

INSURANCE AND WHITE COLLAR DEFENSE; IF YOU DON'T HAVE ONE, YOU MAY NOT BE ABLE TO HAVE THE OTHER

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The BUGA (“Big Ugly Government Agency”) has just metaphorically pounded on the door of your company, howling about civil and criminal charges, mind-blowing fines and penalties, debarment, seizing your first-born and otherwise threatening your existence. So you seek out a phenomenal white collar firm to defend you and yours and lo, they recommend a vigorous internal investigation, leading to the formation of a rock solid defense that, if needs be, can be deployed to defend against BUGA from here to the Supreme Court and back again. It will, however, cost a lot of money to defend yourself. But, like many a modern company, you have insurance coverage that, you believe, will fund your defense. Sadly, when you look to your insurance carrier, it is discovered that you don't have the right kind of insurance, or enough insurance, to fund even the recommended internal investigation, much less a defense through trial and possible appeals, and you surely don't have enough insurance to deal with the possible repercussions of a loss to the BUGA. Lacking the right kind of insurance, all but the very large and/or very financially well-endowed will find themselves in the nightmare situation of knowing a potentially successful defense strategy may exist, but because they cannot afford it, they must take their hat in hand and go to the BUGA seeking the least terrible outcome possible.

The lesson from our sad little fable is clear: all businesses and their owners, executives and employees who are at risk for Government enforcement actions of any sort (which pretty much covers everyone doing business in the modern world); and their attorneys, owe it to themselves to evaluate their insurance situation, *in advance*, to determine if they have the insurance they will need to investigate and defend issues that may come up. To fail to do so should, we suggest, be viewed as just as foolish as failing to make sure the company has fire insurance, and perhaps even more dangerous.

What follows are some suggestions of the questions to ask and the kind of insurance coverage your business should consider.

Questions Every Business Should Ask of their Insurance Provider re: Ability to Respond to White Collar Issues:

Q. Does your insurance cover the cost of an internal investigation, either in response to a governmental investigation or arising out of self-discovered issues (e.g., whistleblower report; compliance program results)?

It is widely accepted amongst white collar practitioners that the ability to carry out a timely and thorough internal investigation in response to issues raised either by the Government or inside the company is essential to achieving the best and most efficacious result for the client. But such investigations can be expensive. Companies wise enough to seek insurance for their legal fees

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generally need to make sure that their insurance reflects and addresses this reality.

Q. What limitations on your defense costs are in your policy (e.g., capped attorney fees, limited payments for necessary expenses such as investigators, experts, or consultants)?

Many insurance policies that provide coverage for some legal costs of defense include significant limitations on that coverage, both in terms of the total amount for that defense and in terms of the scope of defense activities that will be covered. It would be wise to know whether your company's insurance policy has such limitations so that you may plan accordingly.

Q. Do covered defense costs include all likely stages of defense, including pre-trial negotiations and motions, trial, post-trial motions and appeal?

A quality white collar defense does not limit itself to getting ready for trial. Potential white collar defendants may well need attorneys to investigate and negotiate their situation long before any possible trial, and if things should go badly, as they sometimes do, clients need the funding to continue the fight long after the trial. If your insurance doesn't recognize those realities, you may find yourself at a terrible disadvantage.

Q. Are all corporate employees covered; not just officers and executives; for defense costs arising from a government investigation?

The Government has shown an ever growing willingness, nay, eagerness, to pursue not just companies but also individuals in their white collar prosecutions, and not just high ranking executives and managers. The Federal agencies in particular seems to have adopted the old organized crime prosecutor practice of "going up the ladder" by purposefully targeting low level employees to cause them to "roll" on the level just above, who, in turn, is then charged and so the process rolls on until it reaches the top. Overly limited "traditional "D&O" policies covering the highest ranks only may leave the company unable to fund the defense expenses of employees who it would not be wise to leave overwhelmed and defenseless.

Q. Does your insurance cover the potential financial consequences of a loss, including any fines, penalties, interest, disgorgements or restitution that your company may be ordered to pay?

In many types of white collar cases, the largest financial cost of such a prosecution is not the defense costs, of course, but, rather, the potential penalties. FCPA and Securities cases are prominent examples of white collar prosecutions where the financial consequences can be staggering. Consideration should be given to whether any kind of insurance against such catastrophic consequences can be obtained.

Q. Does your insurance cover the tax implications of any financial consequences of a Government investigation (e.g., need to file amended corporate returns)?

Often lost in the whirling storm of concerns raised by a government investigation and/or prosecution of a company is the reality that there are, more often than not, tax consequences to such cases. A company would find itself well served to have discussed possible coverage for such consequences with its insurance carrier.

Q. What exclusions does your insurance include re: Government

investigations (e.g., are investigations related to certain kinds of alleged illegal conduct excluded from coverage)?

The bane of anyone who ever sought to lodge any kind of insurance claim for, the dreaded “exclusion,” is no less important in the white collar realm. Indeed, it is common to find that insurance provisions that purport to cover legal expenses, in fact, exclude any such coverage depending on the nature of the specific allegation under investigation (e.g., fraud). Companies should think hard about what kind of allegations a BUGA is most likely to bring against them; their industry may well be the regular target of certain kinds of criminal allegations; and make sure that the insurance they have does not exclude the costs of defending the allegation with which they are most likely to be charged.

There is a strong argument to be made that the contemporary reality of investigating and defending Government enforcement actions is such that no corporate officer, in-house counsel or, for that matter, any attorney advising any modern business regarding their white collar issues, can meet their fiduciary and ethical obligations without considering, and, in advance, making appropriate arrangements to fund, any defensive strategies that may need to be employed. A great defense is of no use if you can’t afford to assert it, and, as we all know, the time to figure out if you have enough of the right insurance is *before* you need it.