



PANEL: CORPORATE COUNSEL IN THE LINE OF FIRE

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The Securities and Exchange Commission has, for years, viewed in-house counsel, attorneys, compliance officers, and even directors as essential “gatekeepers” in its fight against securities law violations.¹ Over the last few years, the SEC has taken a more ardent position, warning such “deputized” gatekeepers that the SEC has them in its sights and is employing new tools to ferret out corporate noncompliance. Increased regulatory scrutiny on in-house counsel, however, presents a potential for serious conflict. In-house counsel owe their corporations duties of advocacy and confidentiality, which on their face appear to conflict with the SEC’s vision of corporate counsel as active gatekeepers.

In-House Counsel and Other Gatekeepers Should Expect to Face “Aggressive Enforcement”

The SEC has explicitly warned that “[a]ggressive enforcement against wrongdoers who harm investors and threaten our financial markets remains a top priority, and [the Commission] brought and will continue to bring creative and important enforcement actions across a broad range of the securities markets.”² The Commission has further added that, in fulfilling its promise to aggressively enforce securities laws, it will “continue to bring its resources to bear” by initiating “cases against gatekeepers”³ in their individual capacities,

notwithstanding what actions are brought against their corporate employers.⁴ Such actions include “actions against legal and compliance officers when appropriate.”⁵ Targeting individuals advances the Commission’s “broken windows” method of enforcement, which it first adopted in the 1980s.⁶ Under this approach, the SEC seeks out and punishes even minor violations with the hope that doing so will deter larger, more damaging violations.⁷ Historically, though, the SEC has not targeted corporate counsel for “merely giving bad advice, even if that advice is negligent and perhaps worse.”⁸ More recently, though, the Commission has indicated a willingness to bring actions based on negligence where it lacks sufficient evidence to prove intentional wrongdoing.⁹

Whether enforcement actions against in-house counsel are appropriate, however, depends on the circumstances. In addition to cases involving direct participation in misconduct or activities designed to mislead regulators, the SEC warns that in-house counsel and other gatekeepers may be subject to enforcement actions when “they have [a] clear responsibility to implement compliance programs or policies and wholly fail to carry out that responsibility.”¹⁰ This role—implementing compliance programs designed to properly address misconduct—is one of the Commission’s key

1 See, e.g., Stephen M. Cutler, Director, Division of Enforcement, U.S. Securities and Exchange Commission, *The Themes of Sarbanes-Oxley as Reflected in the Commission’s Enforcement Program*, UCLA School of Law, Los Angeles, CA (September 20, 2004) (explaining that the Commission’s increased enforcement against gatekeepers is “paramount in ensuring that [the] markets are clean.”), available at www.sec.gov/news/speech/spch092004smc.htm. In a recent speech by SEC Chair Mary Jo White, Ms. White noted that directors—perhaps more than anyone—must also serve as gatekeepers. See Mary Jo White, Chair, SEC, *A Few Things Directors Should Know About the SEC*, Stanford University, Stanford, CA (June 23, 2014), available at <http://www.sec.gov/News/Speech/Detail/Speech/1370542148863>.

2 Mary Jo White, Chair, SEC, SEC Press Release: SEC’s FY 2014 Enforcement Actions Span Securities Industry and Include First-Ever Cases: New Investigative Approaches and Innovative Use of Data and Analytical Tools Help Drive Successful Enforcement Year (Oct. 16, 2014), available at <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543184660>.

3 See *id.*, Comments by SEC staff: Andrew Ceresney, Director, Division of Enforcement, U.S. Securities and Exchange Commission.

4 Mary Jo White, Chair, SEC, *Deploying the Full Enforcement Arsenal*, Council of Institutional Investors Fall Conference, Chicago, IL (September 26, 2013) (explaining that pursuing individuals even before entities is a core principle of the SEC’s enforcement program).

5 Andrew Ceresney, Director, Division of Enforcement, U.S. Securities and Exchange Commission, *Keynote Address at Compliance Week 2014* (May 20, 2014), available at <http://www.sec.gov/News/Speech/Detail/Speech/1370541872207>.

