

NYU Program on Corporate Compliance and Enforcement

Public Portion of the Roundtable Discussion with Fraud Section Chief Andrew Weissmann and New Compliance Counsel Hui Chen of the DOJ's Criminal Division

November 13, 2015

Professor Arlen:

So welcome, my name is Jennifer Arlen. As I just said, I'm Co-Director with Geoffrey Miller of the Program on Corporate Compliance and Enforcement. And here we also have, I guess in the other room, our Executive Director, Serina Vash. Oh there. Our Executive Director, Serina Vash, and our Executive Assistant, Jerome Miller. The four of us run PCCE. And, welcome to the first of what I hope will be an annual series of roundtables on important events in both enforcement and compliance. A few words about how we're going to structure this roundtable. The first part will be a moderated conversation between me and Andrew Weissmann and Hui Chen. This part will be on the record. So in fact, we are going to videotape it so that we can stream it to people who will not be here. And then at the end of that, we will turn off the videotape and move to what is a standard PCCE approach of having a Chatham House Rule discussion. Chatham House Rule means you can repeat what is said, but not either who said it or where that person is from. So you may not say, "A DOJ official said . . ." And that is why we put the first part on the record, since when you are talking to clients it would be nice if they were a part of that, the conversation where you could say, Andrew Weissmann and Hui Chen said. So we will do that.

A word on the mics, when we get to the question and answer, when you are asking your question, please use the mic. When you are done, please turn it off, because if more than one mic is on, it shuts off everyone else's. So the person answering won't be able to answer if your mic is on.

All right, so, very briefly, just to introduce Andrew Weissmann, who was selected in January 2015 as Chief of the Criminal Division's Fraud Section of the Department of Justice. Prior to that, we are very pleased to say he was a Senior Fellow at NYU School of Law, where he taught Criminal and National Security Law. In fact, he just came from teaching a course here about an hour ago. He previously served as General Counsel for the FBI, from 2011-13 and before that, as Special Counsel to Director Mueller in 2005. After that he was a Partner at Jenner & Block. From 2002 to 2005, he was the Deputy, and then the Director, of the Enron Task Force, and he was a federal prosecutor for 15 years in the Eastern District of New York, where he was Chief of the Criminal Division. He graduated from Columbia Law School and was on the Managing Board of the Columbia Law Review.

Hui Chen is the Compliance Counsel Expert at the Fraud Section of the Department of Justice. Prior to joining the Fraud Section in November 2015, she had served in senior compliance positions in multinational corporations in three industries, as Global Head of Anti-Bribery and Corruption at Standard Chartered Bank in London, Assistant General Counsel of International Compliance Investigations at Pfizer in New York, and as Director of Compliance of the Greater China Area for Microsoft in Beijing. She began her legal career in the Attorney General's Honor Program at the Criminal Division

of the DOJ and subsequently served as an AUSA in the Eastern District of New York and she received her JD from UCLA. So, to begin, I thought I would start with Andrew on what motivated you to create the position of Compliance Counsel?

Mr. Weissmann:

Well, thank you Jennifer, it's great to be here and it's great looking out at the audience and see so many familiar faces. So what motivated this is, I had worked when I was at Jenner & Block, in a lot of areas that dealt with compliance. I dealt with a lot of compliance experts, as I worked with the ECOA on a Compliance Handbook. And so I had a -- what I thought was some knowledge about compliance but I didn't, in any way, think that I was an expert in the way that people who are dealing with compliance issues in-house, every day are. And I knew that when I went back to the Department that, under the Filip factors, there were at least two parts of the Filip factors that dealt with compliance issues and I thought that the same way that the Fraud Section has experts in all sort of fields, it would be useful to have somebody who worked with the Fraud Section full time, who had previously had experience at a company that could bring that expertise to bear in analyzing those Filip factors with us. I didn't dream at that time that I would find somebody that who had the experience that Hui Chen had, so we are incredibly fortunate to be able to have Hui Chen join us just last week.

