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**Protections for Compliance Officers**

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**Why Are Protections Needed?**

- **Communications with the board and senior management on compliance issues**
- **Relationship of counsel to the compliance program and compliance officers**
- **Challenging management (job security)**
- **Witness/Information source**
- **Liability exposure**



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## Liability Exposure – A Brief History

- **Actions against in house attorneys....compliance professionals**
- **Instances of liability for intentional misconduct**
- **U.S. v. Sulzbach**
- **U.S. v. Caputo**



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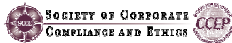
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## Are Key Positions Role-Based or Individual-Based?

**Would a compliance officer have made a difference?**

- **Enron**
- **WorldCom**
- **Tenet**
- **Hewlett-Packard**



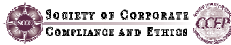
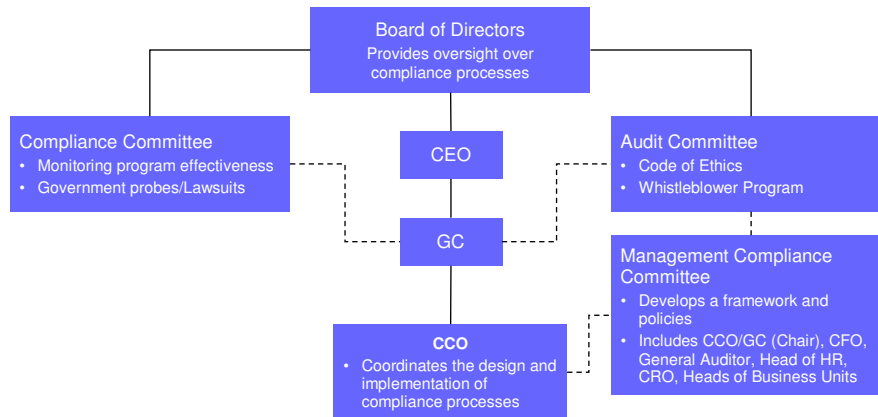
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## Separate but Unequal

### Compliance & Ethics Responsibilities

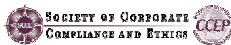


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## Basic Protections

- **Due Diligence – Going in with your eyes open**
  - Who will you report to?
  - What is the scope of your role?
  - Who can you access within the company and on the board?
  - Why did the prior CECO leave? (Has there been turnover?)
  - Can you query staff and front line employees?
- **Support of the program and the position**
  - Board of director's resolution?
  - Board's approval required to remove the CECO?
  - Board committee (independent directors) with oversight over the committee?
  - Participation in executive meetings?
  - What resources will you have?
- **Endorsement of compliance ethical & professional standards**



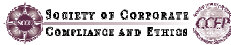
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## Wishful Thinking

- **Employment contract**
- **Severance package/golden parachutes**



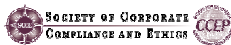
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## Legal Protections

- **Indemnification by the organization**
  - Is it provided? Review statute and company bylaws.
  - Who may claim protection?
  - What issues trigger coverage?
  - What expenses are covered?
  - Are expenses advanced?
- **Directors & Officers (D&O) insurance**
  - Is it provided? Review policy.
  - Is the CEO (and staff) covered?
  - What claims are covered? What is excluded?
  - What expenses are covered?
  - How do the limits apply?
- **Errors and Omissions (E&O) insurance**

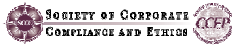


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# Are You Protected?



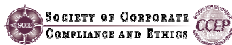
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## Are You Protected?

Insurance carriers offer several key products that could potentially offer protection to compliance officers.

- 1) Directors & Officers Policies
- 2) Professional Liability Policies
- 3) Miscellaneous Professional Liability Policies



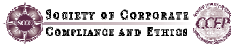
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# Directors & Officers

## What Is Covered?

## Key Definitions



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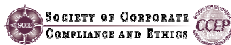
## Directors & Officers - What Is Covered?

Directors and Officers Insurance provides companies and their management with broad coverage for securities claims and also provides management with coverage for employment practices claims.

### INSURING AGREEMENT

#### COVERAGE A: EXECUTIVE LIABILITY INSURANCE

This policy shall pay the **Loss of any Insured Person arising from a Claim made against such Insured Person for any Wrongful Act of such Insured Person**, except when and to the extent that an Organization has indemnified such Insured Person. Coverage A shall not apply to Loss arising from a Claim made against an Outside Entity Executive.



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## Directors & Officers - Key Definitions

- “**Employee**” means any past, present or future employee, other than an **Executive** of an **Organization**, whether such employee is in a supervisory, co-worker or subordinate position or otherwise, including any full-time, part-time, seasonal and temporary employee.
- “**Executive**” means any:
  - 1) past, present and future duly elected or appointed director, officer, trustee or governor of a corporation, management committee member of a joint venture and member of the management board of a limited liability company (or equivalent position);
  - 2) past, present and future person in a duly elected or appointed position in an entity organized and operated in a **Foreign Jurisdiction** that is equivalent to an executive position listed in Definition X; or
  - 3) past, present and future General Counsel and Risk Manager (or equivalent position) of the **Named Entity**.
- “**Insured Person**” means any:
  1. **Executive** of an **Organization**;
  2. **Employee** of an **Organization**.



