

The background features a low-angle, upward-looking perspective of modern skyscrapers with glass facades. The buildings are rendered in shades of blue and grey, creating a sense of height and architectural complexity. The sky is a pale, clear blue. In the foreground, there are large, stylized geometric shapes in bright blue and white, which appear to be part of a graphic design or data visualization. The overall aesthetic is clean, professional, and modern.

AXIS
Insurance

**Insurance
Consideration
for Domestic
and USA Mergers**

Mergers and acquisitions, whether within Canada or involving U.S. entities, introduce complex legal, financial, and operational risks, many of which are tied to insurance. This guide provides Canadian businesses with a practical framework for evaluating insurance considerations during domestic and cross-border M&A activity to ensure seamless coverage, regulatory compliance, and protection against legacy liabilities.

Key insurance issues explored include:

U.S. vs. Canadian Insurance Markets

M&A Related Policy-Level Considerations

Rolling Retroactive Dates

Deal Structure & Consolidation

Insurance Due Diligence

This guide concludes with a policy audit checklist and a list of supporting documentation needed to help insurance advisors assess regulatory requirements, guide insurance integration, and ensure continuity of coverage across all entities.

With proper due diligence, strategic planning, and expert insurance advisory, Canadian businesses can navigate M&A transactions with greater confidence, mitigating risk and supporting long-term success—particularly when entering the U.S. market.

Key insurance issues explored include:

U.S. vs. Canadian Insurance Markets

U.S. expansion introduces added complexity due to higher litigation risk, state-level regulation, and differing structures around workers' compensation, coverage limits, and compliance requirements. Businesses must work with brokers who are familiar with cross-border placements.

M&A Related Policy-Level Considerations

Acquisitions often trigger conditions such as material change in risk, change in control clauses, and the need for tail (ERP) coverage. Failure to address these elements can lead to coverage gaps and uninsured exposures post-close.

Rolling Retroactive Dates

When tail coverage is not obtained by the seller, rolling the target's retroactive dates into the buyer's insurance program can be a viable alternative—but only with proper insurer approval and documentation.

Deal Structure & Consolidation

Whether the acquisition is structured as a stock or asset deal impacts liability and coverage transfer. Operational differences between the acquirer and target may require separate insurance policies, while shared policies demand careful management of limit erosion and risk alignment.

Insurance Due Diligence

A comprehensive audit of the target's policies—reviewing coverage terms, exclusions, retroactive dates, and claims history—is essential. An analysis of post-acquisition documents, organizational structure, and inherited obligations should support this.

A Brief Note on US Expansion: Key Differences Between the Canadian and USA Insurance Markets

For Canadian businesses expanding into or acquiring a company in the U.S., it is important to understand the key differences between the two insurance markets. While both countries share common risk management principles, insurance buyers must navigate distinct variations in compliance, pricing, capacity, regulations, and coverage structures.

Key differences include:

- ✓ **Compliance Requirements** Compliance Requirements: Requirements for admitted vs non-admitted policies and the involvement of a local broker licensed in the jurisdiction where the acquisition or newly established entity is domiciled vary by state and province.
- ✓ **Pricing Variations** Insurance premiums, particularly liability rates, tend to be significantly higher in the USA due to increased litigation risks.
- ✓ **Coverage Capacity** The availability of certain types of coverage, such as cyber, directors and officers (D&O), and non-owned automobile liability insurance, may differ widely between the two markets.
- ✓ **Regulatory Requirements** In Canada, Workers' Compensation coverage is provided through mandatory provincial programs. In the U.S., coverage is provided through a mix of private insurers and mandatory state-operated programs, with regulations, rates, and guidelines largely set at the state level.
- ✓ **Coverage Structure** In the U.S., liability programs typically feature low primary limits supplemented by separate umbrella policies to achieve higher total coverage. In contrast, Canadian policies generally have higher primary limits, with excess and umbrella policies used to attain significantly higher total limits.

These differences impact the approach to structuring insurance coverage for an acquisition or newly established entity. Buyers must work with an insurance advisor experienced in M&A and familiar with U.S. and Canadian regulatory landscapes to ensure compliance and seamless coverage transitions.