Professor Arlen:

So, a couple more questions before I turn to Hui Chen. Some in the press have wondered whether one of the motivations for hiring a compliance expert is to bring in a compliance defense. So that corporations that come in and have an effective compliance program can not only avoid formal conviction but perhaps get a declination all together, solely on the basis of having an effective compliance program. And I wanted to know if you could speak to that?

Mr. Weissmann:

So, the answer is no. So under American law there is no compliance defense. What there is, under the Department of Justice Manual, there are two parts, as I mentioned, of the Filip factors that can give some credit for compliance if you have an adequate program at the time of the crime and if you've adequately remediated. And I think some might say this is, actually, maybe the reverse, in that we are trying to make sure that we are separating the companies that get it and are really doing their best to meet those two criteria from the companies that have a mere paper program. So I would say that we are trying to have heightened scrutiny of those two factors. But in a way that is, hopefully, smarter, in that we are looking at the right things and not requiring companies to do things that would frankly be a waste of their resources and have their compliance function really focus on what an expert thinks is going to be most beneficial and tailoring it to the particular company.

Professor Arlen:

So, the last two, is, the other critique -- which has been offered by people such as Professor Sam Buell but also others -- is that there is no need for this position because if part of the idea is that we want to separate companies that are the victim of rogue employees from those that sort of willfully or recklessly fail to have an effective compliance program, prosecutors are in a good position to do that. They know already what they need to know about what a good program looks like. They just have to look and see how the crime happened. And they don't need any additional advice and that, in fact, the point might be enhanced for the Fraud Section. Which is one of the few -- one

of the areas that really does have some expertise.

Mr. Weissmann:

So, Sam was a trial partner of mine, and so this will not be the last time that I disagree with him, and it is definitely not the first. So, I'm not really sure I understand that criticism. I think prosecutors -- and I'm certainly guilty of this -- think that we know everything. But, I just don't think that it's really true that we do. And, you know, one of things you have to recognize is where you need expert help. We have experts in all sorts of fields, that help us, whether it's accounting or forensics, medical issues. So having a compliance expert, to me, is only an up-side. Having somebody who can make sure that we are really evaluating companies' claims, and also listening to companies in a responsible way, is to me -- The only downside I can see is for companies that actually are not -- are trying to pass off a compliance program that is -- that is really, not the real thing and hoping that we think it is. I think for companies that get it, this is actually something that's going to be a big benefit to them and to the Department of Justice.

Professor Arlen:

Hui, thank you very much for joining us. I wanted to ask you the same question about what you bring to the table beyond what an AUSA would have, since you been in AUSA? And, in particular, both the U.S. Sentencing Guidelines and the FCPA Guidance each provide some guidance to prosecutors on what constitutes effective compliance. And given your expertise coming out of working in-house, when you look at a compliance program, before a wrong has happened, just *ex ante*, what do you hone in on that a prosecutor might not? What are the features you first look for to see "is this the real deal or is it just a paper tiger"?

Ms. Chen:

Thank you. It's a pleasure to be here and I want to -- I think, the most important thing that I like to think I bring to the table, is really the in-house perspective. And not only the in-house perspective, but perspective from not just headquarters but in the field. So, I started my compliance career as the Greater China Compliance Director, Microsoft's first in-field compliance -- full-time compliance person four months before the Beijing Olympics. I moved to Beijing April of 2008. And I literally, my first project was to review all the hospitality offerings and -- related to that event. It was an experience that made me not want to go to any of the events at the Olympics, which I did not. I ended up going to the Paralympics afterwards. It just felt like it was less commercial. So, I think to me, the guidelines that are offered at various levels are simply guidelines that can apply at a very high level. Because I think we all recognize that compliance -- what a compliance program looks like is going to be very different from, not just from industry to industry, but from company to company. Every company is going to be different, not only because of the nature of its business, but also the population that they have. How big is the company? What kind of geographies they operate in? What is the personality of the company? What kind of issues had brought the company into the Department of Justice view, in the first place? So I think, I think there's a variety of factors that, that would impact how real a company's program is. The other thing to recognize is, compliance programs are dynamic, they're evolving. So if you look at compliance program focus from 5-7 years ago, everybody looked at T&E and sponsored trips. Now everybody looks at third party. This is a sign. This is just a simple trend that you would notice to indicate that this is not a field that stays dynamic. Your compliance program

will look different three years from now. It should look different from three years ago. And, so I think that recognition of the dynamic nature of the company.

