Compliance Officer **Roulette in Dangerous Times**

By David O. Stewart

Even Hollywood has noticed that being a compliance officer is no picnic.

In the recent movie "prequel" to Tom Clancy's Jack Ryan series (Jack Ryan: Shadow Recruit), our hero is a CIA agent who goes undercover in the financial industry as a compliance officer. When his wife discovers ticket stubs in his pocket for a weekday movie matinee, she suspects he's been stepping out with a woman at the bank. "Come on," he objects. "I'm the compliance officer. Who'd be willing to be seen in public with me?"

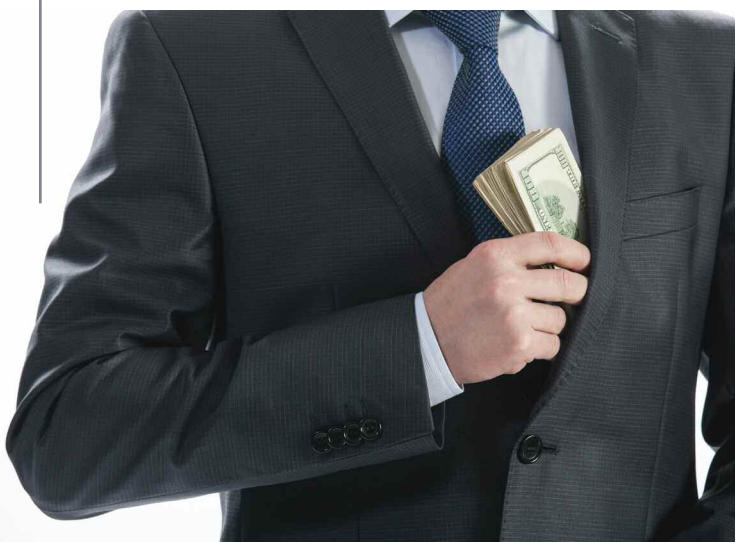
Exactly.

Compliance officer has never been an easy job in the gaming industry. Marketing needs to make their numbers, and so do operators. So do the owners. But it's the compliance officer questioning whether the background and patterns of play of a "good customer" may put the company at risk of violating federal anti-money laundering requirements. That's no way to make friends on the job.

Federal enforcers are increasingly imposing personal liability on compliance officers for the company's violations of anti-money laundering requirements, including the failure to report "suspicious activity" or aggregated currency transactions above $10,000. This trend places compliance officers even more squarely between a rock and a hard place. Their only course is to know the rules, insist that they be respected, and demand that their employers protect them from personal liability. Or else, learn how to sell real estate.

The Trend to Personal Liability

An early effort to impose personal liability on corporate compliance officers came in the health care industry in 2007, when the U.S. Department of Justice brought a Civil False Claims Act lawsuit against Christi Sulzbach, who was both compliance officer and general counsel of a major hospital chain. The complaint alleged that Ms. Sulzbach failed to investigate and halt her employer's violations of federal anti-kickback requirements, so she should be held personally liable for them. Although that complaint was dismissed, the legal model for challenging compliance officers would spread.



The securities industry has seen a number of such challenges by the Securities Exchange Commission (SEC) and by the private self-regulatory organization, the Financial Industry Regulatory Authority (FINRA). When the compliance officer has directly engaged in improper conduct, personal liability comes as little surprise. Yet both agencies have sought to penalize compliance officers of broker-dealers when they found that those individuals simply "failed to supervise" the company's established compliance procedures.

These enforcement policies are now being applied to failures to enforce anti-money laundering (AML) obligations imposed by the federal Bank Secrecy Act (BSA). In December 2013, FINRA entered a settlement with Banorte-Ixe Securities International, a Mexico-based firm, for AML violations. Under the settlement, which included allegations that Banorte failed to report funds in accounts tied to Mexican drug cartels, the firm paid a $475,000 penalty and its AML director was suspended for a month. Even more startling was the settlement agreed to by old-line firm Brown Brothers Harriman earlier this year, for failure to have an adequate AML program in place to monitor penny stock transactions. The firm paid an $8 million penalty and its former compliance officer was fined $25,000 personally and suspended for a month.

To bring even closer to home the risk of personal liability for gaming industry compliance officers, the Financial Crimes Enforcement Network of the U.S. Treasury Department (FinCEN) reportedly may seek a $5 million personal fine against the compliance officer of MoneyGram, a money services business.

