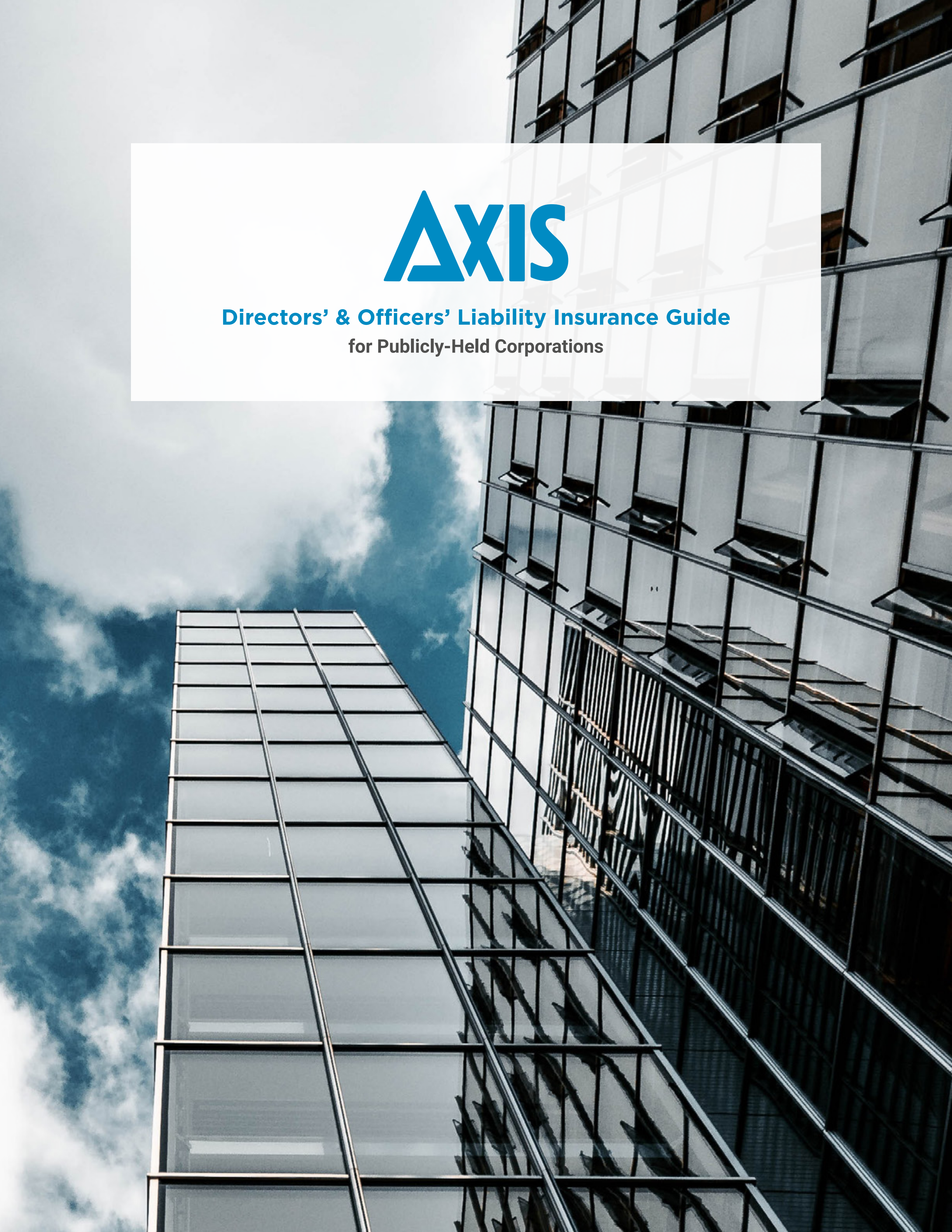

AXIS

Directors' & Officers' Liability Insurance Guide

for Publicly-Held Corporations

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Introduction

Corporate indemnification and insurance policies designed to protect Directors and Officers (D&Os) are complex technical documents. These "risk management" tools are not well understood and too often only considered when problems arise. Legislation concerning corporate governance and disclosure with a dramatic increase in litigation, is causing more boards to ask questions about the scope of protection afforded under the corporate indemnity and insurance policies that are designed to protect them.

