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Insurance Recovery Group

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Armor for the Board: A D&O Insurance Checklist

Serving on a non-profit, private or public company board can yield many benefits, but may also create exposure. Even a baseless lawsuit can take time, energy and dollars to defend. Directors' and officers' liability insurance is designed to protect personal assets, and provide armor for the board. It's not enough to simply know that the board has D&O coverage.

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Be Sure To Ask The Following:

1. **Is there sufficient "Side A" coverage in your D&O policy?** "Side A" coverage is available when the organization is unable to indemnify a director or officer for loss from claims made against her or him. Loss may include defense costs, settlements or judgments. An organization may be unable to indemnify if it is insolvent, if the director or officer does not meet the standard under the charter, bylaws or laws of the state of incorporation to be indemnified, or if it may be against public policy to indemnify the director or officer. In those circumstances, Side A coverage is designed to protect the director or officer, starting at dollar one!

   Not all D&O policies offer the same level of protection. Terms, conditions and exclusions vary, and should be negotiated. Exclusions may be deleted, narrowed or customized.

2. **Is there a broad definition of "Claim"?** A "Claim" should cover not only lawsuits and administrative proceedings, but also investigations, requests to produce documents, or to enter into a tolling agreement. Any time that a director or officer or the organization may be calling outside counsel to assist, ideally the insurance policy will "count" those fees as Loss.

3. **Is there a right to counsel of choice?** Most D&O policies provide that the Insureds defend the Claim, and are reimbursed by the insurer, rather than the insurer providing a defense. Some policies (typically private company policies) provide that the Insureds may tender the Claim to the insurer to defend, within a certain period of time. In virtually all cases, insurer consent to counsel is required, not to be unreasonably withheld. Some counsel may be pre-approved on pre-set "panels." Others can be approved after

consulting with the insurer. Even if the insurer pushes back on rates or otherwise objects, Insureds can often mount effective arguments to secure counsel they prefer.

4. **Is there a broad definition of "Loss"?** Loss typically includes defense costs, settlements and judgments. Loss may also cover certain fines and penalties or punitive damages, pre- and post- judgment interest, plaintiffs' attorneys fees, and other items, depending on the policy and the insureds. Loss typically excludes amounts uninsurable under applicable law. Negotiating for the "most favorable law" to apply to such a determination is an important enhancement to include.
5. **Are there narrowed exclusions?** Side A policies typically have fewer exclusions than "full-side" policies that cover claims made against the entity itself, or which reimburse the organization for loss for which it indemnifies individual insureds. Exclusions for fraud and illegal profit should be narrowly drafted. Wrongful conduct of one insured should not be imputed to another.
6. **What is required to settle a Claim?** Most policies require that the insureds cooperate with the insurer and allow the insurer to associate in the defense and settlement of a Claim. Further, the policy may provide that the insured cannot settle a Claim without the insurer's consent, which shall not be unreasonably withheld. Keeping the insurer apprised of developments in the defense of the Claim is important. The "association" and "cooperation" provisions can be enhanced by negotiating so that one insured's breach of the duty of cooperation or right of association does not impact another Insured's coverage.
7. **Is arbitration or mediation required to resolve a coverage dispute?** Some policies include an alternative dispute resolution ("ADR") clause providing that the insurer or insured may choose to mediate the dispute and if unsuccessful, can sue the insurer after a "cooling off" period. Others policies may require that a coverage dispute be arbitrated. An insured may have the best of all worlds if ADR is at its option, as opposed to being required. Sometimes the threat of litigation and creating an adverse precedent for the insurer provides helpful leverage to settle a coverage dispute.
8. **What about cyber or data privacy Claims?** D&O policies may include coverage for claims for breach of duty by a director or officer, but may have exclusions designed to narrow that coverage. As a result, it is prudent to consider separate cyber or data privacy coverage.
9. **How much insurance should the organization have?** There is no right answer. Typically the amount of coverage is based on a variety of factors, including cost, appetite for risk, prior claim experience, anticipated claims, type of coverage, industry profile, and peer group information. Insurance brokers can be helpful in providing peer group data.
10. **What about excess insurance policies?** Excess policies sit on top of the primary policy and provide additional layers of coverage. The excess policies should also be negotiated carefully, so that there are no "gaps" in coverage if a Claim settles with a discount off the primary insurer's policy limits. In addition to reviewing "exhaustion" and "drop down" language for consistency among excess policies, dispute resolution provisions should also be negotiated so that an Insured is not facing the prospect of arbitrating in Bermuda against one insurer and litigating against another.

Experienced insurance coverage counsel can help navigate both the negotiation of policy terms and conditions and resolution of insurance coverage disputes.