Professional Liability Insurance: Protecting Compliance Professionals from Personal Liability in Legal Actions

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¶61,300 Introduction

In recent years, regulators and enforcement officials have expanded the scope of investigations to compliance personnel. In some cases, such investigations have resulted in personal liability for corporate wrongdoing for those individuals involved in compliance activities. As a result, it is important for compliance personnel to understand available legal protections and, just as important, the limits of those protections.*

For a compliance program to be truly effective, it is critical that an organization's chief compliance officer (CCO) and compliance staff have a high degree of autonomy with full commitment and support from the organization. An important—but often neglected—consideration in this regard is whether the CCO and other compliance staff are afforded protection by the company if named in a civil or criminal lawsuit for alleged actions or omissions on behalf of the organization. Because the CCO role can involve stepping into the line of fire in significant matters of potential misconduct, compliance professionals can be the target of litigation. Because of this, CCOs should be aware of the protections they need to guard against personal liability.

Shareholder derivative actions, class actions, actions by employees, former employees, clients, competitors, or others can be a devastating event in the career of a CCO or other compliance professional if such individuals are named as defendants in a lawsuit. Generally, three types of protections can be provided against personal loss associated with such suits: indemnity from the corporation in accordance with state law, directors and officers (D&O) insurance held by the corporation, and other liability coverage either provided by the corporation or independently obtained by compliance personnel. This chapter explores each of these protections and how they serve to insulate compliance professionals from personal liability resulting from their actions or inactions on behalf of the corporation.

¶61,305 Liability Exposure of Compliance Professionals

When corporate wrongdoing is discovered or disclosed, litigation is likely to follow. If the wrongdoing is based on the acts or omissions of a corporation's officers and directors, the allegations may be targeted on the personal liability of those individuals. For example, errors or omissions by a corporation's officers and directors can lead to litigation by the shareholders, including derivative actions in which shareholders seek to recover damages on behalf of the corporation, and lawsuits (including class action lawsuits) in which shareholders bring suit to recover damages.[1] Directors and officers of a corporation have a fiduciary obligation to the corporation and its shareholders; typically this duty is defined by state law. State law generally defines the fiduciary duties of a corporate officer as loyalty, good faith, and due care.[2] When a plaintiff alleges that an officer has violated any of these fiduciary duties and caused harm to the corporation, the shareholders may maintain an action on behalf of the corporation

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[1] *See, e.g., In re Pfizer Inc. S'holder Derivative Litig.*, 722 F. Supp. 2d 453 (S.D.N.Y. 2010) (Investors brought derivative actions seeking recovery on behalf of the corporation from various senior executives and present and former board members allegedly responsible for misconduct that resulted in imposition of fines and penalties against corporation arising from illegal "off-label" marketing by the corporation).

[2] *See*, for example, *Emerald Partners v. Berlin*, 787 A.2d 85 (Del. 2001).

against the corporation's Board or its directors and officers.[3]

Other types of actions may be brought by third parties against corporate officers and directors; claims may be asserted by employees or former employees, the corporation's competitors or customers or other third parties. The claims made in these suits, if successful, can have serious financial repercussions for individuals, and the cost of defending against such lawsuits, even if lacking merit, can be extremely expensive.

Liability for Misconduct

Compliance professionals, like in-house counsel, can be found liable for their actions or inactions in performing their role. More lawsuits are being brought against in-house counsel for alleged wrongdoing today than in the past,[4] and the government also has indicted lower-ranking in-house counsel for alleged involvement in corporate fraud.[5] Notably, in 2007, the U.S. Department of Justice filed a complaint alleging that a former general counsel of a large health care organization had violated the False Claims Act when serving in the role of an organization's Corporate Integrity Program Director.[6]