6 See Tracey Samuelson, *Why the SEC is all about ‘broken windows’*, Marketplace (September 11, 2014), available at <http://www.marketplace.org/topics/business/why-sec-all-about-broken-windows>.

7 *Id.* (quoting Director Andrew Ceresney as explaining, “Focusing on these violations does keep people on notice that we are going to bring action in connection with violations big and small.”)

8 Giovanni P. Prezioso, SEC General Counsel, *Remarks at the Spring Meeting of the Association of General Counsel* (Apr. 28, 2005), available at <http://www.sec.gov/news/speech/spch042805gpp.htm>.

9 White, *supra* note 7.

10 See *id.*

concerns. As the SEC explains, “in the cases we bring, you will see that they are not cases against [Chief Compliance Officers] that were promoting compliance. Instead, they are cases against CCOs that were assisting fraud, ignoring red flags, not asking the tough questions, and not demanding answers.”¹¹ While this particular comment focuses on the role of compliance personnel, which may not always include in-house counsel, the underlying principles have broader application.

In-house counsel therefore have a “great responsibility: whether drafting and implementing policies, influencing executives’ decision-making, identifying risks, investigating allegations of misconduct, or reporting violations.”¹² Because counsel provide services necessary for issuers to access the markets,¹³ counsel’s diligence in identifying and responding to potential securities laws violations is crucial. Moreover, in-house counsel are obligated to take appropriate measures under the Sarbanes-Oxley Act, which authorized the Commission to set “minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers.”¹⁴ One such obligation is the duty to “report up the ladder” where an attorney has evidence that an issuer or individual has materially violated the securities laws.¹⁵ At the very least, this requires counsel to inform senior management and even the board of directors of such violations.¹⁶ The key is to recognize violations or potential violations, respond swiftly, and ensure that directors, officers, compliance personnel and those in similar positions take appropriate corrective measures.

Despite the SEC’s newly professed willingness to initiate enforcement actions against corporate attorneys for negligence, counsel who meet their gatekeeper obligations likely need not worry that the Commission will be lurking around every corner, waiting for any misstep. As the SEC’s Director of the Division of Enforcement, Andrew Ceresney, explains, “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.”¹⁷ Similarly, Chair White noted that she and the Commission are aware of concerns that overly aggressive pursuit of in-house counsel and other gatekeepers may cause many to rethink their willingness to continue in such positions.¹⁸ To allay this concern, the SEC “will not be looking

to charge a gatekeeper that did her job by asking the hard questions, demanding answers, looking for red flags and raising her hand.”¹⁹

For in-house counsel who abdicate their gatekeeper obligations, however, the SEC has implemented new tools to help it discover wrongdoing without the need for the Commission to wait for tips from whistleblowers. In particular, “[t]he innovative use of technology—enhanced use of data and quantitative analysis—was instrumental in detecting misconduct and contributed to the Enforcement Division’s success in bringing quality actions that resulted in stiff monetary sanctions.”²⁰ As an example of how it uses technology to help it stay on top of wrongdoing, the SEC’s “Advanced Bluesheet Analysis Program” identifies “suspicious trading patterns that would suggest relationships among different traders who may be sharing inside information.”²¹ Another example is the “Center for Quantitative and Risk Analytics,” an in-house resource that helps the SEC “develop technologies to analyze trading and other types of data available . . . from a wide variety of venues.”²²

Fortunately, despite its tough language, new tools, and increased enforcement efforts directed toward gatekeepers, avoiding an enforcement action is relatively simple. Stay involved, be vocal, and be persistent. Counsel who see risky conduct should report up the ladder to senior management, and the board of directors when necessary. The dictates of Sarbanes-Oxley, and the rules promulgated by the Commission pursuant thereto, are not mere aspirational goals. As with counsel and compliance personnel, the Commission views senior management and directors as vital gatekeepers, who must implement and oversee compliance with federal securities laws.²³ To properly discharge their fiduciary duties to the company and its shareholders, “it is essential for directors to establish expectations . . . exercise appropriate oversight . . . [and] to set the all-important ‘tone at the top’ for the entire company.”²⁴

Defining the Lines of Appropriate Action: Recent Enforcement Actions Against In-House Counsel and Other Gatekeepers

*In re Theodore W. Urban*²⁵

Unlike the other cases discussed below, *In re Theodore W.*

11 Kara M. Stein, Commissioner, SEC, Keynote Address at Compliance Week 2014 (May 19, 2014), available at <http://www.sec.gov/News/Speech/Detail/Speech/1370541857558>.

