize a program.
- Stakeholder Communication: Whether there is communication between compliance personnel and a corporation's stakeholders, and whether a corporation's culture facilitates an "open door" atmosphere in which employees feel free to raise issues. Ms. Chen recommended daily communication with Finance, Legal, Human Resources, Audit, and investigatory groups, as well as communication with ground-level operatives in the field.
- Resources: Whether a program receives not only adequate funding, but adequate attention and commitment. Ms. Chen emphasized in-person briefings grounded in hard data – not simply anecdotes – from compliance personnel to the Board of Directors and CEO to ensure real dialogue with executives.
- **Additional Notes**: Mr. Weissmann and Ms. Chen also commented on the following:
 - Compliance structure: Mr. Weissmann stated that the focus is whether compliance personnel have independence and the ability to be heard, and that the structure that enables these capabilities will vary.
 - Role of promotion and compensation policies: Mr. Weissmann stated that there is nothing improper about systems that set goals and targets, but both panelists noted that unintended consequences can arise from such programs and must be considered.
 - Attributes of an effective whistleblower program: Ms. Chen emphasized that employees should feel comfortable raising issues and should have the means to do so without language or technological barriers, and that a company's process should demonstrate to employees that it takes complaints seriously.

Compliance Counsel's Practical Impact

DOJ's retention of Compliance Counsel reflects increased emphasis on differentiating between companies that take compliance seriously and those that view compliance as "window dressing." We do not expect it to change DOJ's approach substantially, although the scrutiny on compliance will likely be more focused. Ms. Chen will concentrate primarily on aiding prosecutors in assessing preexisting compliance programs and designing remedial measures, two factors already memorialized in the Filip Factors and already applied in corporate investigations and resolutions. That review will presumably only occur when there is a basis to proceed criminally. DOJ continues to stress that effective compliance programs will and must vary by company and industry, making specific guidance elusive, and we do not expect DOJ to opine on specific compliance programs and methodologies. Ms. Chen has only been on the job for two weeks and it may take some time to understand her influence, although we expect that to manifest itself in the resolutions themselves and not through the publication of standards. Nonetheless, Ms. Chen's invitation to initiate a dialogue with the compliance community, also echoed by Mr. Weissmann, may reflect an opportunity to engage with DOJ on the particular challenges companies and industries face in designing and implementing an effective compliance program or remedial measures.

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