Though criminal complaints against compliance professionals are rare, the number is increasing, perhaps given the renewed focus on corporate crimes after passage of the Sarbanes-Oxley Act and the United States Sentencing Commission's (USSC) 2002 Economic Crime Amendment. Recent examples of legal and regulatory actions involving compliance personnel include charges brought against the chief compliance officer (CCO) of a money transfer service for violations of the Bank Secrecy Act,[7] criminal charges against a former senior counsel and ethics chief at a major technology company,[8] and an enforcement action against a former compliance officer at Wells Fargo Advisors.[9]

In *U.S. Department of the Treasury v. Thomas E. Haider*, the United States filed a civil enforcement action against the former CCO of MoneyGram International, Inc., for violating the Bank Secrecy Act (BSA).[10] Prior to the filing of the complaint, the Financial Crimes Enforcement Network (FinCEN)—which is responsible for enforcing compliance with the BSA—assessed a $1 million penalty against Haider for his conduct while acting on behalf of MoneyGram.[11] Manhattan U.S. Attorney Preet Bharara commented on the action: "Compliance officers perform an essential function in our society, serving as the first line of defense in the fight against fraud and money laundering. Unfortunately, as the Complaint alleges, Mr. Haider violated his obligations as MoneyGram's Chief Compliance Officer. By allegedly failing to take the actions clearly required of him under the law, he allowed criminals to use MoneyGram to defraud innocent consumers and then launder the proceeds of their fraudulent schemes. As this case demonstrates, we are committed to working with FinCEN to enforce the requirements of the Bank Secrecy Act and hold individuals such as Mr. Haider accountable."[12]

FinCEN Director Jennifer Shasky Calvery went on to say: "In my job, I've met hundreds of compliance officers and I know them to be some of the most dedicated and trustworthy professionals in the financial industry. FinCEN and our law enforcement

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[3] 18B Am. Jur. 2d Corporations § 1583 (2014).

[4] Pamela A. MacLean, *Record Number of General Counsel Charged in 2007*, NAT ' L L.J., October 2, 2007.

[5] Sue Reisinger, *Aiming Lower*, Corporate Counsel, April 1, 2006.

[6] *United States v. Sulzbach*, Case No. 07-61329 (S.D. Fla., September 18, 2007). The case against Sulzbach stemmed from alleged violations of the False Claims Act, whereby Sulzbach filed sworn declarations under a Corporate Integrity Agreement certifying compliance with federal health care laws. The case was dismissed in 2010.

[7] Complaint, *U.S. Department of the Treasury v. Thomas E. Haider*, December 18, 2014 (S.D.N.Y 2014).

[8] Complaint, *People of the State of California v. Patricia Dunn*, DA No: 061027481, Oct. 4, 2006 (Cal. Sup. Ct. 2006)

[9] *SEC Announces Enforcement Action Against Former Wells Fargo Advisors Compliance Officer for Altering Document*, U.S. Securities and Exchange Commission, Press Release dated October 15, 2014.

[10] *SEC Announces Enforcement Action Against Former Wells Fargo Advisors Compliance Officer for Altering Document*, U.S. Securities and Exchange Commission, Press Release dated October 15, 2014.

[11] *Manhattan U.S. Attorney Sues Thomas E. Haider, Former Chief Compliance Officer Of MoneyGram International, Inc., For Violating The Bank Secrecy Act*, United States Attorney's Office for the Southern District of New York, Press Release dated December 18, 2014.

[12] *Id*.

partners greatly depend on their judgment and their diligence in our common fight against money laundering, fraud, and terrorist finance. Mr. Haider's failures are an affront to his peers and to his profession. With his willful violations, he created an environment where fraud and money laundering thrived and dirty money rampaged through the very system he was charged with protecting. His inaction led to personal savings lost and dreams ruined for thousands of victims."[13]

Even if a compliance officer's conduct is not flagrant misconduct like Mr. Haider's was alleged to be, given the sensitive nature of many compliance positions—which typically include responsibility for investigating and responding to allegations of internal misconduct and establishing systems for preventing and detecting such misconduct—it is not difficult to envision scenarios in which compliance professionals are brought into litigation or investigations as witnesses or even as defendants. The cost of defending against such claims or obtaining legal representation—even if just called upon as a witness—can prove to be financially challenging.