The insurance industry has developed a language of insurance jargon and acronyms to deal with the intricacies of the coverage and codify the various policy extensions and endorsements. This has often left management and boards with a difficult challenge of clearly understanding the complexities of the insurance policy and the scope of the protection it provides. This issue is further compounded by the fact that there is no standard D&O policy wording. Small wording changes can have a significant coverage impact. These wording issues form part of every renewal negotiation.

This guide puts into simplified terms the language of insurance to assist any Director or Officer easily understand the coverage nuances. The board and management should understand the protection with which they are provided and what options are available to them before a problem occurs. If they wait, it might be too late to ensure adequate protection is in place.

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Directors' & Officers' Liability

Directors and Officers are faced with a wide range of legal exposures arising from their duties to the corporation. They owe a duty of care to the corporation requiring them to act without negligence and this duty may also apply to other stakeholders such as employees, creditors and customers.

D&O's Duties to the Corporation

Duty to Manage the Corporation

The basic duty of the board is to supervise the management of the corporation. The degree of autonomy given to management is a board decision that must be made carefully. The board should establish guidelines to assist management in making decisions. The board should create reporting structures and monitor performance.

Duty to Act in the Corporation's Best Interests

In Canada, corporate statutes state D&O's have a fiduciary duty to act honestly, in good faith and in the best interests of the corporation.

Duty to Exercise Care and Skill

The standard of care required of a D&O is that of a reasonably prudent person in comparable circumstances. The business judgment rule states that directors can avoid liability as long as they meet this standard of care and act in good faith.

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3 Levels of Protection Available to D&Os

Step 1: Risk Management

Ever y D&O should be aware of their responsibility to the corporation, the role they fulfill on the board, or in a management capacity and the expertise they are expected to bring to the position. The first line of defense for the D&Os is to execute their responsibility to the corporation with the required level of care and skill and using sound judgment. Diligence in attending board meetings, reviewing board materials, understanding and questioning management and matters put before the board, will greatly reduce the risks of litigation and enhance the D&O's defense in responding to any claims.

Axis Insurance, upon request, can provide general material relating to Risk Management guidance for D&Os of publicly traded corporations. However, D&Os are urged to consult their own legal counsel for specific advice concerning their own corporate duties, responsibilities and exposures.

Step 2: Corporate Indemnification - By Laws and Contractual Indemnity

Most corporate by-laws state that the company will advance defense costs and settle claims made against D&Os acting in that capacity. It is recommended that D&Os also have this indemnification specified in their contracts. This prevents any by-law changes from affecting D&Os rights to indemnification. A Delaware court has even ruled that a corporation can change bylaws after a D&O has left the corporation and the new by-laws will apply to that D&O, rather than those that were in place at the time he/she served as a D&O. This makes the contractual indemnification that much more important.

Step 3: Insurance

The Directors' and Officers' Liability policy is "errors and omissions" coverage designed to protect D&Os against personal liability and financial loss arising from a wrongful act committed, or allegedly committed, in their capacities as Directors and/or Officers of the insured companies.

Why do we need D&O Insurance?

A general liability (GL) policy will only cover bodily injury and property damage for which the insured becomes legally liable. An errors and omissions (E&O) policy covers financial loss arising out of a negligent act, error or omission in the rendering of professional services. The D&O policy responds to cover financial losses that would not be covered under the E&O policy (such as securities claims) and also provides coverage for individual D&Os whereas the E&O policy would only cover the entity.

D&Os deserve to be protected as they are risking their personal assets for the benefit of shareholders.

If this protection were not in place, it would be extremely difficult to attract and retain D&Os. In addition, the policy protects the corporation against losses due to the indemnity coverage.

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Coverage Options

Insurance protection is provided under the Directors' and Officers' liability policy. There are commonly two types of insurance coverage available:

Corporate D&O Policy

This policy provides coverage for the Individual D&Os as well as coverage for the corporation under certain conditions.

Individual D&O Coverage

Commonly referred to as Side-A Coverage, this policy protects only the D&Os and offers no coverage benefit to the corporation.

