Action Insurance Brokers Pty Limited
Suite 301 Building A, Sky City, 20 Lexington Drive, Bella Vista NSW 2153
Phone: 02 8935 1500
Fax: 02 8935 1501
ABN 39 080 844 426

Product Fact Sheet – Directors & Officers Liability Insurance

Introduction

This class of insurance provides cover for companies and their office holders and directors for costs involved in, or resulting from, claims or civil and/or criminal actions initiated against those office holders, as individuals, for failing to perform their duties.

Such claims or civil and/or criminal actions might be brought by shareholders, creditors, customers, employees, members of the public or government authorities.

Other names

There are no other names by which directors and officers liability insurance is commonly known (except in its abbreviated form 'D & O'); however, some points to note are:

- D & O liability insurance commonly offers an optional extension: employment practices liability (discussed later in this lecture). A detailed description of this liability is provided in the unit on 'Employment practices liability insurance' (000-TUM-9775).

- D & O liability insurance seeks to address issues which companies and their office holders may face under Australian Federal Corporations Law. A related type of insurance, association liability insurance, seeks to address issues which associations and not-for-profit organisations, incorporated under Australian Federal legislation (the Associations Incorporation Act 1981), and their office holders may face under that legislation. Association liability insurance is detailed in the unit 'Association liability insurance' (000-TUM-9776).

Who needs Directors & Officers Liability Insurance

Every company which appoints office holders should consider undertaking D & O liability insurance. D&O insurance policies offer liability cover for company managers to protect them from claims which may arise from the decisions and actions taken within the scope of their regular duties.

D&O cover was first conceived in the late 19th century, and after a long period of obscurity has spread rapidly throughout the industrialized world since the 1980s. Such policies cover the personal liability of company directors and officers as individuals (Side A cover), but also the reimbursement of the insured company in case it has paid the claim of a third party on behalf of its managers in order to protect them (Side B or Company Reimbursement Cover).

Publicly listed stock companies can also obtain cover for claims against the company itself for a wrongful act in connection with the trading of its securities (Side C or Securities Entity Cover).

D&O cover has become a regular part of large multinational companies' risk management, but it is essential for all kinds of other organizations as well. Although major publicly listed companies have the highest risk of attracting D&O claims, any entity, whether publicly traded or not, as well as any non-profit organization, has potential D&O exposure. There is an increasing demand from Small and Medium-sized Enterprises ("SMEs") for D&O cover, though penetration in this sector is still rather low. For example, in the UK, while 46% of medium sized enterprises purchase D&O cover, only 27% of SMEs purchase such cover.

Why do companies purchase D&O cover?

Quite simply: managers can make mistakes – and are often personally legally liable for them. They constantly walk a fine line, making tough and complex decisions with huge impacts on the basis of the sometimes limited information available, for example in merger and acquisition situations.

More and more companies are operating in a multinational environment. Their investors, trading partners or operations are located in jurisdictions all over the world. This means that directors and officers have to keep in mind not only their markets but also compliance regulations, different government bodies, auditors' opinions and the latest best practices for corporate governance and risk management in numerous locations.. This increased complexity in the operating environment puts managers in the firing line.

What is covered?

The core purpose of a D&O policy is to provide financial protection for managers against the consequences of actual or alleged "wrongful acts" when acting in the scope of their managerial duties. The D&O policy will pay for defence costs and financial losses. In addition, extensions to many D&O policies also cover costs for managers generated by administrative and criminal proceedings or in the course of investigations by regulators or criminal prosecutors.

These coverage extensions are gaining more and more importance among company directors. In this way, managers receive comprehensive, integrated cover that ensures them a reliable, consistent and structured legal defence.

Risks differ from one Country to another.

There are different risks in different markets. The United States is by far the world's largest D&O market with a premium volume of around $ 6 billion, and there the most frequent source of claims are claims related to employment or HR issues such as discrimination, sexual harassment or wrongful termination.