The other aspect that I think is important is: how real is it to the little guys in the field? If you were to go talk to your field operatives in Mexico City, in Chengdu, are they going to understand anything you're talking about? Do they get it at all? They are your, what I call, "front-line gatekeepers." They are the ones who will help you operationalize a program. And I think the last thing I will say is: Compliance work is a constant struggle. And I think a company that has made an effort to put in place an effective program will experience that struggle. And I want to say that we recognize that is the nature of the process. We can -- I don't believe we can always achieve perfection. There's not likely to be a day where there's zero conduct issues, but what I think an indicator of a real program is that effort, is that effort of trying to figure out how to make it better, how to make it more real and how to make it more real to the little guys in the field.

Professor Arlen:

Thank you. I wanted to follow up a little more on that since we have a number of people in the room who are both General Counsel and compliance officers. And there's always an interesting conversation with the Board about how much should we be investing in compliance and how should we be structuring the program. So I was interested in any additional guidance you can give on features of compliance programs that you have found to be particularly effective, and, in particular, this distinction that Leslie Caldwell sort of highlighted between focusing on the risk of having an enforcement action versus both compliance programs that are oriented to actually deterring the wrong itself. So how do you design the program to deter? And how do you bring it down to the little guy? It's -- I assume it's more than the web training programs that I see people doing; right? You go online and you click a lot of buttons. How do you go beyond that?

Ms. Chen:

I think -- Let me, let me break this down into what I've thought as four primary areas that I've been focusing on myself in my previous roles. And I want to emphasize that what I say here is really the beginning of what I hope to be a dialogue between me and the compliance committee as a whole. Because I think this is something, because the dynamic nature of this field, that I need to be constantly listening to what the challenges are out there and what do you think are the realistic pieces. So I want to caveat by saying this is really the beginning of the thinking and the dialogue process and I very much invite your feedback on some of these thoughts.

So I think I would put it into four broad categories, and I'll unpack them just a little bit. So I'd say the four that I would mention are: thoughtful design, how operational, how well designed? How thoughtful is your design? How operational is your program? How well your stakeholders communicate with each other? And also how well-resourced your program is.

So let me unpack those just a little bit and then we can go into more details with your thoughts and comments as well later. I think that one of the first things, when we talk about "thoughtful design" is: Does it address -- So, again, in my role right now, we're going to be dealing with specific conduct that has

brought a company to the Department's attention. So the program you're presenting to us, does that address the conduct, the wrongful conduct, in the first place? So if you have a situation where the wrongful conduct was your most senior CEOs carrying loads of cash to a foreign country and paying them off, and then you come back and tell me that you have a great T&E program that limits people's gifts to \$200, that doesn't seem like a match. So we want to see that your program has thoughtfully diagnosed the root causes of issues and attempt to address them.

Another aspect of it is ownership of your compliance program. Who owns the different pieces of your compliance program? Do you, the compliance person, have to go in and fix payment systems and procurement systems or do these different stakeholders step up and also own their pieces? Because I am not sure, just like the creation of this position, is recognizing expertise. So I don't think it's very effective for a compliance person to be designing an entire procurement process. It's just, it doesn't work. I have had times where I tried to actually revise a procurement system and the procurement guy brings to me the procurement flow chart which takes several, several sheets of large paper to go placed around the room. And I think until that point I had no appreciation of how complex a procurement process could be. And I think at that point the compliance person really becomes a value add. But -- So, we would be looking at programs to see what are the ownerships of the different pieces.

And I think the other piece that relates to that would be: How well have you dialogued with your stakeholders as you are designing those programs? I think a paper program is easy to design because if it's meant to exist only on paper, you don't need to consult anyone. You just write up whatever you think sounds the best on paper and there it is. But if you actually want something to work, you have to talk to the people who these processes and policies are intended to govern. And, by inviting the stakeholders into part of your design process, I think it would give a better chance to the program's success and sustainability.