Corporate D&O coverage will usually be more expensive than a Side A policy which restricts coverage to just the D&Os. Some Directors are merely interested in protecting themselves and will only be interested in purchasing Side A coverage. More typically, the Side A policy is purchased in conjunction with the corporate policy. In this scenario the Side A policy will provide excess coverage above the limits of the corporate policy exclusively for the D&Os, and first dollar coverage to the D&Os in certain situations where the corporate policy does not respond. This in known as "Excess DIC (Difference in Conditions) Coverage", hence the name "Excess Side A DIC." Some corporate D&O's policies offer an extra limit (typically $1,000,000) for Excess Side A coverage as an extra benefit to the D&Os.

Coverage Options and Structured Placements

Certain clients are not interested in corporate coverage and are more concerned with protection just for the D&Os. One issue is the concept of sharing the policy limits with the corporation. What happens if the limits are exhausted or otherwise inadequate? Could a trustee in bankruptcy hold back coverage or claim the proceeds of the policy as benefit to the corporation denying the D&O's access to the funds?

Individual coverage for the D&Os only referred to as "Side A Coverage" would typically work in much the same fashion as the corporate D&O policy. Terms and conditions would be much the same with the exception of those elements that are applicable to the company. It is possible to purchase Side A coverage for the entire board, or just certain board members, such as the outside or independent Directors. It is even possible to purchase coverage for a single Director although these policies are quite rare.

Most companies choose to protect the corporate balance sheet and it is reasonable to do so. If corporate coverage is purchased, this does not negate the need for Side A only coverage and many boards, certainly boards of larger capitalized companies, have been prioritizing purchasing Side A coverage in addition to the corporate policy. There are considerable advantages to purchasing Excess Side-A DIC (Difference in Conditions).

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What is a D&O Tower?

D&O insurers have limited capacity available for any given account. Many insurers are only able to provide limits up to $10,000,000. When higher limits are required, it is usual to purchase excess insurance. This is an additional limit that applies on an excess basis over the original policy, known as the "Primary Policy". The excess policy will generally follow the same terms and conditions as the Primary Policy. It will start paying claims only when the limits of the Primary Policy have been exhausted.

Sometimes the excess insurer will assist on specific conditions which are not contained in the Primary Policy. Sometimes there may be a number of excess policies each applying in subsequent layers on top of each other. This is where the terms "D&O Tower" comes from.

The terms governing the exhaustion of the primary layer of insurance can be adjusted so that this limit is exhausted either by the insurer only, or by the insurer and other parties including the insured (via a shaving of limits endorsement). This second scenario sometimes presents itself when there is a coverage dispute and the primary insurer offers a settlement as a percentage of the primary limit (rather than the full policy limit). If an insured accepts this settlement without the shaving of limits endorsement, then in most cases they would be prevented from approaching the excess carrier for further reimbursement. The shaving of limits endorsement allows them to approach the excess carrier, and in all likelihood negotiate a similar settlement.

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Excess Side A DIC (Difference in Conditions)

Whether there is a tower in place or not, many boards are now incorporating the Excess Side A DIC Policy into the structure. The coverage is exceptionally broad; often contains few exclusions and many advantages to the D&Os.

Coverage applies excess of the limits provided by the corporate policy, but will drop to pay first dollar and defense costs when no coverage is available through the corporate policy or if the corporate policy is held up in litigation. Having access to funds so a D&O can continue to pay for his defense can be exceptionally important.

It is recommended that the Side A policy be provided by an insurer who is not the primary carrier on the corporate policy.

Benefits of the Excess Side A DIC Policy

Limit Dilution

The limits of liability under the policy are available to fund only non-indemnifiable loss incurred by the Directors and Officers. In contrast, the limits of liability under a traditional corporate policy are also available to fund indemnifiable loss and corporate losses in a securities claim. Directors and Officers can lose their personal protection under the corporate policy if the corporation incurs significant covered losses. That risk does not exist under Side A Policy.

Excess Coverage

The policy increases the coverage limits available to D&Os by providing coverage in excess over the corporate policy limit.

Difference in Conditions Coverage

The policy "drops down" to provide primary coverage on a difference in conditions basis. This means that the broad coverage will apply under certain circumstances where coverage is excluded or denied under the corporate policy.

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Benefits of the Excess Side A DIC Policy (continued)

Bankruptcy Protection

Corporate policies may be considered an asset of the bankrupt corporation. The Side A policy is intended to protect the D&Os only and will not be subject to an automatic stay under Bankruptcy Law.

