



NAPABA

Virtual Experience

November 6, 2020
11:00 AM – 12:00 PM

Session 403 | In the Fraught World of Compliance, How Gatekeepers Can Do Their Job And Still Protect Themselves

Virtually every global company has or will face a major crisis because of illegal conduct occurring in some corner of the world. Whistleblower reports are followed by Government investigations, which are in turn followed by exhaustive internal investigations. Non-U.S. prosecuting agencies have adopted many of the aggressive tools utilized by U.S. prosecutors to instigate similar investigations in foreign jurisdictions. Often, the company takes a reputational hit, heavy fines are imposed, monitors are installed,

Heads roll.

In this fraught environment, the so-called "gate-keepers" -- the lawyers and compliance officers -- face ever increasing risks of personal criminal or regulatory liability because they allegedly missed the "red flags." Even if no charges are ever brought, such gatekeepers face potential termination or demotion. Never mind that the red flag was buried deep in the 100th email of a long day. Hindsight is always 20/20.

This panel of distinguished white-collar lawyers will be led by Target's General Counsel, Don Liu, in a discussion about how the gatekeepers can do their jobs while also avoiding undue personal risk. Drawing on their vast experience as federal prosecutors, company counsel, individuals' counsel and chief compliance officers, the panel will offer practical approaches to navigating the fraught environment so that lawyers and compliance personnel can take basic steps to protect the company while also protecting themselves.

Moderator: Tai Park, Partner, White & Case LLP

Faculty:

Don Liu, Executive Vice President and Chief Legal and Risk Officer, Target Corporation

Sung-Hee Suh, Global Head of Regulatory Risk and Compliance, PIMCO

Brian Sun, Of Counsel, Jones Day LLP

Debra Wong Yang, Partner, Gibson Dunn

NAPABA – November 2020

Panel Discussion: **In the Fraught World of Compliance, How Gatekeepers
Can Do Their Jobs And Still Protect Themselves**

Panelists: Moderator - Don H. Liu, Executive Vice-President and
Chief Legal and Risk Officer, Target Corporation

Tai H. Park, Partner, White & Case LLP

Sung-Hee Suh, Managing Director and
Global Head of Regulatory Risk and Compliance, PIMCO

Brian A. Sun, Of Counsel, Jones Day LLP

Debra Wong Yang, Partner, Gibson Dunn & Crutcher LLP

I. The Fraught Environment

- a. In any global company, the chances of some employee somewhere in the world engaging in some violation of law is high.
 - i. Even highly effective compliance programs are not fool proof.
- b. What happens when an investigation uncovers a pattern of misconduct in some corner of the world?
 - i. Disciplinary action for those involved in the misconduct or those who can be blamed for not preventing the misconduct.
 - ii. Criminal/Regulatory investigation and/or prosecution.
- c. In 2015, Andrew Ceresney, then-Director of Enforcement at SEC, said at a compliance conference, **“We have brought, and will continue to bring, actions against...compliance officers when appropriate. This typically will occur when the [SEC] believes...compliance personnel have affirmatively participated in the misconduct, when they have helped mislead regulators, or when they have clear responsibility to implement compliance programs or policies and wholly failed to carry out that responsibility...”**¹
- d. **“Picking and choosing, for example, gatekeeper cases, becomes extremely important in a tight resources environment because gatekeepers are the ones who can prevent wrongdoing among any number of actors.”**
 - i. Lara Shalov Mehraban, SEC Associate Regional Director for Enforcement in New York, December 2018.
- e. Who are “Gatekeepers”?
 - i. Lawyers
 - ii. Compliance personnel
 - iii. Finance and accounting personnel
 - iv. Internal auditors

¹ Andrew Ceresney, Keynote Address at 2015 National Society of Compliance Professionals, National Conference, available at <https://www.sec.gov/news/speech/keynote-address-2015-national-society-compliance-prof-ceresney.html>.