12 See *id.*

13 See *id.*

14 Sarbanes-Oxley Act, 15 U.S.C. § 7245.

15 Cutler, *supra* note 1.

16 See *id.*

17 Ceresney, *supra* note 5.

18 Mary Jo White, Chair, SEC, Remarks at the Securities Enforcement Forum (Oct. 9, 2013),

available at <http://www.sec.gov/News/Speech/Detail/Speech/1370539872100>.

19 *Id.*

20 White, *supra* note 2.

21 Ceresney, *supra* note 3.

22 See *id.*

23 White, *supra* note 1.

24 *Id.*

25 99 S.E.C. Docket 994, Rel. No. 402, 2010 WL 3500928, at *1 (2010).

Urban resulted in dismissal of the charges instituted by the SEC. It is for this very reason, though, that the case is so important to in-house counsel. Even though the charges were eventually dismissed, “[t]his case, perhaps as much as any action pursued by the staff in recent years, demonstrates the perils to the bar of an aggressive program directed at challenging lawyers’ advice or conduct.”²⁶ While *Urban* eventually avoided the charges, he incurred significant costs and damage to his reputation in fighting them.²⁷

The SEC charged *Urban* with failure to supervise an investment broker, Stephen Glantz, who committed numerous violations of the securities laws.²⁸ As General Counsel of Ferris, Baker Watts, Inc. (FBW), *Urban* served on a number of committees charged with ensuring compliance. Not long after joining FBW, Glantz’s activity began to raise red flags for compliance personnel.²⁹ Glantz routinely manipulated accounts by, among other things, “falsely classif[y]ing” some of his accounts as institutional accounts . . . to lessen the scrutiny they would receive.”³⁰ After learning of Glantz’s suspicious activity, *Urban* prepared a memorandum explaining his concerns and provided the memorandum to members of FBW’s senior management. *Urban* also recommended that FBW terminate Glantz, “and had his compliance staff file a report with the New York stock Exchange regarding unauthorized trading.”³¹ Notwithstanding his initiative in reporting up and otherwise exposing Glantz’s illicit trading practices, the SEC instituted and maintained its failure-to-supervise charges against *Urban*. The Administrative Law Judge presiding over the case dismissed the charges, but not before *Urban* had effectively been “thrown under the bus.”

The SEC has since issued guidance regarding its policies and practices governing lawyers’ failure to supervise through a summary of frequently asked questions with answers by the Commission. By and large, the questions and answers mirror the positions espoused by Chair White and Director Ceresney—the SEC will not “single out compliance or legal personnel” except in situations where “that person has the requisite degree of responsibility, ability or authority to affect the conduct of the employee whose behavior is at issue.”³²

*SEC v. Life Partners Holdings, Inc.*³³

In 2012, the Commission brought charges against Life Partners Holdings, Inc., CEO Brian Pardo, and General Counsel Scott Peden for fraud and providing false and misleading disclosures required under federal securities laws during a period of four years.³⁴ Among the charges against the parties were fraud in violation of Section 17(a) (1) of the Securities Act of 1933; numerous false reports in violation of Section 13(a) of the Securities and Exchange Act of 1934 and rules promulgated under the act.³⁵ In one instance underlying the charges, “when Ernst and Young (LPHI’s outside auditors) informed Pardo that it could not sign off on LPHI’s financial disclosures [for failure to comply with GAAP], . . . Pardo authored an email in which he threatened to sue his own auditor unless it signed off on LPHI’s accounting methods.”³⁶