From 2000 to 2008, over 40% of D&O claims in the US were employment related claims. In most cases the managers did not act themselves; they simply did not enforce employee conduct rules against discrimination and harassment.

While these are the most frequent claims in the US market, they are not the most expensive ones. The severity of securities claims is much higher. Insurers are watching closely whether shareholder activism and class-action lawsuits are on the rise, but the frequency of these claims seems to have stabilized at its current high level. In other markets worldwide, shareholder claims are on the rise along with the general trend of increasing shareholder rights.

Common D&O risk scenarios

• Employment practices & HR issues
• Shareholder actions
• Reporting errors
• Inaccurate or inadequate disclosure (e.g. in company accounts)
• Misrepresentation in a prospectus
• Decisions exceeding the authority granted to a company officer
• Failure to comply with regulations or laws

What is not covered?

A D&O policy does not cover fraudulent, criminal or intentional non-compliant acts. Nevertheless, innocent directors remain fully covered if they are co-defendants, even if the acts of their colleagues were intentional or fraudulent.

D&O will also not cover cases where directors obtained illegal remuneration, or acted for personal profit. All activities which are covered by another insurance policy, such as Professional Indemnity, are either excluded in a D&O policy or the D&O cover is only provided after benefits of that other policy are exhausted.

Common D&O exclusions

- Fraud
- Intentional non-compliant acts
- Illegal remuneration or personal profit
- Property damage and bodily harm (except Corporate Manslaughter)
- Legal action already taken when the policy begins
- Claims made under a previous policy
- Claims covered by other insurance

Who is covered?

All current, future and past directors and officers of a company and its subsidiaries are covered under a D&O policy, which can also include non-executive directors. In very specific cases like securities claims, the policy can even be extended to cover claims against the company itself.

Cover is usually taken out and paid for by the company. Depending on the respective local law and policy, this may or may not be viewed by legislators as a “benefit-in-kind” for those persons it covers.

The time period of coverage

D&O insurance grants cover on a claims-made basis. This means that claims are only covered if they are made while the policy is in effect or within a contractually agreed extended reporting period, which can extend up to another 72 months. Normally a policy will have an agreed-on, often unlimited, retroactive period as well, covering claims for wrongful acts that took place before the policy’s inception, provided the Company and its Directors and Officers were unaware that a claim would result.

Limits of cover

Coverage will be restricted by policy terms and conditions, and limited within a certain maximum limit of coverage. This varies greatly and is one of the prime factors in underwriting such a policy.

Many smaller companies with annual revenues of $10 million, for example, may only purchase a limit of up to $2 million. Larger international corporations may purchase much larger cover – up to $300 million or higher. Some Fortune 500 companies with US listings have over $500 million of cover.

The policy limit is an “annual aggregate”, meaning that there is only one single limit for all the claims against all the insured parties,, during one policy year. Unless regulated differently by law in the respective country, all defence and other costs are part of this single limit.

Some covers are sub-limited, ie the sum insured will be lesser than the overall policy limit, for that specific event/claim.

What if a company is merged or bought?

Most of the major D&O policies include a so called “change in control” provision. If the company is merged or bought, the policy will stay in force for the remainder of the policy period, but only for claims based on wrongful acts before the change goes into legal effect.

For directors and officers a takeover is a critical scenario. An acquiring company will often face huge liquidity problems due to the high costs of the acquisition. The new owners of the acquired company may investigate the company's recent history and decide to sue the old management, looking for wrongful acts in the past to make D&O claims.

Since the management team of an acquired company has usually changed, this means that managers who left the company have difficulty defending themselves against these claims without access to the complete data and internal information of the company.

Normally the merged or bought company will be integrated into the D&O program of the new parent company with cover for new wrongful acts. For claims due to wrongful acts in the past, a “run-off policy” can be agreed for an additional premium, granting cover for claims for up to six years after the date of the transaction.

What about Companies which operate in more than one Country?

Larger clients operate with subsidiaries all over the world and need cover in all their markets, making an international insurance solution essential. Some countries such as Brazil, Russia and China require companies to take out a local insurance policy from a locally admitted insurer. Other markets are liberalized and allow a master policy issued in another country to cover local exposure.