Challenging Management

Having an effective compliance program can help organizations prevent and detect misconduct and reduce penalties if misconduct occurs;[14] however, when compliance professionals act to protect an organization from the misconduct of its employees and agents, they can find themselves challenging individuals in the highest levels in the organization. To be effective, when misconduct or the potential for misconduct is discovered, a CCO often must step in and report the issue to directors and officers.

A compliance professional must keep in mind his or her professional obligations and standards when faced with these types of difficult situations. Although there are no specific laws or regulations that currently regulate such issues for a CCO, there are emerging professional codes that a compliance professional can use to guide the actions that they take. For example, the Health Care Compliance Association (HCCA) adopted a *Code of Ethics for Health Care Compliance Professionals* in 1999 (see ¶90,120), which provides guidance on dealing with difficult compliance dilemmas.[15] The HCCA's *Code* describes a compliance professional's obligations to the public as "beyond [that of] other professionals" due to the responsibility of preventing misconduct.[16]

Another useful code for compliance professionals is the Society of Corporate Compliance and Ethics' (SCCE's) *Code of Professional Ethics for Compliance and Ethics Professionals.* The SCCE's *Code* sets forth steps that compliance professionals should consider when dealing with management misconduct. Rule 1.4 of the SCCE's *Code* provides that a compliance professional should not consent, or passively appear to accede to, misconduct. Instead, he or she should object clearly. If the objections do not prevent or stop the misconduct, a compliance professional should escalate the issue, if necessary to the highest governing authority (e.g., the board of directors), when appropriate. If these steps fail, a compliance professional may consider resigning and reporting the decision to public officials when required by law.[17]

Both the HCCA and SCCE Codes make clear that a compliance professional should consider resignation only as a last resort, as he or she may be in the best position to stop the misconduct. Thus, removing a compliance professional from the situation may perpetuate the misconduct within the organization. It is not difficult to imagine a scenario in which a compliance professional is left with the difficult choice of turning a blind eye to misconduct to remain in good standing with the organization or upholding his or her obligation to stop or report misconduct. It is these difficult choices that compliance professionals must make that often can be the basis for a claim that the compliance professional did not act appropriately, exposing the organization and individual to legal risk.

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[13] *Id.*

[14] For a discussion of the potential benefits of a compliance program for the health care industry, see *Compliance Program Guidance for Hospitals*, Notice, 63 FR 8987, February 23, 1998; *see also Compliance is a Culture, Not Just a Policy*, Brent Snyder, Deputy Assistant Attorney General, U.S. Department of Justice. September 9, 2014.

[15] For discussion on the HCCA Code see Joe Murphy, *Ethics for Ethicists? A Code for Ethics and Compliance Professionals*, Ethikos and Corporate Conduct Quarterly, March/April 2004 (Vol. 17, No 5).

[16] HCCA, *Code of Ethics for Health Care Compliance Professionals*, R1.4.

[17] *Id.*

¶61,310 Indemnification

Indemnification is one way to protect compliance professionals personally from the legal risks inherent in their role. The concept of indemnification provides that the company will bear the expense of the liability and, often, costs of defense as well, for acts arising out of an individual's performance of duties on behalf of the organization. Indemnification is a customary protection for directors and officers of an organization. Most organizations have bylaws providing that the company will indemnify directors and officers to the fullest extent permitted by the state law.[18] Many states have enacted indemnification statutes to support the recruitment and retention of corporate leaders and protect them personally from lawsuits.