M&A Related Policy Conditions Every Insurance Buyer Must Understand

1 Material Change in Risk

In most cases, an acquisition represents a material change in risk that triggers a policy-level condition requiring policyholders to notify their insurers and make necessary adjustments. A material change in risk occurs when an event, such as an acquisition, alters the company’s risk profile sufficiently to impact insurance coverage terms.

Failure to promptly report a material change in risk can lead to coverage gaps, policy exclusions, or even cancellations, leaving the purchaser exposed without coverage.

To avoid disruptions, buyers should engage with an insurance broker well-versed in M&A risk early in the acquisition process to ensure continuous and appropriate coverage.

2 Automatic vs. Non-Automatic Coverage

Some policies include automatic coverage for newly acquired subsidiaries provided the acquisition falls below a predetermined threshold, typically based on a percentage increase in consolidated assets or revenue. However, other policies require immediate notification and underwriting approval before extending coverage to the acquired entity. Failure to promptly report the acquisition could result in coverage gaps, exclusions, or even policy cancellations.

Even when automatic coverage is provided, there are often limitations built into the wording that can negate coverage, such as prior claims of the acquired entity, and if the operations of the existing business and new entity differ significantly.

As the latter is subjective, prompt reporting is the prudent way to avoid unwelcome surprises.

Understanding the nuance of these clauses and the policyholder’s obligations is essential in determining whether an acquisition will be seamlessly covered or if additional steps are required. Businesses should review their policy terms carefully and engage with their insurance brokers early in the transaction process to clarify coverage conditions, ensure compliance, and avoid unexpected liabilities.

3 Change in Control – Acquired Company

A change in control provision is a clause common to most insurance policies, but particularly in claims-made policies like Directors & Officers (D&O), Errors & Omissions (E&O), and Cyber Liability, that triggers an automatic termination of coverage when the policyholder undergoes a significant change in ownership or control.

Typical Triggering Events:



What Happens After a Change in Control:

(When this clause is triggered)

- The policy no longer covers acts or omissions occurring after the change in control date.
- It only covers claims arising from acts committed before the change, if they're reported within the policy period or extended reporting period (if purchased).
- Any new liabilities or exposures post-close must be covered under a new policy, typically new policies purchased by the acquiring entity or rolled into their existing program.

Why It Matters in M&A

- If not properly addressed, the target company's existing insurance will not respond to claims relating to incidents that occurred before closing but that are brought after closing
- It affects D&O coverage for the target's executives, E&O protection for past and ongoing work, and cyber coverage for incidents that may be discovered post-close.

4 Extended Reporting Period (ERP) / Tail Coverage

An Extended Reporting Period (ERP), commonly referred to as "tail coverage," is an endorsement that extends the time that a claim can be reported after the policy has been terminated, usually due to a change in control or non-renewal.

- It does not extend the coverage period (i.e., it doesn't cover new acts after the policy ends), but it allows claims to be made for acts that occurred before the termination date.
- It's typically offered for 1 to 6 years post-close, with 6 years being common in M&A transactions.

Why It Matters in M&A

- Acts, errors, or omissions that occurred before the deal closed may not surface until months or years later (e.g., undiscovered product defects, regulatory breaches, or security incidents).
- Without a tail policy, the seller's existing insurance will not respond, leaving directors, officers, or the seller exposed to personal liability.
- For buyers, tail coverage ensures that any pre-close liabilities remain covered by the seller's insurance, helping to ringfence risk.
- For buyers, tail coverage under the D&O ensures a funding mechanism for certain risks exists in the event a dispute arises relating to the transaction.

Types of Policies Where Tail Coverage Is Necessary

Tail coverage is necessary upon termination of claims-made policies because they only cover claims made and reported while the policy is active. Once the policy ends, such as after a change in control, no further claims can be made unless tail coverage is secured to extend the reporting period for past acts.

Claims-made policies

D&O Insurance

Protects directors and officers of the seller from post-close lawsuits alleging pre-close misconduct.

E&O/Professional Liability

Covers claims arising from errors or omissions in services provided before the sale.

Cyber Insurance

Responds to breaches or data incidents that occurred pre-close but were discovered later.