The MoneyGram case arises from a criminal indictment that was resolved in 2012 by a $100 million deferred prosecution agreement. The company admitted to conducting a multi-year fraud against hundreds of consumers, and that compliance personnel at MoneyGram knew of the fraud and repeatedly recommended action against it. Those recommendations were ignored. Compliance officers at other money services businesses have faced comparable personal liability.

Because FinCEN is the principal AML regulator for both money services businesses and for the gaming industry, the trend toward personal liability for compliance officers looms large for Nevada gaming companies.

Coping Strategies

Compliance officers occupy uniquely vulnerable positions in corporate organizations. If they discover non-compliance by their employers, they must rely upon others in the organization to implement corrections. If

corrective action does not occur, the compliance officer's options are limited: (i) she may report her own company to the government, thereby acquiring a reputation as a whistle-blower and likely ending her career in compliance; (ii) she may resign from her current employer, possibly also ending her career in compliance; or (iii) she may keep her head down, look for a new job with a more compliance-friendly employer, and hope for the best.

Although none of these career options is wildly attractive, compliance officers should at least seek meaningful protections against crippling personal liability. The first strategy involves acquiring indemnification by the employer for such liability, a matter controlled by the laws of each state. Under Nevada statutes, a corporation may indemnify its officers and directors for expenses and liability for any civil or criminal action except for those involving "intentional misconduct, fraud, or a knowing violation of the law." That indemnification may be continued after the compliance officer is no longer employed by the company. The corporate bylaws must spell out the company's indemnification policy. Compliance officers should insist that they are listed in the bylaws as entitled to indemnification to the fullest extent permitted by state law.

A second line of defense is coverage under the employer's directors and officers liability insurance (D&O policy). To be safe, the compliance officer should insist that she be listed on the policy as a covered individual, or that her position be so listed. D&O policies may vary substantially from insurance carrier to carrier, so the policy should be examined in detail.

Exclusions for wrongful conduct, fraud, and breach of contract are routine. The D&O policy also may impose a deductible, forcing anyone covered to pay costs until the threshold is reached. The policy may have an aggregate limit on its coverage, which means that every dollar spent on legal and defense costs will leave one less dollar available to pay settlements.

Finally, the coverage and indemnification picture may be modified if the compliance officer also serves as legal counsel to the corporation. In that situation, professional liability insurance will be necessary to cover claims that arise from legal services, rather than from compliance work.

Although compliance officers strive to work only for employers with a culture of compliance, and work hard to create and support such a culture in their organizations, they also should take every available step to protect themselves and their families in the event that things go wrong.

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[1] United States v. Sulzbach, No. 07-61329 (S.D. Fl., Sept. 18, 2007).

[2] E.g., David A. Zwick, 91 S.E.C. Docket 2079, 2007 WL 3119764 (Oct. 25, 2007); Denis Todd Lloyd Gordon, Securities Exchange Act Release No. 57655, 2008 WL 1697151 (Apr. 11, 2008).

[3] *In re Manuel Lopez-Tarre,* Exchange Act Release No. 65391, Admin. Proc. File No. 3-14562 (Sept. 23, 2011) (SEC); Susan Margaret Labant, Letter of Acceptance, Waiver and Consent, FINRA No. 2008013127802 (Aug. 19, 2011).

[4] 31 U.S.C. §§ 5311, et seq.

[5] *Banorte-Ixe Securities International*, Ltd., Letter of Acceptance, Waiver and Consent, FINRA No. 2010025241301 (Dec. 5, 2013).

[6] *Brown Brothers Harriman & Co. and Harold A. Crawford*, Letter of Acceptance, Waiver and Consent No. 213035821401 (Feb. 4, 2014).

[7] Brett Wolf, "Exclusive: U.S. weighs $5 million fine against ex-MoneyGram compliance chief," *www.reuters.com*, April 27, 2014.

[8] Deferred Prosecution Agreement, *United States v. MoneyGram International, Inc.*, No. 12-CR-291 (M.D. PA, Nov. 9, 2012).

[9] *United States v. G&A Check Cashing*, 12-Cr-560 (C.D. Cal. 2012) (compliance officer pled guilty to failure to file currency transaction reports on $24 million of transactions); *United States v. AAA Cash Advance*, 12-CR-559 (C.D. Cal. June 12, 2012).

[10] Nev. Rev. Statutes, § 78.751.