Exclusions

The policy contains very few exclusions, some policies only exclude fraud and personal profit with final adjudication language.

Failure of Underlying Coverage

The policy will respond in the event of a failure of the primary policy to indemnify. This includes a wrongful refusal to indemnify and the failure of the insurer to indemnify due to bankruptcy. Coverage will usually apply within 60 days of a request for indemnification.

Insured vs. Insured

The policy addresses many of the issues relating to the insured versus insured exclusion which can lead to denial of coverage under the corporate policy.

No Presumptive Indemnification

The policy applies if the company refuses or is unable to indemnify, or fails to respond to a request for indemnification.

Cancellation

The policy cannot be rescinded or cancelled except for nonpayment of premium.

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Insurers & International Coverage Options

Who provides insurance coverage?

A number of insurance companies offer D&O insurance for publicly-traded companies. Most of these insurers underwrite the coverage as a specialty class of business employing highly trained underwriting and claims personnel. The companies providing D&O coverage are typically large, diversified insurers with subsidiaries or branch operations in Canada. Other markets include underwriters at Lloyd's of London and insurers based in Bermuda, which due to its tax status, has attracted substantial insurance capacity aimed at the re-insurance market and very large risks.

The major participants in the Canadian D&O market are insurance companies of considerable financial strength and sound reputations for service, knowledge and claims settling ability. Companies are usually rated by S&P and should have a minimum rating of 'A' or higher.

International Subsidiaries – Admitted Insurance

Most policies offer coverage worldwide including suits that are brought anywhere in the world. Companies with foreign operations may find that the worldwide policy lacks adequate protection for Directors and Officers of foreign incorporated subsidiaries. Local, regulatory environments are evolving and giving rise to new requirements and risks which may not be covered under the policy.

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Insurers & International Coverage Options (continued)

Possible Risks of Non-Admitted Coverage

- D&O lawsuits can arise from an international company's foreign operations and subsidiaries.
- Local requirements require D&O policies to be issued by a locally licensed insurer. In some cases severe fines and penalties are possible.
- Indemnity payments by the parent to individuals in foreign jurisdictions may have adverse implications for the company.
- Local law prohibits the parent company policy from paying claims.
- The local subsidiary may not be able to indemnify D&Os leaving personal assets exposed.
- Regulators the world over are intent on enforcing compliance with local laws and regulations.
- Local laws and customs may not be effectively addressed or even considered in the policy wording.
- Evolving trends in the international regulatory landscape create an exposure for non-contemplated liabilities.

Solutions for Protecting Subsidiaries and D&Os in Foreign Jurisdictions

Some insurers can provide a global D&O program, integrating locally admitted policies with the global policy. Many different coverage options are possible and the countries in which local coverage can be arranged will differ between insurers. These coverage arrangements help to mitigate risks by providing:

- Coverage that is admitted locally and complies with local laws and regulations.
- Access to local claims specialists who are experts at dealing with claims in the local jurisdiction.
- Policies can be issued in local languages, often a requirement.

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Corporate D&O Policy

Who is Covered? What does Side A, Side B, and Side C mean?

The corporate D&O Policy has three main insuring agreements universally referred to as Side A, Side B and Side C:

SIDE A Coverage for Directors and Officers	The policy protects all the D&Os past, present and future against losses where they are not reimbursed by the corporation.
SIDE B Corporate Reimbursement	The policy protects the corporation where the corporation is obliged to reimburse the D&Os.
SIDE C Organization or Entity Coverage	The policy protects the corporation with respect to "Securities Claims" that is allegations arising out of the issue and sale of securities.

What is the coverage "trigger"– is it a "claims made" policy?

The "trigger" refers to the event that will give rise to a claim under the policy. The D&O policy is almost universally a "claims made" policy. This means the trigger that will give rise to a claim is the date a claim is made against the insured. The date when the wrongful act occurred (such as a misstatement in a prospectus) that is the underlying cause of the allegation will not determine coverage under the policy; the claim must be made during the policy period and not after the policy has been allowed to lapse. This claims made approach differs from certain other liability insurances, particularly General Liability, which is usually occurrence-based.