Best Practices During M&A

- 1 Ensure your insurance advisor is experienced in M&A and cross-border transactions if involving a US entity and engage them early in the deal process.
- 2 Review all policies for change in control clauses early in the deal process.
- 3 Negotiate and secure appropriate ERP/tail coverage before closing.
- 4 Ensure the tail policy matches the terms and limits of the expiring policy, especially for D&O, where personal liability is at stake.
- 5 Understand who is responsible for purchasing the tail (often the seller, though this can be negotiated).
- 6 In some cases, buyers may require tail coverage as a condition of the deal, particularly in asset sales or where indemnities are limited.

Rolling Retroactive Dates into Buyer's Insurance

When tail coverage isn't secured by the acquired company, rolling its retroactive dates into the acquirer's claims-made policies can be an effective and affordable way to secure legacy liability protection, but it must be handled carefully.

- ✓ **Confirm Coverage in Writing** Buyer to ensure their insurer formally agrees via endorsement to cover prior acts of the acquired entity using the original retroactive dates.
- ✓ **Review Scope & Exclusions** Check that coverage includes:

 - Liabilities prior to closing
 - Former directors & officers, if applicable
- ✓ **Conduct Thorough Due Diligence** Analyze the target's claims history to assess exposure. Large or frequent claims could increase shared limit risk on the buyer's existing policy and point to a higher probability of future claims arising.
- ✓ **Notify Insurers Promptly** Provide full details of the acquisition to all carriers and confirm they accept the rolled-in retroactive dates and new exposure.
- ✓ **Manage Shared Policy Limits** Track claims from the acquired entity to avoid limit erosion that could impact the broader organization. Consider increased or excess limits, particularly for acquisitions of US-based entities.
- ✓ **Address D&O Coverage for Former Executives** Ensure former directors & officers are either:

 - Included as insured's post-close, or
 - Covered through contractual indemnities or D&O runoff endorsements.

Rolling retroactive dates into the acquirer's insurance can be an effective alternative to tail coverage, but only with clear insurer agreement, tight policy management, and careful diligence. Done properly, it offers continuity of protection for legacy liabilities without requiring standalone runoff policies.

Consolidation vs. Separate Policies

Your broker will evaluate whether the new business can be consolidated into the existing insurance program or if maintaining separate policies is necessary and provide a cost-benefit analysis with recommendations. The analysis will weigh important factors such as:

Deal Structure

Whether the transaction is a stock or asset purchase can influence how liabilities transfer and what insurance adjustments are required.

Organizational Structure

Whether the business operates as a standalone entity with similar or different shareholders or functions as a subsidiary of an existing entity is a key consideration.

Operations of the New Entity

Differences in industry, geography, or risk exposures may require standalone policies if they do not align with the parent company's coverage.

Insurance Policy Review

A thorough audit of the acquired entity's insurance policies helps determine whether they should be continued, modified, or replaced.

Regulatory & Compliance Considerations

Some jurisdictions or industries require specific coverage that may not align with the acquirer's current policies, necessitating new placements.

Cost Benefit

The cost of placing coverage from Canada into the USA vs arranging local coverage in the USA can vary significantly.

Ultimately, ensuring a smooth transaction involves coordinating with underwriters, brokers, and risk management teams to structure an insurance program that adequately protects the combined entity while minimizing coverage gaps and unnecessary costs. They will need to assess whether local broker representation is required, and the placement of new policies will require the completion of new applications.