So, on "operational," that's actually relatively self-explanatory. Every piece of your program needs to be tied to the actual operation of the company. So we will be asking you questions, I anticipate, about your payment systems, your HR systems, your vendor-management systems, your audit process, your investigation process. Again, all with a view of looking at how the program you have designed to remediate a conduct have been actually operationalized into the daily life of the corporation. So people don't have to -- I have seen systems where you have to go in and get approval for something and then go into a separate system to actually do the, conduct the transaction. When you don't tie those systems together, it's very easy to ignore the other system that's not necessary to make the transaction happen.

We're going to look at communications. I think, as part of this approach that we have, that I've been referring to dialogue. I do strongly believe -- and that was really Andrew's word in the first place -- that I wanted to make sure that people understand that this is a continuous dialogue, not just we the compliance community with the Justice Department, but continuous dialogue with the compliance community and your stakeholders. How well do you communicate? And I think these are communication issues. This is not -- You

talked about web training. One of the things that I actually enjoy doing is actually going to the field and talking to very ground-level employees. First of all, the attention -- just forget compliance -- from the corporate morale side, they've never had somebody from the headquarters spend two, three hours with them sitting down to talk to them about what exactly is your challenge. I have gone to -- I have dropped in on marketing meetings, looked into the gift bags that were prepared at the sign-in desk, in locations such as Beirut and Chengdu and Guangzhou and -- So those exercises will give you so much insight into what is actually happening. Your compliance stakeholders need to be talking to each other all the time. And, traditionally that, for me, meant Finance, Legal, HR, Audit, Investigations. These are people, frankly, you should be just talking to on a -- at least on a daily basis. So how well you communicate is a key issue.

And another aspect of this goes to the culture of the company. Does your company have an open communication, an open door type of policy where employees feel free to raise issues? That's one aspect of communications as well.

And, lastly, I think we'll talk about, we will look into issues relating to resources. And "resources" is not just money. Money is part of resources. Is your program adequately funded? But there's also the resource of attention and commitment. How often does your Board listen to a briefing, an in-person briefing, from your compliance function? How often does the CEO? How often is your regional leadership outside of the headquarter countries doing that? If they're not constantly paying attention on a regular basis to compliance, then I think they won't be as informed as they need to be to support some decisions that you will need their support on.

And I think the last part of that is those briefings: We would be looking at how well-based are some of those briefings that you would be providing to the senior leadership? Are they based on data collection? Or are they based on anecdotes? And, I think, what we want to see is real attention, real dialogues, and also executives really walking the walk beyond talking the talk.

Professor Arlen:

Thank you. I wanted to ask both of you about two features of compliance program design that you didn't specifically focus on, one of which is the issue of where compliance is located within the firm, which has become a very hot topic. And you see particularly highlighted by some of the mandates in deferred prosecution agreements, which will actually either require that the compliance officer have direct reporting to the Board or even require that the compliance officer not be -- I mean, be in a separate place, not under the GC's Office and various other things. So I was interested in any views either of you have on: Are there certain organizational places for compliance that are better than others? Should it be separate? Part of the GC's Office? Is direct reporting to the Board essential? And then the other aspect of compliance program design that I'm interested in, is the role of compensation and promotion policies in effective compliance. You mentioned "incentives." But one of the interesting issues is: How does one deal with both, not only the procedures that might make crime harder, like you can't just draw a hundred thousand dollars in cash and take it in a suitcase. That's a procedural approach. But also the incentive approach. Since firms, needless to say, want

to incentivize high sales and other things like that, but those can also provide incentives to commit crimes.