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Corporate D&O Policy (continued)

What is the limit of liability?

The limit of liability under the D&O policy is an aggregate limit, meaning it is the most the underwriters will pay for all claims combined during the policy year including defense costs and expenses. The limit of liability usually applies in addition to the retention which is the amount of each claim assumed by the insured.

The limit on the policy is a shared limit and the policy covers multiple insureds, including all the Directors and Officers and the insured organization with respect to security related claims. In the event of large claims, especially a securities claim, defense costs may run into the millions rapidly reducing the limits available.

What is the retention? – When does it apply?

Retention is the term for a deductible on the D&O policy. This retention applies to all claims except Side A coverage. Some policies specify that the retention does not apply to defense costs and some will even contribute equally to damages along with the insured until the retention has been paid.

D&O policies typically contain a large retention that the corporation needs to pay in the event that they reimburse a D&O for a claim. To ensure that companies do not try and avoid paying the retention by not reimbursing the D&O, many policies contain "presumptive indemnification" language. This forces the corporation to reimburse the insured, or at least pay the deductible, unless the corporation is prevented by law from indemnifying the insured.

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Corporate D&O Policy (continued)

Do I control my own defense and appoint legal counsel?

D&O policies can be written on duty to defend or reimbursement policies. A duty to defend policy means that the insurer conducts the defense on your behalf; appointing lawyers and paying legal costs as they are incurred. With a reimbursement policy, you would appoint legal counsel (after consulting the insurer), conduct your own defense, paying legal costs as they're due. The insurer reimburses costs when you provide supporting documentation. The duty to defend option has a cash flow advantage and the reimbursement option allows you a greater level of control over the defense.

The type of policy that you prefer depends on which of these is more important to you. Directors who are comfortable having more control in dealing with lawyers, conducting and overseeing the defense of the claim, and to whom the cash flow advantage of the duty to defend policy is not essential, often prefer the greater level of involvement allowed by the reimbursement policy, especially where serious allegations and personal reputations may be in question. Some insurers offer options of counsel from which the insured may choose but the selection of counsel must have the experience and knowledge to deal with the type of allegations covered by the policy.

Allocation – What happens when there are allegations not covered by the policy?

Allocation is the process of determining the amount of defense costs or judgments which should be attributable (allocated) to loss covered by the policy and loss not covered by the policy. This could be because claims are brought against uninsured persons or because there are allegations that are not covered by the policy. Essentially the policy is trying to determine the amount of insured loss when that loss is comingled with uninsured loss. This process often leads to contention in the settlement of D&O claims. Many insurers have solved these problems by setting a pre-determined percentage that will apply to the allocation of defense costs, regardless of the circumstances, whenever an allocation issue is involved. The allocation of the judgment is normally determined by the relative legal exposure or using the best efforts of the insured and insurer to reach an agreement. The addition of corporate coverage for securities claims removes the need for allocating covered and uncovered loss between the D&Os and the corporate entity.

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Reading the Policy

The policy is difficult to read – how does it work?

The typical policy is divided into 6 sections:

Declarations	This section specifies what is unique to each insured. The name and address of the insured, coverage period, limits and deductibles purchased and the premium.
Insuring Agreements	This clearly spells out the coverage grant in broad terms. The broad scope is then limited and shaped by the exclusions, definitions and conditions as well as certain endorsements that are added to the policy.
Definitions	Many terms are defined in the policy, usually in such a way to put a narrow interpretation to the term and often operate to exclude certain aspects of coverage.
Exclusions	Exclusions typically fall into two categories. Coverage that is provided by other policies, such as the General Liability policy and situations that are beyond the scope of insurance such as conduct exclusions relating to criminal acts and fraud.
Conditions	How the policy is managed and the rights and responsibilities of both the insurer and the insured are specified in this section of the policy. This section would explain the procedure for reporting a claim and what happens in the event of a merger or sale of the corporation amongst other things.
Endorsements	The endorsements of the policy can make changes to any of the sections noted above. This is the insurer's avenue for making changes to their base or standard wording.

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D&O Policy Checklist

Who Is the Insurance Company?