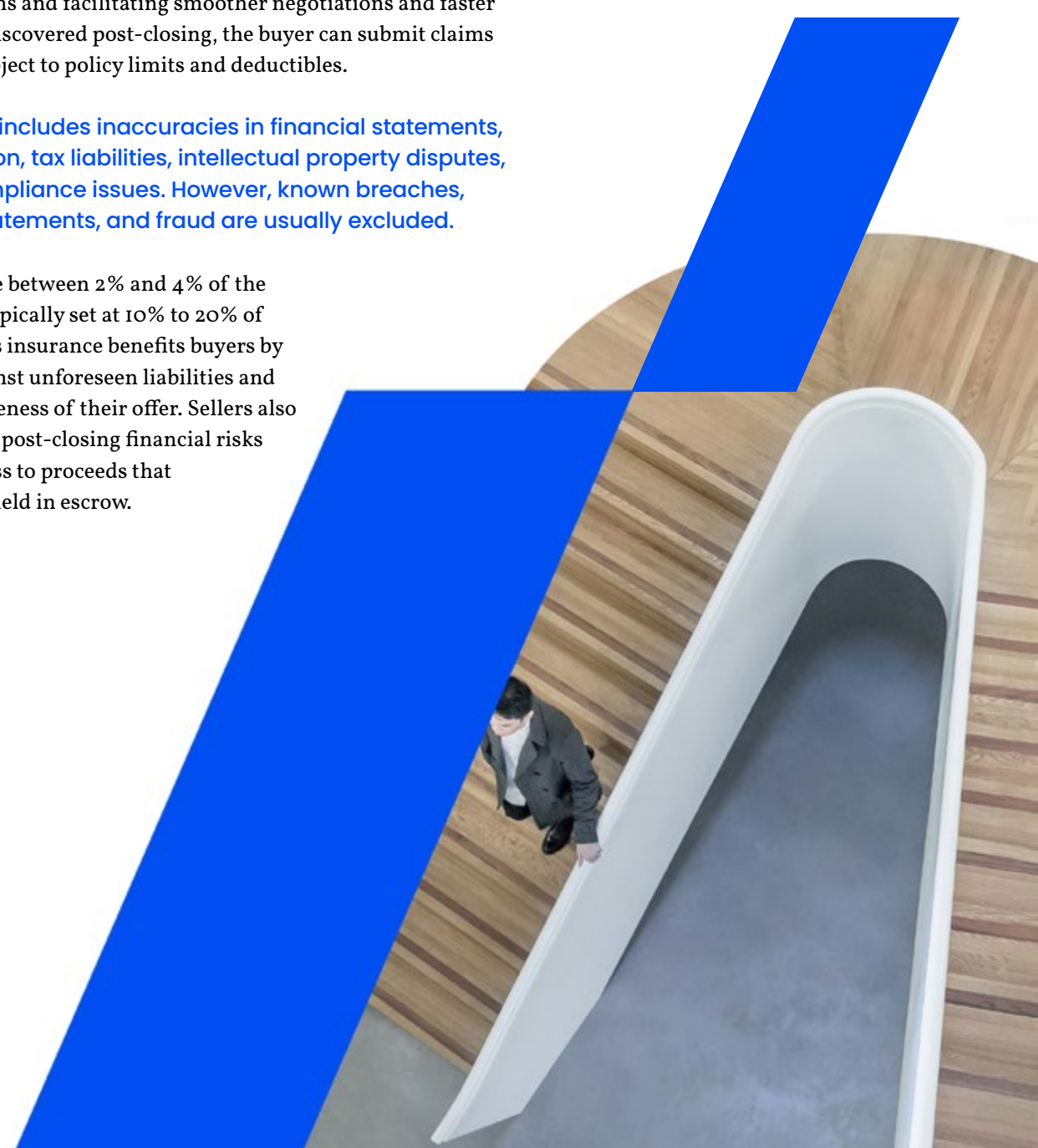
Consider Placing Transaction Liability Insurance

Transaction Liability, or Representations and Warranties Insurance (RWI), protects parties in mergers or acquisitions against financial losses resulting from breaches of representations or warranties in the purchase agreement. Representations are factual assertions about the business, while warranties are assurances of current conditions or future performance.

Typically obtained by buyers, RWI shifts risks associated with breaches from the seller and buyer to the insurance company, reducing escrow or indemnification obligations and facilitating smoother negotiations and faster closings. If breaches are discovered post-closing, the buyer can submit claims directly to the insurer, subject to policy limits and deductibles.

Coverage typically includes inaccuracies in financial statements, undisclosed litigation, tax liabilities, intellectual property disputes, and regulatory compliance issues. However, known breaches, forward-looking statements, and fraud are usually excluded.