Only a few insurers are able to coordinate local policies worldwide – Allianz, Chubb, Zurich and examples. Cover is typically provided by the use of a combination of locally admitted country-specific policies, plus a global master policy which provides additional coverage to harmonize the protection as far as possible worldwide (unless for legal reasons completely stand-alone local policies need to be set up

What is a Company is about to List on the Stock Exchange and become a Public Listed Company?

If a company makes an initial public offering (IPO) or secondary public offering (SPO), this may generate additional risks due to prospectus liability and increased reporting requirements. These exposures are often covered by D&O policies. However, many prospectus claims are primarily made against the company. Therefore, insurers offer separate insurance cover for the prospectus liability, so called POSI policies, which grant cover for the company’s managers as well as for the company and its employees on a multiyear basis.

Are “outside” directorships covered?

Members of supervisory boards or other non-executive directors (Directors who are not actually employees of the Company) in consolidated subsidiaries are normally insured by that company’s D&O policy. But often employees are sent by a company to the supervisory boards of other companies. There is a major risk for persons on such boards without professional managerial training.

Especially in Europe, it is common for supervisory boards or other bodies to oversee executive directors. Members are sometimes appointed by unions, works councils or governments or may come from some other non management background. They carry the same degree of liability as the other members, and even though they have the same D&O cover, they are often not as aware of all the regulations a company will face. This represents an emerging risk that needs to be addressed.

Conclusion

The D&O and Financial Lines segment will continue to grow and develop in the years to come. Claims in conjunction with the Global Financial Crisis that have not yet emerged will lead to higher losses and therefore growth in these products over the mid term.

D&O has long since become a standard product for large corporations. Cover is necessary to enable mangers to make decisions without the threat of personal liability constantly hanging over them. Instead of being forced to protect their livelihood by fighting each and every claim through the courts, this kind of cover enables managers to settle these claims quickly and relatively discreetly.

But even if an insurer ultimately might not cover a loss, D&O insurance will be useful because the defence costs for the claim can also be covered. In today's increasingly globalized markets, it is becoming more and more important for the insurer to also be globally structured.

The insurer needs to understand each legal environment in which the client is active, and the local policies need to reflect local conditions. Most importantly, the insurer needs to be able to manage claims worldwide and set up an international program which provides coordinated global coverage.

D&O will surely remain a subject of public discussion around the world. It is in the interests of the insurance industry, business clients and brokers as well as regulators and the press to continue this discussion and further develop this critical area of corporate risk cover.

References:

Allianz, Chubb , NIBA, ANZIIF.

Terminology

As D & O liability insurance policy wordings differ widely from insurer to insurer, each policy's definitions can be quite different and must be studied with particular reference to the policy in which they are contained. General descriptions of some terms which are traditionally referred to in D & O liability insurance policies are as follows:

'Insured person' or 'director' or 'officer' usually means anyone who is, has been, or becomes an office holder of the insured company, whether they are given an official title or appointed to act in a particular capacity or not; employees are included. If a person acts in a capacity to direct or significantly influence or affect the operations of a company, they will usually be deemed to be an insured person. Some definitions are extended to include anyone legally defined to be or recognised as such. The term usually excludes advisers external to the company such as lawyers, accountants and receivers who act in a professional capacity.

'Wrongful act' means, whether actual or alleged, a breach of duty or of trust, an error or omission (erroneous action or failure to act), a mis-statement or misleading statement (which includes a failure to make a statement), or other act wrongfully committed or wrongfully attempted by an office holder of a company.

'Run-off' cover is defined as cover provided to entities and/or office holders after they cease operation or holding office, for claims made against them subsequently, for an actual or alleged or attempted wrongful act which occurred during the operation of the company or holding of office (subject to insurance having been in force at the time of the act).

Policy coverage

Cover usually provided in two parts

The commission or alleged commission of a wrongful act, by an office holder of a company, may lead to a civil or criminal action being brought against the office holder and result in the office holder incurring a personal financial loss.