Insurer

Questions

- **Does the insurer have a satisfactory financial standing and credit rating?**
- **Does the insurer have the ability to issue locally admitted policies for foreign subsidiaries?**

Considerations

The knowledge, experience, integrity and financial capacity of the insurer are of paramount importance. It is easy for an insurance company to write business when everything is going well for the client. However, the insurer will be needed most when things are going wrong, you may be experiencing difficulties with your business or you are involved in litigation or potential litigation. In these challenging times you will appreciate the comfort of dealing with a knowledgeable and competent insurer should a claim occur. Issues can arise with renewal of coverage and acceptance of notice of claim. While not always avoidable, it is wise to deal with insurers that have sound underwriting and claims personnel with experience in writing the business and exposures presented by your company.

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D&O Policy Checklist (continued)

How are Defense Costs Covered?

Duty to Defend or Reimbursement

Questions

- **Does the policy offer clear guidance on how defense costs may be advanced and reimbursed?**

Considerations

Most policies do not impose a duty to defend on the insurer. Where the insured has the duty to defend the policy will spell out clear guidelines as to how the insured must conduct the defense. In most cases the insured is required to allow the insurer to associate in the defense of a claim and approve the selection of counsel. The policy should also clearly state how the insured will be reimbursed for defense costs as well as settlement amounts.

Duty to Defend or Reimbursement

Questions

- **Is there a pre-determined allocation provision in the policy?**
- **Does it apply to defense cost only or settlements as well?**
- **Is the percentage a minimum or a set amount?**

Questions

- **Where a pre-determined percentage does not apply is allocation based on best efforts or relative legal exposure?**
- **Does allocation apply to all claims including securities**
- **claims?**

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D&O Policy Checklist (continued)

How are Defense Costs Covered?

Hammer Clause

Questions

- **Is there a "Hammer Clause" in the policy?**

Considerations

This clause states that if a settlement offer is declined by the insured and the final damages are higher than that settlement opportunity, then that difference is not covered, or only a portion is covered. Allegations can be highly personal and a D&O may want to prove their innocence without the threat of coverage being withdrawn.amounts.

Retention (Deductible)

Questions

- **Does the policy retention apply to all claims including defense costs?**

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D&O Policy Checklist (continued)

What are the Exclusions in the Policy?

Conduct Exclusions

Questions

- **Does final adjudication apply to all conduct exclusions?**

Considerations

These exclusions deal with fraud and disgorgement of profits or remuneration or financial advantage to which the insured is not legally entitled. An important aspect to these exclusions is when coverage for defense of allegations ends. Some policies refer to a "finding in fact", language that is considered to be limiting and may cut short the continuation of defense costs for an innocent director who may subsequently be exonerated. A far broader approach is "final adjudication" where coverage continues until there is final settlement in the courts which means defense costs will continue through the entire settlement process.

Prior Notice

Questions

- **Has notice been given under a prior policy?**

Considerations

Prior notice of any facts or circumstances given as notice of a claim or potential claim under any other policy. The scope of this exclusion may apply to new allegations that arise from the same or similar facts or circumstances or which in any way may be related to those facts or circumstances reported under another policy.

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D&O Policy Checklist (continued)

What are the Exclusions in the Policy?

Prior or Pending Litigation

Questions

- Are you aware of any litigation or circumstances that could arise out of the same or essentially the same facts?
- If you have changed from one insurer to another, was the prior and pending litigation date from the original policy used?

Considerations

The policy excludes claims that were commenced or pending prior to the "prior and pending litigation" date specified on the policy declarations.

Insured vs. Insured

Questions

- Is there an exception for Trustees in Bankruptcy, whistleblowers and derivative actions?

Considerations

The policy excludes claims brought by any insured against another insured. A number of special exceptions may apply to this exclusion.

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D&O Policy Checklist (continued)

What are the Exclusions in the Policy?

US SEC Exclusion

Questions

- **Are you contemplating a listing on a US exchange?**

Considerations

Policies will often contain this exclusion because exposure to the regulations of the US Securities Commission and US exchanges has not been contemplated in the underwriting or the terms provided. Some insurers will remove this condition upon receiving adequate information and subject to additional premium and amendments to policy terms if required. Usually retentions will be higher for US exposures. Some insurers will not write US listed risks or will not be competitive, so if a future US listing is contemplated careful consideration should be given to the insurer's ability to provide competitive terms.