In 2014, a jury found against Life Partners, Pardo, and Peden on all counts. With respect to Peden, the court noted that Peden “failed to abide by the law and keep the investing public fully informed.”³⁷ The jury convicted Peden of 68 individual violations, which included providing assistance on 17 false reports filed in violation of federal securities laws. Based on this, the jury awarded damages against Peden in the amount of \$4,740,000.³⁸ While the court ultimately found the award too high, it nonetheless found Peden’s recklessness worthy of \$2,000,000 in damages.³⁹

The substantial award against Peden should not come as a surprise, especially in light of his considerable assistance in preparing and filing Life Partners’ reports. Notwithstanding his active participation in Life Partners’ misconduct, Peden stands as an example to general counsel everywhere. The SEC takes counsel’s gatekeeper function seriously, and is not bashful about bringing high-dollar charges where a lawyer neglects that function. In the SEC’s view, Peden had opportunities to respond to red flags, but failed. It is doubtful Peden could have accomplished meaningful change in the company in light of Pardo’s considerable control.⁴⁰ But Peden could have challenged Pardo; he could have left the company if Pardo would not correct the violations. What Peden could not do, though, was ignore the red flags and join in Life Partners’ misconduct.

²⁶ William McLucas, Douglas Davison, & Michael Lamson, SEC Enforcement Developments: Renewed Focus on Lawyers, 45 SEC. REG. & L. REP. 3 (Oct. 28, 2013), available at <http://www.bna.com/sec-enforcement-developments-renewed-focus-on-lawyers/>.

²⁷ See *id.*

²⁸ 2010 WL 3500928, at *1.

²⁹ *Id.* at *5–6.

³⁰ *Id.* at 6.

³¹ McLucas et al., *supra* note 26, at 3.

³² SEC, Division of Trading and Markets, Frequently Asked Questions about Liability of Compliance and Legal Personnel at Broker-Dealers under Sections 15(b)(4) and 15(b)(6) of the Exchange Act (Sept. 30, 2013), available at <http://www.sec.gov/divisions/marketreg/faq-cco-supervision-093013.htm>.

³³ No. 1-12-CV-33-JRN, 2014 WL 7051375, at *1 (W.D. Tex. Dec. 2, 2014).

³⁴ See *id.*

³⁵ See *id.*

³⁶ *Id.* at *2.

³⁷ *Id.* at *3.

³⁸ *Id.* at *7.

³⁹ *Id.*

⁴⁰ *Id.*

*SEC v. AgFeed Industries, Inc.*⁴¹

In March 2014, the SEC charged AgFeed Industries and a number of executives, including the chair of the company's audit committee, K. Ivan Gothner, with *inter alia* fraud, falsified books, aiding and abetting falsified books, deceit of auditors, aiding and abetting false SEC filings, and control person liability for false SEC filings. During his time with the company, Gothner did not serve as its legal counsel, but the lessons from the case apply equally to in-house counsel.

Executives at AgFeed's China location committed accounting fraud by exaggerating revenues from the China operations. Among the various efforts to inflate financial numbers, the executives kept two sets of books relating to the sales and weights of hogs. On one set of books, the company reported increased sales and heavier hogs; whereas, on the other set, the company kept accurate records of hogs sold and weights at the time of sale.⁴² To increase the company's stock price, executives hid the accurate numbers from auditors.⁴³

Gothner worked for AgFeed's U.S. operations, and learned of the fraud in 2011.⁴⁴ When Gothner learned of the fraud, he and others at the U.S. operations had been "engaged in efforts to raise capital for expansion and acquisitions."⁴⁵ Despite warnings from others, Gothner failed to properly investigate the fraud or disclose it to investors. Instead, he initiated an internal investigation of the fraud, which allowed it to continue.⁴⁶ The SEC alleged that Gothner even received a copy of the two sets of books at one point, along with a memorandum from Chinese counsel detailing the company's fraudulent activities, but nonetheless continued to keep the fraud a secret to secure profits for the company and for himself.⁴⁷ Gothner also failed to disclose vital information regarding the fraud to the company's auditors and internal management.⁴⁸

