

August 18, 2015

Andrew Ceresney
Director of Enforcement
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Enforcement Liability for Compliance Officers

Dear Mr. Ceresney,

The National Society of Compliance Professionals (“NSCP”) is a nonprofit, membership organization dedicated to serving and supporting compliance officials in the financial services industry in the U.S. and Canada. NSCP is the largest organization of securities industry professionals devoted exclusively to serving compliance officers. The principal purpose of NSCP is to enhance compliance in the securities industry, including firms' compliance efforts and programs and to further the education and professionalism of the individuals implementing those efforts. Accordingly, our sole focus is on the interests of compliance officers and enhancing their effectiveness as they help guide their firms to achieve outcomes that promote investor protection and market integrity.

It is important to note at the outset that NSCP believes deeply in the importance of holding bad actors, which can regrettably include compliance officers, accountable for violations of the securities laws, and we fundamentally embrace the importance of effective enforcement. We also understand that a rogue compliance officer may intentionally violate or participate in a violation of the securities laws. In such instances, there is no reason to differentiate a compliance officer from any other defendant.

We appreciate the recognition by the Commission and the staff that compliance officers play a valuable role in the regulatory ecosystem. The importance of the role was central to the adoption of the various compliance rules, which have greatly enhanced the governance and compliance efforts by investment advisers, investment companies, and broker-dealers.¹ The growing importance of the compliance role has accordingly lessened the burden on the Commission in both its inspection and enforcement programs and has greatly enhanced the protection of the investing public.

Given the proven value compliance officers have added to the Commission's mission, we trust there is agreement that it is in the public interest to support compliance officers and avoid outcomes that undermine their effectiveness. Compliance officers are already highly motivated as crucial instruments of investor protection and do not need the threat of enforcement action to do their jobs well.

¹ See Investment Advisers Act, Rule 206(4)-7; Investment Company Act Rule 38a-1; FINRA Rule 3030.

As such, we submit that a fundamental policy question is whether enforcement actions against compliance officers will motivate them to greater vigilance or risk a demoralizing belief that even exercising their best judgment will not protect them from the risk of a career ending enforcement action, with the result that many of the best compliance officers will choose to leave the profession rather than face the risks.

This is presented particularly when the compliance officer's liability is based on an alleged failure to prevent a violation by another. Accordingly, we suggest that the Commission, as a matter of policy, decline to bring a proceeding based on simple negligence. Rather, we recommend that the Commission initiate a proceeding on such a theory only if the compliance officer acted intentionally or recklessly to facilitate the underlying violation.

We view your speech last year² as consistent with such an approach and are hopeful that Chair White's remarks at the recent Compliance Outreach Program on July 14, 2015 reflect a parallel view. However, the compliance community is concerned that, increasingly, the liability standard being applied is one of simple negligence, where a compliance officer is alleged to have "caused" a primary violation committed by another. *See, e.g., In the Matter of SFX Financial Advisory Management Enterprises, Inc.*, Administrative Proceeding File No. 3-16591 (June 15, 2015); *In the Matter of BlackRock Advisors, LLC*, Administrative Proceeding File No. 3-16501 (April 20, 2015); *In the Matter of Thomas R. Delaney II and Charles W. Yancey*, Administrative Proceeding File No. 3-15873 (Initial Decision, March 18, 2015).

With this in mind, as a policy matter, NSCP would like to respectfully share its concern about enforcement proceedings against compliance officers predicated on a theory that they caused a violation by their firm or its personnel by the manner in which they discharged their responsibilities as a compliance officer.

We are particularly troubled by the liability exposure for compliance officers when, after the fact, someone reviewing an *ex post* record concludes that they should have known that better procedures (particularly where the obligation to execute those procedures rests with the business) or better judgments could have prevented the primary violation. Put simply, in this context, a negligence standard is so amenable to liability by hindsight, we are concerned that compliance officers will face the rigors of an enforcement investigation, and potentially career-altering liability, for simple mistakes or errors of judgment which could somehow be connected to a primary violation committed by others.

There are a couple of points that we would urge you to consider in applying your prosecutorial discretion when considering a charging decision against a compliance officer.

First, compliance officers do not operate the business; they advise and support the business. While compliance officers may administer policies and procedures, they do not implement them. Management does. Compliance officers do not have the bandwidth, resources and authority to, in essence, be accountable for managing a business. Compliance officers are staff functions, not line functions. By definition, they do not have the same responsibilities or access to information about a business process as does a line manager or supervisor. Their resources, duties and expertise do not match those who execute and run the business.

² See Andrew Ceresney, Director of the Division of Enforcement, "Keynote Address at Compliance Week 2014" (May 20, 2014).