Indemnification statutes typically cover any person who is or was a party to a pending or threatened action, suit, or proceeding due to the person serving as a director or officer (and often employee, or agent) of the corporation.[19] For example, under California's indemnification statute, "agent" includes any person who was serving at the request of the corporation.[20]

A chief compliance officer (CCO) generally should be included among the individuals who can be protected under these statutes. The language and purpose of indemnification statutes—to encourage capable individuals to serve in positions of corporate management—should apply equally to compliance professionals and enable them to benefit from indemnification protections.

Indemnification practice, however, can vary considerably, with some companies' bylaws and policies being more flexible and generous than others.[21] Further, it is possible that a corporation's bylaws may not provide for full protection that is available under state statutes. Thus, it is important to review both the governing indemnification statute and company bylaws to understand the protection afforded by an organization. In addition, the CCO and other compliance professionals should ask the following questions to understand the scope of any indemnification that may be provided by an organization:[22]

- **Does the company provide indemnification against all claims, and does it include expenses in litigation?** Indemnification may not be provided for some expenses or types of claims by some corporations simply because it is permitted by state law.
- **Who may claim protection?** Directors and officers are defined differently from company to company. It may be necessary to determine specifically which individuals are eligible for indemnification and, if possible, written confirmation is recommended.
- **Is indemnification of the CCO mandatory?** Company bylaws vary as to which individuals must be indemnified. As discussed below, in some cases, the bylaws may permit, but not require, indemnification.
- **What issues trigger indemnification?** There also may be limits on the types of proceedings or events that may be indemnified. For example, the indemnification provisions may limit indemnification to just court proceedings and may exclude pending or threatened investigations.
- **What expenses are covered?** Expenses and attorneys' fees resulting from litigation should be covered. Indemnification also should cover judgments, fines, and settlement costs arising from litigation. Whether particular expenses are covered can depend on the nature of the action (e.g., third-party lawsuits versus actions brought by or in the name of the corporation).
- **Are expenses advanced?** Indemnification statutes and corporate bylaws sometimes provide for the advancement of attorneys' fees and other legal expenses in connection with the defense of the matter triggering the coverage. If the right to receive such advances is conditioned on resolution of the merits of the proceeding, a significant

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[18] See Fried Frank, Client Memorandum, *D&O Insurance: What Directors and Officers Should Be Thinking About in the Sarbanes-Oxley World*, March 11, 2003.

[19] *See,e.g.*, Cal. Corp. Code §317(d); 8 Del. Code Ann. §145.

[20] Cal. Corp. Code §317(a).

[21] John Copeland, *Corporate Directors get 'SOX'ed by Insurers*, J. Ins., Risk & Public Risk Mgmt. (Spring 2005).

[22] *Id*.

out-of-pocket loss can occur before indemnification is available.[23]

Statutes generally identify indemnification as either permissive or mandatory. Permissive indemnification does not impose a duty on the corporation to provide indemnification. The corporation's board of directors has discretion to decide whether to grant indemnification; however, implementation of the permissive indemnification may require the board's action. On the other hand, mandatory indemnification provisions *require* the corporation to provide indemnification, giving the individual to be indemnified a judicially enforceable right. Some states extend mandatory indemnification beyond directors and officers to employees and agents.[24] In some cases, indemnification is mandatory if the individual is successful on the merits of a proceeding and, if not successful, then indemnification is permissive. Contractual indemnification agreements also can be drafted and tailored for particular individuals. In this regard, if a CCO believes that the corporate bylaws do not afford sufficient indemnification protection, it may be prudent to include a more expansive indemnification clause in the CCO's employment contract.