Where the personal financial loss is in the form of defence costs, damages, judgments, settlements and/or interest, the policy will respond to cover those amounts (subject to exclusions).

As a matter of course, companies usually undertake to indemnify their office holders for these losses under the companies' constitutions or individual agreements with the office holders.

In certain circumstances, however, Corporations Law denies the company leave to indemnify its office holders, despite any corporate undertakings to the contrary.

For this reason, policy cover is usually provided in two parts as follows:

- D & O liability cover—sometimes referred to as 'A-Side', 'Side A' or 'Part A' cover—seeks to indemnify the office holder who has suffered the loss where the company is not permitted or is not required to indemnify the office holder due to the operation of the Corporations Law

- company reimbursement cover—sometimes referred to as 'B-Side', 'Side B' or 'Part B' cover—seeks to reimburse the company itself when it is permitted or required to indemnify the office holder due to the operation of the Corporations Law and the company indemnifies its office holder for the loss.

It is also important to note that because the D & O liability cover is in place to protect the office holders, they must be recognised as having paid the premium, not the company itself. The company, however, would incur the cost of the company reimbursement cover premium.

Limit of indemnity

The limit of indemnity in D & O liability policies (like professional indemnity policies) is usually expressed in the following form:

> '$n any one claim, and in the aggregate during the period of insurance'
> where 'n' equals the limit of liability.

This contrasts with most other liability insurance policies in which the limit of indemnity is usually expressed in the following form:

> '$n any one occurrence'
> where 'n' equals the limit of liability.

Limit of indemnity – automatic reinstatement

D & O liability policies sometimes contain clauses which provide for one full automatic reinstatement of the aggregate indemnity limit (which is not accessible in respect of existing claims); although insurers tend to be reluctant to offer it.

Other policies carry a limited automatic reinstatement provision—for example, a 25% limit of indemnity reinstatement but only for non-executive directors.

Limit of indemnity – claims aggregation

D & O liability insurance policies can include clauses which specifically state that where more than one claim arises from a single incident, the claims are treated as a single claim for the purposes of application of the limit of indemnity and deductible.

Deductibles

Deductibles are not usually applied to the D & O liability cover but are common for claims made under the company reimbursement cover.

Cover for office holders' actions

D & O liability insurance provides indemnity for claims brought against a company's office holders but not for claims brought against the company itself.

There is, however, one exception to this rule. The optional employment practices liability extension usually available in D & O liability insurance policies does extend to provide indemnity for claims brought against the company itself.

Activities on behalf of the company only

Cover under the policy is typically limited to personal financial losses incurred by office holders when acting in their capacity as office holders of the company which arranges the insurance. Losses arising from any other activities such as those on behalf of another company, association or not-for-profit organisation are not covered by the policy.

Nonetheless, some insurers' policies extend cover (including 'run-off' cover) to activities by insured office holders in connection with positions of office with an entity external to the insured company provided that such cover:

- in no way extends to other office holders of that other entity
- is provided only to the extent that cover is in excess of any cover provided by that other entity
- is provided only for wrongful acts committed during the period in which the office was held with that other entity.

Basis of cover – 'claims made'

D & O liability insurance policies (like professional indemnity insurance) are underwritten on a 'claims made' basis as opposed to the 'claims occurring' basis on which most other liability insurance policies are underwritten.

For a claim to be admitted under a 'claims occurring' policy, the claim must be made against the policy which is, or was, in force at the time when the incident that gives, or gave, rise to the claim occurred.

For a claim to be admitted under a 'claims made' policy, the claim against the office holder (or company, if an employment practices liability claim) must occur during, and be notified to the insurer during, the same policy period. In addition, the incident which gives rise to the claim must have occurred within the policy period unless there is what is known as a 'retroactive date' set in the policy.

The retroactive date, if approved by the insurer, is a date set in the policy which is prior to the inception date of cover, to account for incidents that may have occurred prior to the inception date of cover but which give rise to claims made during the policy's period of insurance.