Accordingly, in their organizations, ultimate responsibility to implement policies and procedures rests with the business and not the compliance officer. Considering their staff role, holding compliance officers accountable for a negligent miss that conceivably could be linked to an implementation failure by the firm fails to reflect the realities and limitations of a compliance officer's responsibilities.

In addition, in light of the role of a compliance officer, there is a practical issue as to whether, absent affirmative misconduct, a compliance officer can be seen as truly "causing" a violation. Because of his or her oversight role, in circumstances where registered securities business professionals who are aware of their obligations choose to circumvent those requirements, the notion of a compliance officer "causing" the violation is often inconsistent with common sense. By definition, the most a compliance officer can do is take steps through monitoring and testing, and subsequent escalation to management, to mitigate a violation that already has been committed. While a compliance officer can certainly alert management that a violation needs to stop, the notion that a compliance officer in his or her oversight role contributes to an accountable business person's violation fails to consider the realities of the compliance officer's role. The compliance officer may, after the fact, detect a violation. However, in doing so, he or she did not play a role in its execution.

Second, there is a danger of liability by hindsight that in many cases would be largely unavoidable when considering the realities of the duties of a compliance officer. Particularly under a "cause" scenario where the liability is based upon the actions of another, a compliance officer would face an unavoidable risk that he or she would be held to violate the securities laws for designing a procedure that could have been improved, missing something that could have been caught sooner, or making a judgment later subject to question.

Unless tempered by prosecutorial discretion, a decision to charge a compliance officer with "causing" a violation unduly places compliance officers in harm's way for real-time judgments of a type that they must routinely make. Specifically, under a negligence-based causing standard, a compliance officer can be charged and found liable, absent intentional participation in wrongdoing. Particularly when the compliance officer is not the primary violator, the staff or trier of fact could find liability through their substitution of judgment as how effective or prompt the compliance officer was in assessing and addressing a situation with management.

On this point, we respectfully suggest that charging a compliance officer for designing what, with the benefit of hindsight, turns out to be a less than perfect policy and procedure, fails to acknowledge that policies or procedures are rarely "perfect." They are routinely reexamined and improved based upon lessons learned at the firm. This dynamic does not suggest a control weakness. Indeed, the American Institute of Certified Public Accountants recognizes that controls are limited in nature and may "not prevent or detect and correct all errors or omissions."³

Third, assessing liability based on negligence could be construed as inconsistent with policy statements articulated by Commission members and staff. As you suggested in your keynote speech at Compliance Week 2014, compliance officers are important partners in the regulatory scheme, and they should not face liability unless (i) they affirmatively participated in the misconduct, (ii) they helped mislead regulators or (iii) they had a clear responsibility to implement compliance policies and procedures and wholly failed to carry out that responsibility. We very much appreciate this thoughtful effort to articulate an approach to compliance officer liability, but fear holding compliance officers liable based on negligence risks outcomes inconsistent with these principles.

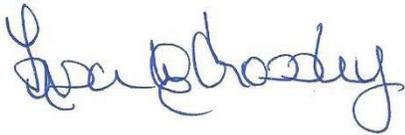
³ See Statement on Standards for Attestation Engagements (SSAE-16), *Reporting on Controls at a Service Organization* (AICPA, *Professional Standards*, AT sec. 801.A68).

As noted in the beginning of this letter, we strongly support an effective enforcement program. We also appreciate the tough choices that you must make in the public interest. We acknowledge that a theory of “causing” liability is available to the staff. However, particularly in light of our universal agreement as to the crucial role that compliance officers play in the regulatory landscape, as well as recognizing the limitations of their roles and how tough their jobs are, we urge restraint in authorizing a case unless the facts suggested an egregious or intentional facilitation of the misconduct.

In this regard, as a matter of policy, we respectfully suggest that the staff adopt internal guidelines that would inform its prosecutorial discretion to avoid these outcomes. As such, we would accordingly urge you to consider an internal guideline based upon the standard for aiding and abetting. These elements: (i) a primary securities law violation, (ii) knowing or extremely reckless conduct, and (iii) substantial assistance to the primary violator appear to capture the spirit of the principles you have articulated. *See Graham v. SEC*, 222 F.3d 994, 1000 (D.C. Cir 2000).

We appreciate your consideration of our views. We would be delighted to have the opportunity to discuss these matters and would be pleased to address any questions.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Lisa D. Crossley". The signature is fluid and cursive, with the first name "Lisa" and last name "Crossley" clearly distinguishable.

Lisa D. Crossley
Executive Director

Cc: ***SEC Chairman Mary Jo White***
 Commissioner Luis A. Aguilar
 Commissioner Daniel M. Gallagher
 Commissioner Kara M. Stein
 Commissioner Michael S. Piwowar