Indemnification typically is limited by law to situations in which the individual acted in good faith and in a manner he or she believed to be in the best interest of the organization. Thus, indemnification will not be available if the individual is determined to have acted in bad faith or have been motivated by improper personal interests. In addition, the advancement of legal expenses typically is conditioned upon repayment if it is determined that the individual is not entitled to indemnification.[25] In most cases, the protections usually are not granted unless the individual is found to have acted in good faith and in the best interest of the corporation. A definitive demonstration of success on the merits also may be required.[26]

¶61,315 Directors and Officers' Liability Insurance

While organizations typically indemnify their directors and officers, sometimes they are financially unable to do so (e.g., due to insolvency or bankruptcy) or are unwilling to do so for economic or other reasons. Indemnification is only as secure as the balance sheet of the organization providing the protection. Thus, many companies often purchase directors and officers (D&O) insurance as additional protection, and it is now customary for organizations—even if financially sound—to insure against the risk indemnification obligations pose through the purchase of D&O insurance. Indemnification shifts the financial responsibility from the indemnified individual to the company, while insurance shifts the risk to the insurer. Thus, indemnification and D&O insurance coverage often go hand-in-hand to protect corporate officers and directors. Some companies even seek to offer the best possible D&O insurance available as a way to recruit and retain board members and officers. Directors and officers can depend on the D&O insurance coverage to protect their personal assets, even if indemnification is not available.

D&O insurance directly protects a corporation and its officers and directors from liabilities arising as a result of the conduct of directors and officers in their official capacity. D&O policies can cover a variety of claims and can provide significant protection from claims filed either by third parties or by shareholders.[27]

While traditional D&O insurance coverage only applies to directors and officers, some policies also may cover managers and nonexecutive employees. Because there is no requirement that D&O policy specifically apply to a corporate compliance officer (CCO) or other compliance professionals, compliance professionals are well-advised to review the scope of their organization's D&O coverage to ensure that it applies to them. For example, an issue regarding coverage could arise if an individual who is not clearly identified as an officer serves on a

[23] *See e.g.*, Cal. Corp. Code §317(f); 8 Del. Code Ann. §145(e); N.Y. Bus. Corp. L. §724(c) (allowing advancement if the person seeking indemnification has raised a genuine issue of fact or law).

[24] *See* Cal. Corp. Code §317(d); 8 Del. Code Ann. §145.

[25] *Homestore, Inc. v. Tafeen*, 888 A.2d 204 (Del. Super. 2005).

[26] See *Green v. Westcap*, 492 A.2d 260, 262 (Del. Super. 1985).

[27] Towers Perrin, 2006 Directors and Officers Liability Survey, 53, April 2007 (reporting that 49 percent of the claims against participating public companies were brought by shareholders.

board committee, and the definition of "insured" is restricted to directors and officers. This issue could be eliminated by having board committee members included in the definition of "insured." Another option is to broaden the definition of "insured" to include certain positions. This latter option may best protect the CCO, by specifically identifying the CCO as an insured.

There also may be issues in determining if an insured is acting in a capacity covered by the D&O policy, especially for those who hold multiple roles. A standard D&O policy may restrict coverage for individuals holding multiple roles (for example, in the case of the general counsel, D&O policies may explicitly exclude coverage for acts involving professional legal services). Thus, in assessing coverage under a D&O policy, it is important to know if certain actions may be excluded depending on the role served by the compliance professional.

Is the CCO a Company "Officer?"

It is often uncertain whether a high-ranking ethics and compliance professional, such as a CCO, is considered a company officer if the D&O policy definition does not explicitly include the role of the CCO. The fiduciary obligation of the CCO to the corporation and its shareholders currently is uncharted territory.

For public corporations, an argument can be made that the CCO should be considered an "executive officer" as defined by the Security Exchange Commission (SEC). The Securities Exchange Act of 1934 and 17 C.F.R. § 240.3b-7, defines the term "executive officer," when used with reference to a registrant, as "its president, any vice president of the registrant in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy making function or any other person who performs similar policy making functions for the registrant." A CCO, as the individual with sole responsibility for establishing and implementing a compliance program, may be considered an officer with a policy making function depending on the CCO's roles and responsibilities.