Premiums generally range between 2% and 4% of the coverage limit, which is typically set at 10% to 20% of the transaction value. This insurance benefits buyers by providing protection against unforeseen liabilities and enhancing the competitiveness of their offer. Sellers also benefit, as it reduces their post-closing financial risks and accelerates their access to proceeds that would otherwise remain held in escrow.



Deal Structure & Insurance

The following tables outline the key items underwriters will need to assess regarding the deal structure and operations of the new entity, along with commentary regarding their significance and impact on the insurance placement.

Deal Structure

| Audit item | Importance from an Insurance Perspective | Impact on Insurance Placement |
|---------------------------------------|--|---|
| Asset or Stock Purchase | Determines how liabilities and insurance policies will transfer post-acquisition. | An asset purchase may limit liability carryover, whereas a stock purchase may require prior acts coverage. |
| Jurisdiction of Acquisition/Expansion | Affects regulatory and insurance jurisdiction requirements. | Cross-border operations will have unique regulatory compliance such as locally admitted paper and local broker representation. |
| Purchase Agreement | Outlines obligations, liabilities, and risk allocation. | Gaps in contract wording may lead to uncovered risks and affect policy structuring. Transaction liability or D&O insurance can help mitigate certain risks. |
| How Was Valuation Determined? | A third-party appraisal prevents buyer's remorse and disputes over overpayment. | Appraisal reduces the risk of potential disputes and ensuing claims relating to overpayment. |
| Details on Funding | The financing structure impacts the company's financial stability, obligations, and liability exposures, directly affecting the risk profile of the acquisition. | Particularly impactful to the D&O policy, all-cash purchase is seen as the least risky, but underwriters may seek assurance that cash flow remains adequate. Debt financing can raise default risk, potentially leading to insolvency exclusions or higher premiums. Equity financing may trigger disputes from dissenting shareholders. The policy may need adjustments in coverage, limits, or premiums to reflect changes in risk. |
| Post Acquisition Board Structure | Directly affects the governance and risk management of the combined entity. Changes in leadership or board composition can increase the likelihood of claims against directors and officers, especially if there are disputes over the direction of the company or management decisions. | Particularly impactful to the D&O policy as underwriters may reassess risks based on the new board structure. If there are significant changes to composition or ownership, the policy may need adjustments in coverage, limits, or premiums to reflect the increased risk exposure. |