II. Trend Toward Finding Liability

a. Attorneys Held Liable

- i.** In 2017, Keppel in-house counsel Jeffery Chow pled guilty to conspiring to violate FCPA.²
- ii.** In 2013, PetroTiger general counsel Gregory Weisman pled guilty to conspiring to pay bribes in violation of the FCPA.
- iii.** In 2012, Jeffrey Tesler, a UK lawyer, was sentenced for conspiring to channel bribes to Nigerian politicians on behalf of an international consortium of construction firms.³
- iv.** In 2004, Stephen Woghin, the former general counsel of Computer Associates International, Inc., pled guilty to securities fraud conspiracy and obstruction of justice for his role in the company’s fraudulent scheme.

b. Compliance Officers Held Civilly Liable

- i.** In 2017, Moneygram International Chief Compliance Officer Thomas Haider settled FinCEN and DOJ claims under the “Bank Secrecy Act.”⁴
 1. Haider failed to ensure that company implemented and maintained an effective anti-money laundering program and file timely SAR reports with FinCEN.
 2. Agreed to 3-year bar from performing compliance functions at a money transmitter and to pay civil penalty of \$250,000.
- ii.** In 2017, Windsor Street Capital Chief Compliance Officer John David Telfer settled SEC allegations of failure to report \$24.8 million in suspicious trading activity.

² Louis Ramos, Benjamin Klein, When Attorneys Get Ensnared in FCPA Misconduct, Law360, January 23, 2018, available at <https://www.law360.com/articles/1004047/when-attorneys-get-ensnared-in-fcpa-misconduct>

³ Second British Man Sentenced Over Nigerian Government Bribes, The Guardian, Feb. 23, 2012, available at <https://www.theguardian.com/world/2012/feb/23/british-jeffrey-tesler-jailed-nigeria>.

⁴ DOJ Press Release, Acting Manhattan U.S. Attorney Announces Settlement Of Bank Secrecy Act Suit Against Former Chief Compliance Officer At Moneygram For Failure To Implement And Maintain An Effective Anti-Money Laundering Program And File Timely SARs, available at <https://www.justice.gov/usao-sdny/pr/acting-manhattan-us-attorney-announces-settlement-bank-secrecy-act-suit-against-former>.

1. Telfer received a \$10,000 penalty and was barred from the securities industry.⁵
- iii. In 2017, Banamex Chief Compliance Officer was fined \$70,000 and prohibited from working for financial institutions as part of the firm’s non-prosecution agreement in a DOJ money-laundering case.⁶
- iv. In 2014, Brown Brothers Harriman’s Anti-Money Laundering Compliance Officer, Harold Crawford, settled charges filed by FINRA for failing to “implement an AML program reasonably designed to detect and cause the reporting of potentially suspicious activity.”
 1. He was barred from the industry for one-month and fined \$25,000.⁷

c. Failure-to-act liability

- i. The compliance officers were held personally responsible for *failing to report or stop* illegal activity.
 1. As to Telfer, the SEC claimed: “Even in cases where one or more of these red flags was brought directly to Telfer’s attention ... Telfer knowingly or recklessly failed to file the required suspicious activity reports.”
 2. As to Haider, the U.S. Attorney claimed: “Compliance officers perform an essential function, serving as the first line of defense in the fight against fraud and money laundering. Unfortunately, . . . Haider violated his obligations as MoneyGram’s chief compliance officer. By failing to terminate MoneyGram outlets that presented a high risk for fraud and to take other actions clearly required of him, Haider allowed criminals to use MoneyGram to defraud innocent consumers.”

⁵ Cara Mannion, Ex-Exec, SEC Settle Suit Over Pump-And-Dump Reporting, Law360, June 14, 2017, Available at <https://www.law360.com/articles/934553/ex-exec-sec-settle-suit-over-pump-and-dump-reporting>

⁶ Sue Reisinger, Chief Compliance Officer Fined, Barred From Work as Banamex Reaches NPA, May 22, 2017, available at <https://www.law.com/corpcounsel/sites/corpcounsel/2017/05/22/chief-compliance-officer-fined-barred-from-work-as-banamex-reaches-npa/>

⁷ Suzanne Barlyn, *Brown Brothers to pay \$8 million fine for money laundering violations*, Reuters (Feb. 5, 2014), <https://www.reuters.com/article/us-finra-brownbrothers>.

d. Personnel Consequences

- i. Even if no governmental enforcement proceeding is brought against a gatekeeper, he or she can be subject to criticism, demotion and/or termination.

III. The Role of Gatekeepers

a. The Government views gatekeepers as their law enforcement partners:

- i. Ceresney: “I do not want you to be concerned that by engaging, you will somehow be exposed to liability...”

1. “At the end of the day, though, legal and compliance officers who perform their responsibilities diligently, in good faith, and in compliance with the law are our partners and need not fear enforcement action.”⁸

2. He specifically used the example of a CCO who was not charged:

- a. The person was "tasked with numerous non-compliance responsibilities that severely limited his ability to focus on his compliance function" and where the CCO had repeatedly asked for more help and warned that the firm would not be ready for an SEC examination.”