The SEC charged Gothner and other executives "with violating or aiding and abetting violations of the antifraud, reporting, books and records, and internal controls provisions of the federal securities laws."⁴⁹ With respect to Gothner, the SEC's charges focused heavily on his failure to take appropriate action once he learned of red flags and his participation in delaying disclosure of the company's

fraudulent acts.⁵⁰ As part of its suit against Gothner and the other AgFeed executives, the SEC is seeking disgorgement of any profits received, financial penalties, and bars preventing the executives from serving in such roles again.⁵¹

Unlike Peden in the Life Partners case, Gothner did not actively participate in the fraud by preparing the falsely inflated books. Instead, he failed to report the fraud and disclose the information to investors, thereby allowing the fraud to continue. Moreover, he ignored the red flags for personal gain. In March 2014, AgFeed settled its suit with the SEC, giving up its registration.⁵² At the time of this article, Gothner still faces potential liability for his failure to report the company's fraud.

Enforcement by Other Regulatory Agencies

In addition to the SEC's efforts, other regulatory agencies have also targeted corporate counsel in an effort to crack down on securities law violations. Among such regulators are the U.S. Treasury's Financial Crimes Enforcement Network ("FinCEN") and the Financial Industry Regulatory Authority ("FINRA"). One area in which FinCEN and FINRA have recently targeted gatekeepers is anti-money laundering.⁵³ While recent actions have focused on compliance personnel more than in-house counsel—e.g., FinCEN's \$1 million action against MoneyGram International, Inc.'s former CCO and FINRA's \$25,000 fine issued to Brown Brothers Harriman's anti-money laundering compliance officer⁵⁴—the lessons apply to in-house counsel, too, especially when corporate counsel lead compliance efforts. These cases show that "[t]he expectations are higher, and the consequences of failure are extraordinarily high as regulators continue to up the ante in terms of sanctions."⁵⁵

Take, for example, the Brown Brothers Harriman case. In addition to an \$8 million sanction against the company, FINRA sanctioned the company's anti-money laundering compliance officer, Harold Crawford, \$25,000 and suspended him for one month despite the fact that Crawford recognized, reported up the ladder, and implemented programs designed to protect against further suspicious activity regarding penny stock trades.⁵⁶ In part, FINRA sanctioned Crawford not for failing to recognize red flags and take steps to address them but instead for failure to take what the agency viewed

41 SEC Press Release, SEC Charges Animal Feed Company and Top Executives in China and U.S. with Accounting Fraud (Mar. 11, 2014), available at <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370541102314>.

42 See *id.*

43 See *id.*

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.*

48 Complaint at 2–3, *SEC v. AgFeed Indus., Inc.*, (M.D. Tenn. Mar. 11, 2014), available at <http://www.sec.gov/litigation/complaints/2014/comp-pr2014-47.pdf>.

49 SEC Press Release, *supra* note 39.

50 Complaint at 2-3, 21-30 (listing the SEC's claims for relief against Gothner and other AgFeed executives).

51 *Id.*

52 Dan Ivers, *AgFeed Settles with SEC, Gives Up Securities Registration*, Law360 (Mar. 31, 2014), available at <http://www.law360.com/articles/523489>.

53 For a more extensive treatment of regulatory actions against corporate counsel in the context of anti-money laundering laws, see Melissa Maleske, *The Compliance Issues Putting GCs in Regulators' Crosshairs*, Law360 (Feb. 18, 2015), available at <http://www.law360.com/articles/622614/pring?section=securities>.

54 See *id.*

55 *Id.* (quoting David DeMuro, senior counsel at Neal Gerber & Eisenberg LLP).

56 See *id.* at 2.

as adequate measures in responding to the red flags.⁵⁷ Among other things, FINRA determined that the company's "automated monitoring system was 'not adequately tailored,' [and] that Brown Brothers Harriman didn't establish written procedures for the AML staff until it was too late[.]"⁵⁸

FINRA's sanctions against Crawford give additional weight to David DeMuro's comments above regarding the heightened expectations gatekeepers face in carrying out their duties. Much like the *Urban* case, FINRA's treatment of Crawford shows that regulators take seriously gatekeepers' duties, and are willing to impose severe sanctions to ensure gatekeepers do, too.