Insured vs. Insured

Questions

- **Is there an exception to the major shareholder exclusion for major shareholders who do not have the right to a board appointment?**

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D&O Policy Checklist (continued)

Exclusions where coverage is available under other policies

Outside Directorship

Questions

- **Do any Directors sit on the board of other companies at the direction or for the benefit of the corporation?**

Considerations

Directors sitting on boards of outside entities at the direction of the insured corporation are not covered unless specifically underwritten and agreed. The policy will usually make an exception for non-profit entities and coverage will apply on an excess basis, firstly after any indemnity that is available from the non-profit entity, and secondly after any insurance available to the non-profit entity is exhausted this is known as a "double excess" basis. This is often the case when the company has an ownership interest in another company which is not a subsidiary under the policy.

Pollution

Questions

- **Does my policy provide the broadest pollution coverage available?**

Considerations

Pollution or Environmental Impairment liability coverage can be purchased as a separate policy. Many insurers will now include some limited coverage which is written back into the policy as an exception to the pollution exclusion. Pollution coverage available is generally limited to shareholder derivative actions, Side A claims and defense costs for Canadian claims. Some policies may offer broader coverage.

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D&O Policy Checklist (continued)

Exclusions where coverage is available under other policies

Bodily Injury and Property Damage

Considerations

Almost all D&O policies contain broad BI/PD exclusions since it is the intention of the D&O policy to provide coverage for financial loss. BI/PD exposures are better addressed via the General Liability policy.

Fiduciary Liability

Considerations

ERISA claims and claims arising out of the administration of benefit plans are excluded by most policies. Once again, this coverage is better provided by another policy, in this case a fiduciary liability policy.

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D&O Policy Checklist (continued)

What Policy Terms have Specific Definitions?

Definition of Claim

Questions

- Does the definition of claim include oral demands?
- Is there coverage for non-monetary and Injunctive relief?
- Does the definition cover criminal allegations?
- Are extradition proceedings explicitly covered?

Considerations

There can be considerable difference in the scope of this important definition between various policies, as many insurers have substantially broadened the definition.

Definition of Loss

Questions

- Does the definition of loss specifically exclude taxes?
- Are punitive damages excluded?
- Is the coverage broad offering “most favorable jurisdiction” language or is coverage limited to Canadian suits only?

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D&O Policy Checklist (continued)

What Policy Terms have Specific Definitions?

Insured

Questions

- Does the definition include employees?

Considerations

Some policies include employees only with respect to an employment practices liability (EPL) claim; if named as a codefendant with another insured person or if the employee acts for the corporation as a qualified person under NI43-101. Some policies also clearly state that in-house legal counsel and risk managers are added as covered persons.

Questions

- Does the definition include spouses, domestic partners or heirs in the event they are named as parties to a suit solely due to their relationship to an insured person?

Considerations

There are subtle differences between definitions that can have a significant coverage impact.

Definition of Loss

Questions

- Do you control subsidiary companies that are not covered by the policy?
- Do your Directors sit on boards or provide management consulting services for companies that you have a minority interest in?
- Do you have foreign subsidiaries that require locally admitted and licensed insurance?
- Do you own or control any LLCs , ULCs or LPs as they may not fall within the definition of Subsidiary under the policy?

Considerations

Most policies automatically cover all subsidiaries if more than 50% of the outstanding voting shares are controlled by the
insured organization.

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D&O Policy Checklist (continued)

Policy Conditions

Change in Control

Questions

- **Are you aware of the policy terms regarding a change in control?**

Considerations

In the event of a change in control, usually the acquisition of more than 50% of the outstanding voting shares of the company, the policy will go into automatic run-off. That is, from the date of the change in control the policy will continue to expiry but only with respect to wrongful acts that occurred prior to the change in control.

Options are available for the board to purchase a multi-year run off policy, typically for a six year term, the cost of which will vary depending on the risk.

Discovery

Questions

- **What is the automatic extended reporting period in the policy?**
- **Does the policy offer a one year bi-lateral extended reporting period (ERP), not requiring the consent of the insurer?**
- **What is the cost for the ERP as a percentage of the annual premium?**

Considerations

If the policy is not renewed or is allowed to lapse an automatic period of time (usually 30 days) is allowed for the insured to report claims or notice of circumstances that could give rise to a claim. Most policies give the insured an option to purchase an extended reporting for one year. This allows the insured to maintain coverage for wrongful acts that took place prior to the expiry of the policy. As the insurer may fail to offer competitive renewal terms or even refuse to renew the policy this can be an important clause allowing the insured valuable time to prepare proper notice of claim or to be covered for events that subsequently come to light after the expiration date.