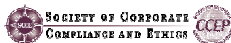
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## Directors & Officers - Key Definitions, cont'd

- “**Wrongful Act**” means:
  1. any actual or alleged breach of duty, neglect, error, misstatement, misleading statement, omission or act or any actual or alleged **Employment Practices Violation**:
    - a) with respect to any **Executive** of an **Organization**, by such **Executive** in his or her capacity as such or any matter claimed against such **Executive** solely by reason of his or her status as such;
    - b) with respect to any **Employee** of an **Organization**, by such **Employee** in his or her capacity as such, but solely in regard to any: (a) **Securities Claim**; or (b) other **Claim** so long as such other **Claim** is also made and continuously maintained against an **Executive** of an **Organization**; or
    - c) with respect to any **Outside Entity Executive**, by such **Outside Entity Executive** in his or her capacity as such or any matter claimed against such **Outside Entity Executive** solely by reason of his or her status as such; or
  2. with respect to an **Organization**, any actual or alleged breach of duty, neglect, error, misstatement, misleading statement, omission or act by such **Organization**, but solely in regard to a **Securities Claim**.



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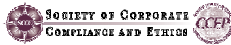
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# Professional Liability Policies

## What Is Covered?

## Key Definitions



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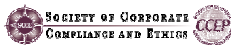
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## Professional Liability - What Is Covered?

Professional Liability Insurance protects Insureds against claims of actual or alleged wrongful acts, errors, omissions and failure to render professional services.

### INSURING AGREEMENT

The Insurer will reimburse the Insured for all sums which the Insured shall have paid as Damages resulting from any Claim or Claims first made against the Insured and reported in writing to the Insurer during the Policy Period or Discovery Period for any **Wrongful Act of the Insured or of any other person for whose actions the Insured is legally responsible in rendering or failing to render Professional Services as defined and listed in endorsement #1 attached hereto**, but only if such Wrongful Act occurs on or after the retroactive date specified in clause V(C) and before the end of the Policy Period.



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## Professional Liability - Key Definitions

- **“Insured”** shall mean the Company and **any person who was, is or hereafter becomes a partner, officer, director or employee of the Company but only while acting the scope of his duties** as such, and shall include the estates, heirs, legal representatives or assigns of deceased persons who were Insureds at the time of the Wrongful Act upon which the Claim or Claims are based, and the legal representatives or assigns of Insureds in the event of their incompetency, insolvency or bankruptcy.
- **“Wrongful Act”** shall mean any actual or alleged negligent act, error or omission in the rendering of or failure to render one or more of the Professional Services listed in Item # of the Declarations.

## Miscellaneous

## Professional Liability Policies

### What Is Covered?

### Key Definitions

## Miscellaneous Professional Liability - What Is Covered?

Miscellaneous Professional Liability Insurance responds to claims arising from wrongful acts, errors and omissions in professional services.

### INSURING AGREEMENT

The Company will pay on behalf of the Insured all sums in excess of the Deductible that the Insured shall become legally obligated to pay as Damages and Claim Expenses for Claims first made against the Insured and reported to the Company as provided in this policy during the Policy Period as a result of a **Wrongful Act** by the Insured or any entity for whom the Insured is legally liable.

For this coverage to apply, all of the following conditions must be satisfied:

1. The **Wrongful Act** forming the basis of the Claim must take place subsequent to the Retroactive Date stated in the Declarations.
2. Prior to the Effective Date of this policy stated in the Declarations, no officer, director, principal, partner, insurance manager or risk manager of the Insured had knowledge of such **Wrongful Act** or circumstance likely to give rise to a Claim.
3. Claim must first be made against the Insured during the Policy Period.
4. The Insured must report the Claim to the Company, in writing, as soon as practicable. Any Claim so reported will be deemed reported during the Policy
5. Period if so reported no later than within the sixty (60) day period next succeeding the expiration of the Policy Period.



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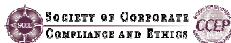


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## Miscellaneous Professional Liability - Key Definitions

- **“Insured”** means:
  - 1) the Named Insured listed in Item # of the Declarations;
  - 2) any person who is or was a partner, officer, director, stockholder or employee of the Named Insured but only while rendering **Professional Services** on behalf of the Named Insured.
- **“Professional Services”** means those services described in Item # of the Declarations performed by the Named Insured for others for a fee.
- **“Wrongful Act”** means any actual or alleged error, omission, neglect, misstatement or misleading statement, or breach of duty unintentionally committed by any Insured, or a person for whom the Named Insured is legally liable, solely in the rendering of **Professional Services**.



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# Policy Language Issues To Consider

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### **Is the Compliance Officer a company “Officer”?**

- An issue of coverage could arise if a non-officer serves on a board-level committee, and the definition of “Insured” appears restricted to directors and executive officers. This may be addressed by having board committee members included in the definition of “Insureds.”

### **What triggers coverage?**

- The definition of claim is extremely important. In addition to court proceedings, do other actions such as pending and threatened grand jury investigations, internal corporate investigations, or SEC or other regulatory investigations trigger coverage?

**Policies should be carefully reviewed to ensure that those individuals and acts which are intended to be covered are actually covered.**

# Q & A



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