The definition of "high-level personnel" under the *Federal Sentencing Guidelines for Organizations* also supports including the CCO within the category of officers of an organization. The *Guidelines* provide that "specific individual[s] within high-level personnel shall be assigned overall responsibility for the compliance and ethics program."[28] In other words, according to the *Guidelines*, the CCO should be a "high-level" employee. The *Guidelines* further define high-level personnel to mean "individuals who have substantial control over the organization or who have a substantial role in the making of policy within the organization."[29]

In a poll conducted by the Open Compliance and Ethics Group[30] (OCEG) in November 2007, 32.3 percent of 421 participants responded that the CCO is considered a company officer as defined by the SEC, and 10 percent of respondents did not know if the CCO is considered an officer under SEC standards. Respondents to the OCEG poll also were asked whether the CCO is covered under their organization's D&O policy. Of 323 respondents, 37 percent indicated that the CCO is covered under the D&O policy, and 14 percent stated that the CCO is not covered. In addition, 37 percent of respondents stated that they did not know whether their CCO has D&O coverage. The remainder either did not have a CCO or did not have D&O coverage. In other words, the number of respondents who *did not know* whether the CCO was covered by a D&O policy is equal to the number of respondents whose organizations provide such coverage to the CCO. The health care industry also appears to be unaware that D&O insurance coverage should extend to CCOs. In the HCCA's *2007 Profile of Health Care Compliance Officers*, surveyors asked, "[d]oes the Chief Compliance Officer have additional liability coverage through the organization?" Of the 836 respondents, 35 percent were "not sure" (22 percent answered "yes" and 42 percent said "no").

[28] USSC Federal Sentencing Guidelines for Organizations, § 8B2.1(b)(2). Available at: http://www.ussc.gov/guidelines-manual/2013/2013-8b21.

[29] *Id.* at Commentary to § 8B2.1.

[30] OCEG (*http://www.oceg.org/*) is a nonprofit organization that provides thought leadership on corporate culture and the integration of governance, risk management, and compliance processes.

These polls demonstrate the need for compliance professionals to review the company's D&O policy carefully and confirm coverage under the policy. Depending on the terms of the policy, an organization may need to work with its insurance carrier to expand the definition of "insured" to include the position of CCO explicitly. Inclusion of other compliance staff also should be considered if permitted by the carrier.

The D&O Policy

Even if a compliance professional is covered under a company's D&O policy, there are critical coverage issues to consider and analyze. The following are some of the key coverage issues to consider:

What is covered? D&O policies generally have three different types of coverage, and a company may select one or more of these options. "Side A" coverage is direct coverage for the personal liability of officers and directors that are either not subject to indemnification by statute or cannot be paid by the company due to insolvency. This coverage is most important for a compliance professional as it would pay for defense costs and the satisfaction of claims and judgments if the company is unable to do so. A compliance professional should always assess whether there is adequate "Side A" coverage. "Side B" coverage covers the corporation for its financial losses if it is called upon to defend itself or indemnify its directors and officers. "Side C" coverage protects both the corporation and its directors and officers from the corporation's own acts and, usually, is limited to actions under applicable securities laws.

What is excluded? D&O coverage often is limited by policy exclusions. Standard exclusions include fraud, personal profiting, other illegal compensation, pending and prior litigation, bodily injury and property damage, and Employee Retirement Income Security Act of 1974 (ERISA) claims. Some of these exclusions may be covered by other types of insurance, but some are simply not covered at all. The fraud exclusion is important to examine closely; some policies insure individuals as long as they have not been "finally adjudicated" to have committed a fraudulent act and require a court determination or admission of guilt before the fraud exclusion applies. This type of fraud exclusion often may not be triggered because most cases (especially civil cases) are settled before a court determination or admission of guilt occurs. In such cases, defense costs may nonetheless get covered. Some insurers, however, have removed the final adjudication limitation or have added language that the final adjudication can occur in a separate declaratory judgment action, thus excluding the ability to recover defense costs. Therefore, it is important to examine D&O policies closely as subtle wording differences and carve-out clauses may restrict the scope of coverage.

