

Key D&O Insurance Considerations For Companies And Compliance Officers In Light Of The U.S. Government's Settlement With MoneyGram's Chief Compliance Officer

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- Companies and compliance officers in all industries should take notice of the recent civil settlement of Bank Secrecy Act claims brought by the U.S. government against MoneyGram's former Chief Compliance Officer.
- Now is the time for companies and compliance officers to consider and review the insurance coverage they have in place to offer protection against governmental claims.
- Directors and officers liability insurance is the most likely source of coverage, but careful attention must be given to the specific policy language.
- Key considerations include whether the insurance policy's definition of claim extends to governmental investigations, and whether there is any pre-claim coverage.
- Other key considerations are whether the definition of insured extends to compliance officers or other compliance personnel and the scope of coverage for fines and penalties.

Recently the U.S. Attorney's Office for the Southern District of New York and the Financial Crimes Enforcement Network announced a settlement of civil claims brought under the Bank Secrecy Act (BSA) against the former Chief Compliance Officer of MoneyGram International, Inc. (MoneyGram) stemming from MoneyGram's failure to implement and maintain an effective anti-money laundering (AML) program or to timely file suspicious activity reports.^[1] The pursuit of the individual compliance officer at MoneyGram set off alarms among many, and the

settlement has generated numerous articles discussing whether it is a sign of the U.S. government's increased efforts to hold individuals accountable.

Compliance officers in all industries, and all companies whose compliance officers may be targets, should use this as an opportunity to review and understand the insurance coverage that could apply in the case of similar claims. The most likely insurance to review is directors and officers (D&O) liability insurance. While other types of insurance policies could be relevant (e.g., errors and omissions liability or other professional liability insurance) depending on the circumstances, in this article we focus on selected aspects of D&O liability insurance.

D&O Liability Insurance General Structure

Companies generally indemnify their corporate directors, corporate officers, and other employees against claims made against them in their capacity as such. This can include indemnification for compliance officers and managers. While there are limits to this indemnification based on state law and based on a company's decisions, D&O insurance is meant to provide another layer of protection.

D&O liability insurance generally provides coverage for claims for a wrongful act first made against an insured during the policy period. Coverage usually is provided in three instances: (1) to an insured individual when he or she is not indemnified by the company; (2) to the company to reimburse it for the indemnification it provides to an insured individual; and (3) to the company to the extent the company is subject to a securities claim (public company) or any type of non-excluded claim (private company).

D&O liability insurance usually is provided in layers – a first, or primary layer, and one or more excess layers. Policies in the excess layers usually will follow the terms and conditions of the primary policy, providing coverage once the underlying limits of the primary policy (or other excess policies) have been met.

Better D&O insurance programs also will have what is known as “Side-A only” difference in conditions policies. These policies have two main features: (1) they insure only individuals to the extent they are not indemnified by the company (no coverage is provided for the company), and (2) they provide coverage from dollar one, subject to broader terms and conditions with fewer exclusions, where any underlying policies either do not provide coverage or fail to provide coverage. In this way insured individuals are provided with broad and dedicated coverage.

Coverage for Claims and Pre-Claims

The definition of “claim” in a D&O insurance policy is important, and better policies provide coverage for a number of different types of claims. As to an insured individual, a claim should include at least (i) written demands, (ii) a civil or criminal proceeding (lawsuit), (iii) an administrative or regulatory proceeding, and (iv) a governmental investigation commenced by a written notice identifying the individual as a person against whom a proceeding may be commenced. The policy also will require that the claim be for a “wrongful act.” That term should be broadly defined to include at least any error, misstatement, misleading statement, act, omission, neglect, or breach of duty actually or allegedly committed by the insured individual in his or her insured capacity or any other matter claimed against the insured individual in an insured capacity.

In addition, better policies provide so-called inquiry coverage or pre-claim coverage. That type of coverage applies when a claim has not yet been made against an insured individual but when, for example, a governmental agency has requested that an individual appear to provide testimony or produce documents in that individual's insured capacity. Importantly, as opposed to coverage for a claim, this expanded inquiry or pre-claim coverage should not require any allegation of a wrongful act by the insured individual. Whether a government investigation implicates D&O insurance coverage for a compliance officer either as a claim or an inquiry can be both fact-specific as to what information the government communicated (e.g., grand jury subpoena, request for interview, etc.) and dependent on

the language of the D&O policy.

Insured Individuals

Key to coverage will be the policy definition of insured individuals. Private company D&O policies generally extend coverage to all employees. But this can vary by policy. Public company D&O policies generally limit coverage to only selected positions, such as members of the company's board of directors, company officers, and other key corporate positions such as general counsel or risk managers. If your company does not consider compliance officers, compliance personnel, AML personnel, or BSA personnel to be formal corporate officers of the company, then you may want to add policy language that includes these specific positions as insured individuals.

Fines or Penalties

D&O insurance policies do contain policy exclusions (such as for criminal conduct or gaining illegal profit) and limit the scope of covered loss or damages. These provisions should be examined carefully, including for any exclusions specific to AML or BSA issues. Importantly, the definition of covered loss or damages may preclude coverage for civil or criminal fines or penalties or matters which may be deemed uninsurable. This exclusion from coverage for fines or penalties could pose an issue when facing BSA liability. Look for the following as possible means of improving coverage:

- Defense costs incurred as to fines or penalties should be covered even if the fines or penalties are not.
- Civil penalties assessed against an insured individual should be covered for violation of any law if such violation is neither intentional nor willful.
- Coverage should be extended to all fines or penalties insurable under the applicable law that most favors coverage for such fines or penalties.
- Coverage for fines or penalties should be provided if they are imposed as a personal obligation of an insured individual in connection with their service to the company in instances when the company becomes financially insolvent.

Even with expanded coverage, if the fine or penalty is deemed uninsurable under applicable law, it may not be covered. This has been an issue for civil money penalties imposed by the Federal Deposit Insurance Corporation (FDIC). FDIC regulation prohibits regulated depository institutions and their holding companies from insuring such penalties. One way to address this issue has been for an individual to obtain their own personal insurance policy for civil money penalties, bought and paid for by the individual rather than the financial institution.

Conclusion

D&O liability insurance can offer important coverage for companies and their compliance officers as a supplement to corporate indemnification. But terms vary greatly in the marketplace and require careful consideration. If a company or its compliance personnel have not recently reviewed their available D&O insurance coverage, consider taking a close look now to ensure that you are well covered should the need to turn to insurance arise in the future.

[1] See U.S. Dep't of Justice 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* (May 4, 2017), available at <https://www.justice.gov/usao-sdny/pr/acting-manhattan-us-attorney-announces-settlement-bank-secrecy-act-suit-against-former>.