- ii. *See also* Sally Yates, then-Deputy Attorney General, calling compliance professionals the DOJ’s “crucial partner in the fight against white collar crime” in 2015.⁹

b. Actually, Gatekeepers are not partners in law enforcement. They are corporate employees looking after the welfare of the company.

- i. Their job is to try to prevent violations of law or policy that can harm the company.

⁸ Andrew Ceresney, Keynote Address at 2015 National Society of Compliance Professionals, National Conference, available at <https://www.sec.gov/news/speech/keynote-address-2015-national-society-compliance-prof-ceresney.html>.

⁹ Sally Yates, Speech to American Banking Association and American Bar Association Money Laundering Enforcement Conference, November 16, 2015, available at <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-american-banking-0>.

IV. **Doing the Job While Mitigating Personal Risk**

- a. Every fact situation calls for a tailored response, but gatekeepers who were successful for their companies while mitigating the risk of personal exposure shared some common approaches.¹⁰
- b. Not just a job:
 - i. Gatekeepers made the corporate compliance program personal, not just a job.
 - ii. Ultimately, ensuring compliance with the laws, regulations and company policies is about protecting the company and its reputation.
 - iii. A genuine attitude toward the importance of compliance came through clearly in a person’s actions and in written communications later reviewed during investigations.
- c. Defined Scope:
 - i. Maintained a clear definition of the scope of responsibilities.
 1. And stayed within the scope.
 - ii. Taking on someone else’s job could have detracted from one’s ability to focus on his job and created confusion about who “owns” a particular issue.
 - iii. Delegated as appropriate, and maintained that appropriate delegation consistently.
 1. Didn’t delegate, then micromanage, then fall back into disinterest.
 2. If a matter was delegated, she required a report back.
 3. Appropriate delegation is not passing the buck. Instead, it entails trusting the organization’s division of responsibilities and trusting colleagues to do their jobs.
 - a. Need to have confidence in your people and hire appropriate people.

¹⁰ THE FOLLOWING DISCUSSION DOES NOT CONSTITUTE LEGAL ADVICE. RATHER, IT DESCRIBES OBSERVATIONS FROM PRIOR INVESTIGATIONS AND MATTERS.

4. At a global company with enormous complexity, any gatekeeper’s line of vision is necessarily limited. One cannot do or know it all.

d. Colleagues’ Scope

- i. Respected her colleagues’ scope of responsibilities.
- ii. Emailing a “reply to all” when it’s a large group, many of whom have no responsibility for that issue, would have created confusion, resentment and even, potential exposure later for those others.

e. Follow-through

- i. If she engaged with an issue, she followed it through to its conclusion.
- ii. Stayed organized and followed up.
 1. Even absent an immediate ability to solve, she formed a plan for when and how to deal with an issue, even if in the future.
- iii. Compliance is as much about ensuring a *process* of controls as it is substance.
 1. Failure to follow through was one of the most common factors leading to personal exposure.
 2. The most troubling and unpleasant item on one’s to do list is often the easiest to put off to another day.

f. Measured Documentation

- i. Documented his steps and reasonable response.
- ii. They need not be elaborate memos to file. Rather, they could be short but sufficient emails to colleagues.
- iii. Critical to refreshing memory later or “prior recollection recorded.”
- iv. Not CYAs (though they later proved highly probative of his reasonable responses).
- v. Helped to provide a clearer record of who was responsible for taking what steps.

- vi. Writing was measured, consistent and reasonable.
 - 1. Alarmist writings come back to haunt the author if he failed to act in a manner commensurate with the level of urgency reflected in the writing.

g. Collaboration

- i. Collaborated and asked for help from relevant colleagues when needed.
- ii. Resources are a never-ending problem for many gatekeepers.
- iii. Most red flags require careful judgment, and in depth discussions with trusted colleagues, bosses or direct reports helped.
 - 1. Avoids misconstruing red flags; inexperienced reactions would have caused more harm than good.
- iv. In some cases, sought out objective evaluations from outside counsel.
 - 1. Documented the same.

h. Big Picture

- i. Kept sight of the big picture and did not get lost in the process weeds.
- ii. The questions common to most compliance issues:
 - 1. What is the problem?
 - 2. How do we fix it?
 - 3. Even if no integrity issue, can controls be tightened?
 - 4. Does the issue need to be reported up?
 - 5. Does it need to be reported out?