How does the policy's limit of liability apply? Typically, there is a single aggregate limit of liability that applies to all claims that fall within the terms of the policy. Thus the number of insureds will affect the amount of coverage available because of the aggregate limit. D&O policies are generally "wasting policies;" that is, the aggregate cost of defending against a suit reduces the amount of coverage over time. Once the limit is exhausted, no more coverage is available. In many cases, this may play a role in the decision as to whether a CCO can be added as an insured because the board of directors may be reluctant to dilute its own coverage.

Is there coverage for a criminal indictment or subpoena? Coverage for the costs incurred in responding to government subpoenas can be invaluable, as responding to a subpoena can require significant costs and the involvement of counsel. In addition, a subpoena often precedes an indictment and, therefore, the expenses associated with a full-fledged investigation may be triggered upon receipt of a subpoena. Under many policies, a subpoena does not trigger coverage. Some policies also do not cover the expense of responding to a criminal indictment. Criminal indictments, however, often can precede other claims. Thus, additional coverage may need to be purchased to include these pre-claim expenses.

What expenses are covered? A D&O policy typically pays for the costs associated with the defense, investigation, negotiation, and settlement of a covered claim. This includes attorneys' fees, court costs, and filing fees. Most policies cover only "reasonable defense costs," and carriers may object to certain expenses as being unreasonable. Policies usually cover the judgment amount, but most policies will specifically exclude criminal or civil fines or penal-

ties or punitive damages. Some policies require that the company use a lawyer or law firm that has been pre-approved by the carrier, which may preclude the covered individuals from selecting preferred counsel or using counsel for the company. All of these factors should be analyzed (and may be negotiated with the insurance carrier) to assess the protection afforded by the D&O policy.

¶61,320 Other Liability Insurance

Compliance professionals also should consider whether they should obtain other forms of coverage, such as professional liability insurance or errors and omissions (E&O) insurance, particularly when the compliance professional is providing the services as a consultant to a company for a fee or if they are not covered by a company's directors and officers (D&O) policy. E&O liability coverage is intended to protect against losses from a claim based on negligent acts, mistakes and errors, or omissions in the performance of professional services, including failure to perform as promised in an engagement agreement with a client. If a compliance professional is in the business of providing a service to clients for a fee, some degree of E&O exposure exists that is not covered by state indemnification statutes or a company's D&O policies.

Although insurers are typically willing to craft E&O policies for almost any type of professional service, compliance professionals are working in a relatively new profession that, while growing in recognition, may not be well understood by insurance carriers. Thus, insurance agents and underwriters may not understand the business of the independent compliance consultant and, therefore, may miss the mark when issuing policies.

Health care compliance professionals particularly need to keep in mind the distinction between compliance activities and those services falling under regulated professions, such as law and accounting. Guidance provided by compliance health care specialists can run the gamut from legal to accounting to clinical advice. Compliance consultants with legal, accounting or other professional licenses should evaluate whether the work they will perform will constitute a professional service regulated by their professional license. For example, an attorney who provides health care consulting services needs to be very careful to determine whether the service constitutes legal advice or counsel (and, therefore, must secure the necessary legal malpractice insurance) or compliance counselling, which would not be considered a professional legal service.

Compliance counsel can be practiced by individuals with assorted employment backgrounds and training. Unlike regulated professions, such as law and accounting, there is no licensure requirement for those practicing as compliance consultants, nor is there any governmental regulation for that line of work. If a company does not have in-house compliance professionals, a compliance consultant can provide a wealth of practical knowledge. In some cases, the line between compliance advice and legal or accounting advice may be blurred, however, that line is important to evaluate the type of insurance that a compliance consultant must carry. E&O coverage can apply to those services provided by compliance consultants that do not cross the line of professional, legal, or accounting services.

As with any insurance, the best time to purchase an E&O policy is before the risk is taken, or, in other words, before the compliance services are performed. Many engagements with clients will require insurance to be in place and, in some cases, having appropriate insurance coverage can be an important selling point.