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D&O Policy Checklist (continued)

Policy Conditions

Cancellation

Considerations

Most policies are non cancellable by the insurer, except with respect to non-payment of premium.

Coverage Territory

Considerations

Most policies provide coverage worldwide and suits are covered whether they are brought in North America or overseas. It is important to note that the policy will not comply with admitted (local licensing requirements) insurance regulations of many foreign countries. If required, admitted coverage can be arranged in many foreign jurisdictions.

Severability

Considerations

Broad policies will contain severability clauses applicable to the application and the exclusions. A misstatement by one insured will not be imputed to another insured.

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D&O Policy Checklist (continued)

Policy Conditions

Priority of Payments

Questions

- **Does the policy include a priority of payment provision?**

Considerations

This wording places individual D&Os ahead of the corporation when claim payments are due to both parties and the policy limits are in danger of being exhausted. This clause is designed to protect individual D&Os in the event that the corporation is using up the policy limits.

Rescission

Questions

- **Is there a non-rescindable endorsement applicable to the Side A coverage?**

Considerations

Is there a non-rescindable endorsement applicable to the Side A coverage?

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D&O Policy Checklist (continued)

Extensions of Coverage

Investigative Costs

Questions

- **What is the sub-limit for investigative costs coverage? Does the retention apply to investigative costs?**

Considerations

Investigative costs mean reasonable costs, charges and fees (including lawyer's fees and expert's fees) and expenses, incurred by the company, or its Board of Directors, in connection with an investigation of any security holder derivative demand.

Employment Practices

Questions

- **Does my policy provide coverage for individual D&Os in the event of an EPL claim?**

Considerations

Public companies EPL coverage is limited to individual D&O's unless a standalone EPL policy is purchased. Since allegations are usually made against the corporation, coverage in this area is somewhat limited.

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Mining Team

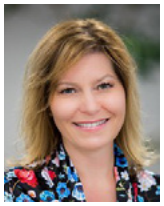
Clive Bird

Clive is an insurance risk specialist, investor, entrepreneur, and product developer for bespoke insurance risks. For over 15 years Axis Insurance enjoyed a reputation for quality, innovation, creativity and relationship building.

Clive began his Insurance career at Lloyd's of London, renowned for its technical underwriting expertise and a creative approach to risk, providing him with opportunities to push the boundaries of product innovation. Moving to the West Coast of Canada, he has expanded his broad Insurance knowledge and London market relationships to produce products for Canadian clients working across the globe.

Clive has worked extensively with public companies with a strong focus on mining and mineral exploration industry, addressing the broad range of risk exposures they face worldwide. Dynamic business enterprises are starved for the innovation and market relationships Clive can deliver. As an entrepreneurially-minded investor himself, he is embracing new technology and the shifting business landscape to stimulate new market capacity and technically efficient insurance products for the new business era.

Stacey Copeland



Stacey is an account executive with 30 years of experience focused in the resource-based industry in Western Canada. Stacey joined Finning International in 1997 after 7 years at AON, and was quickly promoted to a management position with a mandate to build a highly competitive insurance facility for Finning customers. A combination of high service excellence, successful claims management, and expanded insurance offering meant a fivefold increase in net profitability.

Stacey joined Axis Insurance in 2005 as a senior shareholder and partner, immediately helping the company grow through a series of strategic acquisitions and partnerships and was instrumental in the sale of the company in 2016 to the Vertical Group, now renamed the Axis Group. Although specializing in mining, mineral exploration, forestry and energy sectors, Stacey has expanded her knowledge to include construction, transportation, cryptocurrencies, blockchain and other emerging markets and technology risks.

She aligns herself with clients that are best in class and embraces their technical challenges, meets their high service expectations and considers it the ultimate success to place the broadest coverage, at competitive pricing with A+ rated insurers.

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Let us know how we can help you today

Have questions? We have the answers.

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