It is essential to seek the earliest possible retroactive date to best protect an insured's interests. Sometimes insurers will agree to an unlimited retroactive date.

It is also essential to make the insured aware that if a claim against an office holder or company (employment practices liability) is not notified to the insurer during the policy period in which the claim was notified to the insured, the insurer will not be liable to indemnify the insured.

In addition, even after a company ceases operations, there is the potential for claims to be brought against it or its office holders arising from incidents which occurred while the company was in operation. Therefore, it is important to highlight to companies and office holders that they should continue cover beyond the cessation of a company's operations.

Employment practices liability

A company's office holders may have claims or actions brought against them in relation to:

- unfair dismissal or failure to promote
- discrimination (of any nature—e.g. age, sex, race, religious or philosophical beliefs or affiliations)
- workplace harassment (of any nature—e.g. sexual harassment, bullying, intimidation, humiliation, or unwanted, unwelcome or uninvited behaviour and in any form which such harassment may take, such as jokes, physical contact, dissemination of offensive material).

D & O liability insurance has traditionally provided indemnity for office holders under these circumstances although, more recently, insurers have begun underwriting stand-alone employment practices liability insurance policies.

It is important to note that the standard cover offered by insurers seeks to indemnify only the office holders, not the company itself. However, it is usual for policies to include an optional extension which extends indemnity to the company itself in respect of actions brought against it.

Many different policy wordings

Insurers each have their own approach to the cover they are willing to provide and the exclusions they require. For this reason, available policy wordings are structured very differently from each other—issues which might be addressed in the insuring or operative clause in one insurer's policy might be addressed in the exclusions, additional benefits or extensions (automatic or optional) in another insurer's policy.

This makes it difficult to reach a decision as to which policy wording is most appropriate for a particular company's circumstances. Therefore, very careful research and comparison is required.

Common policy extensions

Many extensions in D & O liability insurance policies have similar names but often this is where the similarity ends. Always give careful consideration to the operation of an extension as stated in a particular policy.

Advancement of defence costs

Insurers will, if they choose not to take over the insured's defence, generally advance funds to cover the costs of initiating a defence to a claim or action brought against the insured; although some extend this offer conditionally, provided that:

- the insurer has not denied indemnity for the claim
- the insurer's written permission to incur the defence costs has been sought and provided in advance
- the insurer will recover defence costs paid if the insured is subsequently found not to be entitled to indemnity under the policy.

Extended reporting period

The insured company and office holders can generally request an extension for a period of twelve months during which insurers will continue to accept liability for claims or actions brought against the company or office holders (subject to the terms and conditions of the policy) provided that:

- an additional premium is paid (may be between 50% and 100% of the expiring premium)
- (in some instances) the insurer has refused to offer renewal or the insured specifically requests an extended reported period within a specific timeframe (sometimes 14 days; sometimes prior to expiry)
- this is not an extension of cover in that the wrongful act giving rise to the claim must have occurred before expiry of the period of insurance (and after the inception date or retroactive date set in the policy)

- this is a once-only extension, and
- the policy is not replaced with another D & O liability insurance policy.

Estates, heirs and legal representatives

An extension of cover may be offered for estates, heirs and/or legal representatives of deceased, incompetent or insolvent insured persons when acting in their stead.

Spousal liability

An extension of cover may be offered for personal financial losses incurred by spouses of insured persons by reason of them being spouses of insured persons and owning property which is the subject of such a loss.

Insured Vs insured cover

There is an exclusion relating to 'insured versus insured' claims (refer to 'Common policy exclusions' later in this section). However, this exclusion may not apply in situations where:

- the loss arises in relation to employment practices
- a claim exists involving an insured person and an additional person also becomes involved
- a shareholder brings a claim against an insured person, provided that the shareholder was neither an insured person nor influenced by an insured person at the time of the wrongful act
- a regulatory authority brings a claim against an insured person in the name of the insured company provided that the regulatory authority was not influenced by an insured person (but co-operation with an insured person in bringing such an action is permitted under the policy if required by law)
- a court appointed liquidator, receiver, administrator or trustee administers a compromise or scheme of arrangement of the company.