Every E&O policy should be read carefully to make sure that the coverage being offered is sufficient. Most E&O policies, like many professional liability insurance policies, are written on a "claims made" basis, meaning any claims must be based on events occurring, and reported, during the term of the policy. These policies generally have a retroactive date that establishes the beginning date for coverage, and claims that arise out of acts committed prior to the retroactive date will not be covered. The farther back the retroactive date, the more coverage is provided. Some policies also include defense expenses within the aggregate limit of liability. Some exclude punitive damages. The wording of these policies can vary greatly, and each policy must be carefully read to understand the limits on coverage. The cost of E&O insurance also varies depending on the type of business, location, claims experience (both of the individual insured and of the industry

he or she is in), and also may vary from insurance company to insurance company.

Key features to consider when evaluating separate insurance coverage, such as E&O policies, for compliance professionals include:

- **What is the extent of the coverage?** Does it include the types of services that the compliance professional or compliance consultant provides? What is the definition of a claim? Is it a "claims made" policy?
- **Does the coverage include legal defense costs?** E&O insurance should pay for both the expenses in defending an action and any resulting judgments or settlements, and should include court costs, up to the coverage limits specified in the policy.
- **Does coverage extend to employees and subcontractors?** Coverage should protect the work done by employees or subcontractors of the compliance professional or compliance consultant, if applicable.
- **Is there optional coverage for allegations of copyright infringement and intellectual property infringement?** Intellectual property infringement coverage protects compliance professionals and compliance consultants against claims alleging intellectual property infringement. These claims can arise from the use of software, systems, and processes belonging to others.
- **Does the policy include coverage for personal injury?** Personal injury coverage may afford protection against claims of libel, slander, and invasion of privacy.

¶61,350 Steps to Take if You Are Charged or Named in a Lawsuit

Despite best efforts, a compliance professional can be named as a defendant in a civil lawsuit or be the subject of a criminal investigation. There are practical steps compliance professionals can take if such an event occurs:

Immediately retain independent and experienced counsel. The time to respond to a lawsuit or subpoena varies by jurisdiction, and there is limited time to act. It is critical to quickly retain counsel who can assist in determining when and how to respond. Because the interests of the various defendants in a corporate action can diverge, it also may be important to retain an attorney who is independent from the attorney employed or retained by the organization. In some cases it may be practical for individual defendants to have common representation, but that should be determined with advice from independent counsel. If a compliance professional is prepared, he or she will know if the expenses of independent counsel are covered by the indemnification or insurance protections described above.

Understand the rights and protections available. As described in this chapter, it is advisable to understand the indemnification and scope of insurance coverage that is available before being called on to use them, including whether the protections will allow for the advancement of attorneys' fees and expenses in connection with a lawsuit or other legal proceeding. In addition, there may be steps that the compliance professional must take to secure the protection afforded by indemnification or insurance, such as time frames that apply to submitting a claim. Counsel also can advise on these issues as well.

Preserve documents. It is important to preserve documents and other material that may be relevant as soon as notice of a potential claim is received. Documents can include e-mails and other electronic files as well as meeting minutes and personal notes. Moreover, company policies and applicable laws also may impose requirements regarding document destruction and retention.[31] Once an action is threatened, all relevant materials must be preserved, without regard to the organization's document retention policy and practices.

¶61,360 Conclusion

The consideration of liability protection has often been an afterthought for many compliance professionals. Now, however, compliance professionals should know the importance of adequate personal legal protection. Compliance professionals are increasingly targeted by the government and litigants due to the role of compliance departments in handling alleged misconduct. Because of this, every compliance professional should adequately assess and implement the array of options that may be available to protect against the devastating financial effects of being named in a lawsuit.

[The next page is 72,121.]

[31] Sarbanes-Oxley Act of 2002, (P.L. 107-204) §§802, 1102.