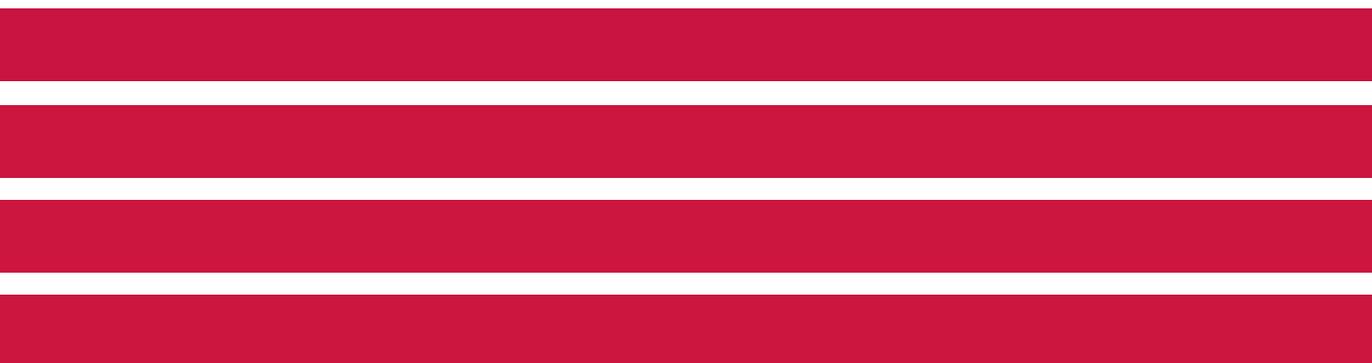


Directors' & Officers' Liability Insurance for Companies with Investment

Insurance for your reputation



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The arrangement of a Directors' and Officers' Liability Insurance is largely a question of good housekeeping for most businesses but for those with external investment it is pretty much an essential form of insurance protection.

Directors' and Officers' Liability provides insurance cover for potential claims against directors and officers of the business from a number of sources, for example, Companies Act liabilities, regulatory, health and safety and environmental issues amongst others.

However, it is its ability to provide protection for claims from disgruntled investors unhappy at how their money has been used or indeed not used, the direction the business has taken or maybe the lack of progress within the business, that makes it an essential insurance for directors and officers of investee businesses.

Ultimately, the success of any such claim would stand or fall based on the legal position and, of course, would be subject to policy cover.

However, it is important to recognise the different insurance factors that come in to play when assessing the risk of claims from investors in arranging Directors' and Officers' Liability Insurance.

Personal Guarantees

There is a common misconception that if the directors of a business are requested to sign personal guarantees this would be automatically covered by a Directors' and Officers' Liability policy.

Regrettably, this is not the case – such a policy is designed to cover individuals whilst acting in their capacity as a company director. By their very nature personal guarantees do not fall in to this category plus there must also be a 'wrongful act' committed by the director for cover to operate. It is rare for insurers to grant cover for personal guarantees, so if Directors are required to sign these it should be in the full knowledge that cover is unlikely to be available under a Directors' and Officers' Liability policy.

How Much Cover?

Setting limits of indemnity for Directors' and Officers' cover is difficult and ultimately is driven by a number of factors, not least the desire to put in place a policy that is reasonable both from a cost perspective and providing a sufficient level of cover.

For example, some businesses take the view that they may have say, £10m of investment, which they should protect in full from a Limit of Liability perspective, however it is often more appropriate to take a more considered approach to setting the amount of cover.

Of course investments in 'spin outs' are frequently from sophisticated institutional investors such as Venture Capitalists, and there is a strong argument to say that they are often taking an educated gamble in investing in a particular business, plus they are likely to be closely linked with the business, even placing someone on the board of that business. In such instances there is a case to say that any potential liability when investments 'go wrong' is diluted.



Conversely, investments from High Net Worth Individuals may be viewed as investments with a greater potential for liability given the relative 'sophistication' of those investing; however the quantum involved is often much reduced on an individual investment basis. All of the foregoing presupposes that a claim comes from a single source. There is, of course, potential for claims from more than one investor and in the event this is deemed to emanate from the same originating source then the claims could be treated as one. Public companies with multiple shareholders could similarly be at risk in the event of a 'class action'. Again care should be taken in assessing the risk of such an occurrence in setting the overall Limit of Indemnity.

Further Funding

Investee businesses should also be aware that additional funding rounds may not be covered under their existing protection and that specific submission may be required to insurers to gain cover for further fundraising if no provision has been made for an automatic extension of cover.

This relates not only to public but also private placements.

Sales/Purchases of Companies

Finally, mergers/acquisitions, flotations and reversals in to existing PLC vehicles require expert advice particularly to ensure that not only all parties post and pre-transaction are covered appropriately but also that liability arising from the transaction itself including submissions made by both parties are catered for.

There are differing methodologies to deal with such activity and it is often prudent to ring fence such liabilities by utilising separate Warranty and Indemnity Insurance.

Contact us

For further information please contact the team:

Mark Philmore ACII, Chartered Insurance Broker

DDI 0113 323 1042 | Switchboard 0161 236 2532 | Email markp@m-f-l.co.uk

www.m-f-l.co.uk