Attendance at official investigations or inquiries

Where an insured person is required by an official body or institution to attend an investigation or hearing involving an allegation of a wrongful act by an insured person, the insurer will pay defence costs.

Occupational health and safety

In certain circumstances, insurers will pay the defence costs incurred by an insured person in relation to a breach of occupational health and safety laws.

Continuity of cover

The exclusion relating to known claims and circumstances may not apply in situations where:

- there is no fraudulent non-disclosure nor fraudulent misrepresentation in respect of the known circumstance
- the insurer is, and continued to be, without interruption up until the commencement of the current policy, the same insurer of the D & O liability insurance policy which was in force when the insured person first became aware of the known circumstance and the insured person was an insured person under that policy
- the insurer would have indemnified the insured person had the known circumstance been notified to the insurer when the insured person first became aware of it
- neither the known circumstance nor a claim arising from it has previously been notified to the insurer or any other insurer.

This extension will not apply if the insured person could have sought indemnity under another policy.

There may be restrictions on the limit of indemnity.

New subsidiaries

In certain circumstances, cover will extend to subsidiaries of the insured company created or acquired during the period of insurance but only in respect of wrongful acts allegedly or actually committed or attempted after the creation or acquisition of the subsidiary.

Run-off cover for subsidiaries

In certain circumstances, where a subsidiary ceases to exist or continues to be a subsidiary of the insured company before or during the period of insurance, the insurer will provide indemnity in respect of the subsidiary but only in respect of wrongful acts allegedly or actually committed or attempted before the cessation of the subsidiary.

Preservation of cover

Where an insured company is required or permitted to indemnify an insured person but cannot do so due to issues regarding its solvency, the insurer will reimburse the insured person.

Prospectus liability

Insurers may automatically extend cover to indemnify insured persons against claims or actions brought about in connection with share issues or dividends and some negotiable instruments but not arising from an initial public offering.

Insurers may offer an optional extension to indemnify insured persons against claims or actions brought about in connection with an initial public offering.

Joint venture cover

Insurers may offer extended cover for claims or actions arising out of a joint venture between the insured company and other entities but cover is limited to the insured company and its own office holders.

Pre-acquisition liability

Under an optional extension, insurers may offer to indemnify office holders of subsidiaries acquired by the insured company against losses arising from wrongful acts which occurred or are alleged to have occurred prior to the acquisition of the subsidiary.

Run off following merger or consolidation

D & O liability policies may include an optional extension to provide run-off cover for the insured company and insured persons for a nominated period, usually a number of years, following the insured company's sale to, or merger with, another company.

Pollution defence costs

D & O liability policies may include an extension providing indemnity for defence costs (but no other cost, fines, penalties or damages) incurred by an insured person in relation to a wrongful act in connection with pollution.

Civil penalty cover

Some policies offer—notwithstanding exclusions regarding cost, fines, penalties or damages—indemnity to insured persons for civil penalties incurred. A monetary limit will apply.

Common policy exclusions

Insurers will vary in relation to the exclusions they apply to their D & O liability policy. Some of the most common exclusions are:

- bodily injury (sometimes excepting emotional distress or mental anguish), sickness, disease or death of any person;

• property damage or destruction (including the loss of use of any property);

• one insured person taking action against another insured person;

• dishonesty and fraud, including wilful breaches of duty, criminal or malicious acts or omissions, including 'insider trading' and other acts by which an insured person may gain a personal advantage;

• prior claims or known circumstances which could give rise to a claim;

• the provision of, or failure to provide, professional services or advice;

• the issue of initial public offering of securities of the company;

• 'year 2000' (Y2K) issues (failure of software or firmware, or hardware incorporating it, to perform due to its inability to continue to perform as expected beyond the 20th century);

• pollution, nuclear risks, war or terrorism;

• the existence of asbestos;