Mr. Weissmann:

So on the structure, I don't think you're going to be seeing, any time soon, the Department of Justice taking a view that companies should be doing, you know, this model versus that model. I'm aware of the tension as to -- on whether the compliance function should be completely independent of the General Counsel's office, whether it should be directly reporting to the CEO. And there are probably pluses and minuses, too, that have been outlined in a lot of the academic literature and by compliance professionals as to various pluses and minuses. I also think, frankly, on a company-by-company basis, it can very much depend on the nature of the actual people in terms of whether something works better in one company versus another. I don't think -- although I might have, you know, a personal preference as to the way if I were running a company, but that's not going to govern an analysis of whether the compliance function is working. It's really going to be about the substance. Whether you are reporting directly to the General Counsel or the CEO, it's going to be a question of whether there is independence and that ability to have run an effective system where compliance has an independent voice at the table and the ability to be heard by, if necessary, the Board. I think that's more critical than where the compliance function is housed.

Just to relate that to compensation, I do think there's a focus on how the compliance folks are compensated and who makes that determination, which would be looked at in situations where we had some question about whether they were functioning independently. So I think that is something that we would ask about in an appropriate case. How was compensation set? And who has the ultimate authority to make that call?

I'm going to turn it over to Hui generally on the issue of -- just sort of generally - - compensation at companies, and obviously that's something one looks at, but, you know, there's an inherent tension that I don't need to tell this audience about. There's nothing improper about systems that set goals and targets; it's a question of how that's communicated. I mean, that is just a natural tension that people who are in-house know all too well. And that is a struggle. But I don't think anyone's going to say any time soon that those are inherently bad things. It's a question of how you have systems in place to make sure that what could be incentivized isn't, in fact, happening.

Ms. Chen:

I completely agree with Andrew on the reporting structure. It really is going to depend on the company, and the issues and the people. On the compensation piece, I think that's -- I talked about compliance being a constant struggle. And that is one of the areas, at least from my experience, that companies have struggled a lot. I am actually not aware of what I, you know, really, anybody had considered really successful solutions on how do we design a good compensation package. And if somebody does know about them, we would love to hear more about them as a compliance community as a whole. But I think one of the things you want to be careful about would be, you know, what are some of the unintended effects might be. So, in some of the discussions and debates, as companies struggle with this issue, I've heard people say, for example, "we will reward the manager who's got the least amount, or zero compliance issues on his team." Now could you possibly be rewarding people

for suppressing compliance issues? So they have issues they just don't report it, so they can get their reward.

So, oftentimes, you do have to think about unintended consequences, and that's what makes this hard. So I'm not sure there is a perfect solution or even quite a good solution yet. But I think that's something that we're all, as a compliance community, continually working towards.

Professor Arlen: But would you expect, in evaluating a program, would you consider a program differently if compliance is in the room when there's a conversation about compensation structure, versus not having compliance in the room, in the sense that sometimes compliance will think of things, such as you just spoke about, that, for example, perhaps the Compensation Committee might not have thought of?

Ms. Chen: I think having Compliance at the table at appropriate occasions, and what is "appropriate" is going to depend on circumstances, is, in general, a good idea.

Professor Arlen: So turning to the issue of the role of compliance once there's a wrong, I'm interested in thoughts that actually either of you have on how the Deputy Attorney General's memo interacts with how compliance officers should be proceeding once they get orange flags that something may be up. Since once they're doing their initial investigation, they're doing it before they're sure there's a problem, and, yet those steps can have an impact on what the company can share later on, and if you have thoughts on that.

Mr. Weissmann: I'm not sure I totally understand the question. I mean, I think that the issue of doing internal investigations -- I mean, Compliance has a role, the General Counsel's office has a role. I think that people who are outside counsel in this room and the in-house folks are aware of the challenge of when you get an allegation and trying to quickly do triage to decide is it routine or is it likely to be something that is more problematic. And when you need to sort of devote more resources. The Department does not expect that we're going to be -- And for those companies that choose to self-report, since most companies are under no legal obligation to do so, the Department is not expecting that that's a report that we're going to get before you have any sense of what the allegation is. So we're certainly expecting that that's going to be looked at. Sometimes that will come in through Compliance; sometimes it will come in through HR; sometimes it comes in through, you know, a whistleblower reporting internally. So there are a variety of ways that Compliance will interact. But I don't think anything -- I don't think that the Yates memo is -- changes the equation on that particular issue.