What In-House Counsel Should Take Away from the SEC's Enforcement Actions

The different actions discussed above provide a glimpse at the types of conduct that will warrant an enforcement action from the Commission. Clearly, active participation in fraud or other misconduct will receive close scrutiny and significant punishment, both professionally and financially. Further, aiding and abetting the continuation of securities law violations will be met with steep penalties. But, perhaps most importantly, "ignoring red flags, not asking the tough questions, and not demanding answers"⁵⁹ may also warrant an enforcement action.

That said, the SEC views counsel's conduct on a continuum. At one end is purely legal advice. "[T]he Commission ordinarily

will not sanction lawyers under the securities laws merely for giving bad [legal] advice, even if that advice is negligent and perhaps worse."⁶⁰ At the opposite end of the continuum is lawyer "conduct that—if carried out by any other person—would have given rise to an enforcement proceeding."⁶¹ The Commission has made clear its willingness to sanction attorneys for conduct approaching the latter.⁶² The more closely counsel's activity resembles typical lawyer functions, the less likely counsel need worry about being charged under the securities laws. With respect to conduct that falls somewhere between these two ends of the continuum, the Commission has explained that it is "not searching for cases at the fringes" but rather on "evidence of potentially serious misconduct: subornation of perjury, alteration of documents and potential violations of the regulations adopted under [Sarbanes-Oxley] 307 itself."⁶³

But, one thing is clear: "compliance is one of the strengths of American financial markets. It gives individuals around the world the confidence to invest. . . . When compliance is lacking, confidence in our financial markets waivers. And with it, so does the health of the entire economy."⁶⁴ In light of this, the SEC views gatekeepers as central to the continued culture of compliance, and therefore takes gatekeeper's obligations seriously. *In re Thomas W. Urban* and FINRA's action against Harold Crawford should be on the forefront of all in-house counsel's minds. Recognize suspicious activity and respond quickly and thoroughly. Take a page out of the SEC's playbook: be aggressive. Make yourselves heard and demand answers.

⁵⁷ See *id.*

⁵⁸ *Id.*

⁵⁹ Stein, *supra* note 9.

⁶⁰ Prezioso, *supra* note 6.

⁶¹ *Id.*; see also *supra* notes 15–17 and accompanying text.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Stein, *supra* note 9.

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Joel P. Hoxie is a senior partner in Snell & Wilmer's Phoenix office and co-chair of the firm's Commercial Litigation Practice Group. He maintains a broad commercial litigation and arbitration practice, with a particular emphasis on securities and financial services institution litigation in both federal and state courts and arbitration before SRO, AAA, and other tribunals.

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In addition to his membership in national, state, and local bar associations, Joel is a member of the Securities Industry and Financial Markets Association Compliance and Legal Division, The International Association of Defense Counsel, and the Arizona Association of Defense Counsel. He has served as a faculty member and author on numerous national, state, and local continuing legal education programs.

Professional Recognition and Awards

- Local Litigation Star-Arizona Ranking, General Commercial, Securities, Benchmark Litigation (2013-2015)
- The Best Lawyers in America®, Commercial Litigation, Banking & Finance Litigation, Mergers & Acquisitions Litigation, Securities Litigation (2006-2015); Banking Law (2006-2011)
- Lawyer of the Year, Phoenix Banking & Finance Litigation (2014)
- Lawyer of the Year, Phoenix Securities Litigation (2012)
- Arizona's Finest Lawyers
- Southwest Super Lawyers®, Business Litigation (2007-2014)
- Super Lawyers®, Business Litigation - Business Edition (2011)
- Super Lawyers®, Business Litigation - Corporate Counsel Edition (2008-2010)
- Ranking Arizona: The Best of Arizona Attorneys, Commercial Litigation (2010-2011)
- Arizona's Top Lawyers, Arizona Business Magazine (2010)

Representative Presentations and Publications

- "The Sell Decision: Aiding, Abetting Liability Not Included," Co-Author, Arizona Attorney Magazine (February 2014)

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