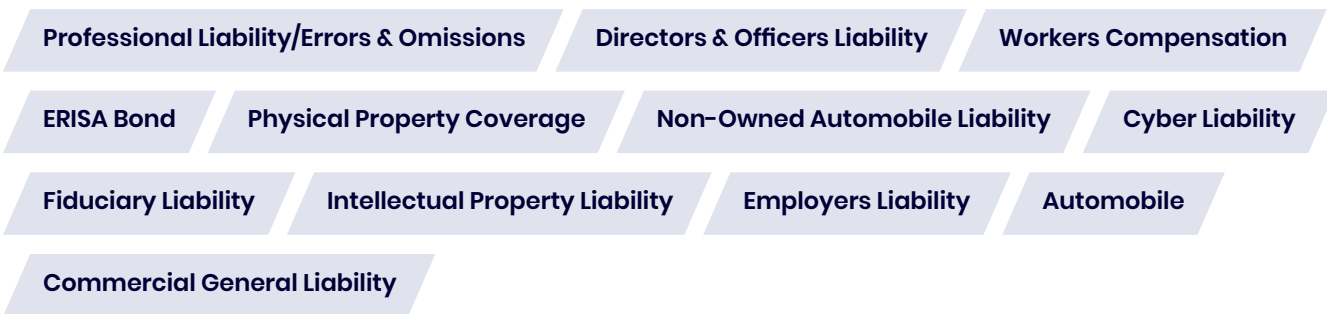
Operations of Acquisition

| Audit item | Importance from an Insurance Perspective | Impact on Insurance Placement |
|--|---|---|
| Revenue Composition (services, revenues, territory) | A company's services, territory, and volume of sales directly influence the risk profile the insurer needs to assess. | The type of services a company provides influences its liability risks, with higher-risk services requiring specialized coverage and potentially higher premiums. Similarly, the company's sales territory affects the regulatory and liability risks. |
| Number of US-Based Employees | US-based employees expose employers to unique regulatory risks that are managed differently from a Canadian context. | US-based employees will require placement of US Workers Compensation cover and Employers Liability. Employment Practices liability premiums can increase, the severity of which is dependent on the number of employees and the state the employee is based. An ERISA bond or Fiduciary Liability coverage is required for employer-sponsored employee benefit plans. |
| Federal Employer Identification Number (FEIN) | FEIN number is used to identify companies in contracts, transactions, and filings with US regulatory agencies. | Required to apply for Worker's Compensation coverage. |
| Listing of Physical Locations | Including asset replacement values, addresses, construction, occupancy, age, and types of updates to building systems. | Data will help determine risk exposures and coverage limits relating to the placement of property insurance. |
| Existing Risk Management & Risk Transfer Measures | Effective risk mitigation controls and contractual risk transfer reduce perceived risk, improving underwriting terms and minimizing exclusions. | Without adequate measures insurers may impose higher costs, stricter conditions, or deny coverage, creating potential gaps in protection. |
| Claims History of Target Company | Claims history helps insurers assess the frequency, severity, and nature of past incidents, and serves as a leading indicator of future claims. | A clean or well-managed claims history may result in more favorable premiums and broader coverage. A poor history may result in higher premiums, policy exclusions, or difficulty securing coverage. Prior claims can negate the automatic coverage provision afforded to newly acquired subsidiaries. |
| Retroactive Dates Associated with Target Company's Existing Policies | Retroactive dates define the period for which past acts are covered under claims-made policies. This determines the extent to which historical liabilities are insurable. | If the retroactive date is recent or coverage gaps exist, claims for earlier acts may not be covered, requiring tail coverage or special indemnities. If the target company fails to purchase an ERP the acquirer should ensure the target company's retroactive dates are carried over on their policy. |
| ERM-14 Form (NCCI Regulated States Only) | When acquiring a company in the US, the buyer inherits the Workers Compensation loss history and an ERM-14 form must be completed. | Incorrect or delayed filing can result in fines, penalties, inaccurate experience ratings, and increased premiums. A negative inherited loss history can substantially raise premiums, potentially affecting profitability post-acquisition. |

Insurance Policies & Documents to Audit

Your insurance broker will need to conduct a comprehensive audit of the acquired entity’s insurance policies, assessing key factors such as retroactive dates, runoff & extended reporting period provisions, change in control clauses, territorial limitations, currency provisions, described operations, cancellation terms, and minimum retained premiums. Additionally, they will review automatic coverage thresholds for newly acquired subsidiaries, coverage limits, endorsements, and policy exclusions to best advise on how to ensure seamless integration and adequate protection.

Insurance Policies to Audit:



Copies of Relevant Documents

Below is a list of important documents related to the transaction that will need to be provided to your insurance broker for review.

- ✓ Purchase agreement
- ✓ Financial statements of the acquired entity
- ✓ Post-acquisition pro forma financial statements
- ✓ Post-acquisition organization chart
- ✓ Premises lease agreements
- ✓ Inherited insurance policies
- ✓ Claims history reports
- ✓ Property coverage schedules
- ✓ Inherited terms of service and standard customer contract
- ✓ Inherited employment agreements

Conclusion

M&A presents both opportunities and challenges for Canadian businesses, with insurance playing an important role in ensuring a smooth transition. Navigating insurance considerations — particularly cross-border transactions involving U.S. entities—requires comprehensive planning, strategic due diligence, and expert guidance.

Understanding critical differences between Canadian and U.S. insurance markets, recognizing policy-level conditions like material changes in risk, and carefully managing coverage integration are essential to ensuring seamless transitions and ongoing protection. Effective use of tail coverage (ERP), accurate management of retroactive dates, and proper handling of unique regulatory requirements, such as the ERM-14 form for Workers' Compensation in NCCI-regulated states, are pivotal in mitigating risks and avoiding unexpected financial exposures.

Ultimately, engaging an insurance advisor experienced in both domestic and cross-border M&A activities early in the transaction process positions Canadian businesses for smoother transitions, stronger risk management, and long-term success in their expansion efforts.



Next step?

Contact us today to learn how we can help You with mergers and acquisitions.

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