• assumed liability or waived right of recovery—e.g. liability incurred by acceptance of 'contracting out' or 'hold harmless' agreements in contracts undertaken by the insured;

• claims brought against the insured in certain jurisdictions. D & O liability insurance is world-wide and therefore traditionally free from jurisdictional constraints. However, in some instances, cover may be issued on the basis that claims brought in certain jurisdictions (e.g. USA and Canada) will not be admitted under the policy except in cases where an insurer offers this cover as an optional extension (with specific restrictions);

• claims by 'major shareholders'—i.e. shareholders holding more than a certain percentage of shares in the insured company—e.g. 15%;

• claims relating to employment practices:
  - after the company becomes bankrupt, goes into receivership or liquidation or is sold or comes under management by another entity
  - arising from a law, award or workplace or other agreement
  - arising from a breach of a duty of fairness or good faith expressed in an employment contract unless the company would have been liable for such a breach in the absence of the contract
  - arising from industrial action
  - arising from actual or alleged failure to comply with laws relating to:
    ° termination or redundancy notification process
    ° workers compensation
    ° occupational health and safety
    ° contract conditions alleged to be harsh, unfair, unconscionable or opposed to the public interest;

• criminal fines, penalties nor punitive, exemplary or aggravated or multiple damages;

• duties and taxes;

• costs incurred in improving employment practices.

Common policy conditions

D & O liability insurance policies have many conditions which are expressed in different forms and vary from policy to policy.

Some of the key policy conditions are detailed below.

Severability and non-imputation

The proposal for D & O liability insurance is completed by a company representative on behalf of the company and its office holders. Office holders are not required to complete individual proposals.

Notwithstanding this, policies are underwritten on the basis that each of the office holders understands and complies with the duty of disclosure and avoids misrepresentation in accordance with the provisions of the Insurance Contracts Act 1984.

This general condition acknowledges that the insured comprises more than one person and states that the failure of one insured person to comply with the above duties or the inadmissibility of indemnity for one insured person will not prejudice the rights of any other insured person to indemnity under the policy.

This condition operates under the proviso that any relevant matters known to such other insured persons are advised to the insurer as soon as they become known and that any such other insured persons were not complicit with any acts, failures to act, non-disclosure or misrepresentation by the insured person.

Authorisation

Some insured companies may have many office holders who should each receive certain notices required of the insurer to give to them—e.g. notice of cancellation. For this reason, this condition states that the company or corporation insured will act on behalf of each of the office holders.

Merger or consolidation

If the insured company merges with, or becomes the subsidiary company of, another company during the period of insurance the policy will continue but only in respect of wrongful acts which occur before such a merger or acquisition.

Excess

An excess will apply but most insurers state that where the same wrongful act results in more than one claim, only one excess will apply.

Senior counsel clause

This clause states that the insured or insurer will not be required to defend any legal proceeding unless a Queens Counsel or Senior Counsel advises that they are likely to be successful.

Underwriting criteria

A completed proposal form will be required to enable a quotation to be obtained.

In addition to the proposal form, copies of the company's audited accounts for the immediately preceding three years will be required.

How does an insurer assess a D&O liability risk?

To assess a D & O liability risk, an underwriter will review the proposal form in conjunction with the corporation's latest financial statements. The following points will be considered as a starting point:

- whether the corporation is in a healthy financial state
- the nature and size of the business activities and the diversity of its activities
- the state of the economy, in particular the industry in which the corporation operates
- whether the corporation is public or private and also the corporation's 'standing' in the community
- the length of time the corporation has been operating
- the experience and qualifications of the directors or officers.

What do insurers consider to be an unfavourable risk?

A corporation that has poor financial standing and a deteriorating financial position or an industry that is in decline will not be favoured by an insurer. A risk that has poor and frequent claims will be approached with caution.

How do insurers work out the premium for the risk?

A number of factors are considered such as the financial state of the corporation, including its size, the nature of the business activities undertaken, the type of corporation, recent acquisitions and divestments undertaken and years in business.