Professor Arlen: My last question before opening it up is: You mentioned information within the firm. I was interested in your sense of attributes of a good- versus a less-good whistleblower program. Because one of the items of effective compliance that was recently outlined, was making sure one has an effective whistleblower program. And we all know that if there's ever a place where there's enormous variation, it's in the effectiveness of internal whistleblowing. Does the firm have a program that genuinely encourages it and makes employees feel confident that they will be, in fact, rewarded for bringing information forward?

And, alternatively, we all have heard of programs where the employee reports and is either explicitly or implicitly not rewarded for it. And what would you look at, in looking at a program, to see whether it's really doing a good job of making sure the firm gets the information that's within the firm about wrongdoing?

Ms. Chen:

I talked a little bit about the open door policy. And I think that's one place I would start. Is that -- Does your firm have a culture where people feel secure to be raising complaints? And one of the data that you might want to think about is: You know, how often do you get whistleblower complaints from within the company? If you've -- In the history of your compliance program, you have never gotten one, then perhaps it's time to look at why you haven't gotten one.

The other aspect is -- again, we're going back to the little guys out in the field -- can your guy or women in Pakistan, in Argentina, in China, in India, feel free -- are they -- not only feel free to raise the issue, but have the language capacity to do so. So when they need to raise an issue to that parent company in the United States, do they have to call an international number and speak in English? That would be a pretty strong deterrent to people in the field who would want to raise the issue. Oftentimes, I go back to what I call "the frontline gatekeepers." They are very, very low-level employees and they oftentimes do not possess the language capacity or even the sophistication of knowing how to make an international call.

So how well have you publicized your whistleblower program in your different geographies, different lines of business? How accessible is it to them? And then, thirdly, really, is how you handle -- how is the program -- Once the complaint is received, how is it handled? Do you have a healthy process for handling these type of complaints? Do they always get a response? Can they remain anonymous? All these are tangible measures to demonstrate to the whistleblower that the company takes your complaint seriously.

I understand, from having handled many whistleblower complaints that it can be very frustrating. A lot of times, you know, I have seen whistleblower complaints that come in fifteen pages and you have no idea what they're saying. And somewhere on page 7, it says "my manager makes me do the wrong thing." And now you're left with trying to figure out what does he mean or he or she mean by this? But, I think, one of the hallmarks of a strong whistleblower program is that you demonstrate that you do take them seriously, you make a reasonable effort to address and inquire into these complaints.

Mr. Weissmann:

I would add one thing that we did when I was at the Bureau -- and it started before me, it wasn't my innovation -- is that we publicized, in both an anonymized and non-anonymized way, illustrations of success stories. And one of the things that we tried to counter was the concern that if you report something, it's kind of a career killer. That you may not be retaliated against, but it may not be the best thing in terms of what's going to happen to you. So we had both reports on an anonymized basis of what happened to people who reported, and getting promoted. And we also had some very senior people at the Bureau talk about it, about their own experiences reporting something and had -- and they were people who were in a very high-level position of authority.

So that was one way to help counter the concern which, I think, is natural.

Ms. Chen:

And on that count, actually, there is a best practice, I'd say, I heard of, where also companies, when they do employee surveys, that this type of question is included in the employee surveys. In addition to how happy you are with your job, is how comfortable do you feel raising an issue.

Professor Arlen:

So thank you very much, and I apologize for this noise we just had. So this is going to end the public part of the program. So we will now turn to the question and answer part under Chatham House Rule, and I open it up to the first question.

Mr. Weissmann:

I wonder, before we start: I just want to repeat something that Hui Chen said, which is that we are going to be trying to speak with as many compliance officers as possible to really hear what issues people have, both within a company -- it's not to focus on particular names of companies -- we're just interested in knowing what kinds of issues are out there, as well as, at the Department, what are we doing right and what are we doing wrong? And really trying to make sure that we're focused on the right issues. So this is part of that effort.